

March 12, 2013

Submitted Via Email: *WHDPRAComments@dol.gov*

Mary Ziegler
Director
Division of Regulations, Legislation, and Interpretations
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW.
Washington, DC 20210

RE: Proposed Information Collection Request (ICR) for the Worker Classification Survey

Dear Ms. Ziegler:

HR Policy Association (“HR Policy” or the “Association”) welcomes the opportunity to comment on the “Proposed Information Collection Request (ICR) for the Worker Classification Survey”¹ published by the Wage and Hour Division (“WHD” or “the Division”) of the U.S. Department of Labor (“DOL” or “the Department”).

HR Policy Association represents the chief human resource offices of more than 335 of the largest employers in the United States. Collectively, their companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce. Their companies also work with a large number of independent consultants, especially professional services. As the senior human resource executive for their companies, HR Policy Association members are generally responsible for talent management and workforce design and have an interest in initiatives the Department may have related to independent contractors.

Independent contractor arrangements are commonplace throughout the U.S. economy, from computer software engineers and emergency room physicians to professional and business services. Such arrangements generate substantial economic and other benefits for workers, employees and employers, allowing firms to use labor services in situations where a traditional employment relationship is impractical.

Stated Purpose of the Worker Classification Survey

In the Federal Register notice and the supporting documents, the Department lists a number of purposes for conducting the survey, which include the following:

- To “collect information about employment experiences and workers' knowledge of basic employment laws and rules so as to better understand employees' experience

¹ Proposed Information Collection Request (ICR) for the Worker Classification Survey, 78 Fed. Reg. 2447 (Jan. 11, 2013).

with worker misclassification”² by attempt to gather information about workers' employment and pay arrangements and measure workers' knowledge about their current job classification, and their knowledge about the rights and benefits associated with their job status.³

- To provide critical information to Department policymakers on whether workers have knowledge of their employment classification and whether they understand the implications of their classification status.⁴
- To provide Congress, the Department, and other policymakers with substantive and relevant data upon which to base policy decisions regarding worker classification.
- To “help the Department better understand part of the decision processes and challenges that employers face when making hiring and staffing arrangements” by interviewing a select number of employers.⁵
- To facilitate a better understanding of the scope and magnitude of misclassification.⁶
- To facilitate the efforts of state governments and workers' compensation programs in their outreach and education of workers and employers.⁷
- To compile an analytical research report on the findings and results of the survey.⁸

Worker Classification Determinations are Complex So Responses to Some Survey Questions are Likely to be Inaccurate and Invalid

Defining and determining who is an “employee” is complex and involves a variety of laws, rules, court cases and many state and federal agencies. For example, the National Labor Relations Act, Title VII of the Civil Rights Act, Fair Labor Standards Act, Employee Retirement Income Security Act and Internal Revenue Code each use a different definition of “employee.” In addition, the tests or criteria used to determine whether a worker is an independent contractor

² 78 Fed. Reg. 2447.

³ 78 Fed. Reg. 2447.

⁴ 78 Fed. Reg. 2448.

⁵ The Department will conduct 16-20 interviews with employers, employer consultants and employer representatives, or approximately three interviews in six industries the Department has identified as having a higher likelihood of employees being misclassified: construction, home health, food service, trucking, hotels and manufacturing.

⁶ U.S. Department of Labor, Wage and Hour Division, “Supporting Statement for Paperwork Reduction Act Submissions of Survey,” submission to the Office of Management and Budget, January 2013. Results will be used by the U.S. Department of Labor to improve policies and benefits for all workers and employers and to inform the Department’s collaboration with state and federal agencies.

⁷ U.S. Department of Labor, Wage and Hour Division, “Supporting Statement for Paperwork Reduction Act Submissions of Survey,” submission to the Office of Management and Budget, January 11, 2013.

⁸ U.S. Department of Labor, Wage and Hour Division, “Supporting Statement for Paperwork Reduction Act Submissions of Survey.”

or an employee are complex, highly fact dependent, and differ from law to law.⁹ The U.S. Supreme Court has indicated that such determinations must examine the totality of the circumstances and cannot be based on isolated factors or a single characteristic.¹⁰ In fact, not even the Department's investigators and lawyers get it right every time.¹¹

Given the complexity surrounding the classification of employees, the Association has very serious concerns about the accuracy, validity—and therefore the utility—of many of the workers' responses to the questions in Part IV of the proposed employee survey. Particularly troubling is the fact that the survey was only cognitively tested with nine people, and the results of that test, or any modifications to the questions that resulted from it, are not identified in the Department's clearance documents.¹² Unlike some other questions in the proposed employee survey, all of the questions in Part IV are new and involve a highly complex legal issue. In fact, the last three questions in Part IV (QAGREE, QAGREE_2, and QTHINK) are purely speculative and likely to produce inaccurate responses from most respondents who are not familiar with the law and various court decisions. HR Policy strongly recommends that all of Part IV of the employee survey be withheld from the survey at this time. The Department should work with the Bureau of Labor Statistics and the Census Bureau to more rigorously test and validate the proposed questions before proceeding with a formal survey.

