Congress of the United States

Washington, D.C. 20515

March 16, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Shalanda Young
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Director Young and Acting Secretary Su:

We write to express our concerns regarding your January 10, 2023 joint issuance of a memorandum entitled "Strengthening Support for Federal Contract Labor Practices" (herein referred to as the joint memorandum).[1] Based on our review, the joint memorandum appears to resurrect unconstitutional policies included in an Obama-era Executive Order (EO) that was enjoined by the U.S. District Court for the Eastern District of Texas[2] in 2016 and that was subsequently disapproved by a joint resolution of Congress signed by President Trump in 2017.[3]

President Obama's EO 13673, entitled "Fair Pay and Workplaces,"[4] required each agency to designate a labor compliance advisor who would, among other things, "consult with the agency's Chief Acquisition Officer and Senior Procurement Executive . . . in the development of regulations, policies, and guidance addressing labor law compliance by contractors and subcontractors."[5] Similarly, the joint memorandum calls on each agency to designate a labor advisor to "advise agency officials in Federal contract labor matters."[6]

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[1] Memorandum from Shalanda D. Young, Dir., Off. of Mgmt. and Budget, and Martin J. Walsh, Sec'y, Dept. of Lab., for the Heads of Exec. Dep'ts and Agencies (Jan. 10, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/01/M-23-08-Labor-Advisor.pdf.
[2] *Assoc. Builders and Contractors of Se. Texas v. Rung*, No. 1:16-CV-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016).[3] H.J. Res. 37, 115th Cong. (2017) (enacted).
[3] H.J. Res. 37, 115th Cong. (2017) (enacted).
[4] Exec. Order No. 13,673, 79 Fed. Reg. 45309 (Aug. 05, 2014) (revoked by Exec. Order No. 13,782, 82 Fed. Reg. 15607 (Mar. 30, 2017)).
[5] Exec. Order No. 13,673, 79 Fed. Reg. 45309 (Aug. 05, 2014) (revoked by Exec. Order No. 13,782, 82 Fed. Reg. 15607 (Mar. 30, 2017)).
[6] Joint Young and Walsh Memorandum, *supra* note 1, at *2.

President Obama's EO also empowered labor advisors to "make recommendations to the agency to strengthen management of contractor compliance with labor laws,"[7] whereas the joint memorandum empowers Contract Labor Advisor Groups (CLAGs) to "make recommendations to the Department of Labor (DOL) and Office of Management and Budget (OMB) for improvements to strengthen existing contract labor policies."[8] President Obama's EO also empowered labor compliance advisors to "publicly report, on an annual basis, a summary of agency actions taken to promote greater labor compliance,"[9] whereas the joint memorandum empowers CLAGS to "[s]hare and advocate for effective and promising practices for implementation of contract labor laws."[10]

While the joint memorandum does not contain explicit provisions requiring contractors to disclose allegations of labor law violations in order to qualify for procurement, like in President Obama's EO, it does give labor advisors the authority to work with federal acquisition authorities "on labor law requirements, and tools and information that can be used by the acquisition workforce."[11] It is well-settled law that government contractors are entitled to the same First Amendment protections as other citizens and that, as a matter of due process, "any employer faced with an administrative merits determination has a right to a hearing before a[n administrative law judge], appeal to the head(s) of the agency involved . . . as well as judicial review."[12] This is why the U.S. District Court for the Eastern District of Texas held that President Obama's EO "depart[ed] from Congress's explicit instructions dictating how violations of labor law statutes are to be addressed."[13]

Moreover, in response to these constitutional and jurisprudential defects, in 2017, the U.S. House of Representatives and the U.S. Senate enacted, and President Trump signed into law, a joint resolution of disapproval under the *Congressional Review Act* (CRA).[14] An enacted resolution of disapproval under the CRA not only prevents a disapproved rule from taking effect but also prohibits implementation of a rule "substantially the same" as the nullified rule.[15]

It is unclear to us how labor advisors will work with acquisition authorities, what types of tools, protocols, or information they will share with contractors, or whether the joint memorandum will be required or enforced by DOL. In fact, the joint memorandum appears purposefully vague to avoid scrutiny. Therefore, in order to understand the administration's decision to announce policy that may violate an employer's due process rights in a joint memorandum rather than by rulemaking, we ask that you provide the following information by March 30, 2023.

1. The joint memorandum contains policy that is identical in nature and substance to President Obama's EO. Why was it not issued as a rule or an EO?

[7] Exec. Order No. 13,673, 79 Fed. Reg. 45309 (Aug. 05, 2014) (revoked by Exec. Order No. 13,782, 82 Fed. Reg. 15607 (Mar. 30, 2017)).
[8] Joint Young and Walsh Memorandum, *supra* note 1, at *4
[9] Exec. Order No. 13,673, 79 Fed. Reg. 45309 (Aug. 05, 2014) (revoked by Exec. Order No. 13,782, 82 Fed. Reg. 15607 (Mar. 30, 2017)).
[10] Joint Young and Walsh Memorandum, *supra* note 1, at *4.
[11] *Id.* at *4.
[12] *Assoc. Builders & Contractors of S.E. Tex. v. Rung*, 2016 WL 8188655, at *33 (E.D. Tex. Oct. 24, 2016).
[13] *Id.* at *7.
[14] *See* H.J. Res. 37, 115th Cong. (2017) (enacted); 82 Fed. Reg. 51358 (Nov. 06, 2017).
[15] 5 U.S.C. § 801(b).

2. Labor agencies already have considerable appropriations and enforcement resources. How is the designation of labor advisors not a duplicative, wasteful use of taxpayer funds?

3. How will labor advisors make their recommendations? Will the procedures for these recommendations be submitted to rulemaking in accordance with the *Administrative Procedure Act*?

4. President Obama's EO unconstitutionally compelled contractors to disclose allegations of labor violations. The joint memorandum appears to implement similar policy by directing labor advisors to "make recommendations to DOL and OMB for improvements to strengthen existing contract labor policies."[16]

    a. Can you give us your assurances that contractors will not be compelled to disclose allegations of labor violations, which was previously held unconstitutional by the U.S. District Court for the Eastern District of Texas?
    b. Please explain why the precise extent and limit of labor advisors' role is not delineated in the joint memorandum.
    c. Does DOL or OMB plan to issue guidance limiting the discretion and powers of labor advisors? If not, why not?

5. Please explain how the joint memorandum does not violate the "substantially similar" provision of the CRA, given that it is nearly identical to President Obama's EO, which was vacated by Congress's joint resolution of disapproval.

6. With regards to labor advisors:

    a. How will they be hired?
    b. What general schedule grade will they be given?
    c. Who will create the position descriptions?
    d. Who will supervise them?
    e. Will they report to the DOL or to each individual agency to which they are assigned?

7. Please produce a list of all personnel and outside interest groups who contributed to the issuance of the joint memorandum.

Sincerely,

Bill Cassidy, M.D.

Bill Cassidy
Ranking Member
Senate Committee on Health, Education,
Labor, and Pensions

Virginia Foxx

Virginia Foxx
Chairwoman
House Committee on Education
and the Workforce

[16] Joint Young and Walsh Memorandum, *supra* note 1, at *4.