

March 21, 2017

R. Alexander Acosta
Dean
Florida International University School of Law
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11200 SW 8th Street
Miami, FL 33199

Dear Dean Acosta,

On February 16, 2017, one day after Andrew Puzder withdrew his nomination to serve as Secretary of the Department of Labor (“Labor Secretary”), President Trump nominated you to serve as Labor Secretary in his Administration.¹ On March 22, 2017, you are scheduled to appear before the U.S Senate Committee on Health, Education, Labor, and Pensions (“HELP Committee”) for a confirmation hearing that will precede a vote on your nomination.²

As a member of the HELP Committee, I will attend this confirmation hearing to ask you questions that will help me determine whether you are qualified to fulfill the Department of Labor’s (“DOL”) mission to “foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States.”³ If you are confirmed, you will be responsible for overseeing and enforcing labor laws that guarantee a minimum wage and establish a forty-hour work week, and federal health and safety laws that ensure that workers are safe on the job.⁴ 150 million American workers and their families will depend on you for their economic security, their safety, and their livelihoods.⁵

I will be blunt: Andrew Puzder was a terrible choice for Labor Secretary. He built his career and his fortune by squeezing hardworking Americans on wages and benefits.⁶ His

¹ Shannon Pettypiece. “Trump Nominates Ex-NLRB Member Acosta as Labor Secretary.” Bloomberg. Online at: <https://www.bloomberg.com/politics/articles/2017-02-16/trump-said-to-choose-ex-nlr-member-acosta-as-labor-secretary>

² Jill Disis. “Hearing delayed for Trump labor nominee because senator is going to Trump rally.” CNN. Online at: <http://money.cnn.com/2017/03/12/news/economy/labor-secretary-alexander-acosta-delayed/>

³ “Our Mission,” *United States Department of Labor* (online at <https://www.dol.gov/opa/aboutdol/mission.htm>).

⁴ “Summary of the Major Laws of the Department of Labor.” *United States Department of Labor*. Online at: <https://www.dol.gov/general/aboutdol/majorlaws>.

⁵ “Labor Force Statistics from the Current Population Survey.” Databases, Tables & Calculators by Subject. Bureau of Labor Statistics. *United States Department of Labor*. Online at: <https://data.bls.gov/cgi-bin/surveymost>.

⁶ Ben Penn, “Burger Executive as Labor Chief Could Pose Conflict,” Bloomberg BNA (Dec. 2, 2016) (online at <https://www.bna.com/burger-executive-labor-n73014448061/>)

company flouted the very labor laws he would be charged with enforcing if confirmed as Secretary.⁷ And his public statements revealed a sneering contempt for the workers in his stores—a contempt that the workers who bravely came forward to share painful accounts of the abuses they had suffered while working in his stores knew firsthand.⁸ Senate Democrats were unified in their opposition to Andrew Puzder from the moment he was nominated, and ultimately, enough Republicans expressed concerns about his nomination that Senate leaders asked the White House to withdraw his nomination.⁹

But let's be clear. While Andrew Puzder's withdrawal was a victory for every American who works for a paycheck, the bar for Secretary of Labor is not simply "better than Andrew Puzder."

My staff's review of your record has raised several concerns regarding your qualifications for this position. In particular, your tenure in the Civil Rights Division at the Department of Justice ("DOJ") raises serious concerns about whether you are capable of running a large government agency independently and without undue political influence. Under your watch at DOJ, the Division was embroiled in a politicized hiring scandal actively orchestrated by your Deputy, and, in an investigation of your tenure at the Division, the Inspector General concluded that you "did not sufficiently supervise" your own deputy.¹⁰

I am also concerned about how you will respond to President Trump's plan to cut more than 20% of DOL's budget—the third biggest cut to any agency after the State Department and the Environmental Protection Agency.¹¹ These draconian cuts will hobble your ability to run core parts of the agency, including the divisions that investigate and enforce the federal health and safety standards that keep workers safe on the job and the federal wage and hour laws that ensure that workers are paid fairly. President Trump's earlier Executive Order freezing hiring and promotion across the government will make your job even more difficult, hamstringing your ability to recruit and retain the most talented federal workers.¹²

Given the breadth of the responsibility you will hold to protect workers if you are confirmed, and the conditions under which you would assume this role, I have a number of outstanding questions and concerns I would like you to address before I vote on your

⁷ Ben Penn, "Burger Executive as Labor Chief Could Pose Conflict," Bloomberg BNA (Dec. 2, 2016) (online at <https://www.bna.com/burger-executive-labor-n73014448061/>)

⁸ "Charbroiled: Workers tell all about life under Puzder." A HELP committee Minority Staff Report. Online at: <http://www.warren.senate.gov/files/documents/CharbroiledReport.pdf>

⁹ James Hohmann. "The Daily 202: What Killed Andrew Puzder's nomination to be Labor secretary." The Washington Post. Online at: https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/02/16/daily-202-what-killed-andrew-puzder-s-nomination-to-be-labor-secretary/58a5126ce9b69b1406c75cb7/?utm_term=.49d930753c3e

