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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

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<http://help.senate.gov>

October 31, 2013

The Honorable Thomas E. Perez
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Dear Secretary Perez:

As members of the Senate Health, Education, Labor and Pensions Committee, we write to request information about the Department of Labor (DOL) Wage and Hour Division's guidance that expands its classification of survey crew members (surveyors) as laborers or mechanics under the Davis-Bacon Act. Specifically, we are concerned that DOL modified its longstanding application of the law to surveyors without proper transparency and without the benefit of broad stakeholder input. Part of the Committee's charge is to conduct oversight of issues that impact our nation's labor laws. Therefore, we request a staff briefing and documents related to DOL's decision.

On March 22, 2013, DOL issued guidance that appears to expand an interpretation of the law that applies to surveyors.¹ Since the 1960s, surveyors generally have not been classified as "laborer[s] or mechanic[s]" under the Davis-Bacon Act, relying on guidance from DOL that surveyors who would fall under the definition of "laborer or mechanic" were not common. Accordingly, surveyors often have not been covered by the Act's labor standards. However, the new guidance appears to retract 50 years of precedent by expanding the class of surveyors that would be considered laborers or mechanics. The new guidance strikes certain enumerated activities that delineated between manual and nonmanual work and establishes a new method for determining whether a surveyor's primary duties are manual labor.

In making this change, it appears DOL did not provide public notice, conduct public hearings, or make any other effort to alter its longstanding policy in a fair and open process. On August 4, 2011, the International Union of Operating Engineers (IUOE) wrote to DOL requesting that certain surveyors be covered by the Davis-Bacon Act.² Nineteen months later, DOL responded to IUOE's request and issued its guidance the same day.³ While DOL's memo claims that

¹ Applicability of Davis-Bacon Labor Standards to Members of Survey Crews, Memo. No. 212 (Dep't of Labor Mar. 22, 2013).

² Letter from Mary Beth Maxwell, Acting Deputy Admin'r, Wage & Hour Div., Dep't of Labor, to Elizabeth A. Nadeau, Assoc. Gen. Counsel, Int'l Union of Operating Eng'rs 1 (Mar. 22, 2013) and *supra* note 1.

³ *Id.*

expansion of the term “laborer or mechanic” was necessary “in light of information indicating that the composition and work of field survey crews have evolved with new technology,”⁴ DOL did not elaborate on the sources of information used to reach this determination. It is unclear from the public record whether other stakeholders were given an opportunity to comment or what additional analysis DOL conducted to study the issue. We are concerned that DOL may have issued its guidance without the benefit of all relevant data.

Indeed, since DOL published its guidance, impacted parties have expressed concern that it will impose a costly administrative burden on surveying firms and contracting agencies.⁵ To assess the aforementioned concerns, we request a staff briefing and the following documents no later than November 14, 2013:

- 1) All documents and communications referring or relating to DOL’s decision not to seek public comment on AAM No. 212: Applicability of Davis-Bacon labor standards to members of survey crews.
- 2) All documents and communications referring or relating to IUOE’s request to DOL that certain surveyors are covered under Davis-Bacon.
- 3) All documents and communications referring or relating to any economic analysis DOL conducted related to AAM No. 212: Applicability of Davis-Bacon labor standards to members of survey crews.

Please have your staff contact Kristin Nelson, Oversight Counsel, for HELP Committee at 202-224-9799 to schedule the requested briefing and arrange production of documents. Thank you for your attention to this matter.

Sincerely,



Lamar Alexander
Ranking Member
Senate Committee on Health, Education,
Labor and Pensions



Pat Roberts
Member
Senate Committee on Health,
Education, Labor and Pensions

⁴ See supra note 1.

⁵ Letter from Curtis W. Sumner, Exec. Dir., Nat’l Soc’y of Prof. Surveyors, to Patricia Davidson, Deputy Admin’r. for Program Operations, U.S. Dep’t of Labor (Aug. 20, 2013).