

American Federation of Labor and Congress of Industrial Organizations



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Via e-mail to: WHDPRAComments@dol.gov

Division of Regulations, Legislation,
and Interpretation, Wage and Hour
U.S. Department of Labor
Room s-3502
200 Constitution Avenue NW
Washington D.C. 20210

RE: Comments on Proposed Information Collection Request (ICR) for the Worker Classification Survey; Comment Request, 78 Fed. Reg. 2447 (Jan. 11, 2013)

Dear Acting Deputy Administrator Maxwell:

The AFL-CIO submits these comments in strong support of the Department of Labor's ("DOL") proposed information collection request for the Worker Classification Survey.

The AFL-CIO is a federation of 57 national and international unions with a total membership of approximately 12.2 million working men and women. Numerous affiliates of the AFL-CIO represent workers employed in industries in which misclassification is common. This misclassification harms the workers who are misclassified, harms law-abiding companies and their employees who must compete with firms that misclassify workers, and harms our economy as a whole. The AFL-CIO therefore strongly supports DOL's effort to gather more empirical data about employees' experiences with and knowledge of worker misclassification as an important step in DOL's continuing efforts to address this serious problem.

We provide the following detailed responses to the specific queries listed in the Notice:

Response to Question 1: The proposed information collection request is necessary to determine, and will assist DOL in devising, an appropriate response to the widespread problem of employee misclassification.

Numerous government and independent studies have confirmed what by now is indisputable: misclassification of employees as independent contractors is a significant and growing problem. *See* U.S. Government Accountability Office, Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention 10-14 (GAO-09-717; Aug. 2009) (summarizing previous federal studies); Richard Cordray, Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio 7-14 (Feb. 18, 2009) (summarizing results of studies in seven states).

Workers who are misclassified as independent contractors “are being deprived of overtime premiums and minimum wages, forced to pay taxes their employers are legally obligated to pay and are left with no recourse if they are injured or discriminated against in the workplace.” Statement of Seth D. Harris, Deputy Secretary, U.S. DOL, Statement before the Committee on Health, Education, Labor, and Pensions of the U.S. Senate (June 17, 2010). For this reason, “[m]isclassification is no mere technical violation. It is a serious threat to workers and the fair application of the laws Congress has enacted to assure workers have good, safe jobs.” *Ibid.*

Misclassification “creates an uneven playing field within many industries, with all law-abiding businesses being left at a competitive disadvantage by their very compliance with the law. Not only does this lead to general disrespect for the law, but also it creates perverse incentives for businesses facing vigorous competition to cheat in order to meet the artificially low prices of their dishonest competitors.” Cordray, Economic Impact of Misclassified Workers, at 2. The competitive advantage gained by dishonest employers who misclassify their employees is significant – one study estimates that companies that misclassify their workers expect to reduce labor costs by as much as thirty percent. Harris, Statement before the Senate HELP Committee.

Moreover, misclassification of employees “costs federal, state, and local governments the revenues that are expected and needed to fund public services and programs.” Cordray, Economic Impact of Misclassified Workers, at 2.

The AFL-CIO and its affiliate unions are all too familiar with the negative effects of employee misclassification. Union members employed by law-abiding employers face constant pressure on their wages and job security from dishonest competitors who flout the law by misclassifying employees as independent contractors. And employees of state, local, and the federal government, as well as the public at-large, have first-hand knowledge of the severe fiscal pressure faced by the public sector in part because of reduced tax revenues resulting from employee misclassification.

DOL's proposed information collection request is a vital step towards fashioning an appropriately comprehensive response to the widespread and damaging problem of employee misclassification. By determining the degree to which workers have knowledge of their own employment classification and the implications of that classification, DOL will be able to complement its current vigorous enforcement efforts against misclassification – efforts which the AFL-CIO applauds – with new policies to prevent future misclassification. Such policies should include, among other things, updating recordkeeping requirements under the Fair Labor Standards Act to enhance transparency, requiring employers to disclose to workers their status and how their pay is computed, and creating DOL notices that provide employees with information about misclassification and how to obtain remedies if they have been misclassified.

Response to Questions 2 & 3: DOL's methodology, which gathers information beyond the narrow legal tests of employee status, and which also focuses on ensuring that hard-to-reach workers are included in the survey, is valid. DOL could further enhance the quality and utility of the information collected by ensuring that the survey sample includes a representative complement of employees in industries DOL has identified as having the highest rates of misclassification.

By definition, many workers who are misclassified as independent contractors are vulnerable, low-paid, and often transient. The methodology used to survey such workers, therefore, must account for these facts. DOL's proposed survey methodology properly does so, both by gathering information indicative of employee status beyond that required by the narrow legal tests, and by ensuring that hard-to-reach workers are included in the survey.

With regard to the survey questions themselves, DOL appropriately seeks to gather a wide variety of information useful for determining “what people who work know about their employment type.” DOL, Worker Classification Survey, p. 4. The survey correctly includes questions that both seek to determine what workers know – and don't know –

about their employee classification status and the significance of that status, as well as what a respondent's actual employee classification status is. As to these latter questions, DOL appropriately gathers a wide range of information about the type of work respondents do that is indicative of employee classification status – such as the industry they work in, whether they are paid by their direct employer or a temporary agency or payroll company, whether they are a day laborer, etc., *see id.* at pp. 14-24 – as well as information more narrowly tailored to the legal tests of employee status, *id.* at pp. 25-31. We especially support the inclusion of survey questions concerning subcontracting and employment through temporary agencies and other job brokers, *id.* at 12-13 since these types of work arrangements are often used to obscure employee misclassification, making it difficult for workers to understand their classification status and the significance of that status.

