CHEMICAL MANUFACTURERS ASSOCIATION

June 12, 1980

To: Occupational Safety and Health Contacts

Subject: Draft response to Agencies' Interpretive Guidelines on Employment Discrimination and Reproductive Hazards

Enclosed is the second draft of a suggested CMA response to proposed guidelines published jointly by the Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL) Office of Federal Register February 1, 1980. The draft response was prepared by the task group on Reproductive Hazards in the Workplace chaired by Mr. John Wheeler of Amoco. The deadline for receipt of comments has been extended by EEOC/DOL to July 2.

This draft is being sent to you for your use as a source document in preparing your company's response to EEOC/DOL. We do not expect substantive changes in the draft before it is finally approved and submitted to the agencies as the CMA comments. Our hope is that by putting this draft in your hands now, it will allow you to meet the tight schedule on which we are all operating.

If you would like additional information, feel free to call me or John Wheeler (telephone 312/856-3871).

Sincerely,

ELF for Milton Freifeld

Milton Freifeld
Associate Director,
Health, Safety and
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Enclosure

cc: John Wheeler
Tom Evans
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OSHC - General Interest

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Second Draft of CMA Comments

on

"Interpretive Guidelines on Employment

Discrimination and Reproductive Hazards"

On February 1, 1980, the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor published proposed "Interpretive Guidelines on Employment Discrimination and Reproductive Hazards." 45 Fed. Reg. 7514-7517. These comments on the proposed Guidelines are being submitted by the Chemical Manufacturers Association, Inc. (CMA), formerly the Manufacturing Chemists Association. CMA is a nonprofit trade association whose 195 member companies account for more than 90 per cent of the total production capacity for basic industrial chemicals in this country. Thus, CMA has particular interest in assuring sound regulatory activity with respect to substances in the workplace. We look upon these comments as an opportunity to inform EEOC and OFCCP of certain medical, economic, and legal facts that will enable those enforcement agencies to better appreciate the complexity of the issue which they have chosen to address.

At the outset, we wish to state that the proposed Guidelines do not address a problem which can validly be termed "sex discrimination." When an employer has sound medical evidence that a substance in his workplace poses a threat to developing fetuses, his decision to exclude fertile women (the only employees who are potential carriers of thoses fetuses) from the workplace is not a decision governed by Title VII of the Civil Rights Act of 1964. We believe that the agencies' labelling of such action on the part of an employer as "sex discrimination" has confused the issue.

CMA will first address certain medical considerations in order to bring to light some important facts that are not apparent in reading the proposal. Second, some economic considerations will be discussed. Finally, legal aspects of the proposal will be reviewed.

Medical Considerations

Concern of the enforcement agencies that certain employers and contractors have policies of excluding women of childbearing capacity from jobs in which there is exposure to "reproductive hazards" was a factor in those agencies' proposal of the Guidelines. We wish to bring to the agencies' attention certain facts regarding how some chemical substances may affect unborn children. We believe that the use of the term "reproductive hazards" in the proposal is a serious misnomer. All hazards that may affect unborn children cannot be grouped together into one category, because, as explained in further detail below, the modes of action of substances are very different. By failing to separate those substances that may affect the developing fetus (through exposure of the mother) from those substances that may affect some reproductive feature of adults directly, the enforcement agencies may have unwittingly made the more sensitive fetus the standard by which to judge whether workplace exposure to such substances is low enough to protect adult employees.

