

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

GLENN SPENCER
SENIOR VICE PRESIDENT
EMPLOYMENT POLICY DIVISION

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WASHINGTON, D.C. 20062
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July 13, 2021

The Honorable Patty Murray
Chair
Committee on Health, Education,
Labor, and Pensions
U.S. Senate
Washington, DC 20510

The Honorable Richard Burr
Ranking Member
Committee on Health, Education
Labor, and Pensions
U.S. Senate
Washington, DC 20510

Re: Nomination 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 nomination of David Weil to be the Administrator of the Wage and Hour Division (WHD) at the Department of Labor (DOL).

As WHD Administrator during the Obama Administration, Dr. Weil took positions on critical questions under the FLSA. This includes 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 raised the salary threshold for determining whether an employee is exempt from overtime from \$23,660 annually to \$47,476 annually—more than doubling it. 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 employees who had been previously exempt valued the flexible hours and work schedules being exempt provided them. Furthermore, the rule applied to all employers including charitable non-profits who could not afford to keep employees working the same hours and would have been forced to reduce the services they provide to those in need. 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 salary threshold of \$35,568 which is currently in effect. Employers are concerned that this salary threshold may be increased under Dr. Weil.

Joint Employment Under the FLSA—Whether two employers are considered joint employers is a key issue when one company contracts with another for services. This has also been alleged to occur in 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 on finding joint employment under the FLSA. Dr. Weil’s AI determined a joint employment relationship existed even when one employer only had “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. 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 is now in the process of being rescinded. If confirmed, Dr. Weil would be able to promulgate a new regulation reflecting the definition of joint employment in the AI he 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 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 has been quoted as saying that an ABC test could only be implemented through legislation, not regulations.

Therefore, if confirmed, Dr. Weil may promulgate a regulation for determining independent contractor status under the FLSA that will reflect the AI he issued, thereby preserving confusion and uncertainty for employers.

Thank you for reviewing these issues. We hope the committee gives these actions serious attention as Dr. Weil’s nomination is considered.

Sincerely,

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

Glenn Spencer

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