March 12, 2013

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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

The National Federation of Independent Business (NFIB) hereby submits the following comments to the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) on its Proposed Information Collection Request (ICR) for the Worker Classification Survey published in the *Federal Register* on January 11, 2013.

NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent-business owners who are located throughout the United States.

DOL's planned "Right to Know" regulations would revise the Fair Labor Standards Act (FLSA) recordkeeping regulations to "enhance the transparency and disclosure to workers of their status as the employer's employee or some other status, such as an independent contractor, and if an employee, how their pay is computed."

Because the planned "Right to Know" regulations would impose significant additional administrative burdens and costs on employers, the survey will have a significant impact on many NFIB members. According to a 2010 U.S. Small Business Administration Office of Advocacy study, the smallest businesses spend 36 percent more per employee per year complying with federal regulation than their larger counterparts.[1] Accordingly, we are concerned that this survey may be used to support the need for, or benefits of, additional FLSA recordkeeping and disclosure requirements.

DOL has not sufficiently established the necessity for conducting a worker classification survey

DOL's supporting documentation indicates that the proposed worker classification survey is necessary because the absence of legally required disclosures regarding employment status may cause employers to "intentionally or unintentionally classify a worker as a contractor rather than as an employee without full knowledge of the worker." This justification is based on DOL's belief that "[c]urrent labor law does not require employers to disclose information regarding employment status (whether the worker is considered an employee or not), the basis for those status determinations, or pay (including hours worked, pay rates, and wages paid) to workers."

[1] http://www.sba.gov/advo/research/rs371tot.pdf.

We believe DOL's justification is in error both as to the lack of disclosure requirements and the cause of misclassification.

DOL's current recordkeeping regulations require employers to keep records regarding the pay of employees subject to FLSA minimum wage and overtime requirements, each employee's rate of pay, basis of pay (e.g., hourly, salary, piece rate, commission), hours worked each day and each week, and total straight-time and overtime wages paid.[2] Most states have paycheck disclosure laws requiring employers to disclose such information to employees each pay period on earning statements (or "paystubs"). Typically, such laws require the paystubs to disclose hours worked, rates of pay, gross wages, deductions from wages, net wages, the pay period dates, and the name and address of the employer. As state laws have long required such disclosures, additional federal regulations in this area seem unnecessary – an added cost with little or no additional benefits.

An individual can determine his status as an employee or independent contractor based on the tax forms completed and received. An employee completes an Internal Revenue Service (IRS) Form W-4 when hired and annually to allow the employer to determine the level of tax withholdings and, each year, receives IRS Form W-2 setting forth total earnings and deductions. An independent contractor completes IRS Form W-9 to provide his tax identification number and certify that he is not subject to tax withholdings and receives an IRS Form 1099 as a record of earnings. An employee classified as exempt from the FLSA does not receive overtime for work over 40 hours in a week; non-exempt employees are paid overtime. Thus, exemption status should be obvious from state-required paystubs.

In short, through disclosures required under state law and the Internal Revenue Code, workers already have access to a significant amount of information regarding their employment status and pay (including hours worked, pay rates, and wages paid). Yet, DOL's proposed survey does not include questions regarding what type of information the respondents currently receive regarding their employment status and pay, or on whether the respondents review and understand that information.

Currently, it is true, companies are not required to prepare and maintain records detailing the basis for its determination that a worker is properly classified as an independent contractor or as exempt from the FLSA overtime requirements. Such a requirement would be very costly and the benefits speculative. A determination of whether a worker may be properly classified as an independent contractor or exempt from the FLSA overtime requirements is rarely black and white – as evidenced by the thousands of lawsuits filed in federal and state courts on these issues. If the answers were clear and easy, litigation would be unnecessary.

Rather, to determine the right answer on independent contractor or exemption status – if, indeed, right answers exist – requires a detailed analysis for each individual of the type of work performed, how work is performed, who controls how the work is performed, the business structure of the independent contractor, how the individual is paid for the work, etc. Such facts will be different for each worker and business. A single worker could meet the requirements for classification as an independent contractor and for classification as an overtime exempt executive, administrative, computer and/or professional employee. And, over time, as the work changes, a worker's qualification for independent contractor or exemption status will change. Thus, unless DOL envisions "Right to Know" regulations that require only a cursory analysis and boilerplate disclosures, the cost of such disclosures (which we estimate could be no less than $500 per worker) would be far outweighed by any additional marginal benefit to workers in receiving additional information that they are unlikely to understand and which could change frequently.

[2] 29 C.F.R. § 516.2(a)

DOL also does not adequately explain why the information sought could not be better obtained from studying its own investigation files, and reviewing records of IRS and state agency audits of independent contractor audits. The proposed survey seeks to determine whether employees have been misclassified. Such determinations require detailed factual information and expert-level knowledge of a complex web of federal and state laws. Standards for determining independent contractor status differ even between federal laws, with DOL applying the "economic reality" test to determine employment status under the FLSA while the IRS applies its 20-factor test. Standards for determining independent status also differ from state to state. Within a state, the legal standards can differ under different laws (wage-hour laws versus unemployment insurance versus workers' compensation laws).