First, some terminology is in order. An "embryo" is the initial stage of development of an organism. In humans, the embryo is generally considered to be the developing organism up through eight weeks after conception. A "fetus" is the developing human from the end of the eighth week until birth. Substances that affect the developing embryo or fetus are called either "embryotoxins," "fetotoxins," or "teratogens." An embryotoxin or fetotoxin

may be defined as any influence that has a toxic (including lethal) effect on the embryo or fetus. Such influences may cause low birth weight, lowered mental capacity, a physical defect, or death, for example. A subclass of embryotoxins and fetotoxins are teratogens, which may be defined as any influence that produces a physical defect in the embryo or fetus. (Hereinafter, embryotoxins, fetotoxins, and teratogens, when referred to collectively, will be referred to as "embryofetotoxins" in order to make these comments read easier.) Two examples of embryofetotoxic "influences" are radiation and some chemical substances. We will refer only to chemical substances in these comments. Such chemical substances can be carried in the pregnant woman's blood and be transferred across the placenta to the embryo or fetus. The developing embryo is most susceptible to toxic effects during the first 60 days of its development. Days 15-60 of development are called the period of "organogenesis," because it is during this time that the major organs of the embryo are developing. It is during the period of organogenesis that the developing embryo is most susceptible to teratogenic effects. Perhaps the most memorable teratogen of recent times was Thalidomide, which produced severe limb malformation in the fetus, while having no adverse effect on the adult female.

Three facts should be noted at this point, to be discussed further below: 1) A woman frequently does not know that she is pregnant until well into or after the period of organogenesis; 2) her employer is even less likely to know; and 3) at maternal exposure levels at which there is an embryofetotoxic effect, there is little probability of adults being adversely affected.

A second class of chemical substances is that which may cause changes in the genetic material (DNA) of cells of adults. These substances are called

"mutagens," and the changes that they effect are called "mutations." Most of a cell's DNA is carried in the "chromosomes" of the cell. At times, a mutation may be manifested as a "break" in the chromosome, which may be visible under a microscope. Some mutagens may affect the genetic material of adult reproductive cells (sperm or eggs), while the same or other mutagens may affect other body cells such as white blood cells. Those that affect reproductive cells are called "germinal mutagens," while those that affect other body cells are called "somatic mutagens." Mutations apparently occur spontaneously without known cause in adult cells. But it is likely that relatively few mutations that may occur in adult reproductive cells are reflected in a developing fetus, because many mutations are repaired by the cell's own "genetic defenses."

The agencies' use of the term "reproductive hazards" does not convey the fact that a substance at certain exposure levels may present an embryofetotoxic risk that is far greater (or far less) than the substance's mutagenic risk. The "risk" presented by a substance is the probability that the substance will cause an adverse health effect. A given substance may have a very high probability of causing an embryofetotoxic effect when a pregnant woman is exposed between days 0 and 60. That very same substance at the same level of exposure may have a very low (or no) probability of causing a mutation in an adult cell's genetic material. The Guidelines, as proposed, ignore levels of comparative risks of embryofetotoxic versus mutagenic substances.

We believe that an employer must be allowed to take measures that are designed to protect the fetus if the employer has sound evidence of an embryofetotoxic risk. An employer should not be required to wait until

information about the risk (or lack of it) from mutagenic activity of the same substance is generated. Facts concerning mutagenic risks are simply not relevant to protecting the developing fetus. Indeed, an employer is under a legal duty to protect the fetus; if he fails to foresee potential harm and to take measures to protect the fetus, he may be held liable in a lawsuit by the parents and/or child for negligence should the child be affected. At least one court has recognized the "right to be born free from prenatal injuries forseeably caused by a breach of duty to the child's mother."[1] An employer's compliance with an EEOC or OFCCP Guideline that would prohibit the employer from taking steps to protect the fetus may have little, if any, effect on the employer's liability to the parents and/or child. It is thus incumbent upon the enforcement agencies not to hinder the employer in efforts that he may undertake in order to protect the developing fetus. However, under the Guidelines the employer would actually be prevented from protecting the fetus no matter how strong the evidence of embryofetotoxicity. This is because the proposal allows exclusion only of women known by the employer to be pregnant in an instance where

> an employer/contractor has obtained reputable scientific evidence that a workplace hazard causes or is likely to cause significant harm to the reproductive health of employees of one sex only, or of pregnant employees, and also where there is insufficient reputable scientific evidence concerning the reproductive harm to the other employees.[2]

(this is the "temporary emergency exclusion" discussed further below). As noted above, a woman (much less her employer) frequently does not know that she is pregnant until well into or after the fetus' most susceptible stage of

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[1] Renslow v. Mennonite Hospital, 367 N.E. 2d 1250, 1255 (Ill. 1977).

