Questions for the Record for Julie A. Su

Committee on Education and the Workforce Hearing
"Examining the Policies and Priorities of the Department of Labor"
May 1, 2024

Chairwoman Virginia Foxx (R-NC)

Wage and Hour Division

Overtime

1. The Department of Labor (DOL) recently published an overtime rule drastically increasing the salary threshold for who is exempt and nonexempt. Do employees under this rule have a say in their exempt or nonexempt status?

***Response**: The Fair Labor Standards Act ("FLSA" or "Act") generally requires that covered employers pay employees at least the federal minimum wage (currently $7.25 an hour) for all hours worked, and overtime pay of at least one and one-half times an employee's regular rate of pay for all hours worked over 40 in a workweek. However, section 13(a)(1) of the FLSA exempts bona fide executive, administrative, or professional (EAP) employees from both of these wage and hour protections. Pursuant to Congress' grant of rulemaking authority, since 1938 the Department has issued regulations (located at 29 CFR part 541), which define and delimit the scope of the section 13(a)(1) exemption.*

On April 26, the Department published a final rule, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, which updates and revises the regulations issued under section 13(a)(1) of the FLSA implementing the exemption from minimum wage and overtime pay requirements for EAP employees. Specifically, the final rule increases certain earnings thresholds for the EAP exemption and establishes a mechanism that provides for the timely and efficient updating of these earnings thresholds to reflect current earnings data. Employees who earn below the new thresholds (or do not meet the other components of the tests for exemption), are entitled to the FLSA's minimum wage and overtime pay protections. Supreme Court decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's rights under the Act and have held that FLSA rights cannot be abridged by contract or otherwise waived. WHD considered input provided by stakeholders prior to the development of its proposed rule and received approximately 33,300 comments during the public comment period that followed the proposed rule's publication in September 2023. The input and comments were provided by a diverse array of stakeholders, including employees, businesses, trade associations, labor unions, advocacy groups, law firms, members of Congress, state and local government officials, and other interested members of the public, and commenters expressed a wide variety of views on the merits of the Department's proposal. Several changes were made in the final rule after careful consideration of the comments received.

2. DOL's implementation cost economic analysis for its final overtime rule seems to have been largely based on the idea that all workers impacted by the increases to the minimum

salary thresholds will now be paid overtime. How did the Wage and Hour Division (WHD) come to that conclusion—despite numerous stakeholders specifically clarifying that this would not be the case?

***Response**: In the final rule's regulatory impact analysis, the Department recognized that employers have a variety of potential responses for each employee who might be affected by an increased earnings threshold. Specifically, employers may respond by: (1) paying overtime premiums to affected workers; (2) reducing overtime hours of affected workers and potentially transferring some of these hours to other workers; (3) reducing the regular rate of pay for affected workers working overtime (provided that the reduced rates still exceed the minimum wage); (4) increasing affected workers' salaries to the updated salary or compensation level to preserve their exempt status; or (5) using some combination of these responses. How employers respond will depend on many factors, including how much affected employees are currently paid and how much overtime work they currently perform. See 89 FR 32914-15.*

3. The final overtime rule's economic analysis fails to consider the non-financial consequences of the rule, such as less worker flexibility, lower worker morale, loss of benefits, and loss of career advancement. Please describe the extent to which DOL considered each of these concerns.

***Response**: In the Department's final rule, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, the Department addressed potential costs that could not be quantified. This included specific consideration of worker flexibility, worker morale, benefits, and opportunities for career advancement.*

Importantly, the FLSA does not restrict when or where work may be performed and there is no requirement that a worker must have a predetermined schedule. See Fact Sheet 22: Hours Worked Under the Fair Labor Standards Act (FLSA). Employers can continue to permit their employees who are newly entitled to overtime pay to work flexible hours as long as their total hours each day are accurately recorded.

In response to concerns that employees converted from salaried to hourly status may experience a decrease in morale, the Department explained its belief that for most employees their feelings of importance and worth come not from their FLSA exemption status, but from the increased pay, flexibility, fringe benefits, and job responsibilities that traditionally have accompanied exempt status, and that these factors are not incompatible with overtime eligibility. Moreover, salaried workers earning below the new salary threshold may continue to be paid a salary, as long as that salary is equivalent to a base wage at least equal to the minimum wage rate for every hour worked, and the employee receives a 50 percent premium on that employee's regular rate for any overtime hours each week.

Nothing in the Department's FLSA regulations restricts employers from providing fringe benefits to employees who are entitled to overtime pay, or from providing career advancement opportunities to such employees. For instance, as explained in the final rule, if an employer believes that training opportunities are sufficiently important, they can ensure employees attend training during their 40-hour workweek.

4. At a November 2023 Subcommittee on Workforce Protections hearing, a witness said that

the proposed overtime rule may reduce future hiring, reduce earnings for workers, reduce capital investment, and increase prices for consumers. The American Action Forum estimated that the proposed rule would have cost $18.8 billion annually or $6,000 per affected worker. Where are these tens of billions in additional business costs supposed to come from?

***Response**: In the Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees final rule, the Department estimated that total annualized direct employer costs over the first 10 years would be roughly $803 million with a 7 percent discount rate. This rulemaking will also give employees higher earnings in the form of transfers of income from employers to employees. The Department estimated annualized transfers to be $1.5 billion, with a 7 percent discount rate. Most of these transfers will be attributable to wages paid under the FLSA's overtime provision; a smaller share will be attributable to the FLSA's minimum wage requirement. These transfers also account for employers who may choose to increase the salary of some affected workers to at least the new threshold so that they can continue to use the EAP exemption. Further, as noted in Table 12 of the final rule, 69 percent of the affected workers who will gain overtime protection do not work overtime hours.*

Independent Contractor

5. Shortly after enacting AB5, California had to exempt more than 100 professions from the law to avoid an economic disaster. Now that DOL's independent contractor rule has been made final, what has the Department done to ensure that the catastrophic impacts seen in California are not made national by this rule?

***Response**: The Employee or Independent Contractor Classification Under the Fair Labor Standards Act final rule revises the Department's guidance on how to analyze who is an employee or independent contractor under the FLSA. Specifically, the final rule rescinds the 2021 Independent Contractor (IC) Rule that was published on January 7, 2021, and replaces it with guidance for how to analyze the employee or independent contractor classification that aligns with the FLSA as consistently interpreted for decades by the Supreme Court and U.S. Courts of Appeals.*

Unlike AB5 in California, the Department's final rule does not adopt an "ABC" test, which permits an independent contractor relationship only if all three factors in a three-factor test are satisfied. Under its final rule, the Department relies on the long-standing multifactor "economic reality" test used by courts to determine whether a worker is an employee or independent contractor under the FLSA. This test relies on the totality of the circumstances where no one factor is determinative. Due to the substantial difference in these analyses regarding worker classification, the Department does not believe that purported economic impacts associated with AB 5 can be ascribed to the Department's final rule.

6. Independent workers have voiced their concerns about job losses from the new independent contractor rule. A study from the Mercatus Center found that when California enacted a rule that made it more difficult to be an independent contractor, this resulted in job losses. DOL was obligated under the *Administrative Procedure Act* to provide an analysis of potential job losses under the rule. Can you confirm whether the Department provided an analysis of potential job losses in the final independent contractor rule?

***Response**: The Employee or Independent Contractor Classification Under the Fair Labor Standards Act final rule addresses potential job losses in its regulatory impact analysis. Notably, the Department does not believe that this rule will lead to job losses because most workers who were properly classified as independent contractors before the 2021 IC Rule will continue to be independent contractors.*

Any reclassification or job loss estimates associated with an ABC test, like the one that applies under California law, are not appropriate to apply to this rule because the Department's rule does not adopt an ABC test.

7. Many people are concerned that the new regulation defining who is an independent contractor and an employee under the *Fair Labor Standards Act* (FLSA) will have a devastating impact on the sole proprietors and entrepreneurs who operate as independent contractors because the regulation is so tilted towards classifying a worker as an employee rather than as an independent contractor.

    a. Is the Biden administration concerned about this possible impact, or does it believe that everyone is better off being classified as an employee?

    b. If the goal of the new independent contractor regulation is to identify and prevent misclassification, why did DOL need to redefine who is an independent contractor?

    c. How is DOL ensuring that it will not be exceedingly difficult under the final regulation for businesses and workers to begin or maintain an independent contractor relationship?

***Response to a. – c**.: It is fundamental to the Department's obligation to administer and enforce the FLSA that workers who should be covered employees under the Act are able to receive its protections. There are many independent contractors in business for themselves across industries, and the Department believes that the guidance in its Employee or Independent Contractor Classification Under the Fair Labor Standards Act final rule provides an analysis for appropriately classifying both employees and independent contractors.*

The Department does not expect widespread reclassification as a result of this rule because the Department is adopting guidance in this rule that is essentially identical to the standard it applied for decades prior to the 2021 IC Rule and that is derived from the same analysis that courts have applied for decades and continued to apply following publication of the 2021 IC Rule.

The Department also recognizes the important role small businesses play in our economy and carefully considers all comments it receives, including those made by small businesses and their membership associations, as well as potential regulatory alternatives when drafting any final rule. WHD published a Small Entity Compliance Guide to assist small businesses in understanding the economic realities test under the Department's final rule. The Small Entity Compliance Guide provides an overview of the final rule and examples of each of the six factors to help small businesses understand how to analyze who is an employee or independent

contractor under the FLSA.

The Department has also created or updated several additional compliance assistance tools for this final rule, including information for potential freelancers, Frequently Asked Questions, and a Fact Sheet: Employee or Independent Classification under the Fair Labor Standards Act. The Department will continue to assess potential guidance, resources and materials that would be helpful and welcomes input from the Committee and the public.

8. During the Biden administration, DOL has been particularly concerned about possible instances of worker misclassification. Since January 20, 2021, how many instances of misclassification have WHD inspectors found? Please provide the total number of instances across each occupation that has been subject to investigation.

***Response**: Since the beginning of the Administration, DOL has recovered more than $50.5 million in back wages and damages for minimum wage and overtime violations of the Fair Labor Standards Act for employees who were misclassified as independent contractors.*

9. A January 2024 report from the Mercatus Center found that following the passage of California's AB5, self-employment in California decreased by 10.5 percent for affected occupations, and overall employment decreased by 4.4 percent. While DOL did not use the same test as AB5 in its final independent contractor rule, there are significant concerns from the regulated community that the new standard will have the same effect as AB5—leading to lost opportunities for many workers who chose to be independent contractors. What specific steps did DOL take while promulgating this rule to ensure that self-employed individuals across the country will not be negatively impacted to the degree they were in California?

***Response**: The Employee or Independent Contractor Classification Under the Fair Labor Standards Act final rule revises the Department's guidance on how to analyze who is an employee or independent contractor under the federal FLSA. Specifically, the final rule rescinds the 2021 IC Rule that was published on January 7, 2021, and replaces it with guidance for how to analyze the employee or independent contractor classification that aligns with the FLSA as consistently interpreted for decades by the Supreme Court and U.S. Courts of Appeals.*

Any reclassification or job loss estimates associated with an ABC test, like the one that applies under California law, are not appropriate to apply to this rule because the Department's rule does not adopt an ABC test. The Department does not expect widespread reclassification as a result of this rule because the Department adopted guidance in this rule that is essentially identical to the standard it applied for decades prior to the 2021 IC Rule and that is derived from the same analysis that courts have applied for decades and continued to apply following publication of the 2021 IC Rule.

10. A Mercatus Center study analyzed the effects of California's AB5 using data from the Census Bureau and the Bureau of Labor Statistics. While the stated goal of AB5 was to reduce misclassification, the study did not find evidence that traditional, W-2 employment increased for affected occupations after AB5. Instead, the study found that self-employment for affected occupations significantly declined. DOL was made aware of this study on November 29, 2023, at a meeting on DOL's proposed independent contractor rule

between Mercatus Center scholars, DOL personnel, and Office of Information and Regulatory Affairs personnel. However, DOL chose to move forward with its final rule. Why do you expect a different result from California's AB5 for DOL's final independent contractor rule with respect to reducing employment for affected occupations?

Response*: The Employee or Independent Contractor Classification Under the Fair Labor Standards Act final rule revises the Department's guidance on how to analyze who is an employee or independent contractor under the federal FLSA. Specifically, the final rule rescinds the 2021 IC Rule that was published on January 7, 2021 and replaces it with guidance for how to analyze the employee or independent contractor classification that aligns with the FLSA as consistently interpreted for decades by the Supreme Court and U.S. Courts of Appeals.*

Any reclassification or job loss estimates associated with an ABC test, like the one that applies under California law, are not appropriate to apply to the Department's rule because it does not adopt an ABC test. The Department does not expect widespread reclassification as a result of this rule because the Department is adopting guidance in this rule that is essentially identical to the standard it applied for decades prior to the 2021 IC Rule and that is derived from the same analysis that courts have applied for decades and continued to apply following publication of the 2021 IC Rule.

11. According to the final independent contractor rule, DOL estimates that the regulatory familiarization costs to a single independent contractor will amount to approximately one half hour of review time and $23.46.

    a. How did DOL estimate this cost?

    b. Alternatively, the final rule estimates the cost to businesses will equal one hour of review time and $52.80 per business. What is DOL's reasoning for assuming that independent contractors will consider and implement the rule more efficiently than businesses?

Response to a. and b.*: The Employee or Independent Contractor Classification Under the Fair Labor Standards Act final rule explains the Department's estimates for familiarization costs. To estimate familiarization costs for independent contractors, the Department used its estimate of 22.1 million independent contractors and assumed that independent contractors would spend an average of 30 minutes to review the regulation. In the proposed rule, consistent with the assumption used in the Department's 2021 Independent Contractor rule, the Department assumed that it would take independent contractors an average of 15 minutes to review the regulation. However, the Department increased this time estimate to 30 minutes in the final rule in response to commenters' concerns. The average time spent by independent contractors is estimated to be shorter than for establishments and governments. This difference is in part because the Department believes independent contractors are likely to rely on summaries of the key elements of the rule published by the Department, worker advocacy groups, media outlets, and accountancy and consultancy firms, as has occurred with other rulemakings. This time is valued at $23.46, which is the median hourly wage rate for independent contractors in the CWS of $19.45 updated to 2022 dollars using the gross domestic product (GDP) deflator.*

The Department estimates that businesses will, on average, take one hour to review the rule.

While some establishments will spend longer to review the rule, many establishments may rely on third-party summaries of the rule or spend little or no time reviewing the rule. The analysis outlined in this rule aligns with existing judicial precedent and previous guidance released by the Department, with which much of the regulated community is already familiar.

12. In your testimony, you identified industries where DOL has recently seen misclassification cases—specifically mentioning instances in homecare, restaurants, and hotels. In her responses to questions for the record, WHD Administrator Jessica Looman explained that WHD is prioritizing "enforcement efforts in lower-paid industries where wage and hour violations are more likely to occur, but where workers are less likely to make complaints." Please provide the number of misclassification enforcement investigations WHD has initiated for each specific industry sector since January 20, 2021.

***Response**: Addressing misclassification is a priority for the Department. It is fundamental to the Department's obligation to administer and enforce the FLSA that employees who should be covered under the Act are able to receive its minimum wage and overtime pay protections. The Department also recognizes that independent contractors, who are in business for themselves, play an important role in our economy.*

The economic reality test applied by the courts and the Department under the FLSA, provides an analysis for appropriately classifying both employees and independent contractors. The Department's final rule, Employee or Independent Contractor Classification Under the Fair Labor Standards, reflects long-standing judicial precedent and helps to ensure that workers who are employees receive the FLSA's wage and hour protections, and that employers are not placed at a competitive disadvantage when competing against employers that misclassify employees.

Since the beginning of the administration, DOL has recovered more than $50.5 million in back wages and damages for minimum wage and overtime violations of the FLSA for employees who were misclassified as independent contractors. The Department continues to see misclassification in industries like health care, building services, construction, and restaurants. For example, in an investigation of a Florida restaurant and bakery, WHD investigators recovered $28,162 in back wages for 36 employees, including dishwashers, who were misclassified as independent contractors.

13. WHD has entered memoranda of understanding (MOU) with the National Labor Relations Board (NLRB) and the Federal Trade Commission (FTC) to collaborate on enforcement related to the misclassification of workers.

    a. Has DOL initiated any investigations related to misclassification based on its coordination with the NLRB and FTC? If so, please provide the number of investigations DOL has undertaken, broken down by each specific industry segment.

    b. Please describe what safeguards DOL has in place to ensure it does not rely on any finding from the FTC that a worker's classification violates competition laws instead of undertaking its own analysis to determine a worker's proper classification under the FLSA.

c. Please describe the process DOL uses to communicate with the FTC and the NLRB related to activities included in the MOUs, including but not limited to an estimate of how often DOL has communicated with these agencies on such activities.

d. Please describe how WHD addresses enforcement under joint investigations pursuant to these MOUs, including how WHD addresses any potential conflicts with the NLRB or the FTC during these joint investigations.

e. Please identify any conflicts that have arisen between WHD, the NLRB, and/or the FTC during the joint investigations.

Response to a. – e.*: The laws under the Department's authority have different statutory language and judicial precedent than the laws enforced by the NLRB or the FTC. The Department's Wage and Hour Division (WHD) enforces the FLSA and the Department's final rule, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, provides guidance on how to analyze who is an employee or independent contractor under the FLSA. This rulemaking is specific to the FLSA, and WHD did not coordinate with the NLRB or FTC on this rulemaking.*

WHD entered into a Memorandum of Understanding (MOU) with the NLRB on December 8, 2021. This agreement encourages greater coordination between the agencies through relevant information sharing, joint investigations and enforcement activity, training, education, and outreach. Through this MOU, WHD and the NLRB may share enforcement-related information or coordinate enforcement efforts about employer practices that might simultaneously violate multiple laws that each agency enforces. WHD defers to the NLRB on its position regarding what constitutes a violation of the National Labor Relations Act.

Because the Department and the FTC share an interest in protecting and promoting competition in labor markets and promoting the welfare of American workers, the agencies entered into an MOU on September 21, 2023, which includes provisions addressing coordination on training, outreach, and education efforts, where appropriate. WHD defers to the FTC on what it determines to be an unfair trade practice.

14. According to a December 2023 study from the Government Accountability Office (GAO), the federal government lacks sufficient information on independent workers. The Bureau of Labor Statistics is working with the Interagency Council on Statistical Policy to participate in the Office of Management and Budget (OMB)-established Work Arrangements Committee to improve data collection efforts. How can DOL take any enforcement or policy actions that impact independent work when GAO itself says that "policymakers do not have reliable and consistent data with which to make key decisions concerning these workers?"

Response*: The Department's Employee or Independent Contractor Classification Under the Fair Labor Standards Act final rule revises the Department's guidance on how to analyze who is an employee or independent contractor under the federal FLSA. Specifically, the final rule rescinds the 2021 IC Rule that was published on January 7, 2021 and replaces it with guidance for how to analyze the employee or independent contractor classification that aligns with the FLSA as*

consistently interpreted for decades by the Supreme Court and U.S. Courts of Appeals. The Department has adopted guidance in this rule that is essentially identical to the standard it applied for decades prior to the 2021 IC Rule and that is derived from the same analysis that courts have applied for decades and continued to apply following publication of the 2021 IC Rule.

In the Employee or Independent Contractor Classification Under the Fair Labor Standards Act rulemaking, WHD considered input provided by stakeholders prior to the development of its proposal and received approximately 55,400 comments during the public comment period that followed the proposal's publication in October 2022. The input and comments were provided by a diverse array of stakeholders, including employees, self-identified independent contractors, businesses, trade associations, labor unions, advocacy groups, law firms, members of Congress, state and local government officials, and other interested members of the public, and commenters expressed a wide variety of views on the merits of the Department's proposal. Several changes were made in the final rule after careful consideration of the comments received.

WHD Rulemaking Procedures

15. During WHD's rulemakings on independent contractors and overtime, the agency held several listening sessions with employers and employer groups prior to issuing its proposals. However, when the proposals came out, there was no indication that DOL had paid any attention to the concerns of the employer community. Why should employers bother engaging with this DOL which is so obviously not concerned about the impact its regulations will have on the one group of stakeholders responsible for implementing and abiding by the regulations?

***Response**: In the Employee or Independent Contractor Classification Under the Fair Labor Standards Act rulemaking, WHD considered input provided by stakeholders prior to the development of its proposal and received approximately 55,400 comments during the public comment period that followed the proposal's publication in October 2022. The input and comments were provided by a diverse array of stakeholders, including employees, self-identified independent contractors, businesses, trade associations, labor unions, advocacy groups, law firms, members of Congress, state and local government officials, and other interested members of the public, and commenters expressed a wide variety of views on the merits of the Department's proposal. Several changes were made in the final rule after careful consideration of the comments received, including comments from employers. For example, the Department clarified, at the suggestion of employer comments, that the mere use of technology in the workplace would not necessarily constitute control unless the technology was used, for example, to supervise the performance of work.*

Similarly, in the Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees rulemaking, WHD considered input provided by stakeholders prior to the development of its proposal and received approximately 33,300 comments during the public comment period that followed the proposal's publication in September 2023. The input and comments were similarly provided by a diverse array of stakeholders, including employees, businesses, trade associations, labor unions, advocacy groups, law firms, members of Congress, state and local government officials, and other

interested members of the public, and commenters expressed a wide variety of views on the merits of the Department's proposal. Several changes were made in the final rule after careful consideration of the comments received, including comments from employers.

Project Labor Agreements

16. The Biden administration promotes the use of controversial Project Labor Agreements (PLAs) for federal and federally funded construction projects, which effectively limit bidders to unionized contractors employing union labor. This approach increases costs and limits opportunities for the vast majority of contractors and their workforce, as 89.3 percent of the U.S. construction workforce are not members of a union.

    a. Describe DOL's role in advising federal agencies about government-mandated PLAs related to the new Federal Acquisition Regulation (FAR) Council rule implementing Executive Order 14063, which requires PLAs on all federal construction contracts of $35 million or more.

