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October 5, 2012

The Honorable Jeffrey Zients
 Acting Director
 Office of Management and Budget
 Eisenhower Executive Office Building
 Washington, D.C. 20500

Dear Acting Director Zients:

We are greatly concerned about the Office of Management and Budget's (OMB) September 28, 2012 guidance regarding "Allowable Contracting Costs Associated with the Worker Adjustment and Retraining Notification (WARN) Act."¹ Specifically, we are concerned by OMB's reliance on the Department of Labor's (DOL) July 30, 2012 misleading and incomplete guidance relating to the applicability of the WARN Act to potential sequestration-caused layoffs.² To better understand the OMB guidance and its relationship to the DOL guidance, we respectfully request information, documents, and communications, as delineated below.

As you know, the WARN Act generally requires employers with at least 100 employees to give affected workers 60 days' notice of plant closings or mass layoffs.³ The DOL guidance concluded, given the "lack of certainty" about sequestration and its implementation, contractors are not required to issue WARN Act notices in advance of sequestration, and it would be inappropriate and inconsistent with the law for contractors to issue notices.⁴ The OMB guidance provides that "if sequestration occurs" and an affected contractor subject to the WARN Act "followed a course of action consistent with [the] DOL guidance," the contractor would be "covered" by the contracting agency.⁵ Specifically, the agency would "cover" the contractor for

¹ *Guidance on Allowable Contracting Costs Associated with the Worker Adjustment and Retraining Notification (WARN) Act*, Office of Mgmt. and Budget (Sept. 28, 2012) [hereinafter OMB Guidance], available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-19.pdf>.

² *Guidance on the Applicability of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. 2101-2109, to layoffs that may occur among Federal Contractors, including in the Defense Industry as a Result of Sequestration*, Emp't and Training Admin., U.S. Dep't of Labor (July 30, 2012) [hereinafter DOL Guidance], available at http://wdr.doleta.gov/directives/attach/TEGL/TEGL_3a_12_acc.pdf.

³ See 29 U.S.C. §§ 2101-2109.

⁴ See DOL Guidance, *supra* note 2, at 5.

⁵ See OMB Guidance, *supra* note 1, at 1-2.

resulting WARN Act-related employee compensation costs (“as determined by a court”), litigation costs, attorneys’ fees, and other unspecified, but “allowable” costs.⁶

On August 2, 2012, we contacted DOL to share our concern that the DOL guidance is misleading and incomplete with respect to contractors’ obligations under the WARN Act and DOL’s role in enforcing the law.⁷ Despite subsequent requests for production, DOL has not answered our concerns or provided substantive responsive materials.⁸ Compounding our unanswered concerns, the OMB guidance attempts to incentivize contractors—with taxpayer dollars—to follow the DOL guidance and not issue WARN Act notices in advance of sequestration.

In the first instance, OMB guidance appears to conflict with guidance issued by DOL. Pursuant to the OMB guidance, a contracting agency would “cover” a contractor’s compliance with the DOL guidance that results in WARN Act-related liability and costs—“irrespective of litigation outcome.”⁹ This suggests OMB expects a federal court could find a contractor who does not issue sequestration-related WARN Act notices in violation of the law. However, the DOL guidance concluded WARN Act notices are not required by law and a contractor’s issuance of notices in advance of sequestration would be inappropriate and inconsistent with the law. This discrepancy could constitute an acknowledgment by the administration that WARN Act notices were required in advance of sequestration, which could foreclose the DOL guidance from receiving any deference from the courts and fuel WARN Act-related liability and costs for contractors who complied with the DOL guidance—to the detriment of hard-working taxpayers.

Similar to DOL’s guidance, OMB guidance fails to make clear that DOL plays no role in enforcing the WARN Act. As highlighted in our August 2 letter to DOL, the WARN Act’s regulations state: “The Department of Labor has no legal standing in any enforcement action and, therefore, will not be in a position to issue advisory opinions on specific cases.”¹⁰ Congress authorized the federal courts, not DOL, to enforce the WARN Act and interpret the law as it applies in particular circumstances. As a result, DOL guidance does not carry the weight of law, and may carry no weight before a federal court. However, OMB’s guidance tempts contractors to ignore the WARN Act and sequestration in favor of the direction of the Secretary of Labor.

Finally, both the OMB and DOL guidance express concern about “the potential for waste and disruption associated with the issuance of unwarranted layoff notices.”¹¹ However, as

⁶ See *id.* at 2.