[2] 45 Fed. Reg. at 7517.

development. If the Guidelines were to allow exclusion of women of childbearing capacity in such an instance, then the fetus could be protected. But the proposal labels such an exclusion as "impermissible."[3]

CMA does not advocate that it is appropriate that women of childbearing capacity be excluded from all workplaces that may present an embryofetotoxic risk. Rather, when it has been determined that a substance presents a risk of embryofetotoxicity, a number of factors in controlling that risk should be taken into account. Because workplaces vary substantially in terms of how a substance is used, the number of employees present, the age of the plant, the duration, intensity and frequency of exposure, and many other variables--it will often be appropriate for different employers to take different actions to reduce employee exposures to known or suspected embryofetotoxins. Specifically, in order to reduce and maintain exposure to acceptable levels, CMA recommends that for each workplace the employer use the best practicable combination of engineering controls, administrative controls, work practice controls, and respiratory protection to reduce such exposures. However, women of childbearing capacity should be excluded from a work area where there is potential for exposure to an embryofetotoxin for which an acceptable exposure level cannot be set due to inadequate data. Also, such women should be excluded where engineering controls, augmented by administrative controls and personal protective equipment as appropriate, are determined to be inadequate to insure acceptable levels of exposure to an embryofetotoxic compound.

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[3] 45 Fed. Reg. at 7516.

The Guidelines' failure to allow exclusion of women of childbearing capacity as an aternative is fatal to their effectiveness in protecting the unborn child. The Guidelines, rather than protecting the fetus, are tantamount to a requirement that the fetus will be exposed if there are women in the critical stage of pregnancy in the workplace who do not know they are pregnant or who have not told their employer of their pregnancy.

It can be seen that the proposed Guidelines, rather than aiding in the protection of the national health and welfare, will probably result in greater numbers of birth defects in children of mothers who would be exposed to certain hazardous substances. It is difficult to conceive that Congress intended that the enforcement agencies would seek to establish such a Guideline.

The temporary emergency exclusion deserves further comment. Aside from the fact that the exclusion simply fails to protect the embryo or fetus in its most critical stage of development, there are some scientific and economic matters which should be brought to the agencies' attention. The exclusion of employees known to be pregnant is allowed

> where an employer/contractor has obtained reputable scientific evidence that a workplace hazard causes or is likely to cause significant harm to the reproductive health of employees of one sex only, or of pregnant employees, and also where there is insufficient reputable scientific evidence concerning the reproductive harm to the other employees.[4]

In such situations, the employer/contractor may, as a temporary measure, exclude the appropriate class of employees (but never women of childbearing capacity)[5] provided that the following conditions are met:

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[4] 45 Fed. Reg. at 7517.

[5] We believe that exclusion of women of childbearing capacity in such a

> (1) [The employer] has thoroughly searched the existing scientific evidence and the search reveals no reputable scientific evidence sufficient to suggest that the reproductive hazard might have a significant harmful effect on the reproductive health of employees not excluded by the policy in question.
>
> (2) It has narrowly tailored its policy to limit any exclusionary impact solely to the group of employees or applicants endangered. . . .
>
> (3) It has investigated and adopted suitable alternatives. . . .[6]

Also, the employer must carry out scientific research "designed to produce evidence of the effect of the reproductive hazard as used in the employer/contractor's workplace on the class not excluded."[7]