***Response**: DOL's role in the final rule promulgated by the Federal Acquisition Regulatory (FAR) Council regarding PLAs on major federal construction projects is to provide technical assistance to federal agencies and to procurement stakeholders—contractors, small businesses, and labor unions. To this end, DOL has posted on its website a PLA Resource Guide with general information about PLAs. https://www.dol.gov/general/good-jobs/project-labor-agreement-resource-guide. It is important to note that PLAs are private agreements negotiated by contractors and labor unions; neither DOL nor any federal agency participates in those negotiations.*

    b. Is DOL aware of any federal agencies that have successfully sought an exemption or exception from the FAR Council's blanket PLA requirement? If so, which specific projects?

***Response**: The Executive Order and the FAR Council rule do not require agencies to seek exceptions from the requirement from the FAR Council, DOL, or any other agency. Rather, the Order and the rule authorize the senior procurement executives within contracting agencies to determine for themselves whether an exception is appropriate. Agencies are not required report the use of exceptions to DOL. Rather, Section 6(b) of the Executive Order requires them to report on their use of exceptions on a quarterly basis to OMB.*

    c. Has DOL acknowledged that government-mandated PLAs and PLA preferences can discourage competition from non-union contractors who may be allowed to work on a PLA jobsite?

***Response**: The FAR Council received many comments about competition in response to its notice of proposed rulemaking to implement the Executive Order. While some respondents stated that the PLA rule would have a negative effect on competition, others argued that the Executive Order and rule were consistent with competitive bidding, and some cited a study indicating no statistically significant difference in bids between surveyed projects requiring PLAs and those that did not. See 88 Fed. Reg. at 88,709. The FAR Council final rule also noted that studies and*

court cases have shown that PLAs can have significant nonunion contractor participation. Id. at 88,712.

d. Has DOL ever surveyed nonunion contractors and workers to assess the negative impact of PLA mandates? If so, please share the results and details of the surveys.

***Response**: DOL has not conducted a survey of contractors and workers to assess the impact of PLAs. In 2009, DOL commissioned a study to evaluate the use of PLAs by federal agencies undertaking large construction projects. The study, Implementation of Project Labor Agreements in Federal Construction Projects, was published in 2011 and can be found through DOL's PLA Resource Guide at https://www.dol.gov/general/good-jobs/project-labor-agreement-resource-guide.*

Davis-Bacon

17. While DOL issued its final rule to update the Davis-Bacon and Related Acts in August 2023, it failed to fix its flawed methodology it uses for calculating prevailing wage and benefit rates reliant on an archaic survey process with low participation rates. Use of this inaccurate methodology results in increased costs for taxpayers, limits the effectiveness of federal funding, and results in wage rates that are not reflective of local prevailing rates.

    a. Please describe the extent to which DOL considered options to improve the accuracy of prevailing wage rates by incorporating the adoption of Bureau of Labor Statistics wage surveys, which use scientific, statistical sampling techniques.

    b. Many contractors, construction industry stakeholders, and small businesses urged in comments that DOL abandon its proposed regulatory changes, based on added costs, increased paperwork, unclear union work rules, and the application of prevailing wage regulations to offsite fabrication and transportation. Please describe the extent to which the Department considered these concerns during rulemaking.

***Response to a. and b**.: In its administration of the Davis-Bacon and Related Acts, as well as in the development of its Updating the Davis-Bacon and Related Acts Regulations final rule, the Department has explored the possibility of using data from the Bureau of Labor Statistics (BLS) at the recommendation of the GAO and others and has repeatedly concluded that relying on BLS data sources to determine prevailing wages is not preferable to continuing to conduct Davis-Bacon wage surveys. No BLS survey publishes, at a county level, the wage data, fringe benefit data, data for sufficiently specific construction craft classifications, and data by construction type, that would align with the Department's longstanding interpretations of the statutory requirements to determine prevailing wages for "corresponding class[es]" of workers on "projects of a character similar" within "civil subdivisions of the State" in which the work is to be performed. (See 40 U.S.C. 3142(b)).*

However, the Department understands that it is important to continue seeking ways to improve contractor participation in its voluntary wage surveys, which will have the benefit of increasing

sample sizes for wage determinations and making wage determinations available for more classifications. The Department is making several efforts to increase participation in wage surveys. These efforts include simplifying the data submission process with the revised wage survey form, and deploying a comprehensive communications plan that involves issuing press releases, utilizing social media platforms, and increasing email and direct communication with stakeholders. Prior to and during the survey collection period, survey briefings are conducted for local stakeholders and interested parties to provide guidance on the survey process to further increase survey participation.

18. Under Davis-Bacon regulations, if DOL determines that a union rate "prevails" in its published wage determinations, that means union work rules and classifications accompany the rate. The problem is that these rules are contained in union collective bargaining agreements (CBAs), which are not typically published publicly by DOL or unions. These CBAs often have rules counterintuitive to how construction tasks might normally operate. This has led to contractors facing noncompliance, fines, and wage and hour violations, yet the compliance information has never been clearly provided. Where union rates prevail, contractors need a copy of the relevant (and potentially relevant) union CBAs to make sure they are paying workers the correct rate of pay. For decades, contractors have been asking DOL to publish these CBAs or require their publication, in order to facilitate compliance.

    a. Please describe why DOL did not make this change during the 2023 Davis-Bacon regulatory overhaul.

    b. Please describe how DOL is working to address this issue.

    c. Can you commit to making this change immediately?

    d. If not, what resources are needed to publish union CBAs?

***Response to a. – d.**: The final rule, Updating the Davis-Bacon and Related Acts Regulations, provides for regulatory changes that improve the Department's ability to administer and enforce Davis-Bacon and Related Acts labor standards more effectively and efficiently. As the first comprehensive regulatory review in nearly 40 years, the final rule will promote compliance, provide appropriate and updated guidance, and enhance the regulations' usefulness in the modern economy.*

The Department recognizes that it is important that contractors be able to understand wage determinations and comply with their obligations to pay laborers and mechanics prevailing wages based on the appropriate labor classifications in the applicable wage determination. Therefore, the Department continues to address the clarity of wage determinations at the subregulatory level.

Child Labor

19. Illegal immigrants and unaccompanied minors often submit false identification when being vetted for employment. In some cases, this fraud has led to minors being employed

in dangerous jobs in violation of the FLSA. What has DOL done to work with employers who may need more guidance on how to verify the age of prospective employees and on how to avoid unknowingly hiring minors in their facilities?

***Response**: The Department has found an 88 percent increase in the number of children employed in violation of federal child labor laws since 2019. Providing guidance to employers is a major component of the Department's work, and WHD maintains a range of tools to help employers understand their legal obligations. This includes an "elaws Advisor" on child labor rules under the FLSA and a database of state child labor laws that, among other things, discusses requirements in some states that employers receive work permits from the state in order to employ minors. WHD also engages in thousands of outreach events and programs annually. Further, the Department has a "YouthRules!" initiative that includes employer self-assessment tools, best practices, and resources and materials for employers who employ young workers. WHD also partners with business associations, employers, schools, and other government entities to provide webinars and guidance on federal child labor standards to parents, educators, employers, and young people seeking employment. The FLSA requires employers to exercise reasonable diligence to determine if they are employing unlawful child labor.*

The Department does not direct employers to use particular types of identification documents and notes that employers may use a range of information to identify whether they are employing children in violation of child labor laws. The Department will continue to do its part to ensure that employers understand their obligations under the law.

Guestworker Programs

H-2A

20. The 2023 final rule on the H-2A adverse effect wage rate made it much more difficult for employers to determine wage rates for individual workers because of unclear job classifications under the rule. What compliance assistance is DOL providing to agricultural employers regarding job classifications under the 2023 wage rate rule?

***Response:** The Department's 2023 H-2A Adverse Effect Wage Rate (AEWR) AEWR Final Rule, which went into effect on March 31, 2023, impacts only a small number of H-2A jobs for which wages are not adequately covered by the Department of Agriculture's Farm Labor Survey (FLS). Based on a review of H-2A jobs certified during the first year of implementing the new regulations, less than 4 percent of all H-2A jobs certified by the Department were assigned an AEWR outside the U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS) and include more specialized and higher-paid job classifications such as supervisors of farm workers, farm equipment mechanics, heavy truck drivers, and agricultural construction workers.*

The Department continues to work in partnership with State Workforce Agencies (SWAs), who perform an initial review of the employer's job opportunity and determine the occupational classification and applicable minimum wage, to provide education and technical assistance to employers. Over the past year, the Department's Employment and Training Administration (ETA) published several rounds of frequently asked questions, hosted a webinar for all interested stakeholders, conducted training sessions for SWAs, and provided technical briefings on job classifications at more than 25 conferences hosted by national and state agricultural associations,

farm bureaus, and other agricultural compliance events. Similarly, the Department's Wage and Hour Division (WHD) has provided extensive outreach to agricultural employers and their representatives touching on topics related to the 2023 Adverse Effect Wage Rate Final Rule. This has included presentations to statewide and regional agricultural employer associations, national agricultural employer stakeholders, H-2A agents, and others. WHD remains committed to providing additional outreach to agricultural employers and invites opportunities for further collaboration.

21. H-2A employers undergo thorough inspections of their employee housing. Recently, a first-time H-2A employer sought guidance on improving compliance. The DOL inspector said in response, "We will always find something" that is not in compliance. Responses like this do not breed trust in the system. Employers who are trying to do the right thing should be given a fair shake. What is DOL doing to ensure that its inspectors and agencies are applying the law fairly, consistently, and impartially?

Response: *State employees and appropriate public agencies inspect farmworker housing that employers offer for migrant workers employed on clearance orders prior to occupancy. Such inspections help employers meet regulatory requirements and ensure safe housing for the U.S. workers and the H-2A workers employed through clearance orders. To ensure that state inspectors apply housing standards fairly, consistently, and impartially, the Department's Employment and Training Administration (ETA) provides regular training to State Workforce Agencies regarding these requirements, including training on the applicable standards and internal controls to ensure state procedures are consistent and compliant. Each state also has a State Monitor Advocate, who monitors the state's compliance with regulations such as preoccupancy housing inspections on an ongoing basis, which improves the quality and consistency of the housing inspections. ETA also monitors state processes for housing inspections.*

Additionally, in the course of its investigations, the WHD also conducts inspections of housing while occupied by workers. WHD is committed to ensuring that employers have all the resources and information they need to comply with labor standards generally, and with the housing safety and health requirements of the H-2A program in particular. While these requirements can be complex, WHD has devoted significant resources to educating the employer community about best practices for compliance with these and other H-2A requirements during hundreds of outreach events in the past few years. In every investigation, WHD staff are dedicated to applying the law in a manner that is fair and in keeping with the agency policy, while appropriately considering the specific facts and circumstances of an employer's operation. Through the publication of internal guidance and resources, continuous staff training, and policy coordination at the national, regional, and local levels, WHD strives to maintain consistency in its enforcement practices.

22. On April 29, 2023, DOL published a final rule on the H-2A guest worker program which is clearly trying to assist labor organizations in unionizing agricultural employers. The rule does this even though Congress specifically exempted agricultural employers from the *National Labor Relations Act* (NLRA). What authority does DOL have to evade clear congressional intent in the NLRA and involve itself in labor-management relations of farmers?

***Response**: In the final rule, Improving Protections for Workers in Temporary Agricultural Employment in the United States, the Department issued regulations pursuant to its statutory authority under the Immigration and Nationality Act (INA) to better protect against adverse effect caused by the use of the H-2A program on similarly employed workers in the United States. The final rule published on April 29, 2024, provides for certain rights and protections to workers employed under the H-2A program.*

23. DOL's April 29, 2024, final rule on the H-2A guest worker program makes it extremely cumbersome to terminate an H-2A worker for cause. This bureaucratic red tape could endanger the safety of other workers and disrupt farm operations. Why is DOL making it so difficult and time-consuming to terminate an H-2A worker for cause?

***Response**: Under previous rules as well as under the final rule Improving Protections for Workers in Temporary Agricultural Employment in the United States published on April 29, 2024, workers employed under the H-2A program are entitled to certain rights unless they are terminated for cause. These rights include outbound transportation, the three-fourths guarantee and, if the worker is a U.S. worker, the right to be contacted for employment in the next year. The final rule clarifies the definition of termination for cause and establishes five conditions with which the employer must comply to ensure that any termination for cause is reasonable and fair. This final rule safeguards worker access to these important rights which in turn serves the statutory purpose of ensuring the H-2A program does not adversely affect the wages and working conditions of workers in the United States and ensuring that the employer only hires H-2A workers when there are insufficient able, willing, and qualified workers in the United States. The final rule does allow for immediate termination for a worker's egregious misconduct, meaning intentional or reckless conduct that is plainly illegal, poses imminent danger to physical safety, or that a reasonable person would understand as being outrageous.*

24. You recently testified at the House Appropriations Labor, Health and Human Services, and Education Subcommittee. In response to questions about the impacts of DOL's 2023 rule on the adverse effect wage rate, you said you were happy to have your team talk to farmers who are affected by the wage rates to understand the impact of the rule. Please provide an update on any meetings with farmers that have taken place or that have been scheduled.

***Response**: The Department's Employment and Training Administration's Office of Foreign Labor Certification, which administers the H-2A program, and the Wage and Hour Division provide extensive outreach to agricultural employers and their representatives touching on many topics including the 2023 Adverse Effect Wage Rate Final Rule. This includes presentations to statewide and regional agricultural employer associations, national agricultural employer stakeholders, H-2A agents, and others. The Department remains committed to providing additional outreach to agricultural employers and invites opportunities for further collaboration.*

Since June 2023, the Department's Employment and Training Administration (ETA) has participated in 25 conferences hosted by national and state agricultural associations, farm bureaus, and other agricultural compliance events. ETA has been represented by senior leadership at these stakeholder events, and in nearly all cases by ETA's Office of Foreign Labor Certification (OFLC) Administrator, the career senior executive responsible for the administration of temporary and permanent labor certification programs for the Department. In

North Carolina, the OFLC Administrator recently delivered an AEWR training session at the Annual Tobacco Good Agricultural Practices meeting located at the State Fairgrounds in Raleigh, and personally visited the North Carolina Growers' Association located in Vass to see their operations, labor camp housing for workers, and provide direct technical assistance on AEWR related issues.

These events have varied in size from hundreds of attendees to a handful and have taken place throughout the country. During the events, ETA has answered questions from stakeholders about all of its regulations, including the AEWR final rule; ETA has provided technical assistance to help employers understand how to submit compliant applications and avoid program violations; and, they have had many opportunities to speak directly to farmers and farm labor contractors about the effect of the H-2A regulations on agricultural employers. ETA has accepted invitations to participate in several more H-2A focused events over the next few months and will continue to attend such events and answer questions to help employers better understand the program.

Foreign Worker Labor Certifications

25. Many American businesses rely on the employment-based immigration system to supplement their workforces when essential positions cannot be filled by American workers. With processing delays and growing backlogs at DOL, American businesses are enduring prolonged wait times to secure vetted and approved foreign nationals with employment authorizations and Green Cards. DOL can significantly reduce the backlog by reverting to the largely automated Program Electronic Review Management (PERM) System. This system was designed to enable an expedited attestation process, but recent changes in DOL productivity and processing methodologies have resulted in lengthy backlogs and delays. The PERM System was intended to be highly automated, with the system identifying potential issues for further review and audit by DOL, allowing most submissions to be processed swiftly and efficiently.

    a. The automated PERM process utilizes modern technology to scan employer-supplied information, reducing paperwork and processing time. DOL ensures accurate and fair processing by automatically auditing approximately 30 percent of applications and ensuring that all applications pass validation checks, resulting in faster processing times compared to manual review processes. Do you agree? Why or why not?

Response: *As noted in the Department's FY 2025 Budget Request, continuing increases in application levels have led to an increase in the amount of time the ETA OFLC needs to adjudicate foreign labor certification (FLC) applications for permanent and temporary employment in the United States. Application levels in most FLC programs have more than doubled since FY 2010 with U.S. employers requesting a record 1.7 million worker positions in FY 2023. While application levels have dramatically increased, inflation-adjusted funding for federal administration has decreased by 13 percent from FY 2010 to FY 2023. Even though OFLC's application filing and processing system are fully electronic, this disparity has led to increased adjudication times. OFLC, in collaboration with the Department's Office of the Chief Information Officer, developed the OFLC Foreign Labor Application Gateway (FLAG). Applications for all OFLC programs are now submitted in FLAG, with it most recently replacing the nearly 20-year-old legacy*

permanent labor certification (PERM) case management system.

A fully automated review of employer-filed applications would make it more difficult for the Department to monitor and enforce employer compliance with program requirements, protect the integrity of the program, and make the required statutory determinations regarding the availability of qualified U.S. workers for the employer's job opportunity and the lack of adverse effect on the wages and working conditions of similarly employed U.S. workers. OFLC cross-trains its available staff resources to increase the number of trained personnel that can adjudicate applications across multiple programs and authorizes overtime during peak filing periods to help adjudicate ever-increasing application filings. Unlike application-processing operations at the Department of Homeland Security's (DHS) U.S. Citizenship and Immigration Services (USCIS), the majority OFLC's case-processing operations are financed by Congressional appropriations rather than by application fees. Therefore, the resources available to the Department to process applications do not automatically and concurrently increase as more applications are filed. The Department continues to support and believe that a broader fee proposal, applying to all labor certification programs, is the right policy. A fee-funded program, as proposed by the Administration, would be cost-based, responsive to workload fluctuations, and significantly less reliant on annual appropriations, with its funding source shifted from all taxpayers – where the burden rests now – to only that segment of employers that uses and benefits from the program.

b. Is it essential to process prevailing wage determinations and labor certifications quickly and accurately to ensure that employment-based applications advance promptly to relevant agencies? Why or why not?

Response: *Although the Department's Employment and Training Administration (ETA) administers a fully electronic application filing and processing system that helps mitigate the risk of delays and avoid unnecessary administrative costs, the Department's mandate is to perform a review of each employer's request for temporary or permanent labor certification to ensure U.S. workers have first access to apply for these job opportunities, protect U.S. workers from adverse effect in their wages and working conditions, ensure employer compliance with program requirements, and protect the integrity of the program. The analysis necessary to meet these mandates cannot be satisfied by a fully automated review of requests for prevailing wage determinations and permanent labor certification (PERM) applications. As noted in its FY 2025 Budget Request, while application levels have more than doubled over the past decade, inflation-adjusted funding for federal foreign labor certification (FLC) case adjudications decreased by 13 percent over the same time period. As a result, the Department has expressed concerns across numerous annual budget requests that nearly all of ETA's case adjudication resources are dedicated to processing labor certification applications to mitigate the risk of delays, leaving very few staff resources available to conduct audit examinations to ensure employer compliance with program requirements. For example, less than 2 out of every 10 PERM applications filed in each of the last 5 years were subject to audit examination – despite a significant increase in the number of new applications filed in recent years. The FY 2025 Budget includes a*

request to help reduce average adjudication time for audited PERM cases. Although using the latest technologies has and will continue to create efficiencies in the administration of employment-based visa programs, the Department believes it must strike a proper balance between consistent and reasonable processing times and ensuring employer compliance with program requirements.

c. DOL has previously and consistently processed PERM applications in six-eight months or less, utilizing existing attestation-based PERM technology. Do you believe that the DOL should prioritize the utilization of this technology to achieve processing times closer to previous timelines and faster than the current 18-20 months? Why or why not?

Response: *While adjudication times in the permanent labor certification (PERM) program have increased due to higher application filings and required statutory and regulatory processing times in other foreign labor certification programs, the Department's mandate is to perform a review of each employer's request for temporary or permanent labor certification to ensure U.S. workers have first access to apply for these job opportunities, protect U.S. workers from adverse effect in their wages and working conditions, ensure employer compliance with program requirements, and protect the integrity of the program from bad actors. The analysis necessary to meet these mandates cannot be met by a fully automated review of requests for prevailing wage determinations and PERM applications.*

The Department is building on its technology in the Foreign Labor Application Gateway (FLAG) System to modernize the application process for permanent, temporary, and prevailing wage applications, enhance program integrity, and assist analysts with their reviews and application decisions to effectively process applications. Although a fully automated system could not replace the close review currently performed by ETA analysts, to partially offset the risk of delays due to increasing application volumes, the Department's Employment and Training Administration (ETA) continues to bolster its workforce by cross-training its existing staff resources to increase the number of trained personnel that can adjudicate applications across multiple programs and by authorizing overtime during peak filing periods to help adjudicate ever-increasing application filings.

As noted in its FY 2025 Budget Request, ETA has experienced a dramatic rise in application volumes in recent years, with application levels in most foreign labor certification (FLC) programs more than doubling since FY 2010 and new prevailing wage and labor certification requirements established for CW-1 visa program. U.S. employers requested more than 1.7 million worker positions through the FLC programs in FY 2023. While application levels doubled, inflation-adjusted funding for federal FLC case adjudications decreased 13 percent over the same time period. As a result, nearly all of ETA's case adjudication resources are dedicated to processing labor certification applications to mitigate the risk of delays, leaving very few staff resources available to conduct audit examinations to ensure employer compliance with program requirements. For example, less than 2 out of every 10 of PERM applications filed in each of the last 5 years were subject to audit examination – despite a significant increase in the number of new applications filed in recent years. The FY 2025 Budget includes a request to help reduce average adjudication time for audited PERM cases. Although using the latest technologies has and will continue to create efficiencies in the administration of

employment-based visa programs, the Department believes it must strike a proper balance between consistent and reasonable processing times and ensuring employer compliance with program requirements.

