

**U.S. Department of Labor**

Office of the Assistant Secretary for  
Congressional and Intergovernmental Affairs  
Washington, D.C. 20210



February 8, 2016

The Honorable John Kline  
Chairman  
Committee on Education and the Workforce  
U.S. House of Representatives  
2176 Rayburn House Office Building  
Washington, D.C. 20515-6100

The Honorable Tim Walberg  
Chairman  
Subcommittee on Workforce Protections

Dear Chairman Kline and Chairman Walberg:

I am writing in response to your January 19, 2016, letter to Labor Secretary Thomas E. Perez regarding the efforts of the Occupational Safety and Health Administration (OSHA) to ensure safe and healthful working conditions, and communications between the Department and the National Labor Relations Board (NLRB). That letter questions the veracity of the Department's November 18, 2015, response to your October 13, 2015, letter on the same subject. The Department takes these matters extremely seriously and continues to fully respect Congress's oversight role. We have reviewed the Department's November response and confirmed that it is accurate.

The Committee's October 13 letter sought, among other things, information about meetings and other communications between the Department and the NLRB related to consideration of a new multiemployer standard under the Occupational Safety and Health Act (OSH Act) or any other federal law. The Department's November 18 response accurately stated that the Department did not coordinate with the NLRB in drafting the list of investigatory questions about joint employer responsibility for workplace safety and health that you referenced. Moreover, during a December 7, 2015, bipartisan, bicameral briefing, the Department restated that it did not consult with the NLRB in the development of the draft list of investigatory questions and further clarified that it has not changed and did not collaborate with the NLRB on making any changes to OSHA's joint or multiemployer policies.

In addition, the Committee's letter of October 13 requested "documents and other information regarding OSHA's multiemployer citation policy" to help the Committee better understand "the department's efforts to modify the existing standard." The Department's November 18 response to the Committee explained that there has been no change in OSHA's multiemployer policy, and that the draft list of investigatory questions did not change OSHA's approach to determining whether there is joint responsibility for worker health and safety at a particular workplace. The Department created this draft list because it had received several complaints that raised questions about joint responsibility for worker safety in the context of a franchise structure. On June 18,

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2015,<sup>1</sup> OSHA provided its CSOs with the draft list of questions in order to help the investigators obtain the facts necessary to decide whether both the franchisor and franchisee may be responsible for particular hazards identified during an inspection. As part of the Department's ongoing accommodation of the Committee, it has thus far produced 92 pages of complaints received by OSHA related to these investigations<sup>2</sup>.

As noted in the Committee's most recent letter, on April 29, 2015, an attorney from the Department's Office of the Solicitor (SOL) invited the NLRB General Counsel to participate in a panel discussion at the June 1, 2015, Honors Attorney Program training. Although conferral between two enforcement agencies may be entirely appropriate in some instances, this particular meeting was in no way an effort to coordinate strategy between the Department and the NLRB; nor was the draft list of investigatory questions discussed at the training. This training was an annual one-day educational session for approximately 20 attorneys who had recently graduated from law school and joined SOL in the national and regional offices and was designed to give the attorneys the opportunity to meet and interact in person. As the attached agenda<sup>3</sup> indicates, the program included a discussion of career planning, a meeting with SOL leadership, a session seeking feedback on the Honors Attorney Program itself, as well as an educational panel discussion organized by the Honors Attorneys on the "fissured workplace" which addressed various business models with implications for workers and the employment relationship. It was the latter panel for which the General Counsel was invited.

Additionally, the Committee's recent letter asked about a June 3, 2015, email inviting the NLRB General Counsel to participate in a video conference with SOL's Executive Committee on June 24. This meeting occurred after the OSHA draft list of investigatory questions was provided to OSHA regional staff on June 18, 2015, and, thus, could not have contributed to the development of that list. The Solicitor conducts a weekly videoconference meeting with SOL leadership from the national and regional offices. The meeting provides a regular opportunity for SOL's leadership to discuss a wide range of matters involving SOL's administration and management, as well as topical legal issues related to SOL's substantive work. Periodically, guests are invited to make presentations on specific topics. The NLRB General Counsel was invited to speak about the *amicus curiae* brief his office filed in *Browning-Ferris*, a case then before the NLRB, and an April 2015 memorandum from the NLRB's Division of Advice to the Board's Regional Director in Chicago concluding that no joint employer relationship existed under the National Labor Relations Act between another company and one of its franchisees. There was no discussion of the draft list of investigatory questions during this meeting.

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<sup>1</sup> The transmittal email and attached draft list of investigatory questions is enclosed and can be found at DOL\_OSHA\_JOINT EMPLOYER 000093-000097.

<sup>2</sup> The Department is continuing to review our records for materials that may be responsive to both your October 13 and your January 19 requests, and we will supplement our document production as appropriate.

<sup>3</sup> Honors Program Training Agenda (June 1, 2015). Available at DOL\_OSHA\_JOINT EMPLOYER 000098.

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The Committee's recent letter also references a July 13, 2015, email exchange between the Department's Associate Solicitor for Occupational Safety and Health and the NLRB General Counsel. This communication occurred almost a month after OSHA distributed the list of investigatory questions to its own regional offices and is not related to any changes in OSHA's joint employer or multiemployer policies or the draft list of questions. Instead, this communication occurred in the ordinary course of conferrals between enforcement agency litigators. Specifically, the Associate Solicitor contacted the NLRB General Counsel to see if she could speak with an NLRB attorney who had litigated a certain case, not about any change to OSHA's multiemployer policy. The NLRB's General Counsel identified the relevant NLRB colleague. The two attorneys did not ultimately connect about the litigation. However, such exchanges between enforcement agencies are entirely appropriate. Federal agencies can foster a more efficient and effective government by working together to learn best practices and to broaden understanding of topical developments in relevant legal issues.

If you have any further questions, please contact Kate Garza, Senior Counselor for Congressional and Intergovernmental Affairs, U.S. Department of Labor. She may be reached at (202) 693-4600.

Sincerely,



Adri Jayaratne  
Acting Assistant Secretary

Enclosure: Documents Bates stamped DOL\_OSHA\_JOINT EMPLOYER 000093-000098.

cc: The Honorable Robert C. "Bobby" Scott  
Ranking Member  
Committee on Education and the Workforce

The Honorable Frederica S. Wilson  
Ranking Member  
Subcommittee on Workforce Protections