With regard to the above, it should be noted that the temporary emergency exclusion provisions of the Guidelines as proposed create a "scientific double standard" with regard to the acceptability of scientific evidence. An employer would need reputable scientific evidence that a substance "causes or is likely to cause significant harm" in order to consider implementing the exclusion (this is a high hurdle that he needs to jump to get into the exclusion). But then the employer is permitted to implement the exclusion only if:

> (1) It has thoroughly searched the existing scientific evidence, and the search reveals no reputable scientific evidence sufficient to suggest that the reproductive hazard might have a significant harmful effect on the reproductive health of [other employees]. (emphasis supplied)

This latter proviso is, in effect, a low hurdle which would prohibit him from implementing the exclusion. Under the proposal, it is conceivable that one positive in vitro test (such as an Ames test[8]) would satisfy the low hurdle proviso, and thus the employer would be prohibited from implementing a policy to protect the fetus. A positive Ames test, however, is entirely insufficient

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[6] 45 Fed. Reg. at 7517.

[7] Id.

[8] The Ames test is a short-term test which measures the mutagenic potential of a chemical substance on a strain of Salmonella bacteria.

evidence from which to deduce any effect on humans. Such a double standard is scientifically without basis and causes the proposed temporary emergency exclusion provision to be legally and scientifically arbitrary and capricious.

Economic Considerations

The enforcement agencies should realize that the health-effects testing which would be mandated upon the implementation of a temporary exclusionary policy is very expensive. A typical three-generation male/female study for one substance now costs approximately $300,000 to $400,000. Under the Guidelines testing would be mandated only for the substance which provided the evidence for the exclusionary policy; however, one of the factors that the agencies propose to use to determine whether the employer's conduct is justified is that he:

> . . . has investigated the effects of all scientifically recognized reproductive hazards present in its workplaces not only on those classes adversely affected by the policy, practice, or plan, but also on those relevant classes not adversely affected. . . .[9]

If this means that male/female testing must be carried out by an employer on "all scientifically recognized reproductive hazards in its workplaces," then these concerns are multiplied.

In enacting Title VII, Congress did not envision that the Equal Employment Opportunity Commission would be mandating health-effects testing. Nor is health-effects testing the province of the Office of Federal Contract Compliance Programs. Not only is such testing itself entirely beyond Congressional intent, the cost of this type of testing creates a burden upon employers not envisioned by the Legislature.

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[9] 45 F.R. at 7516. (emphasis supplied)

CMA is also concerned that the testing provisions of the proposal may have been contemplated without coordination with relevant federal agencies. The proposed Guidelines do not address how the required testing is related to testing that may be required by EPA pursuant to Section 4 of the Toxic Substances Control Act; nor is explanation provided of how the testing is related to OSHA's promulgation of rules regarding chronic health effects. Also, EEOC and OFCCP have made no references to the Interagency Regulatory Liaison Group (IRLG). This group, composed of representatives from the Environmental Protection Agency, the Food and Drug Administration, the Consumer Product Safety Commission, the Occupational Safety and Health Administration, and the Food Safety and Quality Service is concerned with promoting greater cooperation between federal agencies in the areas of worker protection, public health, and the environment. IRLG has been active in the field of health-effects testing. Recently[10] IRLG issued draft guidelines for selected toxicity tests, which included a guideline on teratogenicity testing. The enforcement agencies have not indicated whether they have considered the IRLG draft guidelines, or whether they have consulted with the Liaison Group.

Legal Considerations

As noted above, CMA believes that an employer who excludes women of childbearing capacity from a workplace where an embryofetotoxin is present is not violating Title VII. Were EEOC to have authority to issue these Guidelines, it would lie in the Pregnancy Amendment to Title VII, enacted by Congress in 1978. It is established Title VII law that prior to the Pregnancy

[10] Draft IRLG Guidelines for Selected Acute Toxicity Tests, IRLG, August, 1979.

Amendment, a pregnant woman did not have Title VII rights with respect to disabilities resulting from normal pregnancy and childbirth.