Occupational Safety and Health Administration

Walkaround Rule

26. On April 1, 2024, the Occupational Safety and Health Administration (OSHA) published a final worker walkaround rule that dramatically lowers the qualification standards for individuals who are allowed to participate in a jobsite inspection as a third-party representative. Under the rule, it will be up to an OSHA Compliance Safety and Health Officer's discretion to determine whether a third party would be reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace. However, OSHA provides little guidance to employees, employers, and its own inspectors about what this means.

    a. If a company is subject to an organizing campaign, and a handful of employees select as their representative a union organizer with no particular safety expertise or knowledge of the workplace, should an OSHA inspector authorize this?

Response: *OSHA's Walkaround rule retained the longstanding requirement that third-party representatives may accompany the Compliance Safety and Health Officer (CSHO) if good cause has been shown why they are reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace. As such, whether the CSHO would permit any particular individual to accompany the CSHO on the inspection would depend on the particular facts and whether the CSHO determines that good cause has been shown why accompaniment is reasonably necessary to the conduct of an effective and thorough physical inspection of that workplace (including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills). A third-party representative is "reasonably necessary" when they will make a positive contribution to a thorough and effective inspection.*

OSHA notes that during the opening conference, the CSHO establishes ground rules and makes clear that matters unrelated to safety and health shall not be discussed with employees, and that the CSHO can deny the right of accompaniment to any person whose conduct interferes with a fair and orderly inspection. Any activity not directly related to conducting an effective and thorough physical inspection of the workplace (including handing out union authorization cards or soliciting support for a union) is considered to interfere with a fair and orderly inspection.

    b. Please explain how a labor activist with no safety expertise would aid in the physical inspection of the workplace.

Response*: As described in the preamble to the Walkaround rule, see 89 Fed. Reg. 22558, 22569-72 (Apr. 1, 2024), third parties can assist OSHA in obtaining information and thereby ensure*

comprehensive inspections in a variety of ways. For example, an individual may have technical expertise, understand industry standards, or have language skills or cultural competencies that can better facilitate communication between employees and the CSHO.

27. I am concerned that OSHA put political priorities ahead of worker safety and health when it published the final walkaround rule on April 1, 2024. This rule blatantly invites union organizers with no required safety expertise to participate in OSHA inspections of non-union jobsites. Even OSHA's own Frequently Asked Questions regarding the rule state that an authorized third-party representative may wear clothing promoting a union during an OSHA inspection. Please explain how allowing an organizer wearing a union t-shirt onto a worksite inspection aids in the physical inspection of the workplace.

***Response**: A third-party walkaround representative is only permitted to accompany the CSHO during the physical inspection of the workplace for the purpose of aiding OSHA's inspection. Any activity not directly related to conducting an effective and thorough physical inspection of the workplace may be deemed to interfere with a fair and orderly inspection. The CSHO has the authority to terminate or deny the representative's right of accompaniment if the CSHO deems their conduct disrupts or interferes with the inspection.*

However, OSHA does not place limitations on representatives' clothing and instructs CSHOs to exercise care in making subjective or anticipatory determinations about what could interfere with an inspection. The agency believes that wearing clothing with a union name or logo would not ordinarily interfere with an inspection; nonetheless, both employees and the employer may raise with the CSHO any concerns they have about the attire of the representative. If there are objections, the CSHO will attempt to resolve the issue and if necessary, may contact the Area Director or designee as to whether to suspend the walkaround or take other appropriate action.

28. Under OSHA's April 1, 2024, walkaround regulation, an employee in a non-union workplace can designate a union representative as his or her representative to accompany an OSHA inspector during a walkaround inspection. Please explain why this does not constitute a violation of the NLRA's requirement that a union representative can only be designated a representative of the employees if the union has been chosen by the employees to be his or her representative.

***Response**: As discussed in the preamble to the final rule, the Walkaround rule does not conflict with or circumvent the NLRA because the NLRA and the OSH Act serve distinctly different purposes and govern different issues. See 89 Fed. Reg. at 22581-85. The OSH Act provides that "a representative authorized by [an employer's] employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of [the workplace] for the purpose of aiding such inspection." 29 U.S.C. § 657(e).*

The NLRA, which concerns "the practice and procedure of collective bargaining" and "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection,"29 U.S.C. § 151, contains no analogous provision. Furthermore, the OSH Act does not place limitations on who can serve as the employee representative, other than requiring that the

representative aid OSHA's inspection, and the OSH Act's legislative history shows that Congress "provide[d] the Secretary of Labor with authority to promulgate regulations for resolving this question." 88 FR 59825, 59828-59829 (quoting Legislative History of the Occupational Safety and Health Act of 1970, at 151 (Comm. Print 1971)). As such, OSHA—not the NLRB—determines if an individual is an authorized representative of employees for the purposes of an OSHA walkaround inspection.

Heat Illness Prevention

29. A Small Business Advocacy Review Panel recently issued a report on OSHA's potential heat standard for indoor and outdoor workplaces. The report advises OSHA to explore whether the injury and illness data from the Bureau of Labor Statistics supports the issuance of a heat standard. Has OSHA done this review? If so, what were the results of the review?

***Response**: In August 2023, OSHA convened a Small Business Advocacy Review (SBAR) Panel, in accordance with the requirements of the Small Business Regulatory Enforcement Fairness Act (SBREFA), to hear comments directly from small entity representatives (SERs) on the potential impacts of a heat-specific standard.*

- *The SBAR Panel was comprised of members from the Small Business Administration (SBA) Office of Advocacy, OSHA, and the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA).*
- *The SBAR Panel listened to SERs who would potentially be affected by a heat-specific standard. The SBAR Panel's final report is available at Heat Injury and Illness SBREFA | Occupational Safety and Health Administration (osha.gov).*

OSHA is currently developing a proposed rule based on the recommendations from the panel report, public input, and additional research. OSHA most recently, on April 24, 2024, presented to the Advisory Committee on Construction Safety and Health (ACCSH) an update on the heat injury and illness prevention rulemaking. OSHA shared background information including:

- *Heat is the leading cause of death among all weather-related phenomena in the U.S.*
- *Excessive heat can cause a number of adverse health effects, including heat stroke and even death, if not treated properly.*
- *Workers in both outdoor and indoor work settings are at risk.*
- *According to the Bureau of Labor Statistics (BLS):*
    - *Exposure to environmental heat resulted in 479 fatalities of U.S. workers from 2011-2022, an average of 40 fatalities per year in that time period.*
    - *There have been 33,890 estimated work-related heat injuries and illnesses involving days away from work from 2011-2020, an average of 3,389 per year in that time period.*
    - *Statistics for occupational heat-related illnesses, injuries, and fatalities are likely vast underestimates.*
- *BLS data is not the only source of information OSHA is using to propose a standard.*

- *OSHA has preliminarily determined that occupational exposure to heat poses a significant risk to workers and that workplace controls are necessary to ensure workers' safety.*

The Committee unanimously passed a motion recommending that OSHA proceed expeditiously with proposing a standard on heat injury and illness prevention.

30. How does OSHA plan to implement a federal heat standard equitably (especially when there are places in Arizona, for example, that do not drop below 80 degrees, even during the night) with so much variability among industries and regions within the United States?

Response*: OSHA envisions that a Heat Injury and Illness Proposed rule would be a programmatic standard requiring employers to create a heat injury and illness prevention (HIIPP) to evaluate and control heat hazards in their workplace. Based on data and preliminary analysis of when heat is a hazard to workers, the proposed rule may specify an initial and a higher heat trigger. Acclimatization protocols may be required to gradually acclimatize workers who have not recently worked in heat.*

31. Will OSHA take into account the specific tasks and work environments in a given industry before issuing a one-size-fits-all, federal heat standard for indoor and outdoor work environments?

Response*: OSHA envisions that a Heat Injury and Illness Proposed rule would be a programmatic standard requiring employers to create a heat injury and illness prevention (HIIPP) to evaluate and control heat hazards in their workplace. Employers will develop a HIIPP that includes all policies and procedures necessary to comply with the standard, specific to their work site.*

Miscellaneous Standards

32. In February, OSHA issued a proposed emergency response standard which adds new regulatory requirements for firefighters, technical search and rescue personnel, and emergency medical service responders. While we all support ensuring the health and safety of our nation's emergency responders, I have heard concerns from emergency response organizations that the proposed requirements are overly burdensome, cost prohibitive, and will lead to reduced services and fewer emergency personnel, which would undermine public safety. As DOL is still accepting comments on this standard, what assurances can you give that you will listen to emergency response organizations, particularly in rural parts of the country with fewer resources, during the rulemaking process?

Response*: OSHA has already extended the public comment period by 45 days: from May 6 until June 21. Based on stakeholder concern, OSHA is further extending the deadline for submitting written comments until July 22. The agency is planning to convene a public hearing with virtual capability so that more stakeholders from around the country can meet with OSHA to provide input, express their opinions, and ask questions in real time. Additionally, stakeholders who participate in the hearing or file a notice of intent to appear also have the opportunity to provide additional written comments following the hearing.*

OSHA understands the importance of stakeholder participation in this rulemaking in particular. We will continue to ensure that the public's voice is heard.

33. OSHA recently finalized the controversial walkaround rule at the behest of organized labor, while little work has been done on the tree care standard or lockout-tagout rulemaking. Are the tree care standard and lockout-tagout rules still priorities this year?

***Response**: OSHA maintains a robust regulatory agenda and is working concurrently on multiple priority rules with limited resources. We continue to make progress on developing proposed rules for Tree Care Operations and updates to The Control of Hazardous Energy (lockout/tagout).*

34. OSHA's most recent regulatory agenda still lists a final COVID-19 standard for the health care industry, and the rule has been under review at OMB since December 2022. What is the status of this rule?

***Response**: The COVID-19 Healthcare final rule is currently under review at the Office of Management and Budget (OMB). When additional updates become available, they will be shared through our COVID-19 Healthcare Rulemaking webpage: https://www.osha.gov/coronavirus/healthcare/rulemaking.*

Mine Safety and Health Administration

Crystalline Silica Rulemaking

35. On April 18, 2024, the Mine Safety and Health Administration (MSHA) published a final rule lowering the permissible exposure limit for miners' exposure to respirable crystalline silica to align with the limit that OSHA requires. However, the final MSHA silica rule is much more prescriptive and adopts more burdensome and costly compliance measures than the OSHA silica standard. DOL's two differing standards on workplace silica exposure will be particularly confusing for industries that must comply with both OSHA and MSHA regulations. Please describe how DOL will ensure that MSHA and OSHA work together to provide guidance to these employers in light of the new MSHA standard.

***Response**: The Mine Act gives MSHA jurisdiction over each metal, nonmetal, and coal mine and each operator of such mine.*

Employers with employees performing mining tasks on mine property under MSHA jurisdiction will be required to comply with the requirements in the respirable crystalline silica final rule, just as they are required to comply with other MSHA requirements.

MSHA reviews jurisdiction questions about its authority under the Mine Act on a case-by-case basis. In cases where there may be overlapping jurisdiction with OSHA, MSHA follows the 1979 Interagency Agreement between the two agencies. See 44 Fed. Reg. 22827 (Apr. 17, 1979).

36. U.S. mining companies prioritize the safety and health of their employees, and many have initiated rigorous programs to minimize employee exposure to respirable silica based on

the current rules. While the mining industry is generally supportive of the lower permissible exposure limit required by MSHA's April 18, 2024, silica final rule, there are concerns that the engineering modifications which would be required in the rule—without allowing the use of personal protective equipment or worker rotation to be used to meet the new permissible exposure limit—could cost facilities hundreds of millions of dollars for each mining operation. These additional costs may lead to mine closures and job losses. Stakeholders are also concerned that MSHA's economic analysis is underestimating the cost of compliance. Does DOL commit to working with impacted companies to ensure that a rule designed to protect workers does not impact a mining company's future viability and harm workers by threatening their livelihoods?

Response: *MSHA will work with mine operators to provide compliance assistance, including assisting mine operators in developing and implementing appropriate controls. MSHA will also offer outreach seminars; dust control workshops held at the National Mine Health and Safety Academy; support from the Educational Field and Small Mine Services staff; support from Technical Support staff; silica training and best practice materials; and information on enforcement efforts.*

MSHA will continue to maintain a team of experts in regulatory compliance and respirable dust control to conduct compliance assistance visits to evaluate the conditions, mining practices, and controls that lead to silica dust overexposures. MSHA will discuss its results with mine operators and miners and make recommendations, as appropriate.

37. MSHA's final silica rule will result in a significant increase in the need for more sampling at metal and nonmetal mines.

    a. Please outline the specific steps MSHA has taken to ensure that there will be adequate sampling equipment and lab capacity to handle the increased sampling demand.

Response*: MSHA determined that it is technologically feasible for mine operators to conduct air sampling and analysis and to achieve the final rule's PEL using commercially available samplers, that these technologically feasible samplers are widely available, and a number of commercial laboratories provide the service of analyzing dust containing respirable crystalline silica. The Agency took steps to ensure that laboratory capacity can meet the increase in sampling demand, including: interviews with laboratories, estimating current laboratory capacity, and comparing that laboratory capacity with the expected number of annual samples required of industry. MSHA also extended compliance dates of the final rule (12 months after the final rule publication for coal mines and 24 months after the final rule publication for metal and nonmetal mines), which provides operators and laboratories with more time to prepare to meet the standard's requirements and spreads the number of first-time samples needed over a longer period of time.*

    b. How would MSHA respond if a mining company is prepared to meet the final rule's requirements, but labs are not able to accommodate the increased sampling demands?

***Response**: MSHA has determined existing laboratory capacity is sufficient to meet peak sampling demand. However, if there are laboratory constraints, MSHA will monitor the situation closely and adjust enforcement accordingly.*

38. The Committee and mining industry stakeholders have urged MSHA to allow administrative controls such as worker rotation and respirators to meet the new permissible exposure limit under MSHA's final silica rule. For example, powered air purifying respirators have been approved by OSHA as an appropriate compliance measure for toxic substances, and they meet National Institute of Occupational Safety and Health specifications. These respirators have also been widely demonstrated to be protective against silica exposure. Does MSHA believe it is reasonable to force mining companies potentially to close operations because they are physically or economically unable to comply with the final MSHA silica rule when effective and economical administrative controls are available? Why or why not?

***Response**: Since the 1970s, MSHA has maintained health standards to protect miners from excessive exposure to airborne contaminants, including respirable crystalline silica. These standards require mine operators to use engineering controls as the primary means of suppressing, diluting, or diverting dust generated by mining activities.*

Under the silica final rule, mine operators must install, use, and maintain engineering controls, supplemented by administrative controls, when necessary, to keep each miner's exposure at or below the PEL. Engineering controls reduce or prevent miners' exposure to hazards. Administrative controls establish work practices that reduce the duration, frequency, or intensity of miners' exposures.

MSHA data and experience show that mine operators already have numerous engineering and administrative control options to control miners' exposures to respirable crystalline silica. These control options are widely recognized and used throughout the mining industry. The National Institute for Occupational Safety and Health (NIOSH) has extensively researched and documented engineering and administrative controls for respirable dust in mines, including respirable crystalline silica. NIOSH has published a series on reducing respirable dust in mines.

MSHA has determined that engineering controls are the most effective way to protect miners from exposures to respirable crystalline silica. Engineering controls, when properly designed, implemented, and maintained, can reduce the concentration of respirable crystalline silica and protect miners from overexposures. Well-designed and maintained controls can eliminate or minimize respirable silica dust at the source, preventing dispersion of the silica dust into the workplace.

The final standard has addressed respiratory protection when it is used to protect miners from silica and other respiratory hazards by incorporating by reference ASTM F3387-19, Standard Practice for Respiratory Protection in order to reflect current respirator technology and accepted effective respiratory protection practices. MSHA has observed that many operators have already implemented respiratory protection programs that are substantially similar to many requirements in ASTM F3387-19.

Respiratory protection, however, has limitations and is not as reliable as engineering controls in

reducing miners' exposures to respirable crystalline silica. Although respirators can be used in limited circumstances, a respirator's effectiveness depends on a number of factors, such as full implementation of a properly developed respiratory protection program; required medical evaluation and clearance to wear a respirator; proper respirator fit and use by the wearer; proper respirator care and maintenance; and adequate supervision to ensure that the respirator is always worn properly to achieve its expected workplace level of protection. MSHA has determined that reliance on respiratory protection for compliance with the PEL would risk miners' exposure to silica and undermine the Agency's mandate to address respiratory hazards at the source, providing the highest level of health protection for miners.

MSHA will work with mine operators to provide compliance assistance, including assisting mine operators in developing and implementing appropriate controls. MSHA will continue to maintain a team of experts in regulatory compliance and respirable dust control to conduct compliance assistance visits to evaluate the conditions, mining practices, and controls that lead to silica dust overexposures. MSHA will discuss its results with mine operators and miners and make recommendations, as appropriate.

Health Care

Association Health Plans

39. Committee Republicans have a longstanding interest in allowing associations and businesses to band together to purchase affordable health insurance coverage through Association Health Plans (AHPs). In 2018, DOL issued a final rule to expand access to AHPs. Before a court invalidated the rule, 35 new AHPs were formed, which saw average savings of 29 percent. On April 30, 2024, DOL published a final rule rescinding the 2018 rule, robbing Americans of an innovative way to access high-quality, low-cost health care. Please provide any estimates regarding how many people will be prevented from accessing affordable health coverage due to the April 30, 2024, final rule.

Response: *The Department recognizes that a number of AHPs were established and briefly existed as a result of the 2018 AHP Rule. However, after the district court's decision holding the 2018 AHP Rule to be invalid, and the Department's subsequent guidance that parties should cease establishing AHPs (under the alternative criteria established pursuant to the 2018 AHP Rule) and to wind down any that were in existence, commercial AHPs permitted under the 2018 AHP Rule halted by the end of 2019. Therefore, the rescission itself has no effect independent of the effects of the district court's opinion and the expiration of the winding-down period provided in the Department's long-expired temporary safe harbor from enforcement.*

The final rule reflects the Administration's goal to expand the availability of affordable health coverage, improve coverage quality, strengthen benefits, and help more Americans enroll in quality health coverage. AHPs formed under the 2018 AHP Rule might have reduced access to quality coverage, for example, by not covering essential health benefits that are required in the individual and small group markets. AHPs offering less comprehensive coverage might have been cheaper to purchase, but individuals who had coverage under these AHPs would become underinsured if the AHP did not cover benefits that are expected or necessary, such as emergency services, prescription drug benefits, or

even inpatient hospital coverage. AHPs under the 2018 AHP Rule might also have disrupted the stability of the individual and small group health insurance markets. Under the relaxed standards of that rule, there was a risk that AHPs would have attracted healthier, younger people to AHPs with lower premiums, thus increasing premiums for those remaining in the individual and small group markets. AHPs are generally classified as multiple employer welfare arrangements (MEWAs), which have historically been subject to financial mismanagement or abuse. Because the 2018 AHP Rule increases the possibility that individuals who join AHPs will be subject to mismanaged plans, it could interfere with the goal of increasing affordable, quality coverage.

Short-Term Limited-Duration Insurance

40. On April 3, 2024, DOL published final rules severely reducing access to short-term, limited duration insurance. The final rules state: "These final rules might also lead to an increase in the number of individuals without some form of health insurance coverage…. Those individuals who become uninsured or obtain coverage in unregulated markets could face an increased risk of higher out-of-pocket expenses and medical debt, reduced access to health care, and potentially worse health outcomes." How many Americans will become uninsured because of the April 3, 2024, final rules?

***Response**: The final rules, which were issued by the Department of Labor, the Department of Health and Human Services, and the Department of the Treasury, are intended to encourage enrollment in comprehensive coverage and lower the risk that short-term, limited-duration insurance (STLDI) is viewed or marketed as a substitute for comprehensive health coverage. As noted in the regulatory impact analysis in the final rules, data from the NAIC indicate that 235,775 individuals were covered by STLDI sold to individuals at the end of 2022. Projections by the Congressional Budget Office and the Joint Committee on Taxation suggest that 1.5 million people could currently be enrolled in STLDI, and the Centers for Medicare and Medicaid Services previously estimated that 1.9 million individuals would enroll in STLDI by 2023. However, it's important to note that the final rules specify that the new definition of STLDI will apply to new STLDI policies, certificates, or contracts of insurance for coverage periods beginning on or after September 1, 2024. For STLDI sold or issued before September 1, 2024, the existing definition remains in effect through the maximum allowable duration (except that the updated notice provision adopted in these final rules applies to such policies for coverage periods beginning on or after September 1, 2024). While STLDI can provide temporary coverage for individuals who are experiencing brief periods of time without comprehensive health coverage, consumers who enroll in STLDI as a substitute for comprehensive coverage are at risk of being exposed to significant financial liability in the event of a costly or unexpected health event, often without knowledge of the risks and limitations associated with STLDI. STLDI is not subject to the same consumer protections and requirements as comprehensive coverage, including the prohibition on preexisting condition exclusions or other discrimination based on health status, the prohibition on lifetime and annual dollar limits on essential health benefits, prohibitions on rescission of coverage, and the requirement to cover certain preventive services without cost sharing. We anticipate that the rule will lead to increased enrollment in comprehensive health coverage.*

ERISA Preemption

41. Last year, DOL submitted an amicus brief in the case of *Pharmaceutical Care Management Association v. Mulready.* The brief suggests that the *Employee Retirement Income Security Act* (ERISA)—the linchpin of multistate group health plans—does not preempt state regulation of health plan administration.

    a. Why did DOL take this position in its amicus brief?

    b. Does this amicus brief signal that DOL has changed its position on ERISA preemption?

