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October 13, 2015

The Honorable Thomas E. Perez  
Secretary  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Dear Secretary Perez:

The primary mission of the Occupational Safety and Health Administration (OSHA) is "to assure safe and healthful working conditions for working men and women." We write to express our concern that this important agency may be drifting from its core mission. Specifically, we write to request documents and other information regarding OSHA's multiemployer citation policy.

An August 25, 2015, press report revealed a new Department of Labor (Department) effort to expand franchisor liability for workplace safety and health violations of a franchisee under the *Occupational Safety and Health Act* (OSH Act).<sup>1</sup> This purported draft memorandum from the Department's Solicitor of Labor (Solicitor) outlines guidance to OSHA inspectors expected to enforce a new "multiemployer citation standard."<sup>2</sup> The memorandum mirrors recent efforts by the National Labor Relations Board (NLRB) and its General Counsel to help labor unions increase their presence in the workforce by expanding joint-employer liability.<sup>3</sup>

OSHA already has a robust multiemployer citation policy.<sup>4</sup> In undertaking determinations of whether a franchisor shares liability for the actions of its franchisees, OSHA inspectors are directed to consider who has control, responsibility, or the ability to expose a worker to a hazard on a worksite. The department has not put forward any evidence to demonstrate the current

<sup>1</sup> Brian Mahoney, *OSHA Probes Franchises on Joint Employment*, POLITICO, Aug. 25, 2015. Available at: <https://www.politicopro.com/labor/story/2015/08/osha-probes-franchises-on-joint-employment-051728>. (Accessed Sept. 15, 2015)

<sup>2</sup> *Id.*

<sup>3</sup> In fact, labor unions have pursued an expansion of franchisor liability in the workplace safety context. See, e.g., Alexandra Berzon and Annie Gasparro, *Labor Group Seeks to Hold Fast Food Chains Responsible for Worker Safety*, The Wall Street Journal, Mar. 16, 2015. Available at: <http://www.wsj.com/articles/labor-group-seeks-to-hold-fast-food-chains-responsible-for-worker-safety-1426540569> (Accessed Sept. 17, 2015).

<sup>4</sup> Multi-Employer Citation Policy, CPL 2-0.124. Dec. 10, 1999.

multiemployer standard is not sufficient to hold accountable those who jeopardize employee health and safety.

Now, without any public notice or warning, the Solicitor's memorandum would instruct OSHA inspectors to delve into unrelated matters – financial and otherwise – far outside their expertise. Drifting further from the agency's core mission, inspectors would have to consider “brand standards,” menu and product creation, and the use of specific computer systems. Inspectors would consider these and other questions that move far beyond the “safety control” factors OSHA currently considers before issuing a multiemployer citation. This proposed change has alarmed employers and other stakeholders, resulting in a recent request under the *Freedom of Information Act* (FOIA) for the department to provide more transparency and information.<sup>5</sup>

In order for the Committee to better understand the department's efforts to modify the existing multiemployer citation standard, please contact our staff to schedule a briefing and provide the following information one week in advance of said briefing, **but no later than October 27, 2015**:

- 1) A description of the factors OSHA inspectors currently must consider when deciding whether multiple employers should be held legally responsible for health and safety violations;
- 2) A list of all meetings held between the Solicitor and any other department agencies, and all associated documents and communications, related to consideration of modifying the multiemployer standard under the OSH Act or any other federal law;
- 3) A list of all meetings held between the department and the NLRB, and all associated documents and communications, related to consideration of the new standard under any federal law;
- 4) A list of all meetings held between the department and stakeholders, including but not limited to the Service Employees International Union (SEIU), and all associated documents and communications, related to consideration of the SEIU's complaints that were reported about on March 16, 2015,<sup>6</sup> the OSH Act, or any other law enforced by the department;
- 5) A statement of the department's legal justification for the new policy under the OSH Act, including the difference between OSHA's existing multiemployer policy and the new standard; and

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<sup>5</sup> Letter from Elizabeth Taylor, Vice President, Government Relations and Public Policy and Counsel, and Michael J. Lotito, Counsel, International Franchise Association, to the Hon. David Michaels, Asst. Sec'y for Occupational Health and Safety, U.S. Dep't of Labor (Aug. 26, 2015) *available at*: <http://emarket.franchise.org/FOIAIFA2015.pdf>

<sup>6</sup> Berzon and Annie Gasparro, *supra* note 3.

The Honorable Thomas E. Perez


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- 6) A detailed description of the timing and manner by which the department intends to comply with the August 26, 2015, FOIA request related to the Solicitor's memorandum.

If you have additional questions or comments, please contact Loren Sweatt or Joe Wheeler of the Committee staff at (202) 225-7101.

Sincerely,

  
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JOHN KLINE  
Chairman  
Committee on Education and the Workforce

  
\_\_\_\_\_  
TIM WALBERG  
Chairman  
Subcommittee on Workforce Protections

Enclosure

CC: The Honorable Robert C. "Bobby" Scott, Ranking 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.