Despite these complexities, DOL proposes to assess whether workers are properly classified by having interviewers without demonstrable knowledge of legal standards ask only a handful of questions over 15 minutes of respondents who are unlikely to even understand the questions. We must wonder if DOL's planned "Right to Know" regulations would consider such a process adequate to ensure workers are properly classified. Certainly, expert employment attorneys who advise companies on independent contractor and exemption status would not feel comfortable reaching a legal conclusion based only on DOL's proposed 15-minute interviews. DOL's own wage-hour investigators also likely require more than a 15-minute interview asking only a handful of questions relevant to employment status to determine whether a worker has been misclassified.

In fact, DOL could learn far more regarding employee misclassification by studying its own investigation files. DOL has reported that, under its "Misclassification Initiative," WHD has collected more than $9.5 million in back wages for more than 11,400 workers as the result of investigations where the primary violation found was the failure to classify workers as employees.[3] The records of the many investigations that preceded collection of these back wages will contain factual information and legal analysis that is far more detailed and reliable than any proposed employee survey could generate.

In addition, DOL has entered Memorandums of Understanding (MOU) regarding independent contractor misclassification with labor commissioners and other agency leaders in 14 states.[4] These MOUs "enable the Department to share information and to coordinate enforcement efforts with participating states." Thus, DOL could also review the records of investigation files on independent contractor misclassification in at least these 14 states. DOL also has an MOU on independent contractor misclassification with the IRS. As the IRS has also focused many audits on this issue, DOL should also review IRS audit files.

Thus, DOL's statement that, without the proposed survey, "policy makers will have no substantive relevant data upon which to base policy decisions regarding worker classification," ignores the vast amount of data to be mined in its own files, at the IRS, and available through state agencies.

DOL has not provided sufficient time for review of the survey

This is the first survey that DOL will conduct addressing the complex issue of employee versus independent contractor status. Accordingly, ensuring that all aspects of the project plan – including sample selection, question content, and survey administration – meet accepted survey and statistical standards is critical. Inadequate sampling methods, imprecise questions or poorly worded directions would result in unreliable and invalid survey results, which do not meet federal information quality standards. And, of course, if the survey results are unreliable and invalid, the information collected could not be used by DOL as it proposes new regulations or other policy changes.

[3] http://www.dol.gov/opa/media/press/whd/WHD20122496.htm.
[4] http://www.dol.gov/whd/workers/Misclassification/index.htm.

Yet, despite the significant influence the survey results will have over future DOL policy, DOL failed to publish in the *Federal Register*, or on any website, its supporting statement justifying the need for the survey, the sampling methodology document and the survey instrument itself – almost 125 pages of materials essential for the public to review before it can provide meaningful comments on the survey.

Although publication of the survey instrument and sampling methodology on www.dol.gov, www.reginfo.gov or www.regulations.gov would have been a simple matter, the only means by which the public currently can obtain copies of these key documents is by calling a DOL telephone number, which is not toll-free, and leaving a voice mail message requesting copies.

Of course, obtaining copies also assumes that interested parties have discerned the need to call the DOL telephone number from the oblique reference in the *Federal Register* notice.[5] Further, it is our understanding that there have been delays in sending out the survey documents even after leaving a voice mail message with DOL.

Because of the difficulty in obtaining copies of the survey and supporting documents, and the time required to provide meaningful, in-depth and expert review of the proposed survey instrument and sampling methodology, the original 60-day comment period was grossly inadequate.

Accordingly, DOL should extend the comment period for an additional 90 days, running from the date of the publication of an announcement in the *Federal Register* that the proposed survey instrument, sampling methodology and other supporting documents have been made available online.

The survey plan should include a pre-testing component

As stated in DOL's supporting documents, the proposed worker classification survey is "the first of its kind," and most of the key questions in the survey questionnaire have never before been used in any survey. Further, one purpose of the survey is to test whether the respondents are properly classified as employees or independent contractors – a legal conclusion which cannot be reached without detailed knowledge of both the particular factual circumstances and a complex web of state and federal laws. The data collected during the survey will impact DOL policy, including perhaps new and costly recordkeeping requirements.

Yet, nothing in DOL's supporting documents indicates that the survey questionnaire has been tested. To ensure that the survey results are credible and useful, the survey questions should be thoroughly pre-tested with a panel of individuals whose classification as an employee or independent contractor, and the legal correctness of that classification, is known. The questionnaire must be pre-tested not only with respect to whether the respondents understand the 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. Without such testing, the validity of any survey results will be suspect. An invalid survey cannot be used by DOL to support policy changes or new regulations.

Conclusion

NFIB is deeply concerned about the significant administrative burden DOL's "Right to Know" rule would place on small businesses, who have been found to be disproportionately impacted by regulation. NFIB believes that this survey will be used to justify the need for the "Right to Know" rule. As it pertains

[5] 78 Fed. Reg. at 2447, col. 3

to this survey being used for such a purpose, NFIB is concerned that DOL has not sufficiently justified the need for the survey given years of data that is readily available, has provided neither sufficient access nor time to review the survey, and that it has not performed any pre-testing on the survey to see whether employees understand the type of information they will be asked.

NFIB appreciates the opportunity to comment on the proposed survey. Should DOL require additional information, please contact NFIB's manager of regulatory policy, Daniel Bosch, at 202-314-2052.

Sincerely,

Susan Eckerly
Senior Vice President
Public Policy