Geduldig v. Aiello, 417 U.S. 484, 8 FEP Cases 97 held that under the Fourteenth Amendment to the United States Constitution, it is permissible to divide persons into two groups--pregnant persons and non-pregnant persons:

> While the first group is exclusively female, the second includes members of both sexes.[11]

In that case, the court reasoned that the alleged discrimination was not discrimination on the basis of sex, but rather on the basis of "physical condition."[12]

Subsequently, General Electric Company v. Gilbert, 429 U.S. 125, 13 FEP Cases 1657, confirmed the application of traditional Fourteenth Amendment concepts of discrimination as enunciated in Geduldig to Title VII. The General Electric Company provided a disability plan that paid sickness and accident benefits, but specifically excluded from its coverage normal disabilities arising from pregnancy. Suit was brought by woman who were pregnant and who were denied disability pay. The Court concluded that its decision in Geduldig was relevant in determining whether or not the pregnancy exclusion in General Electric's disability plan discriminated on the basis of sex and was thus violative of Title VII. Restating Geduldig's finding that an exclusion based upon pregnancy was not, in itself, discrimination based on sex, the Court concluded that "it is a finding of sex-based discrimination that must trigger in a case such as Gilbert the finding of an unlawful

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[11] 417 U.S. at 497, footnote 20; 8 FEP Cases at 101, footnote 20.

[12] Id.

employment practice under Title VII ."[13] Even th ugh pregnancy is, of course, confined to women, the Court concluded that "the respondents have not made the requisite showing of gender-based effects,"[14] and that "Just as there is no facial gender-based discrimination in Geduldig , so, too, there is none here."[15] In holding that General Electric's disability benefits plan did not violate Title VII, even though the plan excluded a disability that only women could have, the Court effectively held that employment practices concerned with the state of pregnancy were not contemplated by Congress when it enacted Title VII. Title VII was concerned with gender-based discrimination; a pregnancy exclusion in a company's benefits policy is not gender-based but is rather condition-based.

It is with this background that we discuss the 1978 Pregnancy Amendment to Title VII which now appears, in part, as 42 U.S.C. Section 2000e(k).[16] The legislative history of the Amendment leaves no doubt that it was enacted in response to the Court's decision in Gilbert. Congress sought, in effect, to "override" the Gilbert decision. However, it must be realized that the Amendment was not intended to

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[13] 429 U.S. at 136, 13 FEP Cases at 1662

[14] 429 U.S. at 137, 13 FEP Cases at 1662

[15] 429 U.S. at 140, 13 FEP Cases at 1663-64

[16] The Amendment states in pertinent part that

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.

encompass health effects to unborn children. The Amendment was concerned with the disability of the mother in relation to her ability to work. It does not prohibit an employer from drawing classifications along lines that are other than sexual in order to protect the health of developing fetuses.[17] Just as EEOC was without authority under Title VII to issue Guidelines concerning pregnancy prior to the Amendment, it was also without authority to issue Guidelines on embryofetotoxins prior to the Amendment. Since Congress, by enacting the Amendment, changed EEOC's authority with respect to pregnancy but not with respect to embryofetotoxins, the Commission is still without authority to issue Guidelines concerning the latter.

Just as the Gilbert court found that until Congress spoke with clarity concerning pregnant women and traditional Fourteenth Amendment concepts of discrimination, so, too, now Congress must speak with clarity concerning EEOC's authority vis-a-vis health effects to unborn children.

