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COMMITTEE ON EDUCATION  
AND THE WORKFORCE  
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September 30, 2011

The Honorable Hilda L. Solis  
Secretary  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, D.C. 20210

Dear Secretary Solis:

On December 7, 2009, the U.S. Department of Labor (DOL) published its Fall 2009 Semiannual Regulatory Agenda in the *Federal Register*. This agenda noted DOL's intention to issue a Notice of Proposed Rulemaking (NPRM) in August 2010, entitled *Records to Be Kept by Employers Under the Fair Labor Standards Act* ("the anticipated rulemaking").<sup>1</sup> At the time, DOL characterized the proposal as an "update [to] the recordkeeping regulations under the Fair Labor Standards Act (FLSA) in order to enhance the transparency and disclosure to workers of how their pay is computed, and to modernize other requirements under 'telework' and 'flexiplace' arrangements."<sup>2</sup>

In subsequent Semiannual Regulatory Agendas, DOL changed the title of this anticipated rulemaking to *Right to Know Under the Fair Labor Standards Act*,<sup>3</sup> and delayed its projected date for issuing a NPRM.<sup>4</sup> Most recently, in its July 7, 2011, Semiannual Regulatory Agenda, DOL indicated a significant change to the depth and scope of this anticipated rulemaking, characterizing it as an "update [to] the recordkeeping regulations under the FLSA in order to enhance the transparency and disclosure to workers of their status as the employer's employee or some other status, such as an independent contractor, and if an employee, how their pay is computed."<sup>5</sup> In addition, DOL changed the anticipated rulemaking "to clarify that the mandatory manual preparation of 'homeworker' handbooks applies only to employers of employees performing

<sup>1</sup> Regulatory Information Number (RIN) 1215-AB78.

<sup>2</sup> Fall 2009 Regulatory Agenda, U.S. Department of Labor. *Federal Register*. December 7, 2009.

<sup>3</sup> The proposal's title changed as of December 20, 2010.

<sup>4</sup> RIN 1215-AB78 was transferred to RIN 1235-AA04 on March 2, 2010.

<sup>5</sup> Spring 2011 Regulatory Agenda, U.S. Department of Labor. *Federal Register*. July 7, 2011.

homework in the restricted industries.”<sup>6</sup> According to this July 2011 agenda, DOL now intends to issue an NPRM in October 2011.<sup>7</sup>

Certainty is needed for employers, workers, and entrepreneurs to spend, hire, and invest. This anticipated rulemaking has been on DOL’s regulatory agenda for more than a year-and-a-half, and despite questions from stakeholders and this committee, DOL has not been forthcoming about the contents of the anticipated rulemaking. During its July 13, 2011, “webchat” on the Wage and Hour Division’s (WHD) regulatory activities, DOL failed to provide substantive responses to the more than 10 questions raised by interested parties concerning the proposal.<sup>8</sup> In addition, DOL’s response to a question previously posed about this anticipated rulemaking lacked the substance necessary to understand DOL’s work on the proposal, the contents of the proposal, and the timing of a NPRM.<sup>9</sup>

To better understand DOL’s anticipated rulemaking, we ask you to direct all DOL agencies responsible for researching and crafting the Right to Know proposal(s) under RIN 1215-AB78 and/or RIN 1235-AA04 to provide the following information and responses in a single letter, attaching documents, to the House Committee on Education and the Workforce **no later than October 14, 2011**:

- 1) A detailed timetable outlining DOL’s internal review process for this anticipated rulemaking, including, but not limited to, the offices and agencies that have reviewed or will review it, documents created for each review to date, and the names and job titles of officials who have reviewed and/or approved the proposal;
- 2) All documents and communications relating to the decision to expand the depth and scope of this anticipated rulemaking from what the abstract described for RIN 1215-AB78 in December 2009 to what is being considered as of September 30, 2011;
- 3) A list of all meetings with outside groups relating to the decision to expand RIN 1215-AB78, including the date, location, attendees, and topic of such meetings;
- 4) All documents exchanged and communications between DOL and the Office of Management and Budget (OMB) concerning this anticipated rulemaking, specifically including, but not limited to, all documents relating to this proposal transmitted by DOL to OMB, other than the semiannual regulatory agendas;
- 5) A list of the dates, attendees, and topics for all meetings and telephone conversations between DOL and OMB relating to this anticipated rulemaking, and all documents and communications relating to such meetings;
- 6) A list of all meetings with outside groups relating to the development of this proposed rulemaking and DOL’s decision to include it as part of its Fall 2009 Semiannual

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Department of Labor Regulations- Live Question and Answer with the Wage and Hour Division. July 13, 2011. <http://www.dol.gov/regulations/chat-whd-201107.htm>.

<sup>9</sup> Letter responding to “Questions for the Record submitted to Secretary Solis after the Committee on Education and Workforce’s February 16, 2011 hearing entitled “Policies and Priorities at the U.S. Department of Labor.” May 5, 2011.

Regulatory Agenda and/or subsequent Semiannual Regulatory Agendas, as well as the date, location, attendees, and topics of such meetings; and all documents and communications relating to such meetings;

- 7) All documents and communications—from WHD, the Office of Solicitor or any other agency or contractor—discussing or relating to whether DOL has the statutory authority to impose the recordkeeping duties contemplated by these proposals under 29 U.S.C. § 211 or any other statutory provision; and
- 8) Any economic impact studies, regulatory flexibility analyses, and/or burden analyses developed by DOL, including by any contractor, in anticipation of the proposed rulemaking, or in any way relating to the proposal(s) under RIN 1215-AB78 and/or RIN 1235-AA04;
- 9) A copy of the Office of Inspector General (OIG) report entitled *Wage and Hour's Management Oversight of the FLSA's Minimum Wage and Overtime Exemption Provisions Under 29 CFR Part 541 Could Be Strengthened Report No. 04-10-002-04-420* (December 16, 2009), along with WHD's response to the report and all documents exchanged and communications between DOL and OIG relating to the report.

Thank you for your attention to this matter. If you have any questions or comments, please contact Joe Wheeler of the committee staff at (202) 225-7101.

Sincerely,

  
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JOHN KLINE  
Chairman  
Committee on Education and the Workforce

  
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TIM WALBERG  
Chairman  
Subcommittee on Workforce Protections

  
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RICHARD HANNA

Enclosure

CC: The Honorable George Miller, Senior Democratic Member

## Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i. e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one *CD*, hard drive, memory stick, thumb drive, box or folder is produced, each *CD*, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents should be delivered, one set to the Majority Staff in Room 2181 of the Rayburn House Office Building and one set to the Minority Staff in Room 2101 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

## Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.