RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYEE
BENEFITS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5448

MARC D. FREEDMAN
EXEC. DIRECTOR, LABOR LAW POLICY
LABOR, IMMIGRATION & EMPLOYEE
BENEFITS

March 12, 2013

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

By electronic transmission: WHDPRAComments@dol.gov

> **RE: Comments on Information Collection Request for the Worker Classification Survey; 78 Fed. Reg. 2447 (January 11, 2013)**

Dear Ms. Ziegler:

The Chamber is the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region. The proposed worker classification survey will drive Department of Labor Wage and Hour policies that will affect virtually all of our members. In particular, this survey is expected to support the Department's announced Right to Know under the Fair Labor Standards Act (FLSA) rulemaking (RIN 1235-AA04) as well as the ongoing Employee Misclassification Initiative.

On March 1, the Chamber submitted a request for an extension of time on this comment period because the survey documents and instrument were not made easily available. We requested that the comment period be extended to 90 days from the date of the Federal Register announcing that these documents are available online. Unfortunately, we received no response or indication of an extension. Accordingly, we are submitting the following comments and may submit additional comments at a later date after reviewing it more closely and conducting more research on the survey instrument.

As we stated in our request for an extension, the proposed survey raises significant and novel issues of both statistical sampling design and substantive content. The fact that this will be the first-ever Federal survey addressing the complex issue of employment/contractor status classification means that all aspects of the project plan, including sample selection, survey administration approach and question content, contribute to a reliable, credible and replicable product. The results of the survey will become a highly influential statistical finding and the

requirements of the Information Quality Act should be scrupulously observed in its design and execution. The results of the survey may inform public policy decisions that affect the structure, productivity, and competitiveness of the U. S. economy for generations to come.

The comments below reflect concerns we have with the design, content, and plan for conducting the survey. For a more complete analysis of the survey and supporting documents please see the comments submitted by the National Association of Wholesaler-Distributors.

The Employee Survey Planned Sample Size Is Inadequate

The planned sample size (10,000 interviews) seems to only contemplate global estimates of the proportions of workers who are self-employed and not self-employed and of the proportions of workers who are correctly classified and who are incorrectly classified. These are the only tabulations addressed in the statistical power and precision estimates (Exhibits 3, 4 and 5 of "OMB Part B" Document) included in the documentation for OMB information collection clearance. Such global estimates will be of extremely limited value as a basis for assessing the complex issue of classification of workers as independent contractors or employees.

In order to obtain useful results the sample plan needs to obtain enough completed interviews to enable statistically reliable estimates of target items (e.g., self-employed versus employee and correctly versus incorrectly classified) cross-tabulated by salient respondent characteristics. At the very least, the correct versus incorrect classification proportions should be estimated in cross-tabulation with the presented classification status (self-employed versus not-self employed). Estimates should be made separately of the proportions of persons identified as self employed who have been correctly classified versus incorrectly classified and of the proportions of persons identified as not-self employed who have been correctly classified versus incorrectly classified as not-self employed.

To make effective policy requires knowing whether a misclassified worker is someone who is identified as a contractor but who should properly be treated as an employee, or is someone who is identified as an employee but could correctly be classified as a contractor. The documentation presented does not calculate the power and precision of estimates for results cross-tabulated in this way. As presented, the sample design risks obtaining results that are so ambiguous as to be worthless for purposes of public policy.

In addition to these basic cross-tabulation estimates, the survey sample size should be large enough to support statistically reliable estimates of classification and classification correctness cross-tabulated by salient worker characteristics such as gender, age cohort, educational attainment, occupation and industry. If the purpose of the survey is to inform public policy decisions regarding the possible need for regulations or the form of regulations, it will be important to know, for example, whether misclassification, if it exists, is a common problem across the spectrum of the labor market or whether it is a problem that affects disproportionately certain industries, occupations or types of workers (e.g., categorized by educational attainment).

Only with such detailed information about the incidence and pattern of perceived misclassification can efficient and effective education, information or regulation strategies be devised.

