

United States Senate

WASHINGTON, DC 20510-2101

October 27, 2015

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

Dear Secretary Perez:

As Chairmen of the U.S. Senate Committee on Health, Education, Labor and Pensions, the U.S. Senate Committee on Homeland Security and Governmental Affairs, and the U.S. Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, we write to request information about draft guidance from the Department of Labor (DOL) that suggests DOL is planning to hold franchisors liable for the health and safety violations of a franchisee.

On August 26, 2015, draft guidance from DOL's Office of the Solicitor instructing Occupational Safety and Health Administration (OSHA) investigators to evaluate whether a franchisor can be liable as a joint employer for the health and safety violations of a franchisee was leaked to the press.¹ The guidance states that "while the franchisor and the franchisee may appear to be separate and independent employers, a joint employer standard may apply where the corporate entity exercises direct or indirect control over the working conditions, has the unexercised potential to control working conditions or based on the economic realities."²

This would be a significant change in policy, as OSHA's long-standing multi-employer enforcement policies do not contemplate such a broad definition of who can be held liable for health and safety violations.³ For example, OSHA's long-standing multi-employer citation policy instructs OSHA investigators to look at whether an employer is creating, exposing, correcting, or controlling a health or safety hazard in order for an employer to be cited for it.⁴

¹ Aaron Vehling, OSHA Mulls Joint Employer Standard for Safety Probes, Law360, Aug. 26, 2015, available at <http://www.law360.com/articles/695686/osha-mulls-joint-employer-standard-for-safety-probes>.

² *Id.*

³ Case law emphasizes the right to control, not the unexercised potential to control. See *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992).

⁴ U.S. Dept. of Labor, OSHA Instruction: Multi-Employer Citation Policy, Dec. 10, 1999, available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024.

Yet, DOL's draft guidance instructs OSHA investigators to ask for information that does not appear to be related to health and safety. For example, the guidance asks for information about franchisor fees, the creation of menus, the approval of signage, and whether suppliers are recommended, among many other things.

The leaked document also raises questions about whether DOL and the National Labor Relations Board (NLRB) have a coordinated effort underway to change joint employer laws. Indeed, the day after OSHA's draft guidance was leaked, the NLRB announced its *Browning-Ferris* decision that similarly transformed the standard for when franchisors can be held liable as joint employers for labor law violations of a franchisee. At an Appropriations Subcommittee hearing in March 2015, you were asked if OSHA was "planning to follow the NLRB and hold franchisors jointly liable for labor law violations committed by franchisees?"⁵ You responded, "I am unaware of any OSHA action."⁶ Yet, just five months later, the leaked draft guidance shows OSHA has been working on such a policy.

Finally, DOL's apparent effort to expand its view of the joint employer standard in OSHA enforcement is being done through guidance without the opportunity for public comment and outside the normal rulemaking process. In a hearing before Chairman Lankford's Subcommittee, the Principal Deputy Assistant Secretary for Policy, Mary Beth Maxwell, stated that the OSHA memorandum served to inform enforcement procedures, but regardless of how DOL characterizes the document, if OSHA plans to hold franchisors liable for health and safety violations of a franchisee, it is effectively creating new pressures for franchisors to play a bigger role in the franchisees' operations. Such a change should at least be subject to public feedback before it goes into effect. In fact, it appears that the last time OSHA changed its multi-employer citation policy it took into account the view of the Advisory Committee on Construction Safety & Health, which is made up of employees, employers, and states.⁷

To help us understand DOL's basis for this guidance, please answer the following questions and provide the following documents by November 10, 2015. In answering the questions, please include the question and your response below each question.

- 1) From July 29, 2014, to the present, please produce all documents and communications referring or relating to OSHA's draft guidance entitled "Can Franchisor (Corporate Entity) and Franchisee be Considered Joint Employers."
- 2) From July 29, 2014, to the present, please produce all documents and communications referring or relating to joint employer issues between Department of Labor officials and National Labor Relations Board officials.

