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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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October 11, 2012

The Honorable Jeffrey Zients
Acting Director
Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

Mr. Patrick Fitzgerald
Director
Defense Contract Audit Agency
8725 John J. Kingman Road, Suite 2135
Fort Belvoir, VA 22060-6219

Dear Messrs. Zients and Fitzgerald:

The Committee on Oversight and Government Reform is conducting oversight of the Administration's recent executive guidance¹ advising government contractors that they should not adhere to the requirements of the Worker Adjustment and Retraining Notification (WARN) Act.² The guidance seems intended to invite federal contractors to flout the law, and in so doing places a large contingent financial liability on the shoulders of American taxpayers in order to indemnify those contractors who follow the Administration's direction.

The WARN Act offers protection to American workers, their families and communities from being laid off without proper notice and time to adjust.³ The Act mandates a minimum notice of 60 days before any mass lay off. Only three exceptions exist to this critical workforce protection: when the company is "faltering"; unforeseeable business circumstances; and natural disasters.⁴ Violations of the WARN Act can be severe. An employer who violates the WARN

¹ Memorandum for the Chief Financial Officers and Senior Procurement Executives of Executive Departments and Agencies; Subject: Guidance on Allowable Contracting Costs Associated with the Worker Adjustment and Retraining Notification (WARN) Act; M-12-19 (September 28, 2012).

² 29 U.S.C. Sections 2101-2109.

³ U.S. Department of Labor Employment and Training Administration Fact Sheet; The Worker Adjustment and Retraining Notification Act- A Guide to Advance Notice of Closings and Lay Offs.

⁴ Id. The Department of Labor, which administers the WARN Act, goes on to note:

"If an employer provides less than 60 days advance notice of a closing or layoff and relies on one of three exceptions, the employer bears the burden of proof that the conditions for the exceptions have been met. The employer must also give as much notice as is practicable."

Act is liable to each aggrieved employee for an amount including back pay and benefits for a period of violation, up to 60 days. Civil penalties are also available.

On July 30, 2012, Assistant Secretary of Labor Jane Oates, an Administration political appointee, issued “guidance” claiming that layoff notices prior to the election were not necessary because the triggering event – sequestration and its resultant layoffs – was not a “foreseeable” business circumstance.⁵ The purported inability to foresee layoffs caused by sequestration was buttressed by an extensive list of the many exhaustive public comments, hearings and discussions regarding the devastating impact of the sequestration on jobs. Much of this discourse specifically focused upon the loss of jobs that sequestration will directly cause, yet the Labor Department argued that these imminent layoffs caused by sequestration cannot be foreseen.

Although sequestration is scheduled to occur under current law, that law can be changed. And there is a level of ambiguity regarding the specific impacts of the sequestration process. But “ambiguity” is contemplated under pertinent existing regulation: The preamble to 20 CFR Section 639.1 states that, in the event of ambiguity, “the employer is best advised to give notice unless it is certain, at the time it must decide to give notice, that there is no possibility of coverage.”⁶ The regulation goes on to state “[t]he Department encourages employers to give notice in all circumstances.”⁷ The regulation is also very clear on WARN enforcement: “The Department of Labor has no legal standing in any enforcement action and, therefore, will not be in a position to issue advisory opinions of specific cases.”⁸ Instead, “enforcement of WARN will be through the courts, as provided in Section 5 of the statute.”⁹

Recognizing the dubious legal value of the Labor Department’s guidance, many contractors continued to balk at violating the WARN Act, even after the document was issued.¹⁰ Press reports indicate that several major defense contractors intended to send out WARN Act notices 60 days in advance of possible across-the-board cuts to the federal budget on January 2, 2013, to ensure compliance with the law.

Since OMB issued its September 28, 2012, policy memorandum, however, many contractors appear to have changed course. They now intend to ignore the law, per the Administration’s guidance, and refrain from issuing WARN notices.¹¹ The Administration’s guidance has the effect of committing American taxpayer funds to pay for workers’ claims and damages cause by WARN act violations, but only for contractors that have “followed a course of

⁵ Training and Employment Guidance Letter No. 3-12 (July 30, 2012).

⁶ Preamble to regulation at 20 CFR Section 639.1(e).

⁷ 20 CFR Section 639.1(e).

⁸ Id.

⁹ Id.

¹⁰ Lockheed Martin has now publically acknowledged that they will refrain from sending out WARN notices. The Hill, October 1, 2012.

¹¹ Id.

action consistent with DOL (Labor Department) guidance.”¹² The Administration is urging federal contractors to risk violating federal law, and offering to cover any resulting repercussions using taxpayer funds. The timing and unprecedented nature of the Administration’s actions make it hard to interpret this as anything other than a transparent political reaction to the prospect of WARN Act notices being delivered to tens of thousands of employees on the eve of the November election (which would enable employers to meet the WARN Act’s 60-day notice requirement).

Accordingly, we request that the Defense Contract Audit Agency – the agency charged with administering cost accounting standards and guidelines – intervene to examine OMB’s guidelines to ascertain whether those costs incurred by contractors who have been found to violate layoff law should be deemed to be “allowable costs” for purposes of the Cost Accounting Standards. Please provide a response as soon as possible, but not later than, October 12, 2012.

In addition, the Committee seeks responses by Wednesday, October 24, 2012, from OMB to the items listed below:

1. Please produce all documents and communications relating to the drafting of the guidance.
2. Identify the specific legal authority used by the DOL to justify the position that contractors need not provide WARN Act notices to their employees in light of the pending sequestration.
3. The WARN Act declares that it is the Sense of Congress that any employer not subject to the notice requirements should, to the extent possible, notify its employees. DOL regulation also encourages notice where not required. Does the Administration intend to take any action against such voluntary notice by contractors?
4. Identify the specific legal authority that enables the Administration to assume judgments and litigation costs from lawsuits that could follow from employers’ failure to comply with the WARN Act.
5. Has OMB estimated the cost to taxpayers of the commitment to reimburse contractors for judgment and litigation costs relating to WARN Act noncompliance? Provide any such estimates, including supporting documentation.
6. Is OMB’s memorandum an indemnity to contractors from liability in the event of WARN Act litigation by displaced workers? If not, what is the OMB memorandum intended to accomplish?

¹² Id.

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Mr. Patrick Fitzgerald
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The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at “any time” investigate “any matter” as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions, please contact Rich Beutel of the Committee staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Darrell Issa", is written over a light blue horizontal line. The signature is fluid and cursive.

Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member