Since the target group of interest, workers who perceive themselves as self-employed independent contractors, may be a small (less than 10 percent) proportion of the labor force, the planned sample size may yield only about 1,000 completed interviews with such workers (the documentation submitted to OMB lists 1,100 in Exhibit 3 (OMB Part B) as the expected number of self-employed to be identified). In Exhibit 4 (OMB Part B), the documentation estimates that the number of misclassified workers found among survey respondents will be 500, but the documentation does not make clear whether the expectation is that these 500 are expected all to be self-employed who should properly have been classified as employees. Even if the number of identified self-employed persons who are estimated to be misclassified turned out to be 500, this number would likely be too few to impute findings cross tabulated by salient characteristics, especially by industry or occupation.

For example, the draft survey instrument identifies 11 distinct industry classifications and 23 distinct occupations. A cross tabulation matrix of the industry by occupation survey results for a target variable such as employment classification, which has three possible outcomes, would potentially have 759 cells (3 x 11 x 23). With a sample of only 10,000, even if the response rate were 100 percent, the average number of respondent observations per cell would be only 13, and an average cell might only contain one or two identified self-employed persons and less than one misclassified self employed person. To ensure that statistically reliable cell estimates of putatively misclassified self employment proportions can be estimated by industry and occupation, the sample size needs to be at least ten times larger (e.g., 100,000), or alternatively, the sample frame needs to be redesigned to start with a sample of persons pre-determined to be identified as self-employed (e.g., start with a random sample of 10,000 persons who have been previously identified as claiming self-employed status)

The survey plan should include a pre-testing component

The proposed survey is novel and important for policy making. To ensure that its results are credible and useful it should be thoroughly pre-tested with a panel of individuals whose classification and correctness of classification is known. It must be pretested not only with respect to whether the respondents understand their questions but with respect to the accuracy of their answers. Many of the questions relate to facts that can be established objectively, and it is important that the answers provided by the test sample be correlated with actual facts, to determine whether the answers to the survey are accurate.

The use of the term "job" in the questionnaire is confusing and potentially a source of bias

The survey repeatedly uses the term "job" or "main job." This terminology is a potential source of confusion because its meaning may be different for a person whose usual work

arrangement is as an employee compared to a person who engages in self-employment. An employee might understand the term "job" as identical to a given work arrangement. A self-employed consultant or contractor might understand the term "job" to identify a particular task assignment or client relationship within his business or self-employment working arrangement. A free-lance writer, might identify each of several contract assignments to produce articles for different magazines to be distinct "jobs." While independent, self-employed lawyers or doctors may refer to their individual work engagements as "clients" or "patients," self-employed carpenters, plumbers or printers more typically refer to their individual work engagements as "jobs." Indeed, a standard printed form that trade contractors use to estimate and schedule work assignments is called a "job order." Misunderstanding of the term by self-employed respondents could lead to erroneous survey results.

The survey questionnaire presents ambiguous and potentially confusing concepts of work patterns and practices

The questionnaire creates unnecessary confusion by beginning with the concept that an individual may have multiple relationships with the labor market.   The design of the survey could be improved and simplified by introducing at the outset the distinctions between employment and alternative work arrangements. The survey instrument should present a definition of each, and it should ask the respondent to apply those definitions when answering questions about his or her work arrangements. The first questions should identify which of the following categories describes the individual situation:

1. Employee with only one employer in the past 30 days.
2. Employee with only one employer at a time but changed employers in last 30 days.
3. Employee with multiple employers simultaneously in the last 30 days.
4. Self-employed exclusively with multiple clients or customers.
5. Self-employed with one client or customer in the last 30 days (in this case ask follow-on to determine how many different clients or customers in last 12 months and /or duration of assignments.
6. Both self-employment and employee working arrangements during the last 30 days.

From each of these starting points, somewhat different question series could be developed and more clearly worded to fit the circumstances. The concept of "main job" can be dropped and instead questions asked about each of the work arrangements for persons with multiple arrangements. The categorization presented above may be useful for identifying circumstances where new or modified policy guidance is needed.

Conclusion

This survey will have far reaching impacts and needs to be done in a statistically sound and unbiased way. As these comments and those submitted by others make clear, this survey

instrument needs substantial revisions before it is conducted and relied upon to support various Wage and Hour Division actions such as rulemaking or enforcement initiatives.

Sincerely,

Randel K. Johnson
Sr. Vice President
Labor Immigration & Employee Benefits

Marc Freedman
Executive Director, Labor Policy
Labor Immigration & Employee Benefits

Consulting Economist
Ronald Bird, Ph.D.
U.S. Chamber of Commerce