⁵ Hearing before the U.S. Senate Committee on Appropriations Labor-HHS Subcommittee on FY16 Dept. of Labor Budget, Mar. 26, 2015, available at <http://www.appropriations.senate.gov/webcast/labor-hhs-subcommittee-hearing-fy16-department-labor-budget>.

⁶ *Id.*

⁷ See <https://www.osha.gov/doc/accsh/accshwkggrpdoc/multiemployercitwkggrp.html>; see also <https://www.osha.gov/doc/accsh/accshwkggrpdoc/comments8.html>.

- 3) What changed since the March 26, 2015, appropriations hearing when you testified that you were unaware of any OSHA action related to whether OSHA planned to hold franchisors jointly liable for labor law violations committed by franchisees?
 - a. When did OSHA begin to consider drafting the guidance memo on the joint employer standard in OSHA enforcement?
 - b. When did you first learn that the guidance was being drafted or under consideration at OSHA?
- 4) Is DOL currently instructing OSHA and its investigators to evaluate whether a franchisor can be liable for health and safety violations of its franchisees?
 - a. If yes, how many OSHA investigations are underway that are considering an enforcement action against a franchisor for the health and safety violations of its franchisees?
 - b. If yes, how long has it taken OSHA investigators to gather and evaluate the information outlined in the draft guidance?
 - c. If yes, aside from the draft guidance, have OSHA investigators received any training in determining joint-employer relationships between franchisor and franchisees?
 - d. If no, does DOL plan to finalize the document and in the future instruct their investigators to evaluate whether a franchisor can be liable for health and safety violations of its franchisees?
- 5) If DOL plans to finalize the document, will you consider it through the rulemaking process, or at a minimum, allow the public to comment on it before it is finalized?
- 6) Why does OSHA need to gather information, for example, about franchisor fees, or the creation of menus, or the approval of signage by franchisors to assess health and safety violations?
 - a. How is that information consistent with OSHA's current enforcement policies and how does it promote health and safety?
- 7) Has OSHA ever cited a franchisor for a health or safety violation believed to have been committed by one or more of its franchisees under its Multi-Employer Citation Policy or any other enforcement policy?
 - a. If so, please provide the dates of the citation and what entities were cited.

If you have any questions about this request, please have your staff contact Kristin Nelson, HELP staff at (202) 224-6770, David Brewer, HSGAC staff, at (202) 224-4751, or Elizabeth

The Honorable Thomas Perez

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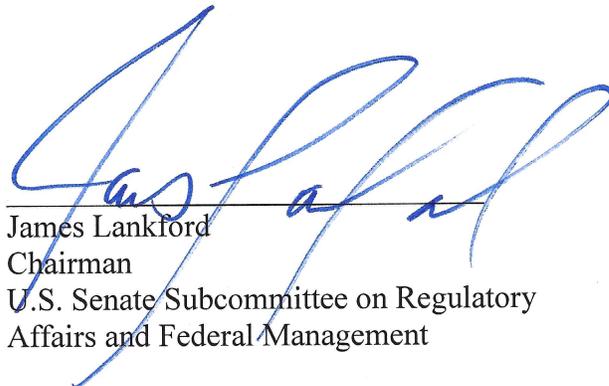
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Gorman with HSGAC RAFM staff, at (202) 224-2862. Thank you for your attention to this matter.

Sincerely,



Lamar Alexander
Chairman
U.S. Senate Committee on Health, Education,
Labor and Pensions



James Lankford
Chairman
U.S. Senate Subcommittee on Regulatory
Affairs and Federal Management



Ron Johnson
Chairman
U.S. Senate Committee on Homeland Security and
Governmental Affairs

cc: The Honorable Patty Murray
Ranking Minority Member
U.S. Senate Committee on Health, Education, Labor and Pensions

The Honorable Heidi Heitkamp
Ranking Minority Member
U.S. Senate Subcommittee on Regulatory Affairs and Federal Management

The Honorable Tom Carper
Ranking Minority Member
U.S. Senate Committee on Homeland Security and Governmental Affairs