

December 18, 2013

The Honorable Tom Harkin
Chairman
Committee on Health, Education, Labor and
Pensions
U.S. Senate
Washington, DC 20510

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

Dear Chairman Harkin and Ranking Member Alexander:

The undersigned are writing to express our serious concerns with the nomination of David Weil to be Administrator of the Wage and Hour Division (WHD) at the U.S. Department of Labor (DOL). Based on his writings, advocacy positions, and lack of *any* non-academic job experience, we believe Dr. Weil would be unable to impartially administer and enforce the critical federal wage and hour laws governing the workplace.

Our collective memberships represent millions of employers and employees across the United States. We are committed to fair enforcement of the requirements of federal employment and labor statutes.

As the DOL sub-agency responsible for enforcement of the Fair Labor Standards Act (FLSA) and other significant employment laws, the WHD Administrator's decisions can impact virtually every employer and employee in the country. Over the next few years, the WHD will implement many key regulatory and policy proposals, including the recently-released final rule on companionship services and various worker misclassification initiatives. Given the impact such initiatives can have on jobs and the economy, it is important to ensure that the WHD Administrator can be an impartial arbitrator – able to fairly consider the interests of both employees and employers – without preconceived misconceptions about the employer community.

Dr. Weil's public writing reveals that he is an employee advocate, not an impartial arbitrator. In May 2010, under a contract with WHD, Dr. Weil published a report entitled "*Improving Workplace Conditions through Strategic Enforcement: Report to the Wage and Hour Division Strategic Enforcement.*" Even a quick review of Dr. Weil's Report raises serious questions regarding Dr. Weil's ability to remain impartial.

For example, in his Report, Dr. Weil assumes without evidence that employers do not comply with the FLSA and other employment laws because they "operate under an expectation" that government investigations are not "a matter of first order concern." Thus, Dr. Weil concludes, draconian enforcement – "uniformly and consistently" imposing civil money penalties and liquidated damages, seeking temporary restraining orders and injunctions, stopping the shipment of "hot goods," and using criminal prosecution – is the only effective means of changing employer behavior. To the contrary, our members spend a great deal of time and resources to ensure compliance with the FLSA and all other laws. A more careful study of the WHD data used by Dr. Weil, data from the "WHISARD" database, would show that most employers voluntarily pay the back wages as determined by the WHD after an investigation – without threats of penalties, double damages or criminal prosecution. The assumption underlying Dr. Weil's conclusions that employers will not comply without a sword of Damocles hanging over their heads reveals a lack of understanding of the realities of running a for-profit company in America today which, perhaps, is a result of Dr. Weil having never been employed by any of the private-sector, for-profit companies he seeks to regulate.

Similarly, Dr. Weil accuses employers of using long-standing, common business relationships – subcontracting, independent contracting, franchising – as “a means to subvert compliance with labor policies.” Dr. Weil has little evidence for such a broad condemnation of these wide-spread business practices or his conclusion that because subcontractors, independent contractors and franchisees are small businesses, they are more likely to violate the FLSA. In Dr. Weil’s view, only large employers can hope to maintain compliance for themselves and force their business partners into compliance.

Yet, Dr. Weil’s censures are not limited to small employers; in his Report, Dr. Weil attacks specific large employers by name. As examples, Dr. Weil spends many pages condemning standard, legal business arrangements in both the franchised restaurant industry and the hospitality industry, highlighting practices at dozens of specific companies. How can Dr. Weil remain impartial after publically criticizing the companies named in his report? Will he agree to recuse himself from involvement with any investigation of these companies?

Finally, in his Report, Dr. Weil made no effort to research or even consider the impact of compliance assistance for and partnerships with the employer community. Since 2009, for example, WHD has refused to respond to employer’s requests for opinion letters, to assist employers seeking to pay back wages for self-discovered violations, and to enter partnership agreements with employers that allow quick resolution of compliance issues. Last year, in *Christopher et.al. v. SmithKline Beecham, Corp.* (Case No. 11-204), the U.S. Supreme Court unanimously refused deference to DOL’s position on the exempt status of pharmaceutical sales representatives because the agency articulated that position for the first time in *amicus* briefs, although the industry had requested an opinion letter on the issue. Employers cannot comply with the law if WHD will not tell them what the law is. Dr. Weil should not be confirmed unless he commits to: (1) dedicating more resources to compliance assistance for employers; (2) responding to employer requests for opinion letters; and (3) developing a partnership program to reward employers who commit to compliance.

While it is certainly Dr. Weil’s right to advocate a punitive approach to enforcement as an academic, it would be inappropriate for him to do so as an unbiased leader of a federal agency. Dr. Weil’s career in advocacy makes us believe he will not administer federal labor law in a fair and impartial way.

For these reasons, we believe his nomination should be rejected by the Committee on December 18.

Thank you for considering our views.

Sincerely,

Associated Builders and Contractors
International Foodservice Distributors Association
International Franchise Association
National Association of Home Builders
National Association of Wholesaler-Distributors
National Franchise Association

CC: Members of the U.S. Senate Committee on Health, Education, Labor and Pensions