⁷ See Letter from the Honorable John Kline, Chairman, House Committee on Education and the Workforce, the Honorable Tim Walberg, Chairman, House Subcommittee on Workforce Protections, and the Honorable Phil Roe, Chairman, House Subcommittee on Health, Employment, Labor, and Pensions, to the Honorable Hilda L. Solis, Secretary, U.S. Dep’t of Labor (Aug. 2, 2012) [hereinafter E&W Letter], *available at* http://edworkforce.house.gov/uploadedfiles/08-02-12_letter_warn_act_sequestration.pdf.

⁸ See Letter from the Honorable John Kline, Chairman, House Committee on Education and the Workforce, the Honorable Tim Walberg, Chairman, House Subcommittee on Workforce Protections, and the Honorable Phil Roe, Chairman, House Subcommittee on Health, Employment, Labor, and Pensions, to the Honorable Hilda L. Solis, Secretary, U.S. Dep’t of Labor (Sept. 24, 2012), *available at* http://edworkforce.house.gov/uploadedfiles/09-24-12_solis_letter_warn_act_-_sequestration_follow-up.pdf.

⁹ See OMB Guidance, *supra* note 1, at 2.

¹⁰ 20 C.F.R. § 639.1; see E&W Letter, *supra* note 7, at 2.

¹¹ See OMB Guidance, *supra* note 1, at 1.

highlighted in our August 2 letter to DOL, the WARN Act and its regulations indicate employers are encouraged—even when not required—to provide notice to employees about a proposal to close a plant or significantly reduce a workforce.¹² The WARN Act’s regulations also state that in “ambiguous situations,” “[i]t is civically desirable and it would appear to be good business practice for an employer to provide advance notice,” and employers are encouraged to “give notice in all circumstances.”¹³ Yet, both the OMB and DOL guidance express a contrary position—that is, advance notice in the case of sequestration would “waste[] the states’ resources” and “create[] unnecessary uncertainty and anxiety in workers.”¹⁴

In light of the above, please provide the following documents and communications and respond to the following inquiries **no later than October 19, 2012**.

1. All documents and communications within OMB relating to the OMB guidance of September 28, 2012.
2. All documents and communications within OMB relating to the DOL guidance of July 30, 2012.
3. All documents from and communications with DOL relating to the OMB guidance, the DOL guidance, and the applicability of the WARN Act to sequestration.
4. All documents from and communications with other federal and state agencies and Members of Congress relating to the OMB guidance, the DOL guidance, and the applicability of the WARN Act to sequestration.
5. All documents from and communications with outside parties, including contractors, relating to the OMB guidance, the DOL guidance, and the applicability of the WARN Act to sequestration.
6. An explanation of the process by which a contracting agency would cover a contractor for WARN Act-related liability and costs.
7. The source(s) of government funding from which a contracting agency would cover a contractor for WARN Act-related liability and costs.
8. All possible costs described in the OMB guidance as “other costs potentially associated with sequestration, including WARN Act-related costs arising under circumstances not specified in this guidance, based on the usual cost principles of allocability, allowability, and reasonableness as set forth in the FAR.”¹⁵

¹² See E&W Letter, *supra* note 7, at 2 (citing 29 U.S.C. § 2106; 20 C.F.R. § 639.1).

¹³ 20 C.F.R. § 639.1(e).

¹⁴ See DOL Guidance, *supra* note 2, at 4; *see also* OMB Guidance, *supra* note 1, at 1.

¹⁵ See OMB Guidance, *supra* note 1, at 2.

9. Pursuant to the Federal Acquisition Regulation, the OMB guidance, and any other applicable law, an explanation of the circumstances in which a contracting agency would cover a contractor for the costs of settling a WARN Act-related legal matter short of a finding of liability as determined by a court.
10. An explanation of the level of legal deference, if any, OMB expects federal courts to accord the DOL guidance.

If you have questions, please contact Donald McIntosh or Molly Conway of the committee staff at (202) 225-7101.

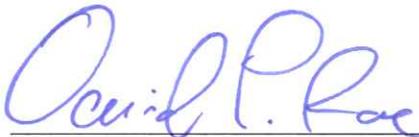
Sincerely,



JOHN KLINE
Chairman
Committee on Education and the Workforce



TIM WALBERG
Chairman
Subcommittee on Workforce Protections



DAVID "PHIL" ROE
Chairman
Subcommittee on Health, Employment,
Labor, and Pensions

Enclosure

CC: The Honorable George Miller, Senior Democratic Member, Committee on Education and the Workforce

The Honorable Lynn Woolsey, Senior Democratic Member, Subcommittee on Workforce Protections