In sum, the collection of these broader categories of information in the survey is valuable both because such information is highly probative of employment classification status and because it is the sort of concrete information that vulnerable workers are likely to be able to provide based on their own daily work experiences.

In terms of the methodology for determining the survey pool, we applaud DOL's decision to include a higher-than-typical percentage of cell phone numbers within the allocated phone numbers for the survey, a decision that is fundamental to the agency's efforts to contact the type of workers who are often misclassified, since cell phones are "much more effective . . . for reaching adults in the labor force racial and ethnic minorities, and low-income households." DOL Supporting Statement for Paperwork Reduction Act Submissions of Survey, p. 10 (citing Link, Michael, et al., "Reaching the U.S. Cell Phone Generation: Comparison of Cell Phone Survey results with an Ongoing Landline Telephone Survey." *Public Opinion Quarterly* 71:814-839 (2007)). We similarly support DOL's decision to conduct the survey in both English and, where appropriate, Spanish as crucial to reaching a representative pool of employees. DOL, Worker Classification Survey, p. 42.

We support DOL's decision to include in the survey sample individuals who have worked in the last thirty days rather than only those who have worked in the last week because "[g]iven current economic conditions, there [is a] concern that a 'did work for pay last week' reference period would potentially exclude workers of interest for the analysis," DOL, Collections of Information Employing Statistical Methods, pp. 1-2.

We also strongly support DOL's decision to use appropriately-tailored recruitment strategies to encourage survey participation by members of often hard-to-reach segments

of the workforce. For example, DOL has set forth a data collection methodology that includes: multiple attempts to contact survey respondents by telephone; conducting surveys at various times of the day and seven days a week to accommodate a variety of work schedules; providing respondents with the opportunity to schedule the interview at a convenient time; and the use of “interview converters” with extensive training in telephone interviewing to increase survey participation rates. DOL, *Collections of Information Employing Statistical Methods*, p. 11.

Further, we support DOL’s decision to utilize a small amount of remuneration to persuade cell phone users to participate in the survey and to compensate them for telephone charges incurred from such participation, as well as the use of this technique to encourage non-responders to participate in a short follow-up survey. DOL, *Supporting Statement*, pp. 10-11. Particularly with regard to cell phone users, we agree that the use of a small monetary incentive “will help minimize the risk of nonresponse bias, achieve a high response rate, and ultimately improve . . . estimates among cell-only or cell mostly respondents who are more difficult to reach.” *Id.*, p. 10.

We suggest that DOL take steps to ensure that the survey sample include a representative number of workers from industries DOL has identified as having a higher likelihood of employees being misclassified: construction, home health, food service, trucking, hotels, and manufacturing. DOL, *Supporting Statement*, p. 4. *See also* Linda H. Donahue, et al., *The Cost of Worker Misclassification in New York State*, (Cornell Univ. Sch. of Indus. and Labor Relations, Feb. 2007) (“The construction sector is prone to classification abuse by unscrupulous contractors.”). Just as DOL has determined that it is important that the employer survey include employer representatives from these industries, it is equally crucial that the worker survey adequately reflect employees from industries where misclassification is most rampant.

In sum, we support DOL’s efforts to ensure that the “sampling methodology . . . generate[s] nationally representative samples of workers (or as close to nationally representative as possible),” 78 Fed. Reg. at 2448, making sure that, in particular, workers in industries where misclassification is known to be a problem are included. We also encourage DOL to make every effort to reach the hardest-to-reach workers because in our experience such workers are the most likely to be misclassified and therefore can provide valuable information to the agency concerning “whether workers have knowledge of their employment classification and whether they understand the implications of their classification status.” 78 Fed. Reg. at 2448.

Response to Question 4: DOL has appropriately minimized the burden of the proposed information collection on those who are to respond to the degree feasible in light of the overall goals of the Worker Classification Survey.

DOL has appropriately sought to minimize the burden of the proposed information collections on survey respondents to the extent feasible given the overall goals of the Worker Classification Survey, which require a significant amount of qualitative and open-ended research.

As to the employee portion of the survey, DOL's use of a computer assisted telephone interview technique will facilitate the efficient application of the survey so that it will take as little of respondents' time as possible. DOL, Supporting Statement, p. 5. DOL has also appropriately sought to minimize the burden of the survey on employees by allowing respondents to conduct the survey at a time convenient for them as well as the opportunity to begin the survey in one session and complete it at a later one. *Ibid.* Taken together, these methods appropriately minimize the burden on employees who participate in the survey.

As to the in-depth employer portion of the survey, DOL has appropriately sought to minimize the burden on respondents by providing an advance letter that informs potential employer respondents of the purpose of the survey and by allowing for the option of in-person or telephonic surveys at the option of the employer. *Id.*, p. 4. DOL has also fashioned its survey questions to avoid sensitive topics, including avoiding collecting information that would make any employer's responses individually identifiable. *Id.*, p. 12. Given the nature of the interviews as semi-structured and open-ended, these efforts to minimize the burden on employer respondents are wholly adequate; it is not feasible for DOL to substitute written, electronic, or other automated responses for the qualitative interviews proposed here without significantly decreasing the quality, utility, and clarity of the information collected.

The AFL-CIO greatly appreciates the opportunity to provide the Department of Labor with these comments. We would be happy to meet with you to discuss any of these issues further. Please contact AFL-CIO Associate General Counsel Matthew Ginsburg at (202) 637-5397 or mginsburg@aficio.org with any questions.

Sincerely,

A handwritten signature in black ink, appearing to be 'MG' with a large loop at the end.

Matthew Ginsburg
Associate General Counsel