Response to a. and b.: *The United States submitted a brief in Pharmaceutical Care Management Association v. Mulready, No. 22-6074 (10th Cir.), in response to the invitation of the 10th Circuit. In our brief, we argued that ERISA does preempt certain provisions of Oklahoma's law regulating pharmacy benefit managers to the extent those laws apply to ERISA plans. As that brief demonstrates, there is no "one size fits all" ERISA preemption analysis. DOL has long consistently maintained that each case is different, and the analysis is highly dependent on its particular facts and circumstances. With respect to state regulation of health plan administration, the statute itself contains an insurance savings clause, see ERISA Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), which recognizes that not all state regulation is preempted by ERISA because it expressly exempts state insurance laws from the scope of ERISA preemption. See ERISA Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). The Supreme Court decisions in this area also acknowledge that ERISA's preemptive reach is not unlimited.*

Surprise Billing

42. This Committee's efforts helped lead to the passage of the historic *No Surprises Act*. This law has been remarkably successful in preventing patients from receiving surprise medical bills. However, the law's Independent Dispute Resolution (IDR) process has been mired in litigation, delays, and faulty implementation. In February 2024, the Centers for Medicare and Medicaid Services released data showing that 77 percent of disputes completing the IDR process are ruled in favor of providers. The Brookings Institution now anticipates that the IDR process will raise costs and premiums, contrary to the law's goals.

    a. What is DOL doing to improve the operations of the IDR process under the *No Surprises Act*?

    b. Are you concerned that the law's current implementation will raise health care costs for employers and employees?

Response to a. and b.: *Since 2021, DOL, the Department of Health and Human Services, and the Department of the Treasury have continued to issue regulations in phases that implement provisions of the No Surprises Act. This includes rules to establish the Federal IDR process to determine payment amounts when there is a dispute between plans or issuers and providers, facilities, or providers of air ambulance services about the out-of-network rate for these*

services. These regulations are protecting consumers from as many as 1 million surprise medical bills every month. The Departments' regulations and guidance have been the subject of numerous lawsuits resulting in the vacatur of certain provisions, which has impacted the operations of the Federal IDR process. These lawsuits have challenged, among other things, the Departments' regulations regarding the structure of the Federal IDR process, the factors that certified IDR entities use to make payment determinations, regulations governing calculation of the qualifying payment amount, and the administrative fee the Departments are statutorily required to charge disputing parties.

After opening the Federal IDR process, the Departments observed that the volume of disputes was substantially larger than the Departments or certified IDR entities initially expected. DOL takes the issue of rising costs seriously. Based on our review of state arbitration processes and studies on such processes, we understand that a more predictable IDR process is used less frequently because parties have a clearer idea of what the outcome will be. With that in mind, the Departments focused on implementing a predictable and efficient IDR process that includes continued efforts to improve the Federal IDR portal operations as well as amendments to regulations to create efficiencies.

To address the high volume of disputes, the Departments worked to improve and automate how the Federal IDR portal operates, as well as provide technical assistance and guidance to certified IDR entities and disputing parties to make the process run more smoothly. We also continue to improve our existing regulations. On November 3, 2023, the Departments published the "Federal Independent Dispute Resolution Operations" proposed rules, which proposed a number of regulatory changes to the Federal IDR process intended to increase efficiency and to minimize costs, including proposals to improve communications among payers, providers, and certified IDR entities to reduce the number of disputes initiated that are ineligible for the Federal IDR process; adjust specific timelines and steps of the Federal IDR process to improve efficiency; and improve the open negotiation process, giving disputing parties a better opportunity to avoid use of the Federal IDR process. The Departments believe that taken together, these proposals, if finalized, would result in the improved operation of the Federal IDR process and more timely payment determinations.

Mental Health Parity

43. I have serious concerns about DOL's proposed rules released in 2023 regarding mental health parity. These proposed rules do little to expand access to quality mental health care while burdening employers with more paperwork requirements.

    a. How is DOL ensuring that the conditioning of mental health parity compliance on reimbursement rates will not raise premiums and health care costs?

Response: *MHPAEA requires that financial requirements and treatment limitations for mental health and substance use disorder benefits not be more restrictive than the predominant financial requirements and treatment limitations that apply to substantially all medical/surgical benefits. Accordingly, the Department is committed to ensuring that plans and issuers do not impose special burdens on access to mental health or substance use disorder benefits by taking a discriminatory or more stringent approach to their standards and practices for covering mental health and*

substance use disorder services and for compensating mental health and substance use disorder providers than for medical/surgical providers. The proposed rule does not specify particular reimbursement rates or practices, but rather requires parity with respect to the standards and practices adopted by the plan or issuer. The proposed rule would require health plans and issuers to show their MHPAEA compliance – not just with words – but with data to demonstrate what effect the limits they place on benefits have on a person's access to treatment and take action to remove any limits, restrictions, or exclusions that are more stringently applied to mental health and substance use disorder benefits than to medical/surgical benefits.

The Department takes the issue of rising costs seriously and analyzed the potential for higher premiums associated with lower cost-sharing requirements, increased utilization of mental health and substance use disorder services, provider network improvements, and increased provider reimbursement rates in drafting the regulatory impact analysis included in the 2023 MHPAEA proposed rules. The Departments requested comment or data on this issue and are considering the comments received in response to the proposed rules.

b. What is DOL doing to alleviate provider shortages?

***Response**: The 2023 MHPAEA proposed rules aim to ensure that participants, beneficiaries, and enrollees do not encounter greater access restrictions for mental health and substance use disorder benefits than they experience in relation to medical/surgical benefits. The proposed rules would require plans and issuers to conduct meaningful comparative analyses to measure the impact of their non-quantitative treatment limitations (NQTLs,) including evaluating NQTLs related to network adequacy. In addition, the proposed rules and a Technical Release issued concurrently with the proposed rules solicit comments pertaining to network composition NQTLs.*

In its enforcement efforts, EBSA has placed increased priority on NQTLs related to network adequacy, particularly provider network composition and participation standards, which includes reviewing how plans set their provider reimbursement rates and their efforts to monitor the adequacy of provider networks. By ensuring parity in network standards and requiring plans and issuers to close network gaps resulting from parity violations, the Department expects to improve access to in-network coverage for mental health and substance use disorder benefits. Plans and issuers can reduce gaps by ensuring parity in reimbursement practices, avoiding disparate provider admission standards and practices, reaching out to providers who are currently providing services on an out-of-network basis, assisting plan participants in locating in-network providers, ensuring that they respond to any shortages of mental health providers with the same determination and vigor that they respond to shortages with respect to medical/surgical providers, and numerous other actions.

The Department's Employment and Training Administration (ETA) is also working to support the training of mental healthcare professionals to expand the supply of workers in the field and further improve access to mental health services. In 2023, ETA awarded $78 million in H-1B Skills Training Grants funding to 25 public-private partnerships for a Nursing Expansion Grant Program, which is aimed at easing the unprecedented need for nurses following the pandemic. These grants support a broad array of nursing degrees, including Psychiatric/Mental Health Nurse Practitioner credentials. As one example, Thomas Edison State University in Trenton, NJ is focused on mental health nurses through their "Expanding Mental Health Nursing Pathways in High Needs Geographic Areas of New Jersey" grant project. Similarly, ETA awarded $40 million in H-1B rural

healthcare grants to 17 partnerships of public and private entities to address rural healthcare workforce needs, particularly in areas designated as Health Professional Shortage Areas by the Health Resources and Services Administration (HRSA). Many of these grants support pathways into behavioral/mental health and substance use disorder counseling and nursing occupations, including a grant to the Workforce Development Board of Herkimer, Madison & Oneida Counties to support mental health professions, including mental health and rehabilitation counselors and mental health and substance abuse social workers.

ETA is also promoting registered apprenticeships to help create additional pathways to become a mental health counselor. For example, ETA awarded a $4 million State Apprenticeship Expansion, Equity, and Innovation Grant (SAEEI) to the Oregon Higher Education Coordinating Commission to, among other activities, partner with United We Heal to develop an apprentice pathway for workers in the mental health and substance use disorder counseling fields to earn their related certificate. The grantee has already begun working with partners to recruit and train new apprentices in the counseling field and is also working to leverage funding from other grants and funding streams to provide wraparound support to behavioral health apprentices. ETA also awarded a $4 million SAEEI grant to the Alaska Department of Labor &Workforce Development to develop registered apprenticeship programs for mental health peer support specialists in partnership with the Alaska Mental Health Trust Authority, under which the grantee has started the sponsorship process and anticipates many apprentices to begin soon due to the State's Crisis Now project and new licensing requirements. Another SAEEI grantee, the Colorado Department of Labor & Employment, has already been able to expand 34 registered apprenticeship programs within the healthcare and behavioral health industry. In addition to these active grantees, ETA ensured that the development of mental health professionals continues to be a priority by identifying the care economy as a priority sector in our most recent rounds of State Apprenticeship Expansion Formula and Apprenticeship Building America funding, which recently closed in April.

Additionally, ETA plans to award approximately $40 million to up to 14 national out-of-school time (OST) grantees for grant awards of up to $3.3 million each. These Workforce Pathways for Youth demonstration grants will support national OST organizations that serve historically underserved and marginalized youth ages 14 to 21. These grants will place an emphasis on age-appropriate workforce readiness programming to expand job training and workforce pathways for youth, including soft skill development, career exploration, job readiness and certification, and work-based learning opportunities and other work experiences, such as summer jobs, year-round job opportunities, pre-apprenticeships, and Registered Apprenticeships. This grant program encourages partners across the workforce system to meet the mental health needs of young people, as well as grow the future mental health workforce. Successful applicants will ensure the workforce system is equipped and ready to identify and respond to the holistic needs of young people and may represent existing or emerging models that are reducing mental health stigma and/or expanding the capacity of the mental health workforce system.

Finally, since 2019, ETA has issued over $123 million in Opioid Disaster Recovery Dislocated Workers Grants to 18 states and 2 tribes which provide reemployment; train individuals to transition into professions that can impact the crisis, including mental health and substance use disorder treatment. In 2020, the Department also awarded $20 million in grants to four states through the Support to Communities (SUPPORT Act) grant program, established under the SUPPORT Act. These grants are similar to the Dislocated Worker Grants in that they implement strategies to mitigate the economic and workforce impacts of the opioid crisis. Examples of

professional certifications and employment that participants in these grants have achieved include peer recovery support, mental health rehabilitation, community health and counseling, and medical assisting.

The Department's Office of Disability Employment Policy (ODEP)'s State Exchange on Employment & Disability (SEED) is a unique state-federal bipartisan collaboration supporting state and local governments in adopting and implementing inclusive policies and best practices that lead to increased employment opportunities for individuals with disabilities, and a stronger, more inclusive American workforce and economy.

In 2022, SEED, in collaboration with The Council of State Governments (CSG) and the National Conference of State Legislatures (NCSL), established the Mental Health Matters: National Task Force on Workforce Mental Health Policy to assist states in advancing inclusive mental health policies in the workplace & addressing the behavioral health workforce shortage.

Throughout 2023, the Task Force's four subcommittees—comprised of state policymakers and subject matter experts—met to identify and discuss best and emerging practices as well as policy options related to (1) nondiscrimination, parity and benefits; (2) workplace care and supports; (3) underserved communities; and (4) behavioral health workforce shortages and state behavioral health resource systems.

The Task Force efforts informed the Mental Health Matters: Toolkit on Workforce Mental Health Policy (Mental Health Matters). This resource suite, which consists of a policy framework and policy briefs, (1) identifies state strategies leveraged to address these issues; (2) outlines principles to consider when examining mental health policies; and (3) highlights policy options as well as best and promising practices for creating a mentally healthy workforce.

The Department continues to play a key role in the Biden Administration's efforts to address provider shortages.

c. Should health plans serving areas with mental health provider shortages be given a safe harbor from parity compliance?

Response: *The Department is of the view that plans and issuers should undertake comparable efforts to ensure adequate networks of mental health and substance use disorder providers to those in which they engage to ensure access to medical providers to ensure that participants, beneficiaries, and enrollees will not face greater access restrictions for mental health and substance use disorder benefits than those they encounter for medical/surgical benefits. However, as noted in the preamble to the 2023 MHPAEA proposed rules, the Departments recognize that shortages of mental health and substance use disorder providers may pose challenges to issuers, plans, and their service providers. Accordingly, under that proposal, the Departments indicated that if, despite taking appropriate action to address provider shortages, there continued to be material differences in access to in-network treatment for mental health conditions and substance use disorders, as compared to treatment for conditions requiring medical/surgical benefits, through no fault of the plan or issuer, the Departments would not cite such a plan or issuer for failure to comply with MHPAEA. However, the Department remains concerned that plans and issuers continue to cite provider shortages as a justification for potential*

violations of parity requirements without complying with their obligations under MHPAEA. The Departments are currently considering comments on the 2023 proposed rules and Technical Release 2023-01P.

d. Does the Biden administration support efforts to expand telehealth to alleviate mental health provider shortages, particularly in rural areas?

Response: *The Department recognizes that telehealth has become a vital means of providing health care, including mental health and substance use disorder care, especially in rural areas, and in light of the COVID-19 pandemic. In the 2023 MHPAEA proposed rules, the Departments solicited comments on issues related to rural Americans' access to providers of mental health and substance use disorder services and telehealth. For example, the Departments solicited comments on ways that telehealth or other remote care services can be used to enhance access to mental health and substance use disorder treatment under the Departments' existing authority for both routine and crisis care for behavioral health conditions, including through parity requirements with respect to financial requirements and treatment limitations. The Departments are currently considering comments in response to the 2023 MHPAEA proposed rules.*

As stated in the 2022 MHPAEA Report to Congress, the Departments continue to recommend that Congress consider ways to permanently expand access to telehealth and remote care services. As noted above, telehealth has become a vital means of providing health care, including mental health and substance use disorder care, especially in light of the COVID-19 pandemic. Nonetheless, there are noteworthy barriers to ensuring access to telehealth services, including limited broadband access and interstate licensing requirements. The Departments look forward to working with Congress and stakeholders to identify ways to achieve this goal.

Telehealth

44. During the declared COVID-19 public health emergency, employers were allowed to offer stand-alone telehealth benefits to employees who were ineligible for full benefits—including seasonal or part-time workers. Does the Biden administration support efforts to codify this flexibility for employers?

Response*: The Departments of HHS, Labor, and the Treasury recognize that telehealth and other remote care services can be an important tool in the delivery of healthcare. The COVID-19 pandemic posed critical challenges to the delivery of healthcare services as jurisdictions issued stay-at-home orders and providers limited their operations in order to minimize the risk of exposure to and the community spread of COVID-19. The Departments generally encouraged use of these services during the COVID-19 pandemic to help ensure that employers and other plan sponsors were able to provide a robust variety of treatment, including for mental health and substance use disorder services, and to ensure that employees were able to access the healthcare services they needed.*

As noted above and in the 2022 MHPAEA Report to Congress, The Departments continue to

recommend that Congress consider ways to permanently expand access to telehealth and remote care services, while ensuring that individuals receiving telehealth or remote care are still covered by important consumer protections that might not otherwise apply to stand-alone telehealth benefits. Telehealth has become a vital means of providing health care, including mental health and substance use disorder care, especially in light of the COVID-19 pandemic. Nonetheless, there are noteworthy barriers to ensuring access to telehealth services, including limited broadband access and interstate licensing requirements. The Departments look forward to working with Congress and stakeholders to identify ways to achieve this goal.

Medicare-For-All

45. Protecting employees' access to employer-sponsored health benefits is an important responsibility of DOL.

    a. Do you support protecting and strengthening our current employer-sponsored health insurance system?

    b. Do you oppose big-government policies that will weaken employer-sponsored health care, such as Medicare for All, single-payer, or a public option?

Response to a. and b.: *The Department of Labor's role is to faithfully enforce the laws enacted by Congress and implement the President's agenda consistent with those laws. The Department is committed to ensuring the security of the retirement, health and other workplace related benefits of America's workers and their families.*

Retirement Security

Fiduciary Rule

46. DOL's April 25, 2024, final rule on fiduciary duties was pushed though the rulemaking process with a relatively short comment period—despite it being an economically significant rule—and the public had little time to prepare to participate in public hearings. DOL seems to justify this by suggesting that because it has already heard from the public during prior rulemakings, including on the 2016 fiduciary rule that was invalidated by the U.S. Court of Appeals for the Fifth Circuit.

    a. Is it DOL's position that the public engagement during the 2016 fiduciary rulemaking allowed DOL to write a new rule eight years later without robust engagement?

    b. Does DOL take the position that the 2024 final rule is similar enough to the 2016 rule to shorten the rulemaking process?

    c. DOL published its proposed fiduciary rule package on November 3, 2023, DOL noticed its required hearing on exemptions days before the Thanksgiving holidays, and DOL held that hearing on December 12. You therefore only gave 14 business

days for stakeholders to prepare for a hearing that is required by ERISA on economically significant amendments to seven exemptions. Please compare this notice period to the number of days' notice for other hearings for exemptions that have been issued as part of a package of economically exempt exemptions in the past. Why do you think 14 business days is adequate notice for a statutorily required hearing in this context?

Response to a. – c.*: The significant input and public engagement on this project since 2010 informed the Department's development of its proposed Retirement Security Rule and proposed amendments to associated class exemptions. The process for adopting a final rule and related exemption amendments allowed for a robust public debate. During the 60-day comment period, the Department received more than 400 individual comments — many of which were lengthy, detailed, and thoughtful — and just under 20,000 submissions as part of 14 separate petitions on the proposal. More than 40 witnesses testified at the public hearing. The Department's decision to hold the hearing before the close of the comment period allowed the comments to be informed by the hearing testimony.*

The timetable for the hearing on the exemptions associated with the Retirement Security Rule fully satisfied the Department's statutory obligation under ERISA section 408(a) to afford the opportunity for a hearing. The timing for hearings on exemption proposals is determined on a case-by-case basis. As one example for comparison, the Department announced on August 25, 2020, that a hearing on the proposed Improving Investment Advice for Workers & Retirees exemption (original PTE 2020-02) would be held on September 3, 2020 and (if necessary) September 4, 2020. (See 85 FR 52292). It is also important to note in this regard that the proposed Retirement Security Rule and proposed amendments to the associated exemptions, first posted on the Department's website on October 31, 2023, each announced the Department's intention to hold a public hearing approximately 45 days after publication. Accordingly, the Federal Register hearing announcement was not the first notice provided to interested parties that the Department intended to hold a hearing on these proposals and the anticipated timeframe for the hearing.

47. The April 25, 2024, fiduciary rule attempts to regulate sales of annuities to retirement investors, which are already regulated by the states. DOL is justifying this overreach by claiming its fiduciary rule is necessary to fill loopholes and gaps. What evidence does DOL have that gaps and loopholes exist in the states' model best interest regulation, and that those gaps are being exploited to harm consumers?

Response*: The Department's final Retirement Security Rule, which covers compensated retirement recommendations under conditions when it is reasonable to place trust and confidence in the advice, falls well within ERISA's broad fiduciary definition, even if it is more protective of federally-protected retirement investments than State insurance regulations. The U.S. Supreme Court has made it clear that "the McCarran-Ferguson Act does not surrender regulation [of insurance products] exclusively to the States so as to preclude the application of ERISA to an insurer's actions . . . ." John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 98 (1993).*

The Regulatory Impact Analysis for the Retirement Security Rule notes that the market for fixed annuities is very large, with sales estimated at $286 billion in 2023. Commenters on the

Department's proposed rule discussed significant conflicts of interest associated with large commissions on annuity sales, as well as abusive sales practices. Conflicted, imprudent, and disloyal advice with respect to such annuity sales can result in large investor losses.

The Retirement Security Rule further provides a discussion of research that demonstrates the low levels of financial literacy of many advice recipients. Given the complexity of some annuity products, it is very easy for investors to purchase products that have very different risks and benefits than they thought they were purchasing, and that have considerably more downside than they expected. For all these reasons, one type of annuities - fixed indexed annuities – has been the subject of various regulatory alerts, warning investors of the dangers associated with the products. See, e.g., Securities and Exchange Commission Office of Investor Education and Advocacy Updated Investor Bulletin: Indexed Annuities (July 31, 2020), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_indexedannuities; Iowa Insurance Division, Bulletin 14-02 (September 15, 2014), https://iid.iowa.gov/media/153/download?inline=.

The NAIC Model Regulation updated in 2020 includes a gap under which it does not apply at all to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA. It also is not as protective as the Department's Retirement Security Rule and related prohibited transaction exemptions. The NAIC model's specific care, disclosure, conflict of interest, and documentation requirements do not expressly incorporate the "best interest" obligation not to put the producer's or insurer's interests before the customer's interests, even though compliance with these component obligations is treated as meeting the best interest standard. Instead, the core conduct standard of care includes a requirement to "have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs, and financial objectives." Additionally, the obligation to comply with the "best interest" standard is limited to the individual producer, as opposed to the insurer responsible for supervising the producer.

The Model Regulation's definition of "material conflicts of interest" that must be identified and avoided or reasonably managed and disclosed also excludes all "cash compensation" and "non-cash compensation." As a result, the NAIC Model Regulation excludes "any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer," as well as "any form of compensation that is not cash compensation" despite their obvious potential to drive recommendations that favor the financial professional's own financial interests at the expense of the investor's interests.

48. Following the U.S. Court of Appeals for the Fifth Circuit vacating the 2016 fiduciary rule, a new framework governing the standard of conduct of financial professionals has been put in place. The Securities and Exchange Commission (SEC) has implemented the Regulation Best Interest standard, and the National Association of Insurance Commissioners' (NAIC) Best Interest Rule has been adopted in 45 states. Please describe the Biden administration's view on whether the SEC's standard and the NAIC's rule are protecting retirement investors.

***Response**: While the actions of other regulators, particularly the SEC's adoption of Regulation Best Interest, have partly addressed concerns about imprudent investment recommendations to retirement investors and conflicts of interest in advice relationships, significant gaps remain, and*

the current patchwork regulatory structure is neither uniform nor sufficiently protective of retirement investors. As one important example, neither the SEC's Regulation Best Interest nor the NAIC Model Regulation applies to recommendations to plan fiduciaries.

