July 6, 2023

The Honorable Gene L. Dodaro  
U.S. Comptroller General  
U.S. Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Mr. Dodaro:

Deputy Assistant Secretary of Labor Julie A. Su is currently serving as Acting Secretary of Labor. However, as her nomination to become the next Secretary of Labor continues to languish in the Senate, questions regarding the length of time she can remain the head of the Department of Labor (DOL) need answers. Therefore, the Committee on Education and the Workforce (Committee) is examining the ability of an Acting Secretary of Labor to remain in office in accordance with the Federal Vacancies Reform Act of 1998 (Vacancies Act). The Committee is aware of a potential conflict between two federal statutes regarding an Acting Secretary of Labor’s tenure: 1) the statute that created the position of Deputy Secretary of Labor and 2) the Vacancies Act. The Committee requests that the Government Accountability Office issue an opinion about what legal authority determines an Acting Secretary of Labor’s tenure in office and DOL’s adherence to that statute.

On February 16, 2023, the National Hockey League Players’ Association announced that Secretary of Labor Martin J. Walsh would become its executive director.1 On February 28, the White House announced the President’s nomination of Deputy Secretary Su for Secretary of Labor.2 On March 11, 2023, Secretary Walsh resigned from his position in the federal government. On that same day, DOL reported that Deputy Secretary Su began her service as Acting Secretary under section 552 of title 29 of the United States Code.3 This section provides:

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3 Submission Under the Federal Vacancies Reform Act from the Dep’t of Lab. to Comp. Gen. of the U.S., et al. (Mar. 21, 2023) (on file with the Committee).
The Deputy Secretary shall (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties of the Secretary until a successor is appointed, and (2) in case of the absence or sickness of the Secretary, perform the duties of the Secretary until such absence or sickness shall terminate.

The Vacancies Act establishes requirements for temporarily authorizing an acting official to perform the functions and duties of certain vacant positions that require a presidential appointment and Senate confirmation. The Vacancies Act is the exclusive means for an acting official to serve in a covered position unless

(1) a statutory provision expressly-

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

On behalf of the Committee, I am writing to request an opinion addressing the following:


2. Does 29 U.S.C. § 552 provide authority, independent of the Vacancies Act, to designate an Acting Secretary of Labor? In other words, does this position qualify as a statutory provision that operates as an exception to the Vacancies Act’s exclusive authority, as described in 5 U.S.C. § 3347(a)(1)?

3. Is Ms. Su serving as Acting Secretary in compliance with the applicable governing legal authority?

4. Are there time limitations on Ms. Su’s acting service, and if so, what are those limitations?

Thank you for your attention to this matter.

Sincerely,

Virginia Foxx
Chairwoman

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5 5 U.S.C. § 3347(a).