



January 11, 2022

The Honorable Patty Murray
Chair
Committee on Health, Education,
Labor and Pensions
United States Senate
Washington, DC 20510

The Honorable Richard Burr
Ranking Member
Committee on Health, Education,
Labor and Pensions
United States Senate
Washington, DC 20510

Re: Renomination of David Weil to Be Administrator of the Wage and Hour Division

Dear Chair Murray and Ranking Member Burr:

The U.S. Chamber of Commerce has concerns regarding the renomination of David Weil to be Administrator of the Wage and Hour Division (WHD) at Department of Labor (DOL).

As WHD Administrator during the Obama Administration, Dr. Weil advanced policy proposals on critical questions under the FLSA that would present significant challenges to employers and employees alike. Those proposals related to whether an employee would be exempt from overtime, finding joint employment relationships, and whether a worker is an employee or an independent contractor. His actions regarding these issues are detailed below.

Overtime Exempt Status under the FLSA: Dr. Weil promulgated a regulation that more than doubled the salary threshold for determining whether an employee is exempt from overtime from \$23,660 annually to \$47,476 annually. As a result, millions of employees who had enjoyed flexible hours and professional status were converted to non-exempt status and put on the clock. Surveys showed that many previously exempt employees valued the flexible hours and work schedules that exempt status provided. Furthermore, because the rule applied to all employers, some charitable non-profits could not afford to keep employees working the same hours and would have been forced to reduce the services they provide. The regulation was eventually struck down by a federal judge in Texas who ruled that the new threshold was so high it rendered moot the salary test for exempt status. The Trump Administration's DOL promulgated a new regulation establishing the current salary threshold of \$35,568, a significant increase and a level the business community supports. We are concerned that Dr. Weil would again seek to unnecessarily raise this salary threshold.

Joint Employment Under the FLSA: Whether two employers are considered joint employers is a critical question when one company contracts with another for services, and is also raised in the context of franchising relationships. If they are considered joint employers, the hiring company, or franchisor, can be held liable for the other employer's FLSA violations. While Administrator of WHD, Dr. Weil issued an Administrator's Interpretation (AI) on finding joint employment under the FLSA. Dr. Weil's AI determined a joint employment relationship existed even when one employer had only "indirect control" of the other employer's employees, such as in a staffing arrangement where the so-called joint employer did not control work rules, hours, or wages of the staffing company's workers. Such an open ended definition meant employers were more likely to be considered joint employers, which could reduce opportunities for small businesses to contract with other businesses to provide needed services. The AI was rescinded by the Trump DOL and replaced by a regulation that reset the terms for joint employment to require actual control of another employer's employees. That regulation has, unfortunately, been

rescinded by the Biden DOL, and if confirmed, Dr. Weil would likely promulgate a new regulation reflecting the troubling definition of joint employment in the AI he previously issued.

Employee versus Independent Contractor Classification Under the FLSA: Dr. Weil issued another AI that sought to clarify when a worker should be classified as an employee and when that worker can be considered an independent contractor. The AI relied on the “economic realities” test which includes several factors such as the nature and degree of the employer’s control; the permanency of the worker’s relationship with the employer; the amount of the worker’s investment in facilities, equipment, or helpers; the amount of skill, initiative, judgment, and foresight required for the worker’s services; the worker’s opportunities for profit or loss; and the extent of the integration of the worker’s services into the employer’s business. Under the AI, all of these factors were to be considered together, with no specific factor or factors being considered more important than the others. Because of this, an employer would never be able to tell whether they had properly classified a worker as an employee or an independent contractor until the WHD made the determination. The AI was rescinded by the Trump DOL and replaced with a balanced regulation that ordered the various factors so that employers would be able to properly classify a worker as an employee or independent contractor. That regulation, too, has been rescinded by the current DOL, restoring the previous state of confusion and uncertainty to classification of employees.

In addition to the economic realities test, another test for determining whether a worker is an employee or independent contractor is known as the ABC test. An individual is classified as an employee unless they satisfy all three prongs: A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact; B) the service is performed outside the usual course of the business of the employer; and C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed. The ABC test makes finding an independent contracting relationship exceedingly difficult. Dr. Weil stated at his confirmation hearing that an ABC test could only be implemented through legislation, not regulations. On this matter, we agree with Dr. Weil.

If confirmed, however, we are concerned Dr. Weil may seek to promulgate a regulation for determining independent contractor status under the FLSA that will reflect the AI he issued, which would perpetuate confusion and uncertainty for employers.

Thank you for considering our views as you consider Dr. Weil’s nomination.

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn Spencer", with a long horizontal flourish extending to the right.

Glenn Spencer
Senior Vice President
Employment Policy
U.S. Chamber of Commerce

cc: Members of the Senate Committee on Health, Education, Labor and Pensions