Further, some commenters indicated that there are disparities in the degree to which firms have implemented Regulation Best Interest. The Department expects the addition of ERISA remedies and the Department's enforcement resources to enhance protection of retirement investors in Title I plans, and to better ensure that advice providers compete on a level playing field where recommendations are made pursuant to a common best interest standard.

Finally, the Department agrees with those commenters on the Retirement Security Rulemaking proposal who concluded that the NAIC Model Regulation is not as protective as Regulation Best Interest and does not protect retirement investors to the same degree as the fiduciary protections in Title I and Title II of ERISA. Although the NAIC Model Regulation provides that insurers must "establish and maintain reasonable procedures to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time," the Department believes that broader conflict mitigation is needed to protect the interests of retirement investors. An important premise of Title I and Title II of ERISA is that fiduciaries' conflicts of interest should not be left unchecked, but rather should be carefully regulated through rules requiring adherence to basic fiduciary norms and avoidance of prohibited transactions.

49. NAIC Commissioners issued a statement on the April 25, 2024, final fiduciary rule saying the rule was written with "virtually no coordination with state insurance regulators." NAIC also stated that DOL discounted the work of the states enhancing consumer protections.

    a. Please describe DOL's coordination efforts with the states to help the fulfill the states' role as the primary regulators of annuities.

    b. Please explain the key differences between types of annuities and how they are regulated by the states.

***Response to a. and b.**: Under Title I and Title II of ERISA, the Department has primary responsibility for the regulation of ERISA fiduciaries' advice to retirement investors. The fiduciary protections and prohibited transaction rules set forth in Title I and Title II of ERISA, as applicable, broadly apply to covered fiduciaries, irrespective of the particular investment product they recommend or their status as investment advisers under the Advisers Act, broker-dealers, insurance agents, bankers, or other status.*

Nevertheless, to better understand whether the proposed Retirement Security Rule and proposed amendments to the associated exemptions would have subjected investment advice providers to requirements that conflict with or add to their obligations under other laws and regulations, the Department reached out to and consulted with other regulators, including NAIC. The Department's coordination with NAIC was initially at the staff level and focused on aspects of the NAIC Model Regulation (but did not involve the Department sharing its intended approach in advance of public release of the proposal). Immediately after the release of the proposed rule, however, the Department met with NAIC members and repeatedly offered additional meetings before the rule was finalized. The NAIC also offered substantive comments to the proposed rule

after its release, which the Department carefully considered along with other commenters, including the comments of many others in the insurance industry.

The Department understands the NAIC Model Regulation to apply generally to recommendations and sales of "annuities," as defined in the model, without distinguishing among types of annuities. However, the model does provide a safe harbor for annuity recommendations made in compliance with "comparable standards," recognizing that some annuity recommendations may be subject to other regulatory regimes that also impose conduct standards. "Comparable standards" identified in the model include SEC and FINRA rules as well as duties and obligations under ERISA and the Internal Revenue Code, as applicable.

SECURE 2.0 Implementation

50. SECURE 2.0 was signed into law in December 2022. A provision in the law requires DOL to issue formal guidance on acceptable standards and procedures to establish good-faith fair-market value in order for shares of a business to be acquired by an employee stock ownership plan (ESOP). However, I am not aware of any activity from DOL on this matter.

    a. Why has DOL delayed its issuance of formal guidance for ESOPs?

    b. The same provision in SECURE 2.0 requires DOL to consult with the Secretary of the Treasury on this guidance. What consultations has DOL had with the Secretary of the Treasury, including how many drafts of guidance it has passed over to the Department of the Treasury?

Response to a. and b.*: In its spring 2023 semi-annual regulatory agenda, the Department included a project that will carry out the SECURE 2.0 directive to provide formal written guidance through rulemaking. The Department is actively developing a proposed rule that will be published in the Federal Register for public comment. In an effort to develop a proposal that is responsive to the need for guidance, the Department began meetings with ESOP stakeholders (including ESOP sponsors, appraisers, and plan service providers) in fall 2023 to hear about issues they believe the Department should address. The Department is continuing to meet with stakeholders as it makes progress drafting the proposal. The Department will consult with Secretary of the Treasury as part of the rulemaking process.*

51. SECURE 2.0 directs DOL to update its electronic delivery guidance to add five limited requirements. In August 2023, DOL issued a Request for Information (RFI) that contemplates changes far beyond what Congress directed under the law. DOL's RFI asks whether plans should be required to monitor whether participants view the electronically provided documents—and even how long they view them. The RFI also asks whether a plan should be required to revert to providing paper to the participant if the participant is not viewing the documents. Why does DOL believe that a benefits plan should observe whether a participant opens mail and how long it takes to read the mail?

Response*: Section 338 of SECURE 2.0 amended ERISA section 105(a)(2) by adding a new requirement, "Provision of Paper Statements," effective for plan years beginning after December*

31, 2025, that at least one pension benefit statement furnished for a calendar year for an individual account plan, and at least one pension benefit statement furnished every three years for a defined benefit plan, must be furnished on paper in written form, with two general exceptions.

Section 338 of SECURE 2.0 directs the Department to update the 2002 safe harbor to provide that, in addition to the other requirements of the safe harbor, participants who first become eligible to participate (and beneficiaries who first become eligible for benefits) after December 31, 2025 must be furnished a one-time initial notice on paper in written form, prior to the electronic delivery of any pension benefit statement, their right to request that all documents be furnished on paper in written form. Section 338 of SECURE 2.0 also directs the Department, no later than December 31, 2024, to update "applicable guidance governing electronic disclosure," except for the 2002 safe harbor, as necessary to ensure that (1) participants and beneficiaries are permitted the opportunity to request that any disclosure required to be delivered on paper under such guidance be furnished electronically; (2) each paper statement furnished pursuant to such updated guidance includes an explanation of how to request that all such statements, and any other documents required to be disclosed under ERISA, be furnished electronically and contact information for the plan sponsor, including a telephone number; (3) the plan may not charge any fee to a participant or beneficiary for delivery of any paper statements; (4) each required document that is furnished electronically by such plan shall include an explanation of how to request that all such documents be furnished on paper in written form; and (5) a plan is permitted to furnish a duplicate electronic statement in any case when the plan furnishes a paper pension benefit statement. The "applicable guidance governing electronic disclosure" referenced in section 338(b) of SECURE 2.0 refers to the Department's second electronic delivery safe harbor regulation at 29 CFR 2520.104b–31, titled "Alternative method for disclosure through electronic media—Notice-and-access" (the 2020 electronic delivery safe harbor, or the 2020 safe harbor). The Department intends, therefore, to update the 2020 safe harbor as necessary to reflect these updates.

As the Department works to comply with these various directives, an RFI is an opportunity to obtain public input on how to best reduce burdens and protect rights simultaneously. The questions in the RFI should not be interpreted as signaling any preconceived ideas about future regulatory requirements, but rather a continued openness to receive public input on all aspects of this issue, especially access, delivery, and engagement. The RFI reaches no conclusions on any of these matters.

52. The Employee Benefits Security Administration has spent a significant amount of time and effort finalizing the April 25, 2024, fiduciary rule, which is nearly identical to the 2016 rule that was overturned in court. The 2024 rule created a Qualified Professional Asset Manager prohibited transaction exemption, regarding which DOL has never explained why any changes were needed. These efforts were made at the expense of other priorities sought by Congress. Please provide an update on the time and effort spent on implementing SECURE and SECURE 2.0, and DOL's plans for finalizing their implementation.

***Response**: The Department has expended, and will continue to expend, considerable resources towards complying with its obligations in SECURE and SECURE 2.0. Our work on other long-standing projects and priorities is "in addition to" these Congressional priorities, rather than at*

the expense of such priorities. We are mindful of the timelines established by Congress for some of our work and have planned accordingly.

SECURE 2.0 – Status/Updates

- *In January 2024, we provided guidance on a new plan feature added to ERISA in SECURE 2.0 – pension linked emergency savings accounts (PLESAs) (section 127). The guidance is available at FAQs: Pension-Linked Emergency Savings Accounts | U.S. Department of Labor (dol.gov).*

- *In January 2024, we also published a notice of proposed rulemaking regarding standards for the receipt of compensation by service providers who administer automatic portability transactions. These transactions will preserve retirement savings by facilitating the automatic transfer of workers' retirement savings from one tax-advantaged plan or account to another when workers change jobs. (section 120). The proposal is available at 2024-01208.pdf (govinfo.gov). We also confirmed plan administrators' ability to consolidate a number of ERISA and Internal Revenue Code-required disclosures (section 341), including PLESA notices, as permitted in SECURE 2.0. See Q18 in the FAQs on PLESAs at FAQs: Pension-Linked Emergency Savings Accounts | U.S. Department of Labor (dol.gov).*

- *In August 2023, we issued a Request for Information, titled Request for Information – SECURE 2.0 Reporting and Disclosure, requesting stakeholder input on a number of SECURE 2.0 provisions. The Department received 26 responses to the RFI, which are available on the Department's website at Request for Information - SECURE 2.0 Reporting and Disclosure | U.S. Department of Labor (dol.gov). The responses to this RFI are currently under review by Departmental staff.*

- *In January 2024, the Department issued a joint Request for Information, along with the Department of the Treasury, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation. This RFI, titled "Request for Information—SECURE 2.0 Section 319—Effectiveness of Reporting and Disclosure Requirements," asks for feedback on a detailed series of questions, broad in scope, covering all aspects of the disclosure process – not just the content of such reporting and disclosure, but questions of access, comprehension, retention, delivery, administrative costs, and compliance assistance. The public comment period for this RFI closed on May 22, 2024. The agencies received 27 comments, which are available at SECURE 2.0 Section 319 – Effectiveness of Reporting and Disclosure Requirements Request for Information | U.S. Department of Labor (dol.gov).*
- *In April 2024, the Department published in the Federal Register a proposal to collect information voluntarily in order to establish the Retirement Savings Lost and Found online searchable database described in section 523 of ERISA and to connect missing participants and other individuals who have lost track of their retirement benefits with such benefits. The proposal solicits specific information from administrators of retirement plans subject to ERISA. Pursuant to the Paperwork Reduction Act of 1995 (PRA), the Department solicited comments on the proposed information collection request (ICR). Comments are requested by June 17, 2024.*

- *The Department also recently completed a report to Congress on our guidance on pension risk transfers in Interpretive Bulletin 95-1 (section 321). In developing the report, the Department conducted more than 40 stakeholder meetings. The Department also consulted with the Advisory Council on Employee Welfare and Pension Benefit Plans (ERISA Advisory Council), which held a public meeting on the Interpretive Bulletin on July 18, 2023. The Department's consultation paper is available at www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/about-us/erisa-advisory-council/eac-consultation-paper07142023-r.pdf. The ERISA Advisory Council discussed the topic at its meeting on August 29, 2023, after which it provided a written statement to the Department with a variety of viewpoints of its members on whether and how the Interpretive Bulletin should be updated. The report will be provided to the Congress in the near future.*

SECURE – Status/Updates

- *We also accomplished a great deal of work following issuance of the 2019 SECURE Act. For example, we issued required guidance on "pooled employer plans," including registration requirements for entities that wish to sponsor such plans. We also prescribed standards for plan administrators required to include lifetime income illustrations on participants' pension benefit statements. Participants are now better equipped to assess the sufficiency of their retirement savings, because they can see estimates of what their retirement savings will look like when they retire, as a stream of monthly payments.*

ERISA Pension Plan E-Delivery

53. In 2020, DOL issued a rule enabling default e-delivery of member disclosures in ERISA pension plans. When this rule was finalized, DOL staff indicated that extending the e-delivery safe harbor to health and welfare plans would be considered at a later date. Nearly four years later, there has been little action in achieving this key goal—a priority for employers, unions, and other business leaders.

    a. Why has there been a delay in extending the e-delivery safe harbor to health and welfare plans?

    b. When will guidance be issued?

    c. Members of Congress have heard from employers, unions, environmental advocates, and business leaders about default e-delivery being a priority. Has DOL heard from these groups?

    d. DOL projected that the e-delivery safe harbor for pension plans would reduce printing, mailing, and related plan costs by an estimated $3.2 billion over the next decade. Extending this safe harbor to health and welfare plans would likely save significantly more. What is the latest estimated savings from e-delivery for pension plans, and what is the latest estimate for savings if e-delivery is extended to health and welfare plans?

e. To what extent are e-delivery provisions already in place across the Federal Employee Health Benefits Program, and what is the utilization among federal employees?

Response to a. – e.*: The Department's 2002 electronic delivery safe harbor applies to both retirement and health and welfare plans. See CFR-2005-title29-vol9-sec2520-104b-1.pdf (govinfo.gov). In contrast, the Department's 2020 safe harbor alternative for electronic delivery applies only to retirement plans but reserves a section for potential future extension to welfare plans, including health plans. See Federal Register: Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA. As explained when issuing the 2020 safe harbor, health plan disclosures may raise different considerations and have different impacts than retirement plan disclosures. Any extension to welfare plans warrants careful consideration and analysis. In addition, the Department shares jurisdiction over many group health plan disclosures with the Department of the Treasury and the Department of Health and Human Services. The Department of Labor would need to consult with these other Departments on any such extension. Although certain stakeholders have expressed to the Department their support for maximizing opportunities for default electronic delivery of group health plan disclosures, other stakeholders have requested that the Department proceed with caution in protecting the rights of participants and beneficiaries to receive paper disclosures, similar to the caution used by Congress in enacting section 338 of SECURE 2.0.*

Regarding estimated cost savings of 29 CFR 104b-1(c) and 29 CFR 104b-31, the Department has not recently updated its estimate of the cost savings for pension plans nor has the Department estimated comparable savings for welfare plans.

Finally, The Federal Employee Health Benefits Program is under the jurisdiction of the Office of Personnel Management.

Investment Duties Regulation

54. On April 23, 2024, the White House stated that DOL and the White House convened asset managers representing more than $1 trillion in public and pension fund capital. A central theme of this event was that asset managers should use their capital to encourage private businesses to promote union interests. How is encouraging private businesses to promote union efforts expected to impact the value of, the return on, and the diversification of pension plan investments?

Response*: Please refer to the Department's June 25, 2024 response to the Committee's May 22, 2024, letter concerning this event.*

Office of Federal Contract Compliance Programs

Religious Contractor Rule

55. The Trump administration issued a rule that protected faith-based organizations

participating in federal contracting. The rule ensured they could bid on contracts without having to violate their religious beliefs. The rule also provided clarity about the rights and obligations of these faith-based organizations. Unfortunately, the Biden DOL issued a final rule rescinding the Trump administration rule protecting religious contractors. What is DOL doing to ensure that faith-based organizations can bid on federal contracts on an equal footing with other federal contractors and to ensure that the constitutional rights of faith-based organizations are protected?

Response: *OFCCP remains committed to protecting religious freedom on behalf of all Americans through its enforcement of Executive Order 11246, which requires federal government contractors and subcontractors to provide equal employment opportunity. Since 2002, Executive Order 11246 has contained a religious exemption in Section 204(c) for certain religious corporations, associations, educational institutions, and societies with respect to the employment of individuals of a particular religion. The Executive Order 11246 religious exemption expressly imports the religious exemption from Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on certain bases and which, as amended in 1972, exempts certain religious corporations, associations, educational institutions, and societies with regard to the employment of individuals of a particular religion to perform work connected with their activities.*

The Executive Order 11246 religious exemption is still in place, pursuant to the final rule issued during the Biden administration. The Biden administration rule merely returns to OFCCP's long-established policy, in place under both Republican and Democratic administrations, of analyzing contractors' exemption claims on a case-by-case basis, consistent with the law.

OFCCP Enforcement

56. The Office of Federal Contract Compliance Programs (OFCCP) is not providing sufficient compliance assistance. According to federal contractors, OFCCP refuses to provide substantive answers to questions. What specific steps will OFCPP take to ensure substantive questions from federal contractors are answered to fulfill OFCCP's responsibility to provide compliance assistance?

Response: *OFCCP offers robust compliance assistance to educate federal contractors about the agency's legal authorities and how to comply with the law. Compliance assistance is offered one-on-one at the request of the contractor and through compliance assistance sessions offered to the public. Compliance assistance events have covered such topics as What to Expect During an OFCCP Compliance Evaluation and Compliance Assistance for Construction Contractors. In FY 2024 alone, OFCCP has offered hundreds of live compliance assistance events. OFCCP also maintains a productive exchange with the National Industry Liaison Group (NILG) which represents federal contractors. Through this relationship, OFCCP meets regularly with the NILG to provide information and address questions about OFCCP policies and procedures.*

In addition to live compliance assistance events and sessions, OFCCP has also invested resources to improve the efficiency of its Customer Service Help Desk operations by focusing on quality customer service and compliance assistance to federal contractors. The role of the Help Desk is to respond to federal contractors who need resources, publications, and detailed information about their obligations under the legal authorities OFCCP enforces. Federal

contractors may contact OFCCP anonymously using a toll-free number or by submitting a written inquiry through the OFCCP Public Intake portal. So far, in FY 2024, the Help Desk has responded to more than 750 calls and written inquiries providing compliance assistance to federal contractors.

OFCCP also offers an on-demand learning management system that is designed to provide employers with Federal contracts and subcontracts with the tools to comply with OFCCP's equal employment regulations. Launched in FY 2020, the Contractor Compliance Institute has served more than 7,000 users to date, to help them learn and meet their legal obligations. Users have completed courses on the recently revised Supply and Service Scheduling Letter, How to Develop an Affirmative Action Program, How to Establish the VEVRAA Hiring Benchmark, Construction Compliance Reviews, and The Path to Compliance: Understanding Expectations to Governance. Finally, OFCCP regularly updates its subregulatory guidance to address substantive questions posed by stakeholders, including federal contractors. OFCCP's subregulatory guidance includes but is not limited to comprehensive Technical Assistance Guides, Promising Practices and Resources, Infographics, Frequently Asked Questions, and User Guides for IT systems. Recent updates include new subregulatory guidance that addresses several stakeholder questions received on Artificial Intelligence, the agency's Construction Program, and the supply and service Scheduling Letter and Itemized Listing. Additionally, OFCCP provides a high level of transparency on its compliance investigation procedures by publishing the Federal Contract Compliance Manual, an internal manual instructing compliance investigators on how to conduct compliance evaluations and complaint investigations.

57. The Biden administration's OFCCP reversed Trump administration OFCCP rules that required the agency to explain to the federal contractor the reason for a Notice of Violation and to allow the contractor to respond. Why is OFCCP not required to explain to the federal contractor the exact reason the agency believes the contractor deserves a Notice of Violation?

Response: *In 2023, OFCCP published a final rule that modified its pre-enforcement notice and conciliation procedures, to streamline and strengthen the agency's enforcement. In publishing the final rule, OFCCP made clear that the agency remains committed to open communication to ensure contractors understand the nature of any concerns identified in the pre-enforcement notices.*

As stated in the regulations, OFCCP provides three separate notices to contractors describing the agency's findings, and an opportunity to respond to each notice, before the agency will seek enforcement: the Predetermination Notice, the Notice of Violation, and the Show Cause Notice.

The predetermination notice describes preliminary findings of potential discrimination. The notice "describes the preliminary findings and provides the contractor an opportunity to respond." See 41 CFR 60-1.33(a), 60-300.62(a), and 60-741.62(a). "If the contractor does not respond or OFCCP determines that the contractor's response and any additional investigation undertaken by the agency did not resolve the preliminary findings of potential discrimination or other violations identified in the Predetermination Notice, OFCCP will proceed to issue a Notice of Violation." Id.

When OFCCP issues a Notice of Violation, the notice identifies "the violations found and describe[s] the recommended corrective actions." See 41 CFR 60-1.33(b), 60-300.62(b), and 60-741.62(b). The notice invites the contractor to conciliate the matter. Id.

Finally, if OFCCP has reasonable cause to believe that a contractor is in violation of an equal opportunity clause, the agency "may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings, or other appropriate action to ensure compliance should not be instituted." See 41 CFR 60-1.33(d), 60-300.62(d), and 41 CFR 60-741.62(e).

58. During the Biden administration, OFCCP has recovered far less in monetary relief from federal contractors for alleged discrimination than was collected under the Trump administration. Why did the Biden OFCCP recover only $11.7 million in monetary relief in Fiscal Year (FY) 2022 and $17.5 million in FY 2023 while the Trump OFCCP collected nearly $100 million from FY 2019 through FY 2021?

Response: *From January 21, 2021, to May 17, 2024, OFCCP has secured over $56 million in financial remedies for US workers. Moreover, as part of its on-going monitoring, it has facilitated over $40 million in additional salary adjustments.*

Early Resolution Conciliation Agreements (ERCAS) were introduced in early FY 2019, which greatly reduced OFCCP's aged case load by offering contractors a way to settle longstanding cases that had been open for multiple years. Although OFCCP still encourages early resolution, the majority of these initial ERCAs were signed in FY 2019 and FY 2020 and led to several large settlements. Many of the resolutions achieved during the Trump administration were initiated and investigated by OFCCP during the Obama administration. Those conciliation agreements involved a large number of compensation claims against technology and finance companies for highly paid employees.

59. OFCCP is proposing to revive a form that would require all construction contractors to submit the form monthly and include information on employee work hours by race or ethnicity, gender, and trade in the covered area. Why is OFCCP requiring construction contractors to submit a form that the agency discontinued in 1995?

Response: *OFCCP is currently in the process of seeking reinstatement of the "CC-257" report, to help the agency better meet its mission of protecting workers in the construction trades as employment discrimination continues to be a problem in the construction industry. Specifically, reinstating the collection will improve OFCCP's process for neutrally scheduling contractors for compliance evaluations as the reports will provide relevant information on which projects are currently active and current employee counts. In this way, OFCCP can bolster its enforcement efforts by focusing its limited resources on compliance evaluations that can have the greatest impact.*

The report will also provide data that the agency can use to inform compliance assistance efforts and track the progress of contractors' outreach efforts. Lastly, the report will strengthen OFCCP's Mega Construction Project (Megaproject) Program. On megaprojects, OFCCP can use the data on employment and work hours in construction trades to track the effectiveness of outreach efforts and inform decisions regarding Megaproject resource allocation, program emphasis, and training

efforts.