City of Los Angeles v. Manhart, 435 U.S. 702, 17 FEP Cases 395, was decided after Geduldig and Gilbert, and before the Pregnancy Amendment. In Manhart, the Supreme Court found provisions of a certain pension plan to be violative of Title VII but reaffirmed the reasoning in the former two cases. Manhart dealt with a requirement by the Los Angeles Department of Water and Power that its women employees make larger contributions to its pension fund than male employees. The requirement was instituted on the basis of mortality tables and its own experience that women live longer than men (thus necessitating greater total payments by the Company to retired women employees). The Court struck down the pension plan as violative of Title VII. The Court reasoned that any individual's life expectancy is based on a number of factors, of which sex is only one:

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[17] If an employer excludes only women of childbearing capacity from a workplace that is hazardous to developing fetuses, he would be treating the remainder of the female employees in that workplace in a manner identical with the male employees.

> The record contains no evidence that any factor other than the employee's sex was taken into account in calculating the 14.84 per cent differential between the respective contributions by men and women. We agree with Judge Duniway's observation that one cannot "say that an actuarial distinction based entirely on sex 'is based on any other factor other than sex.' Sex is exactly what it is based on." 553 F2d 581,588 (1976).[18]

It is thus clear that one of the Court's concerns was that sex was the sole basis for the discrepancy.

The Court was also concerned that the criterion of longer life did not apply to all members of the class: i.e., many men live longer than many women. However, in this case, the criterion in question (the ability to become pregnant) does apply to all members of the class (women of childbearing capacity). Nonfertile women and all men are not included in the class. The class is defined by immutable biological and medical facts -- the ability of only some women to become pregnant, and the difficulty of ascertaining immediately when that event has occurred. It is medically impossible for an employer to know, within a few days of the event, if a female employee becomes pregnant, since the employee herself will not know for a period of weeks. This medical fact of impossibility of knowledge of a critical event was not a factor in the Manhart decision. Also, Manhart was concerned with the involuntary act of dying; no member of the excluded class could control the event. Here we are concerned with a voluntary act over which each member of the excluded class has control. In addition, the very voluntariness of the act is magnified by the employee's voluntary choice of whether she informs the employer of the pregnancy. These facts, when considered in light of the

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[18] 435 U.S. at 712-13, 17 FEP Cases at 400.

sensitivity of the embryo to embryotoxins during its first 60 days, make the present classification acceptable under Manhart. Moreover, the Manhart Court restated the validity under Title VII of General Electric's exclusion that it considered in Gilbert:

> In Gilbert, the Court held that the exclusion of pregnancy from an employer's disability benefit plan did not constitute sex discrimination within the meaning of Title VII. Relying on the reasoning in Geduldig v. Aiello, 417 U.S. 484, 8 FEP Cases 97, the Court first held that the General Electric plan did not involve "discrimination based upon gender as such." The two groups of potential recipients which that case concerned were pregnant women and nonpregnant persons. "While the first group is exclusively female, the second included members of both sexes." 429 U.S. at 135, 13 FEP Cases, at 1661. In contrast, each of the two groups of employees involved in this case [Manhart] is composed entirely and exclusively of members of the same sex. On its face, this plan discriminated on the basis of sex, whereas the General Electric plan discriminated on the basis of a special physical disability.[19]

Neither the decision in Manhart nor the Pregnancy Amendment changes the validity of the rationale used in Geduldig and Gilbert that classifications may be drawn along lines that are other than sexual. An employer who excludes persons of childbearing capacity from a workplace where a fetus is threatened by an embryofetotoxin is not making a distinction based upon sex. This leads us back to an initial statement on page 1 of these Comments: "At the outset, we wish to state that the proposed Guidelines do not address a problem which can validly be termed 'sex discrimination.'" So long as the employer would not also exclude women incapable of bearing children, the employer would have drawn classifications not along sexual lines, but rather along a line separating childbearing capacity from nonchildbearing capacity.

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[19] 435 U.S. at 715, 17 FEP Cases at 401, footnote omitted.

In summary, we hope that the medical, economic, and legal material contained in these comments has enabled the enforcement agencies to better appreciate the complex area they have chosen to address. Should any final Guidelines be issued, we hope that they will be within the agencies' scope of authority and will have considered the material in these comments.