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Memorandum LABOR COUNSEL

May 8, 1990

To: ORC Equal Opportunity Group Members
From: Marcy K. Schwartz
Subject: Developments Regarding Fetal Protection Policies
[EOG 90-64]

During the last round of meetings of the ORC Equal Opportunity Group we discussed the case UAW v. Johnson Controls Inc. In that case, the Seventh Circuit held that a fetal protection policy which barred women from working in battery production, where there was high lead exposure, did not constitute sex discrimination under Title VII. Pursuant to the policy, only women who could prove they were not fertile were eligible for battery manufacturing jobs. The Seventh Circuit held that the fetal protection policy fell under the business necessity and bona fide occupational qualification defenses of Title VII.

Subsequently, the EEOC issued internal policy guidance stating that the agency would not follow the rule of Johnson Controls outside of the jurisdiction of the Seventh Circuit. In addition, on March 26, 1990, the U. S. Supreme Court accepted review of UAW v. Johnson Controls Inc. (No. 89-1215). A number of unions, women's groups, the American Civil Liberties Union, and experts in occupational health had joined plaintiff UAW as amici curiae in its petition for review to the Supreme Court, arguing that there are less restrictive means to achieve the ends of fetal protection.

Meanwhile, in an opinion issued on February 28, 1990, the California Court of Appeals held that the Johnson Controls fetal protection policy violated the state FEP law. Johnson Controls Inc. v. California Fair Employment and Housing Commission, 218 Cal. App. 3d 517, 52 FEP Cases 585, mod., reh. den., 218 Cal. App. 3d 1492e. In consideration of the same fetal protection policy reviewed by the Seventh Circuit, the court upheld a decision by the Fair Employment and Housing

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Commission that the policy discriminated against women. The court affirmed the Commission, while reversing a trial court that had in the interim reweighed the evidence and found in favor of the company.

The California appeals court accepted the Commission's reasoning that the fetal protection policy should receive the same scrutiny as any other gender-based employment policy. The court discussed the protectionist nature of the fetal protection policy as overbroad. According to the court, fully informing women of the dangers of lead exposure would allow them to make informed choices about working in a high lead environment, without barring women from jobs for which they are otherwise qualified. Johnson Controls has expressed its intention to appeal the decision to the California Supreme Court.

Finally, in a legislative response to the Seventh Circuit Johnson Controls decision, The Employee Protection Act was introduced in the U. S. House of Representatives on March 29, 1990. The bill, H. R. 4420, would prohibit employers from requiring fertility tests or sterilization as a condition of employment. Employers would also be prohibited from inquiring about fertility tests or the ability of workers to bear children. However, the bill would not in general prevent the offer of voluntary transfers to employees. While the House Committee on Education and Labor may hold hearings on the measure this year, the Committee will probably not vote on the bill until after the Supreme Court issues its decision in UAW v. Johnson Controls Inc.