OFCCP discontinued the collection in 1995, as reviewing the paper reports required extensive agency resources. With the proposed collection, OFCCP is allowing for electronic submission of the report, which will reduce the burden on the agency, allow for more efficient submission for contractors, and improve the agency's ability to efficiently review and analyze the submitted data.

60. OFCCP is now subjecting federal contractors that are both Supply and Service contractors and Construction contractors to audits under both categories' requirements. This is a change to a policy that has been in place for 20 years which did not require audits under both categories' requirements. Why has OFCCP made this policy change without providing any notice or guidance to federal contractors?

Response: *OFCCP has provided notice and guidance to contractors about their legal requirements pursuant to the Federal Acquisition Regulations and OFCCP's legal authorities. As background, the agency continuously updates its scheduling methodology for supply & service and construction compliance evaluations. The agency is transparent about changes to the methodology and makes a description of each methodology publicly available on the OFCCP website.*

Additionally, in June 2023, OFCCP provided clarifying guidance for federal contractors who hold both supply & service and construction contracts, based on stakeholder inquiries into the matter. OFCCP's guidance is consistent with its regulations and the Federal Acquisition Regulations. If a contractor holds a covered supply and service contract and a covered construction contract, the contractor may be scheduled and reviewed by OFCCP under 41 CFR part 60-2 and 41 CFR part 60-4 depending on the establishment or worksite that is scheduled. As required by the Federal Acquisition Regulations, if a contractor holds a single contract meeting applicable jurisdiction thresholds and including both construction work and supply and service, the contractor must comply with the obligations applicable to the predominant part of the work, or if the contract is divided into parts, the obligations applicable to each portion.

Union Transparency and Accountability

Persuader Enforcement

61. Recently, the Office of Labor-Management Standards (OLMS) started requiring businesses to file persuader reports whenever the business sends a company officer to a company facility to discuss issues related to collective bargaining. However, the *Labor-Management Reporting and Disclosure Act* (LMRDA) has never been interpreted to require persuader reports for company officers at company facilities. This requirement also seems to contradict the OLMS interpretive manual.

    a. Please explain why OLMS is targeting businesses in this way.

Response: *Under LMRDA section 203(a)(2), employer payments to their employees, including reimbursed expenses, to persuade other employees are expressly reportable. OLMS seeks to fully enforce Section 203 of the LMRDA, including the explicit requirement for employers to report,*

subject to certain exemptions, payments to their employees for the purpose of causing them to persuade other employees. Under the LMRDA, OLMS has the authority to investigate whether businesses have complied with the employer disclosure and reporting requirements under section 203(a). OLMS does not comment on specific complaints or investigations.

b. Has OLMS published a written explanation to justify this novel approach?

Response: *The LMRDA, section 203(a)(2), expressly requires employers to report payments to their employees, including reimbursed expenses, to persuade other employees. OLMS seeks to fully enforce Section 203 of the LMRDA, as it has with the union reporting requirements in Sections 201 and 202.*

62. DOL has taken a rather creative approach to persuader reporting under the LMRDA. Ever since the statute was first signed into law, there has been a clear exemption to reporting requirements for employers who send their own executives out to talk to workers about unions. Not only is this exemption codified under section 203(e) of the LMRDA, but it also has long been a part of OLMS's interpretive manual. However, during the Biden administration, DOL has decided that this activity is subject to reporting.

    a. Please cite any agency document—whether a regulation, guidance, an interpretive letter, or anything DOL has published—explaining the Biden administration's view that this new reporting requirement is authorized by the LMRDA.

Response: *Under LMRDA section 203(a)(2), employer payments to their employees, including reimbursed expenses, to persuade other employees are expressly reportable. Section 203(e) of the LMRDA does not exempt from the reporting requirements all payments that an employer makes to its managers and other employees. Rather, Section 203(e) only exempts expenditures made to any regular officer, supervisor, or employee as compensation for service as a regular officer, supervisor, or employee of such employer.*

    b. DOL has begun issuing subpoenas to employers demanding information about expenses associated with their own executives traveling to meet with workers. Please provide a justification why these subpoenas are proper.

Response: *Under LMRDA section 203(a)(2), employer payments to their employees, including reimbursed expenses, to persuade other employees are expressly reportable. OLMS has clear statutory authority to investigate employers to determine whether they are required to file reports that include information expressly required under the LMRDA.*

63. Unions pay individuals to obtain jobs at companies for the sole purpose of organizing the company. These individuals, known as "salts," work to convince their coworkers to organize. It is a coercive tactic that misleads workers and employers, but DOL does not enforce the LMRDA's reporting requirements for persuader activity against unions for these activities.

    a. Please explain why the use of salts does not qualify as reportable activity under Section 203(a)(4) of the LMRDA.

Response: *OLMS Interpretative Manual Section 260.005 (Consultant for Labor Organization) has long provided that the persuader reporting requirements apply to consultants and other third parties who have entered into agreements with employers, not labor organizations.*

b. Should salts be required to disclose their actions to the public and, more importantly, to their coworkers?

Response: *The Supreme Court unanimously held that "salts" are "employee[s]" under the National Labor Relations Act and are therefore protected from discrimination on account of their union membership. As stated by OLMS in a 2003 final rule revising the Form LM-2 Labor Organization Annual Report, requiring the reporting of certain expenditures relating to the deployment of "salts" could jeopardize employees' right to organize. The disclosure of the salts' identities to the employer could potentially result in their termination or other retaliatory action. It could also inform an employer of an organizing campaign in its early stages, allowing the employer to undermine the union's organizing efforts. As a result, the 2003 Form LM-2 final rule exempted unions from disclosing certain confidential information, including the identity of their salts.*

64. On several occasions, OLMS has sought records from private companies related to the salaries and expenses of the companies' own employees, claiming these individuals were engaged in reportable persuader activity, and the companies failed to file necessary reports. The LMRDA, however, specifically exempts these expenses from reporting requirements under the statute.

    a. Please explain DOL's justification for requiring this information from employers and why DOL believes this information does not fall within the LMRDA's exemption.

Response: *Under LMRDA section 203(a)(2), employer payments to their employees, including reimbursed expenses, to persuade other employees are expressly reportable, subject to certain exemptions. OLMS has clear statutory authority to investigate employers to determine whether they are required to file reports that include information expressly required under the LMRDA.*

    b. Does OLMS believe that travel expenditures for an employer's own employees, where the travel is for the purpose of participating in persuader activities, are reportable? If so, does the same hold for individuals who are employed as labor relations professionals?

Response: *Under LMRDA section 203(a)(2), employer payments to their employees, including reimbursed expenses, to persuade other employees are expressly reportable. Section 203(e) of the LMRDA does not exempt from the reporting requirements all payments that an employer makes to its managers and employees. Rather, Section 203(e) exempts expenditures made to any regular officer, supervisor, or employee as compensation for service as a regular officer, supervisor, or employee of such employer.*

    c. How many employers did OLMS send requests to for production of information regarding employees who traveled to employer facilities in response to union

organizing efforts in FY 2021, FY 2022, and FY 2023?

Response: *Requests have been sent to two employers, both subject to subpoena litigation. In addition, there were two employers that were the subjects of cases closed within that time period, which involved such requests. To protect the integrity of OLMS investigations, OLMS cannot comment further on whether there are any other such pending investigations that were active in this time period.*

d. What specific information did OLMS ask of employers in their requests for information regarding employees who traveled to employer facilities in response to union organizing efforts?

Response: *As has been disclosed publicly in related litigation, specific information was sought pertaining to dates, purposes, the names of those who traveled, receipts, disbursements, meeting agendas, and any other information or records relevant to determining the reportability of the alleged activity.*

e. How many subpoenas did OLMS serve on employers seeking the production of materials for any officers, managers, supervisors, or employees who traveled to employer facilities to participate in response to union organizing efforts in FY 2021, FY 2022, and FY 2023?

Response: *As was disclosed publicly in related litigation, two subpoenas were served during this time. One other subpoena was served during this time period in a case that is now closed.*

65. With respect to OLMS's requests to employers for production of information regarding employees who traveled to employer facilities in response to union organizing efforts:

a. How many requests were sent prior to the required LM-10 filing date covering the fiscal year in which the referenced actions occurred?

b. Were any such request letters sent between January 1, 2010, and January 1, 2021? If so, how many?

c. Were any such letters sent prior to January 1, 2010? If so, how many?

Response to a. – c.: *There were no requests sent prior to the required LM-10 filing date. Further, OLMS is unaware of any such request letters sent between January 1, 2010, and January 1, 2021, or prior to January 1, 2010.*

Union Favoritism

66. DOL has no authority to enforce or implement the NLRA. DOL enforces parts of the LMRDA, which was enacted to ensure basic standards of democracy and fiscal responsibility in labor organizations. Despite DOL possessing zero jurisdiction over union election procedures, the Department created an entire website called WorkerCenter.gov

that provides a step-by-step guide to forming a union under the NLRA's procedures. The website also provides information about the purported benefits of labor organizations from union-funded think tanks.

a. Please explain why DOL created a website to promote unionization and discuss issues outside its jurisdiction.

b. Provide a calculation of how much DOL spent to create this website, and what funds were used.

Response to a. and b.*: In keeping with the statutory purpose of the Department "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment," the Department has a number of websites that help inform workers and employers about their rights and responsibilities under the law, including:*

- *Employer.gov, a plain-language resource for employers seeking to learn more about workers' rights and responsibilities under the laws we enforce;*
- *Worker.gov, a similar resource for workers; and*
- *The Department's eLaws advisors are a set of interactive, online tools developed by the Department to help employers and employees learn more about their rights and responsibilities under numerous Federal employment laws – continuously updated for the freshest content.*

The Department has used the same procurement contract to redesign the Worker Organizing Resource and Knowledge Center, a one-stop shop for information and resources on unions and collective bargaining for workers, employers, unions, government agencies, students, and anyone interested in unions and collective bargaining.

Workers and employers seeking information about their rights and responsibilities under core workplace laws do not necessarily know which of these laws are enforced by the Department, the National Labor Relations Board, or the Equal Employment Opportunity Commission. These websites provide workers and employers with sufficient background and links to be generally helpful. Further, unions have a long history of supporting actions that empower working people and advance our economy. Four examples where unions complement the Department's mission are:

- *The Department relies on worker reports to enforce federal employment laws effectively, and unions empower workers to report violations of the law.*
- *Unions help the Department achieve its workforce development goals by fostering strong labor-management partnerships and related training programs.*
- *Unions help secure compliance with OSHA standards and foster healthier and safer workplaces.*
- *Unions help secure compliance with wage standards by negotiating contractually guaranteed wages.*

67. The website workcenter.gov seems to be a government website solely focused on promoting unionization.

a. Was this DOL's chief purpose for creating and managing this website?

b. Please describe the extent to which DOL and outside organizations communicate and collaborate about what materials and resources are posted on the website.

Response to a. and b.*: Unions can empower workers to report violations of the law, which is a key complement to the Department's mission. The Biden-Harris administration's Task Force on Worker Organizing and Empowerment recognized the gap between historically high worker interest in labor unions and collective bargaining and their lack of knowledge on how to organize a union. In response, the Department developed a centralized resource to narrow that gap while benefiting both workers and employers.*

We welcome feedback from the public on how to improve the website, and we have posted on the website a dedicated email address to collect such feedback: WORKCenter@dol.gov.

68. Your published schedule of appointments is not up to date.

a. What is the total number of meetings you have had with union officials and union events you have held during your time leading DOL?

b. What is the total number of meetings you have held with employer officials and employer events you have held during your time leading DOL?

Response: *You may access my calendar through April 2024 online here. As Acting Secretary I have the privilege of meeting with a variety of stakeholders, including employers, workers, and other stakeholder organizations, both in DC and in my travels across the country.*

69. In several tweets (or posts) from your government Twitter (or X) account, you encourage workers to form unions, and you display overt favoritism toward labor unions. DOL leads the Biden administration's Worker Organizing and Empowerment Task Force and the "Good Jobs Initiative," which both were designed to mobilize taxpayer funding and government policies for the benefit of unions. Given the blatant favoritism toward unions from you and the Biden administration, do you believe that a job needs to be a union job to be considered a "good job"?

Response*: The Department of Labor and Commerce's Good Jobs Principles lay out a framework for a shared vision of job quality. The Good Jobs principles recognize the importance of fair recruitment and hiring, family sustaining benefits, equal employment opportunity, worker empowerment and representation, job security and safe working conditions, organizational culture, stable predictable living wages, and equitable opportunities for upskilling and career advancement. Workers know the value of a good job that provides stability and security for them and their families. Many companies also recognize that providing good quality jobs creates a clear competitive advantage when it comes to recruitment, retention, and execution of a company's mission.*

Office of Workers' Compensation Programs

Longshore and Harbor Workers' Compensation Act

70. The Office of Workers' Compensation Programs recently updated its Form LS-203, which workers who are covered under the Longshore Program use to file a claim for compensation. The new form asks what gender workers "think themselves as" instead of their gender at birth. I am concerned that this change will impact the longstanding practices for making actuarial assumptions and hurt data quality. What is the justification for this change to the form?

Response: *During routine updating of the LS-203 form, OWCP expanded the gender identity options on the form to provide workers greater flexibility in their response.*

Energy Employees Occupational Illness Compensation Program Act

71. DOL's Office of the Inspector General (OIG) recently released an audit which found that the Office of Workers' Compensation Programs' Division of Energy Employees Occupational Illness Compensation (DEEOIC) has not been transparent in reporting claims processing timelines, and that gaps in oversight increased the risk of delays in processing claims and increased incorrect claims decisions. As a result, under the Biden administration, wait times increased, and the number of final decisions decreased. Longer wait times are detrimental to these workers who were unknowingly exposed to radioactive substances and other toxins, and who need timely medical care.

    a. Please describe the failures within DEEOIC's leadership that led to the issues outlined in the OIG audit.

Response: *DEEOIC continues to process claims from former nuclear weapons workers in a timely manner and take a multitude of actions to monitor timeliness and quality of adjudication and claims processing.*

The OIG did not establish in their May 2, 2024, report, which looked at DEEOIC claims processing in FY 2018 – 2022, that wait times increased, final decisions decreased, or that there was an increase in incorrect decisions. In fact, since 2021, the number of final decisions issued has increased. In addition, the quality of both recommended and final decisions has remained above an excellent 95 percent, and DEEOIC has consistently exceeded our timeliness goals (over 92percent) for both processing of initial and final decisions.

    b. What steps is DOL taking to improve processing timelines and ensure that claims decisions are accurate?

Response*: DEEOIC maintains timeliness measures for almost every step of the claims adjudication process, including more than 20 goals. While some of the recommendations are somewhat duplicative of actions that DEEOIC already takes, DEEOIC has agreed to adopt all five of the OIG recommendations. Concerning timeliness, the OIG recommended that DEEOIC include remand times in our end-to-end measurement, which we have agreed to do. In addition, the OIG recommended that DEEOIC regularly assess progress toward meeting the performance metrics and publicly report results. DEEOIC already regularly assesses and publishes these*

goals but has agreed to review and update the goals that are available on its website. Regarding quality, OIG recognized that DEEOIC already has a robust quality review process, including sampling and ongoing reviews by dedicated performance management units. As a result, in their last 3 recommendations, the OIG simply recommended that DEEOIC track cases that require action post audit and develop related standard operating procedures. DEEOIC has agreed to adopt these recommendations for the very minimal number of errors found during the quality review process.

Workforce Development

Apprenticeship Rulemaking

72. The Small Business Administration's (SBA) Office of Advocacy asserted that DOL's initial regulatory flexibility analysis (IRFA) on the proposed apprenticeship regulations does not comply with the *Regulatory Flexibility Act* because it does not properly inform the public about the impact of this rule on small entities. Does DOL intend to heed the request from the SBA's Office of Advocacy to publish a supplemental IRFA that is not deficient?

Response: *The proposed rule seeks to revise the Department's regulations at 29 CFR part 29 to strengthen, expand, modernize, and diversify the National Apprenticeship System by enhancing worker protections and equity, improving the quality of registered apprenticeships, revising the state governance provisions, and more clearly establishing critical pipelines to registered apprenticeships, such as pre-apprenticeships, so that the National Apprenticeship System is more responsive to current worker and employer needs.*

The Department has sought advice, recommendations, and guidance from a number of external sources, research, and stakeholder inputs in the development of the proposal, including:

- *A roundtable during the open comment period with the Office of Advocacy under the Small Business Administration on February 16, 2024, to further gather small businesses' perspectives on the proposed rule;*
- *The 2022 Interim recommendations of the Advisory Committee on Apprenticeship, which includes business/industry representation, and its 2023 Biennial Report;*
- *Over 20 Virtual Listening Sessions in 2021 on ways to modernize apprenticeship programs;*
- *A National Online Dialogue in 2022, including various partners and stakeholders, to describe what they believed to be the optimal implementation of the registered apprenticeship model; and*
- *Virtual Listening Sessions in 2023, where partners and stakeholders were given the opportunity to share perspectives on the current state of the National Apprenticeship System and to share policy recommendation for ways to strengthen and modernize the system.*

In addition to these inputs that informed the development of the NPRM, the Department takes seriously its obligation to consider any "written data, views, or arguments" submitted by commenters during the open comment period. As it works to develop the final rule, the

Department evaluates comments – including any comments related to IRFA – received during the comment period, which closed on March 18, 2024.

73. DOL refers to registered apprenticeships as the "gold standard" of work-based learning. As you know, there are currently 3,500 apprenticeship programs registered under the competency-based model. Can you provide data comparing the completion rates and labor market outcomes of competency-based registered apprenticeship programs to other models of registered apprenticeships?

Response: *The Department appreciates your interest in an analysis regarding competency-based apprenticeships. While we are currently not able to provide this analysis, we are considering how to conduct it and are happy to follow up with you regarding the analysis. The Department is seeking to make registered apprenticeship data more accessible and has launched a series of dashboards to be able to compare apprenticeship data and is considering expanding those dashboards to include breakdowns by training approach.*

As you are aware, the Department's notice of proposed rulemaking sought to enhance data reporting and collection, which it believes can help to better assess labor market outcomes, including post-participation earnings.

74. Are the records provided by a registered apprenticeship sponsor to DOL's Office of Apprenticeship kept within the Office of Apprenticeship or are they in any case shared with other enforcement agencies within DOL or across the federal government? Should employers expect that information they provide to the Office of Apprenticeship could subject them to investigations and enforcement actions unrelated to the *National Apprenticeship Act*?

Response: *The Department's Employment and Training Administration's (ETA) oversight role is based on the statutory language of the National Apprenticeship Act (NAA) of 1937 (29 U.S.C. 50) and the regulations implementing the NAA at 29 CFR parts 29 and 30. The Department shares records obtained through its oversight of the National Apprenticeship System consistent with federal law, including the Privacy Act and its regulations, including routinely sharing ADA information with the Department's Wage and Hour Division (WHD) to assist WHD in the proper enforcement of the Davis-Bacon and Related Acts provisions regarding bona fide apprenticeship programs. Additionally, the Department (under 29 CFR 30.14) may refer EEO-related complaints to the EEOC, the United States Attorney General, the Department's Office of Federal Contract Compliance Programs (OFCCP), or a State Apprenticeship Agency (SAA) to its Fair Employment Practices Agency. The Department notes that if a record indicates a violation or potential violation of law, disclosure may be made to the appropriate agency, whether Federal, foreign, state, local, or tribal, or other public authority responsible for enforcing, investigating, or prosecuting such violation or charged with enforcing or implementing the statute, rule, regulation, or order.*

75. Proposed § 29.8(a)(4)(i) and § 29.8(a)(4)(ii) eliminate the current regulation's three "on-the-job training" approaches and substitute a unitary approach required to be used by all registered apprenticeship programs. The proposed rule states that this received a clear endorsement in the Advisory Committee on Apprenticeship's (ACA) 2022 Interim Report, which recommended updating the current regulatory framework "to ensure competency

attainment is achieved through all [training] models, while providing certain protections into standards with regard to time in [on-the-job training] to ensure proficiency is obtained, potentially expanding the hybrid model as a long-term goal for quality standards." Please identify the studies and data used by the ACA to determine in their 2022 Interim Report the need to consolidate the "on-the-job training" approaches into a unitary model for all apprenticeship programs.

Response: *The Advisory Committee on Apprenticeship (ACA) provides advice and recommendations to the Secretary of Labor on ways to better use the apprenticeship training model. The ACA is composed of a balanced representation of employers, labor organizations, and members of the public who possess unique perspectives on workforce development topics in general and on registered apprenticeship in particular. For almost 90 years, the Department has relied on the expertise and advice of the ACA in the development of apprenticeship policy and the identification of innovative approaches to apprenticeship training.*

The recommendations contained in the reports issued by the ACA are typically based on robust public deliberations and discussions, in contributing their perspectives based on their sector, industry, and experience. ACA members voted on the content of the Interim and Biennial reports, including the recommendations contained in each, and ultimately advanced a document that reflected the Committee's consensus recommendations for the Employment and Training Administration and the Acting Secretary's consideration. For more information on the deliberations of ACA members across their seven meetings, including meeting agendas and minutes, please see the Department's website on the ACA available here; https://www.apprenticeship.gov/advisory-committee-apprenticeship.

76. Proposed § 29.9(d) and § 29.9(e) would prevent program sponsors and participating employers from including in the apprenticeship agreement a non-compete and non-disclosure provision.

    a. How did DOL decide to include non-compete and non-disclosure bans in the proposed rule?

    b. Were non-compete and non-disclosure bans recommended by the ACA or the International Labour Organization?