Duplicative Survey Will Not Serve One of Its Primary Purposes

One purpose of the survey is to provide more substantive and relevant data about the nature, scope, and magnitude of worker misclassification so that federal and state policymakers can identify how best to address the issue of how workers are classified. Yet, as noted above, the questions in Part IV are unlikely to provide accurate, relevant responses about the nature, scope, and magnitude of worker misclassification. Such inaccurate data would actually be detrimental by misinforming or misleading policymakers who may base policy decisions on the flawed survey results. Moreover, responses to the seven questions in Part II of the proposed employee survey that will be used to determine whether a worker is an employee or is self-employed will yield an "unsure" determination in 11 of the 16 possible determination scenarios.¹³ Further, given the number of factors that are involved in making an accurate worker classification decision, it is highly likely the seven questions in Part II will not capture with any validity the appropriate classification for survey respondents in the other five scenarios in Table 2 in the survey instrument.

⁹ U.S. Government Accountability Office, "Employment Relationships: Improved Outreach Could Help Ensure Proper Worker Classification," GAO-06-656, July 11, 2006.

¹⁰ U.S. Government Accountability Office, "Employment Relationships: Improved Outreach Could Help Ensure Proper Worker Classification."

¹¹ Bloomberg BNA, "Court Rules Against DOL in Determining Gate Attendants' FLSA Employment Status," Daily Labor Report, February 15, 2013. *Gate Guard Servs. LP v. Solis*, S.D. Tex., No. 10-00091 (S.D. Tex., Feb. 2, 2013) (holding that oil field gate attendants were independent contractors—not employees—under the FLSA).

¹² U.S. Department of Labor, Wage and Hour Division, "Supporting Statement for Paperwork Reduction Act Submissions of Survey."

¹³ See Table 2. Exhaustive List of 16 Scenarios that Generate EMPFLAG, attached to the proposed employee survey instrument.

The survey is also duplicative of data the Department has in its own enforcement databases. Every year WHD typically conducts over 30,000 compliance actions.¹⁴ According to the latest budget request for WHD, for the past three years WHD has focused its enforcement resources on the classification of employees as part of an initiative to detect and deter inappropriate misclassification. The Association strongly recommends that before proceeding with the proposed survey, the Department fully review its own enforcement databases and compile a complete and statistically sound analytical research report based on that review.

Employer Survey Will Provide Biased Results

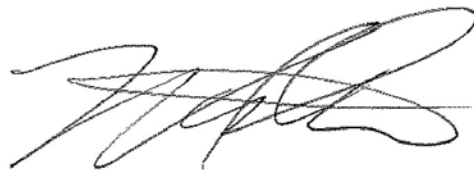
The purpose of the employer survey is to help the Department better understand part of the decision processes and challenges that employers face when making hiring and staffing arrangements, and to better understand the factors that influence employers' hiring and employment classification practices. To accomplish this purpose, the Department proposes to conduct 16-20 interviews with employers, employer consultants and employer representatives, or just three interviews in each of the six industries the Department has identified as having a higher likelihood of employees being misclassified.

However, by focusing only on these six industries, the employer survey will generate an incomplete picture of the factors that influence employers' hiring and employment classification practices. The results will be, by design, biased and not reflective of the broader use of independent contractors in the U.S. economy. Moreover, the limited number of interviews—three per industry—is not nearly enough for the Department to accurately obtain a broad range of employer views within these six industries. HR Policy strongly recommends a complete redesign and resubmission of the proposed employer survey.

* * *

We appreciate your consideration of the concerns set forth above. If the Association can be of further assistance, please contact us at 202-789-8659 or mpeterson@hrpolicy.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael Peterson', with a stylized, cursive script.

Michael Peterson
HR Policy Association
Vice President, Benefits & Employment Policy
Associate General Counsel

cc: Office of Management and Budget, OIRA Administrator

¹⁴ FY 2013, Congressional Budget Justification, Wage and Hour Division, available at: <http://www.dol.gov/dol/budget/2013/PDF/CBJ-2013-V2-09.pdf>.