Response to a. and b.: *The Department cited its rationales for the notice of proposed rulemaking's (NPRM) non-compete and non-disclosure provisions in the proposed rule, particularly pages 3165 through 3167 of the Federal Register Notice of the NPRM. The Department does note that both the ACA report and the International Labour Organization included provisions pertaining to helping to ensure that apprentices have labor market or job mobility.*

The Department is evaluating the comments that were received on these regulatory provisions during the comment period, which closed on March 18, 2024. The Department takes seriously its obligation to consider any "written data, views, or arguments" (see 5 U.S.C. 553(c)) submitted by commenters during the open comment period.

77. Many employers have reported they don't appreciate the one-size-fits-all, Washington-knows-best approach to government-registered apprenticeship programs, which have already failed to meet industry needs with less bureaucracy. Were state government apprenticeship agencies and leaders consulted about the proposed rule's new limitations on state government apprenticeship program approvals and regulations? If so, which state apprenticeship agencies did DOL consult with and which states were supportive of new limitations on their existing authority on apprenticeship approval?

Response: *The Department values the role its State partners play in promoting and expanding registered apprenticeship opportunities. The Department's NPRM was informed by the ACA, as well as through other inputs such as State Apprenticeship Agency-focused listening sessions in the drafting of the proposed rule. The Department notes that State Apprenticeship Agencies (SAA) have representation on the ACA through the National Association of State and Territorial Apprenticeship Directors (NASTAD), and that all of the SAAs were invited to its listening sessions.*

Job Corps

78. I understand that enrollment in the Job Corps program declined significantly when most centers were shut down during the pandemic.

    a. I don't believe enrollment has fully recovered since then, so do you have an estimate of when enrollment in the Job Corps program will return to pre-pandemic levels and can you discuss how DOL is working to increase enrollment?

Response: *The national average student enrollment or onboard strength (OBS) right before the pandemic, as of March 2020, was 29,041. As of May 15, 2024, Job Corps centers had 24,088 students enrolled. During the 90-day time period from February 14 to May 14, 2024, Job Corps welcomed on average 2,940 new students each month. The Department's Employment and training Administration (ETA) anticipates reaching its OBS goal of 30,000 students by September 2024.*

ETA's approach to rebuilding OBS is multifaceted and uses a new vision and strategy called Job Corps 2.0, which is focused on a student-centered design that will boost enrollment and retention in the program. A student-centered design ensures that student voice is woven into every aspect of the program, from academics to residential living. The seven key pillars of Job Corps 2.0 include: 1) modernizing enrollment, 2) fostering a positive student experience, 3) modernizing training programs, 4) developing meaningful partnerships, 5) ensuring successful transition to employment, 6) enhancing federal oversight of center operations, and 7) rebranding Job Corps. Each pillar is connected to improving student onboard strength across Job Corps' 123 campuses.

Students from disadvantaged and underserved communities may not always have access to academic and technical training opportunities. Job Corps began focusing on how to streamline the application process to minimize barriers to enrollment. This includes moving from an analog enrollment (paper process) to digital through the development of a system called MyJobCorps. With nationwide launch scheduled by the end of the year, prospective

students can now easily connect with Job Corps by going to jobcorps.gov and accessing the Express Interest Tool (EIT) – from the device of their choice (smart phone, tablet, computer). When ready to apply, prospective students control their journey and use the portal to begin an application, upload documents, sign forms, and track their progress. A process that could take up to 8 months has been significantly reduced to a month.

ETA is also enhancing federal oversight to support the increase of student enrollment and retention. ETA is actively recovering funding from the operators of 85 Firm Fixed Priced (FFP) contracts that exceed the allowable 4 percent staff vacancy provision. The nature of the FFP contract vehicle limits the program's allowable takeback amount regardless of the onboard strength achieved by the center operator. In Program Year 2022, the Average FFP contract vacancy rate was 15 percent. Through recovery of funds from centers' high staff vacancy rates and low onboard strength, the program was able to reinvest in training equipment, dormitory furniture, and leadership-related activities for students to support retention in the program.

Additionally, ETA is increasingly deciding against awarding additional contract years to center operators that fail to deliver required student services (e.g., Health and Wellness) or to effectively enroll and retain students at levels that increase the center's onboard strength.

b. Given that Congress has continued appropriating over $1.7 billion a year for the Job Corps program despite the decline in enrollment, what is the average cost per participant for the program based on the current enrollment numbers?

Response: *For the last complete Program Year (PY) 2022 or the period from July 1, 2022-June 30, 2023, the average cost per participant was $33,300. This includes active students as of July 1, 2022, new enrollees during the year, and graduates and former enrollees who received post-enrollment placement and other transition support services from Job Corps within PY 2022.*

79. There have been numerous serious safety incidents, including student deaths, at Job Corps Centers over the past decade. As DOL has made efforts to improve safety in the program, how is it measuring the success of these efforts and more specifically, what data does DOL collect on the safety of Job Corps campuses?

Response: *All Job Corps centers are required to report significant incidents, which include student safety-related incidents such as possession of a weapon or dangerous item, assault or threat of assault, serious illness, injury, and bullying or harassment, to name a few. The Job Corps' Safety Hotline, which can be anonymous, also collects data on safety concerns that students report. In 2022, Job Corps implemented the Student Experience Assessment survey to gauge students' overall center experience and feedback. Having done six survey administrations thus far, Job Corps uses information from this survey to identify center operational areas that need focused attention and oversight. Starting in the fall of 2024, Job Corps will pilot and implement the Student Safety Assessment to collect students' perception of safety and security on center and further focus operator attention and federal oversight to remedy the identified risks.*

80. In a report on Job Corps issued by GAO last year, survey data revealed a notable discrepancy between the views of Job Corps staff and Job Corps students on drug use at centers. While safety and security staff from all six centers surveyed considered drug use a minor concern on their campuses, about one third of the students responding to the survey indicated that drugs were getting onto campuses and that the screening procedures were not adequate. What actions has DOL taken to prevent drugs from getting onto Job Corps campuses?

Response: *The Department requires all Job Corps centers to develop protocols to regulate campus entry and exit for students, staff, and visitors, which involves screening for any unauthorized goods including drugs. Job Corps has invested in screening tools such as x-ray machines and tests that detect THC in vape pens. Job Corps has also instituted a campaign with corresponding training to increase awareness among staff and students about the dangers of fentanyl. Job Corps continues to leverage its 24/7 Safety Hotline, which offers multiple ways for students, staff, or visitors to report suspected possession, consumption, or distribution of drugs, which is investigated immediately.*

FY 2025 Budget Request

81. DOL's FY 2025 budget request $8 billion in mandatory spending for a new "Career Training Fund."

    a. How would this not be duplicative of the *Workforce Innovation and Opportunity Act* system and layer yet another federal workforce development program upon the existing maze of programs?

Response: *The Career Training Fund would supplement Workforce Innovation and Opportunity Act (WIOA) programs by providing resources to deliver high-quality training at scale in specific sectors. WIOA funding is distributed by statutory formula to each State across the nation to ensure that jobseekers in every State have access to career counseling and supports. But this fund would target 50-100 regions with significant infrastructure and other investments that are also experiencing high poverty levels, locations where a sector-specific training investment could fill employers' needs for skilled workers, and where the workers in the community could experience significant economic mobility. This fund would provide up to $10,000 per worker which exceeds the existing amount of funding that current funding levels of WIOA can support. Rather than creating another layer, workforce development boards funded through WIOA would be central in the partnerships of employers, community colleges, high schools, and community-based organizations that would administer the Fund to ensure alignment and to avoid duplication of WIOA-funded activities. The Training Fund would increase the reach and scope of the WIOA formula funding to help ensure that individuals acquire in-depth skills and technical knowledge necessary to meet employers' demand for skilled workers.*

    b. Can you explain how funding under your proposed "Career Training Fund" would reach employers and jobseekers, and how DOL would choose which industries get funding and which do not?

Response: *The Career Training Fund would provide up to $10,000 per worker to support the development and expansion of public-private partnerships, including employers, to equitably deliver high-quality training for job seekers. The Department intends to award these funds competitively, including considering national level labor market data on skill needs and reviewing applicants' use of labor market information and employer input to select its targeted industry. The Fund would target regions with significant Invest in America investments that spark a demand for skilled workers in certain sectors, such as infrastructure, clean energy, and advanced manufacturing, all sectors that are growing and in demand. Through the competitive process and in consultation with the Departments of Commerce and Education, the Department will ensure that the sector-based training is proven to deliver increases in earnings, including for underserved workers, offer industry-recognized credentials, and lead directly to good jobs and careers.*

Wagner-Peyser Staffing

82. Last year, DOL issued a final rule that stripped most states of the flexibility to choose the appropriate staffing model for the Employment Service authorized under the *Wagner-Peyser Act*, yet allowed Colorado, Massachusetts, and Michigan to continue using alternative staffing models under their longstanding waivers. The final rule also asserted that DOL will conduct rigorous multistate evaluations that include these three states with the waivers.

    a. Do you have a timeline for when the evaluations will be completed and published?

Response: *The Department will competitively procure a third-party evaluator this year. The Department and its third-party evaluator will develop an evaluation methodology and information collection, and then collect and evaluate quantitative and qualitative data. The Department projects that the evaluation required by the final rule will be completed and published in approximately calendar year 2028.*

    b. Is DOL committed to following the evidence and expanding staffing flexibility to more states if the evaluations find Colorado, Massachusetts, or Michigan's approaches to be successful?

Response: *The Department will take the results of the evaluation and the broader evidence base into consideration as it decides the best approach to implement labor exchange services in the future.*

Miscellaneous

Joint Work with the NLRB

83. DOL has an MOU with the NLRB on information sharing, joint investigations and enforcement, and outreach.

    a. What type of information has DOL shared with the NLRB?

b. What information has DOL received from the NLRB?

c. How does DOL ensure that the information it exchanges with the NLRB does not compromise personally identifiable information of workers and businesses?

Response to a. - c: *The Department's Office of Labor-Management Standards (OLMS) has a Memorandum of Understanding (MOU) and a Memorandum of Agreement (MOA) on information sharing with the National Labor Relations Board (NLRB) regarding enforcement responsibilities. As part of these agreements, OLMS and the NLRB share a semiannually updated list of contact information for each agency's field office, national office directors, and key staff. Each agency provides the other with information suggesting potential noncompliance with applicable law, information on coordinating investigative activities involving matters under both agencies' authority, and notification when shared information is used in an investigation by the NLRB or results in the initiation of an investigation by OLMS. Upon request, OLMS provides the NLRB information regarding investigations into the existence of a labor organization and on special report cases. The NLRB provides OLMS with updates on basic information involving union representation election cases and unfair labor practice cases, as well as OLMS' specific requests for case files. OLMS complies with all laws, regulations, and directives regarding the safeguarding of PII and requires that any information exchanged with the NLRB maintains confidentiality.*

The Department's Wage and Hour Division (WHD) entered into an MOU with the NLRB on December 8, 2021. This agreement encourages greater coordination between the agencies through relevant information sharing, joint investigations and enforcement activity, training, education, and outreach. Through this MOU, WHD and the NLRB may share enforcement-related information or coordinate enforcement efforts about employer practices that might simultaneously violate multiple laws that each agency enforces. WHD and NLRB staff meet regularly to discuss efforts under the MOU and have provided cross-training for each agency's staff to improve understanding of each other's laws.

The NLRB and the Occupational Safety and Health Administration (OSHA) executed an MOU on October 31, 2023, to facilitate interagency cooperation and coordination between the agencies, including by establishing a process for information sharing and referrals, training, and outreach concerning the National Labor Relations Act (NLRA) and the OSH Act, particularly concerning OSHA's anti-retaliation provision under Section 11(c), 29 U.S.C. 660(c). Under the MOU, OSHA has shared information in support of its enforcement mandates, particularly related to anti-retaliation matters. In addition, OSHA also recently provided the NLRB an "OSHA 101" presentation describing OSHA's Safety and Health Programs and Whistleblower Protection Program.

The MOU specifically addresses Confidentiality and Disclosure requirements for protecting shared information from disclosure to the public or unauthorized persons where federal laws protect such information. This section includes protocols for each party to take steps to ensure such information, including protected personally identifiable information (PII) of individuals as well as sensitive business information, is not inadvertently disclosed.

Artificial Intelligence (AI) Principles/Guidance

84. On October 30, 2023, President Biden issued an Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence. Among other things, the Executive Order directed the Secretary of Labor to "publish principles and best practices for employers that could be used to mitigate AI's potential harms to employees' well-being and maximize its potential benefits" within 180 days of the Executive Order's publication.

    a. Please describe the extent to which DOL engaged with stakeholders as it developed the Department's AI principles and best practices document.

Response: *The Department of Labor engaged extensively with stakeholders from various organizations during the development of our AI Principles, which were published on May 16, 2024. In mid-December 2023, the Department hosted three virtual listening sessions to hear directly from stakeholders and the public to inform the principles. During these listening sessions, we did not ask particular questions but informed participants that we were interested in learning about the three topic categories detailed in the Executive Order: Job-displacement risks and career opportunities related to AI; Labor standards and job quality implications of AI in the workplace, including those related to equity, protected-activity, compensation, and health and safety; and Implications of employers using AI to collect data on workers, including issues such as data privacy, ownership and transparency. The first session, held on Wednesday, December 13, 2023, was a comprehensive and open-ended session. The second session, held on Thursday, December 14, 2023, was focused on hearing from AI developers and employers. The third session, held on Friday, December 15, 2023, focused on hearing from workers, unions, worker advocates, and AI researchers. There were over 1,700 people who registered across the three listening sessions.*

The Department also met with many stakeholders in the development of the AI Principles. These stakeholders included employers, employer associations, AI developers and technology businesses, unions, state government officials, researchers and academics, and worker advocates.

    b. Please identify what scholarly research and materials DOL reviewed in order to address both the potential harms and the potential benefits of AI?

Response*: The Department of Labor reviewed many other guidelines, principles, and best practices during the development of our AI Principles. These included other U.S. Government publications, such as:*

- *The "Blueprint for an AI Bill of Rights" from the White House Office of Science and Technology Policy*
- *The U.S. Department of Commerce National Institute of Standards and Technology "AI Risk Management Framework"*
- *The "Trustworthy AI Playbook" from the U.S. Department of Health & Human Services*
- *A June 2021 report from GAO called "Artificial Intelligence: An Accountability Framework for Federal Agencies and Other Entities,"*

- *The National Labor Relations Board General Counsel Memorandum GC 23-02, "Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights"*
- *Resources from the Equal Employment Opportunity Commission "Artificial Intelligence and Algorithmic Fairness Initiative"*

The Department also reviewed information from non-governmental and academic sources, such as:

- *Partnership on Employment & Accessible Technology's (PEAT) "AI & Disability Inclusion Toolkit"*
- *Partnership on AI's "Guidelines for AI and Shared Prosperity: Tools for Improving AI's Impact on Jobs"*
- *A report by the UC Berkeley Labor Center, "Data and Algorithms at Work: The Case for Worker Technology Rights"*
- *A report from the Harvard Berkman Klein Center, "Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-Based Approaches to Principles for AI"*
- *A policy memo by Daron Acemoglu, David Autor, and Simon Johnson, "Can we Have Pro-Worker AI? Choosing a path of machines in service of minds"*
- *The Future of Privacy Forum's "Best Practices for AI and Workplace Assessment Technologies"*

In addition, the Department reviewed AI ethics guidelines and reports from businesses and union collective bargaining agreements with AI or automated technology provisions, such as:

- *Microsoft's "Governing AI: A Blueprint for the Future" and "Microsoft Responsible AI Standard, v2"*
- *IBM's AI ethics "Principles for Trust and Transparency"*
- *"Adobe's Commitment to AI Ethics"*
- *A Harvard Business Review article by Salesforce leaders Kathy Baxter and Yoav Schlesinger on "Managing the Risks of Generative AI"*
- *Google's post "Launching the Digital Futures Project to support responsible AI"*
- *Indeed's "AI at Work Report: The People Behind the Jobs GenAI is Most- and Least-Poised to Change — A Look at Age, Gender, and Race"*
- *LinkedIn's Economic Graph, "Preparing the Workforce for Generative AI: Insights and Implications"*
- *The Writers' Guild of America 2023 Minimum Basic Agreement*
- *The SAG-AFTRA 2023 Collective Bargaining Agreement summary*
- *The Teamsters-UPS 2023 Collective Bargaining Agreement*

c. Does DOL plan to release additional AI guidance beyond the April 29, 2024, Field Assistance Bulletin from WHD and the April 29, 2024, "Artificial Intelligence and Equal Employment Opportunity for Federal Contractors" released by OFCCP?

Response*: The Department may issue additional AI guidance in the future in response to stakeholder feedback, changes in the legal landscape on this issue, and/or the evolution of the use of AI in the workplace.*

Regulatory Analysis

85. Small businesses are the economic engine of the United States and generate most new jobs. It is important for all federal agencies, including DOL, to consider the effects on small businesses when developing regulations. However, SBA's Office of Advocacy has submitted at least eight comment letters in response to DOL regulations that failed to analyze the impact of the Department's rules on small businesses.

    a. Please explain why DOL consistently fails to conduct adequate regulatory flexibility analysis.

***Response**: DOL believes that our Regulatory Flexibility Analyses (RFAs) have been adequately conducted in accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121. In developing our RFAs, we have always endeavored to capture and estimate the economic impacts of the Department's rules on small businesses. However, in some instances, the Department has not been able to identify sufficient data and information to quantify estimates of secondary impacts, such as indirect costs and ripple effects on small businesses, with an acceptable degree of confidence in our estimates. When that has occurred, we qualitatively discuss the impacts in detail but cannot quantify those impacts given the data limitations. In some cases, SBA's Office of Advocacy does not fully concur with the Department's initial approach and assumptions in estimating the impact of the Department's rules on small businesses. Therefore, the Department strives to address concerns raised by SBA's Office of Advocacy to the greatest extent possible during OMB review. We firmly believe that our final RFAs have adequately been conducted based on available data and reasonable assumptions.*

    b. What are your plans for ensuring that future rulemakings will include adequate regulatory flexibility analysis?

***Response**: The Department will work closely with the SBA's Office of Advocacy to ensure that it fully understands concerns they raise in response to the Department's initial regulatory flexibility analyses. We will continue to solicit public comments and inputs from small businesses to accurately incorporate their feedback on the Department's regulatory flexibility analysis. We will also make our best efforts to reach out to small businesses prior to formulating the Department's initial regulatory flexibility analysis to identify information and data that will allow us to accurately measure the impact of the proposed rule on small businesses.*

Electric Vehicle Infrastructure Training Program

86. Under §680.106(j)) titled "Installation, operation, and maintenance by qualified technicians of electric vehicle charging infrastructure," at least one electrician on a project must have received certification from the Electric Vehicle Infrastructure Training Program

or have "graduated from or received continuing education certificate from a registered apprenticeship program for electricians that includes charger-specific training and is developed as a part of a national guideline standard approved by DOL in consultation with the U.S. Department of Transportation." What was DOL's role in drafting this requirement in the final rule?

Response: *The Department provided subject matter expertise on registered apprenticeship programs as requested by the U.S. Department of Transportation, but DOL did not participate in the drafting of the foregoing final rule text by the DOT.*

Equity Versus Equality

87. You speak often about the importance of equity rather than equal opportunity or the equal protection of the laws.

    a. What is the difference between equity and equal opportunity?

Response: *"Equal opportunity" and "equity" are interrelated concepts. The phrase "equal opportunity" is typically used to describe the terms of laws that prohibit discrimination on certain bases (e.g., depending on the law, race, color, religion, sex, age, disability, or national origin). Equal opportunity laws set forth the minimum legal standards that employers and other covered entities must satisfy to not engage in unlawful discrimination.*

The related term "equity" refers to "the consistent and systematic treatment of all individuals in a fair, just, and impartial manner, including individuals who belong to communities that often have been denied such treatment." See Executive Order 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (EO 14091). Equity cannot be achieved if employers and others are not in compliance with equal opportunity laws. If equal opportunity law is fully satisfied, equity is promoted. However, equity is a broader concept that recognizes that not all individuals start on equal footing. Equity may encompass-efforts to identify and eliminate systemic biases or barriers that have prevented or hindered certain groups from accessing the benefits of a DOL-funded program.

    b. Does equity mean equal outcome?

Response*: To determine the success of certain equity measures, it may be necessary to evaluate outcomes so that entities can assess whether their equity measures are effective. However, equity does not mean or guarantee equal outcomes. Efforts to advance equity aim to ensure that all applicants and workers are treated fairly and impartially, without barriers to equal access to employment opportunities and resources.*

    c. Does seeking equity in the way that you speak about it conflict with the Constitution's fundamental principle of equal protection of the laws?

Response*: No. Section 1 of the Fourteenth Amendment of the United States Constitution guarantees equal protection of the laws to all persons. There is nothing inherent in the concept of equity that violates the Equal Protection Clause. In fact, "the consistent and systematic fair, just,*

and impartial treatment of all individuals" (see definition of "equity" in EO 14091) is wholly consistent with the Equal Protection Clause's purpose of ensuring that laws in the United States protect and preserve everyone's rights equally.

Forced Labor in China

88. Under the *Uyghur Forced Labor Prevention Act* (UFLPA), the Bureau of International Labor Affairs (ILAB) is tasked with the critical role of monitoring forced labor in the People's Republic of China. However, ILAB employs an insufficient number of cleared personnel, and it relies on open-source tools such as Google translate. It seems clear that ILAB does not have the intelligence capabilities necessary to implement the UFLPA. Please describe why the Biden administration believes ILAB is qualified to carry out this important task.

Response: *ILAB has over 75 years of experience working at the intersection of labor rights, human rights, and the global economy and is uniquely positioned to guide the U.S. government's efforts to address forced labor throughout global supply chains. ILAB is the leading provider of in-depth research on global labor abuses.*

ILAB has a team of over 160 professionals, with a wide range of expertise – speaking over 20 languages, including Spanish, French, Portuguese, Arabic, Mandarin, Thai, Hindi, Romanian, and Albanian, among others, representing the largest group of government officials specifically dedicated to international labor issues within the U.S. government. Over half of ILAB staff have PhDs, JDs, or Masters degrees in a wide range of subjects, and ILAB staff have lived and/or worked on six continents.

ILAB's UFLPA team consists of staff with expertise in research, data collection, and legal review and analysis. They have extensive experience carrying out in-depth analysis of complex trade and corporate information, as well as state-imposed forced labor schemes. The team also has Chinese language skills. Moreover, all of ILAB staff dedicated to the Forced Labor Enforcement Task Force and the UFLPA have the appropriate clearance levels.

Since the UFLPA's enactment in December 2021, ILAB has played a significant role in its implementation including serving as a co-lead in development of the UFLPA Strategy, as well as co-chair of the UFLPA Entity List Subcommittee, which leads research and identification of new entities to add to the UFLPA Entity List. To conduct this research, ILAB relies on technical software and supply chain tracing subscription platforms, in addition to open-source data.

Rep. Joe Wilson (R-SC)

1. DOL's recent final rule on the H-2A guest worker program eliminates the 14-day period for adjusting payrolls following DOL's release of the adverse effect wage rate. Instead, the rule requires employers to adjust their pay rates immediately. What do you say to farmers who have told DOL that eliminating the 14-day adjustment period will be impossible for them to implement?

Response: *The Department believes this final rule will clarify employer wage obligations, provide sufficient notice of AEWR updates, and ensure that agricultural workers are paid at least the AEWR in effect at the time the work is performed, without new or additional impact to employers' ability to budget and plan. The rule returns to longstanding practice prior to 2018, ensuring agricultural workers are paid at least the most current AEWR when work is performed, thereby preventing the harm caused through even a modest delay in receiving a wage increase. Immediate implementation of updated AEWRs also better aligns with the Department's statutory mandate to prevent adverse effect on the wages of workers in the United States similarly employed by keeping wages paid to H-2A workers and workers in corresponding employment consistent with wages paid to similarly employed workers.*

The Department is sensitive to the concerns commenters expressed that payroll systems may not allow adjustments to be made instantaneously and that some flexibility should be provided to permit difficult payroll adjustments and provide prompt retroactive payment of wages. In order to address those concerns, the final rule provides practical flexibility by permitting an employer to pay workers back wages for the updated AEWR owed on the pay date for the next pay period, if the employer demonstrates it is not possible to update payroll systems in the current pay period.

The final rule also ensures employers have ample notice of upcoming changes to the AEWR. The vast majority of employers are subject to the U.S. Department of Agriculture (USDA) Farm Labor Survey (FLS) AEWR and will continue to have the opportunity to view and assess the impact of the updated AEWRs prior to their publication by the Department's Employment and Training Administration's (ETA) Office of Foreign Labor Certification (OFLC) Administrator in the Federal Register on or around January 1. USDA typically publishes the FLS in late November showing the wage data findings that become the new AEWR for the field and livestock workers (combined) occupational grouping. Similarly, employers of the limited set of workers subject to the Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) AEWR will be able to view updated wages when BLS publishes its OEWS data each spring, which contains the wage data that will become the new OEWS AEWRs on or around July 1. Moreover, the Department will provide employers advance notice of these AEWR changes through an announcement on the OFLC website, prior to publication of a notice in the Federal Register which formally adopts the wage survey results as AEWRs.

Setting the effective date of updated AEWRs as the date of publication in the Federal Register is a return to longstanding prior practice. The duty to pay an updated AEWR where it is higher than the other wage sources is not a new requirement, nor is the requirement to pay an increased AEWR immediately upon publication in the Federal Register. Employers participating in the H-2A program historically have been required to offer and pay the highest of the AEWR, the prevailing wage, or the Federal or State minimum wage at the time the work is performed, and employers were required to make these adjustments immediately for decades prior to recent practice starting with the AEWRs for 2018 that allowed a minor period for wage adjustment. Neither program experience nor comments on the proposed rule demonstrated that a longer adjustment period would be necessary to avoid significant operational burdens on employers.

Rep. Tim Walberg (R-MI)

1. At the Workforce Protections Subcommittee hearing in February, I asked Wage and Hour Division Administrator Jessica Looman about the clarity that could be provided under the Department of Labor's Independent Contractor Rule to industries such as real estate agents and direct sellers who are specifically classified as independent contractors under the Internal Revenue Code. Ms. Looman expressed commitment to developing guidance and resources to assist these legacy independent contractors in compliance.

    a. Has the Small Entity Compliance Guide or Frequently Asked Questions document been reflected to provide this clarity?

    b. Can you please provide an update on the outreach to stakeholders?

***Response to a. and b**.: The Department continues to develop materials and resources to provide information to stakeholders related to the final rule, Employee or Independent Contractor Classification Under the Fair Labor Standards. In addition to the Small Entity Compliance Guide and Frequently Asked Questions, the Department has developed information for potential Freelancers. Additional materials and resources will be provided over the next several months and will continue to be updated over time.*

Rep. Rick Allen (R-GA)

1. Your Department's proposed rule on apprenticeships seeks to drastically expand federal control over apprenticeships, including by empowering DOL to create apprenticeship standards and curriculum.

    a. Can you explain how DOL's Office of Apprenticeship has the capacity and expertise to write curriculum that is aligned with the ever-changing demands of industry?

    b. North America's Building Trades Unions commented that currently, curriculum design is "left to the plan sponsors, who are in the best position to craft a curriculum that fits their industry" and that the proposed rule "would permit DOL for the first time ever to control the detailed substance of an apprenticeship program's curriculum." Why is your Department proposing to dictate apprenticeship curriculum to employers?

***Response to a. and b.:** The Department notes that its proposal is focused on facilitating industry input on occupations suitable for registered apprenticeship programs and identifying the skills and competencies necessary for apprentices to achieve proficiency in an occupation. Additionally, as described in the NPRM, the Department proposed codifying a proactive step to seek industry feedback on occupations in which registered apprenticeship may not be widespread, which may be used by employers to accelerate the registration process. While, ultimately, the Department's Employment and Training Administration is responsible for approving the occupations, and similarly the proposed National Occupational Standards, the intent is that they are driven by industry demands*

and not developed in isolation from industry demands and makes it easier for employers working across multiple states to register their apprenticeship programs.

The Department is evaluating the comments received during the comment period, which closed on March 18, 2024. The Department takes seriously its obligation to consider any "written data, views, or arguments" (see 5 U.S.C. 553(c)) submitted by commenters during the open comment period.

Rep. James Comer (R-KY)

1. In February 2023, DOL and HHS announced a joint Interagency Task Force to Combat Child Labor Exploitation. Can you provide the dates of when the Task Force has met and how it plans to tackle the prevention of child labor, specifically through the creation of an age verification tool?

***Response**: The Department recognizes the need for a whole-of-government approach in combating unlawful child labor and is committed to working closely with our interagency partners. The Department of Labor-led Interagency Task Force to Combat Child Labor Exploitation (Task Force) participants include the Departments of Agriculture, Commerce, Education, Health and Human Services, Homeland Security, Justice, and State, all of which are taking concrete steps to improve cross-training, outreach, education, and health outcomes of children that could be subject to child labor. The Department is committed to working closely with the members of the interagency taskforce and will do everything within its power to use interagency resources to enforce the law and protect affected children and their families.*

The Department is in ongoing communication with members of the Task Force and meets regularly with participating agencies to advance specific workstreams. The Department also meets regularly with HHS to implement the DOL-HHS MOA. Further, in addition to the ongoing engagement with individual members of the Task Force, the Task Force members come together across agencies to share information and updates on a bi-monthly basis and have met as a full group eight times since the Task Force's inception.

The Department does not direct employers to use particular types of identification documents and notes that employers may use a range of information to identify whether they are employing children in violation of child labor laws. The Department will continue to do its part to ensure that employers understand their obligations under the law.

Rep. Burgess Owens (R-UT)

1. Acting Secretary Su, I understand you are a big proponent of apprenticeships. As you know, apprenticeships are jobs that connect "paid on-the-job" learning with related classroom-based instruction. When selecting apprentices, employers are therefore making employment decisions.

    a. Under federal civil rights law, is it ever ok for an employer to discriminate against employment hiring based on race?

Response: *Discrimination on a protected basis, such as race, is prohibited in apprenticeship, as well as any other employment setting or federally sponsored training. The Department's regulations at 29 CFR part 30 incorporate the legal standards and defenses applied under Title VII. The regulations make clear that it is unlawful for a sponsor of a registered apprenticeship program to discriminate against an apprentice or applicant for apprenticeship on the basis of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability with regard to any employment decision and with respect to any benefit, term, condition, or privilege associated with apprenticeship.*

b. Your proposed rule on apprenticeships requires states to set diversity quotas and for employers to conduct race-based recruitment. There are very well-established Federal Laws and penalties against discrimination based on Race, creed, or color. It appears your Department is aggressively forcing states and employers to break federal nondiscrimination laws with your racist DEI mandates. Also, how do you square these mandates with the Supreme Court's decision deeming affirmative action, is judging a person based on skin color unconstitutional?

Response: *The Department is strongly committed to ensuring opportunity and access for all workers regardless of their race, sex, ethnicity, or disability status. The Department's NPRM, National Apprenticeship System Enhancements, 89 Fed. Reg. 3118 (Jan. 17, 2024), does not seek to establish or enforce any diversity quotas or require program sponsors to take any race-based actions. The NPRM emphasizes the importance of ensuring that Registered Apprenticeship (RA) programs are available and accessible to all workers, and that workers from all communities, including those that may be underserved, have the support they need to succeed in an RA program. This aim is consistent with nondiscrimination laws, including the standards set out in 29 CFR part 30, and does not require or permit states or sponsors to take race-based actions. Part 30 of the Department's regulations expressly prohibit any such race-based employment decisions and forbids racial quotas, preferences, or set-asides in RA programs.*

Among the updates proposed in the NPRM was a requirement that sponsors submit a written plan for the equitable recruitment and retention of apprentices, including those from underserved communities, and a requirement that states seeking federal recognition as a State Apprenticeship Agency (SAA) submit a strategic plan that included a narrative regarding promoting registered apprenticeship access to underserved communities. These proposals are race-neutral. Elsewhere in the NPRM, the Department proposed enhancing the alignment between its labor standards regulations for RA programs at 29 CFR Part 29 with its EEO regulations for RA programs at 29 CFR Part 30. This further reinforces that the proposed DEIA-related provisions were in keeping with the nondiscrimination requirements of those regulations.

The Supreme Court decision in Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023), does not bear directly on the Department's proposed rule as that decision related to race-based decisions in higher education admissions programs. As described above, the Department's regulations at 29 CFR part 30 expressly prohibit race-based employment decisions and forbid the use of racial quotas, preferences, or set-asides in RA programs. The strategic planning and recruitment

elements in the Department's proposed rule are not race-based actions but are instead designed to ensure the inclusive selection practices of all current and future apprentices.

The Department is currently evaluating the comments received during the comment period, which closed on March 18, 2024. The Department takes seriously its obligation to consider any "written data, views, or arguments" (see 5 U.S.C. 553(c)) submitted by commenters during the open comment period.

2. The ability of states to operate their own safety and health programs is allowed by the Occupational Safety and Health Act (OSH Act). Some individual states successfully operated their own workplace safety plan, with monitoring by OSHA. This flexibility is granted as long as the State plan is "at least as effective as OSHA" in protecting workers. Utah is one of 22 state-plan states. The intent behind these individual state plans is to grant flexibility to states as long as the results are good. Utah has proven over ***many years*** that it is in fact **VERY** effective at regulating workplace safety… This is despite having a lower penalty structure than OSHA currently has. One of the challenges Utah is having from your OSHA staff is efforts to force increased penalties for workplace violations to match the OSHA penalties. That strikes me as overly prescriptive.

    a. If Utah's penalties and its work with employers is showing results that are at least as effective as OSHA's, why is your agency attempting to force them to conform to DC's bar. In other words, why is OSHA attempting to fix a Utah model that is working and has been for years?

Response*: Section 18 of the OSH Act permits States to assume responsibility for the development and enforcement of their own occupational safety and health standards, but only through an OSHA-approved State Plan that satisfies all the requirements of section 18(c). State Plans are not required to adopt requirements that are identical to federal OSHA, but they must be "at least as effective." OSHA has a responsibility under section 18 of the OSH Act to ensure that State Plans enforce standards in a manner that is "at least as effective" as federal OSHA (see 29 USC 667(c)(2), (f)). OSHA first promulgated "indices of effectiveness" through rulemaking in 1971, and these indices contain several criteria that OSHA evaluates to make this determination, including effective penalties. (See 29 CFR 1902.4(c)(2)(xi).) State Plans are required to maintain maximum and minimum civil penalties that are at least as effective as federal OSHA's penalty levels per section 18(c)(2) of the OSH Act and these OSHA regulations.*

Previously Congress established OSHA penalty levels in the OSH Act, and State Plans, including Utah, adopted penalty levels that matched. In 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which amended the Federal Civil Penalties Inflation Adjustment Act of 1990, and required OSHA, as well as other agencies, to make a one-time adjustment to their federal civil penalties, and then to make annual adjustments for inflation. OSHA published a rule on July 1, 2016, raising its maximum and minimum penalties. Thereafter, as required by that law, OSHA has increased its penalties annually to adjust for inflation as measured by the Consumer Price Index. Each year, federal OSHA increases its minimum and maximum penalties in January, and the State Plans have six months, until July, to adopt penalty levels that are at least as effective as OSHA's penalty increases. (See 29 CFR 1953.4.)

b. That seems to defeat the purpose of state plan flexibility. Can you talk about how you view OSHA's role here and what the Department of Labor has done under your leadership to promote flexibility?"

***Response**: OSHA recognizes that some State Plans have flexibility to adopt more protective requirements or standards for hazards not currently addressed by federal OSHA standards. OSHA encourages these State Plans' efforts to enhance worker protections. OSHA can also learn helpful information from State Plans in such circumstances. Where State Plans adopt requirements that are different than federal OSHA's requirements, OSHA conducts an evaluation to determine whether such requirements are at least as effective as federal requirements.*

The following is a non-exhaustive list of a few notable examples where State Plans have been afforded flexibility in adopting worker protection standards and rules in areas that federal OSHA currently does not have a standard:

- *The California, Washington, Oregon, and Minnesota State Plans have adopted standards to protect workers from heat hazards (the Minnesota State Plan's standard is limited to indoor places of employment.)*
- *Although State Plans must have the same requirements as federal OSHA for determining which injuries and illnesses are recordable and how they are recorded, nine State Plans have slightly different, at least as effective, provisions for certain other recordkeeping and reporting requirements (AK, CA, HI, KY, MD, OR, UT, VA, and WA). In fact, the Utah State Plan is a prime example where Utah Administrative Code R614-1-5.B.1 includes an 8-hour reporting requirement for all work-related fatality, disabling, serious, or significant injury, and any occupational disease (not just fatalities). In addition, for injuries or disease, the Utah rule does not require hospitalization, amputation, or loss of an eye to trigger the reporting requirement.*
- *The Washington, California, and Oregon State Plans each have a standard regulating the hazard of wildfire smoke.*
- *There are other State Plan specific standards in place throughout other states. For example, California's State Plan also has a standard to protect workers from workplace violence in healthcare. Virginia, Oregon, California, Maryland, and Michigan have standards for tree care work. Many of these are listed on OSHA's webpages for each State Plan, located at: https://www.osha.gov/stateplans.*

In addition, State Plans may provide compliance assistance that goes beyond the federal program. For example:

- *South Carolina OSH works with its Voluntary Protection Program sites to provide OSHA 10-hour training to high school students, through a formal program established by the State (federal OSHA does offer a similar program).*
- *The New York State Plan developed a new training "Firefighter Requirements: Myth vs. Fact." This was developed in response to questions that the New York State Plan had received over the years regarding the fire service, compliance with OSHA/NY standards, and to address the inconsistent information that the fire service has regarding the New York State Plan.*
- *The Virgin Islands State Plan developed a "Hurricane Survival Toolbox Kit" which is a three-part series that provides tools and guidance needed to prepare local agencies*

for a hurricane, as well as recovery operations.

- *The New Jersey State Plan has initiatives to ensure public employers and employees, particularly beach patrols, are aware of the risks involved when operating a surfboat or in a situation of increased risk of lightning strike. As part of this initiative, NJ Public Employees Occupational Safety and Health (PEOSH) issued hazard alerts on preventing worker injuries and deaths involving surfboats and lightning strikes.*
- *Some State Plans are addressing the hazards associated with growing, harvesting and processing cannabis. For example, Michigan has a State Emphasis Program and has held educational sessions and prepared outreach materials on the topic.*

Representative Bob Good (R-VA)

1. We have seen a growing trend of antisemitic business practices since Hamas brutally attacked Israel on Oct 7. The Boycott, Divestment, Sanctions, or BDS, Movement is an economic and political effort created to harm Israel. It encourages companies, universities, and governments to refuse to offer Israel any financial support. This movement has spread like wildfire across college campuses. Radical college students have demanded that university endowments be divested from any source that could have a connection to Israel. In 2022, the Department of Labor issued a rule that allows fiduciaries to consider Environmental, Social, and Governance, or ESG, factors when analyzing investments.

    a. Does anything in the rule prevent plan trustees or fiduciaries from following the antisemitic BDS Movement when analyzing investments?

    b. Does the Department of Labor plan to make any adjustments to the rule so that it isn't used to harm our greatest ally in the Middle East, Israel?

Response to a. and b.*: The Department's final rule reflects the core principle that the duties of prudence and loyalty require ERISA plan fiduciaries to focus on relevant risk-return factors. The rule firmly forbids fiduciaries from subordinating the financial interests of plan participants and beneficiaries to objectives unrelated to those financial benefits. Thus, fiduciaries cannot sacrifice investment return or take on additional investment risk to advance any other objectives. At this time, the Department does not have plans to revisit the rule.*

2. On August 23, 2023, your department issued a final rule that updates Davis-Bacon policies.

    a. Why is this Biden Administration supporting a law with a racist history?

    b. Are you concerned that Davis-Bacon discriminates against 89 percent of construction workers who have not elected to join a union?

Response to a. and b*.: The Davis-Bacon and Related Acts (DBRA) help ensure that local wage standards are protected and preserved, which benefit all workers regardless of their sex or race. The purpose of the DBRA is to ensure that workers on federal and federally assisted construction projects are being paid fairly across the board, reducing pay discrimination. In issuing the*

Updating the Davis-Bacon and Related Acts Regulations final rule, the Department seeks to prevent contractors from paying substandard wages to any DBRA-covered workers, therefore giving all such workers a pathway to a good job.

The DBRA protects locally prevailing wages, which may, depending on the locality and classification, reflect collectively bargained wage rates, non-collectively bargained rates, or a combination of the two. All contractors compete on equal footing on DBRA-covered contracts because they are all required to pay at least the prevailing wage.

3. One long-standing criticism of Davis-Bacon is that it uses flawed wage data to determine the "prevailing wage," a metric set by the Department of Labor. The new rule did not correct the way the prevailing wage is calculated, in spite of criticism from DOL's Inspector General and the Government Accountability Office.

    a. Why did the Department fail to make any adjustments to the wage survey in the new rule?

    b. Will you commit to revisiting the new Davis-Bacon rule to make improvements to the broken wage-survey process that takes all workers into account, including those who choose not to be in a union?

***Response to a. and b.**: The final rule, Updating the Davis-Bacon and Related Acts Regulations, improves the Department's ability to administer and enforce DBRA labor standards more effectively and efficiently. As the first comprehensive regulatory review in nearly 40 years, the final rule will promote compliance, provide appropriate and updated guidance, and enhance the regulations' usefulness in the modern economy.*

When conducting Davis-Bacon wage surveys, the agency notifies contractors and other interested parties and strongly encourages participation in construction wage surveys conducted by the Department. Through this voluntary survey process, the Department gathers wage rate data paid to workers performing work on construction projects in the local community. Using this survey information, WHD determines the local prevailing wage for the various classifications of construction workers.

The Department is making several efforts to increase participation in wage surveys. These efforts include simplifying the data submission process with the revised wage survey form, and deploying a comprehensive communications plan that involves issuing press releases, using social media platforms, and increasing email and direct communication with stakeholders. Prior to and during the survey collection period, survey briefings are conducted for local stakeholders and interested parties to provide guidance on the survey process to further increase survey participation.

Rep. Julia Letlow (R-LA-05)

1. In February 2023, the Departments of Labor and Health and Human Services announced a joint Interagency Task Force to Combat Child Labor Exploitation (Task Force). Can you elaborate how often the Task Force has met and, if so, how/if it plans to tackle preventing

child labor at root causes, specifically through the creation and development of age verification tools?

***Response**: The Department recognizes the need for a whole-of-government approach in combating unlawful child labor and is committed to working closely with our interagency partners. The Department of Labor-led Interagency Task Force to Combat Child Labor Exploitation (Task Force) participants include the Departments of Agriculture, Commerce, Education, Health and Human Services, Homeland Security, Justice, and State, all of which are taking concrete steps to improve cross-training, outreach, education, and health outcomes of children that could be subject to child labor. The Department is committed to working closely with the members of the interagency taskforce and will do everything within its power to use interagency resources to enforce the law and protect affected children and their families.*

The Department is in ongoing communication with members of the Task Force and meets regularly with participating agencies to advance specific workstreams. The Department also meets regularly with HHS to implement the DOL-HHS MOA. Further, in addition to the ongoing engagement with individual members of the Task Force, the Task Force members come together across agencies to share information and updates on a bi-monthly basis and have met as a full group eight times since the Task Force's inception.

The Department does not direct employers to use particular types of identification documents and notes that employers may use a range of information to identify whether they are employing children in violation of child labor laws. The Department will continue to do its part to ensure that employers understand their obligations under the law.