¹⁰ An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division, DOJ Inspector General and DOJ Office of Professional Responsibility (July 2, 2008). Online at <https://oig.justice.gov/special/s0901/final.pdf>

¹¹ Kim Soffen and Denise Lu. "What Trump Cut in his Budget." The Washington Post. Online at: https://www.washingtonpost.com/graphics/politics/trump-presidential-budget-2018-proposal/?utm_term=.f86cb42013aa

¹² "Presidential Memorandum Regarding the Hiring Freeze." The White House. Online at: <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-hiring-freeze>

nomination. Unfortunately, despite repeated requests from my Democratic colleagues on the committee and myself, and contrary to established committee precedent, the Republican Chairman has only allowed a few minutes for questions in previous confirmation hearings this Congress.¹³ To ensure that the Senate and the public can obtain answers about your readiness for this job and determine whether you are indeed qualified for this position, this letter contains my additional questions. I sent a similar letter to Andrew Puzder, President Trump's first nominee for this position, but Mr. Puzder withdrew his nomination before he responded to my questions.

The remainder of this letter details my concerns and asks you a set of questions that will help me to better understand how you would approach the position of Secretary of Labor. In order for me to have a complete understanding of your views, please provide me with answers to the following questions no later than March 27, 2017.

CONFLICTS OF INTEREST

The next Labor Secretary will be responsible for improving working conditions across the country; providing opportunities for employment to those seeking it; and guaranteeing employment-related rights and benefits. That is why our next Labor Secretary must work exclusively for American workers and families.

Andrew Puzder had extensive conflicts of interest from which he was not able to remove himself. I am encouraged by your letter to DOL's designated ethics official, in which you pledge to divest from all conflicts of interest, including those associated with your role on the Board of Directors of U.S. Century Bank.¹⁴ If confirmed, I hope that you and your office remain diligent throughout your tenure in your efforts to avoid any and all conflicts of interest and the appearance thereof.

While you have reached an agreement with the Office of Government Ethics to disclose and divest all of your conflicts of interest, President Trump has made it abundantly clear that he will not appropriately divest.¹⁵ Mr. Trump's company has a long record of mistreating workers and violating federal labor laws.¹⁶ President Trump still owns his business.¹⁷ President Trump

¹³ Strauss, V. "How Sen. Lamar Alexander slammed Betsy DeVos's confirmation hearing through committee." *The Washington Post* (Jan. 17, 2017). Online at: <https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/17/how-sen-lamar-alexander-slammed-betsy-devoss-confirmation-hearing-through-his-committee/>.

¹⁴ Rene Alexander Acosta, Letter to Alternate Designated Agency Ethics Official, March 6, 2017.

¹⁵ Andy Sullivan, Emily Stephenson, and Steve Holland, "Trump says won't divest from his business while president," *Reuters* (Jan. 11, 2017) (online at <http://www.reuters.com/article/us-usa-trump-finance-idUSKBN14V21I>).

¹⁶ See Cogan Schneider, "Labor board: Trump hotel violated labor law," *Politico* (Nov. 3, 2016) (online at <http://www.politico.com/story/2016/11/labor-board-trump-hotel-230720>); see also Steve Reilly, "Hundreds allege Donald Trump doesn't pay his bills," *USA Today* (online at <http://www.usatoday.com/story/news/politics/elections/2016/06/09/donald-trump-unpaid-bills-republican-president-laswuits/85297274/>).

¹⁷ *Supra* note 11.

appointed you to run the agency responsible for enforcing the law against his own company, creating a conflict that will be extraordinarily difficult for you to manage.

Our next Labor Secretary must hold *all* employers accountable for unfair practices, and I hope that if confirmed, you will not put the interests of the man who appointed you above those of the American people.

Based on these facts, I have the following questions on this subject:

If confirmed, what actions will you take as Secretary to continually ensure that you avoid all conflicts of interest and the appearance thereof?

Do you believe President Trump should fully divest from The Trump Organization in order to prevent conflicts of interest for you and other federal government agencies?

Will you commit to enforce wage and hour and occupational health and safety regulations against The Trump Organization if the company violates these laws and harms its employees?

What is your specific plan for insulating yourself and DOL from conflicts of interest related to DOL actions that may impact the Trump Organization?

POLITICIZATION OF DOJ'S CIVIL RIGHTS DIVISION

If confirmed as Labor Secretary, you will oversee nearly 16,000 federal employees dedicated to serving *all* of our nation's workers.¹⁸ But your tenure as Assistant Attorney General for Civil Rights at the DOJ from 2003-2005 calls into question your ability to lead and manage an agency dedicated to protecting American workers.

Under your watch, the Division was embroiled in a politicized hiring scandal actively orchestrated by your Deputy Assistant Attorney General, Bradley Schlozman. A 2008 investigation by the DOJ Inspector General and DOJ Office of Professional Responsibility found that Mr. Schlozman "violated Department policy and federal civil service laws, and committed misconduct."¹⁹ Specifically, Mr. Schlozman "inappropriately considered political and ideological affiliations in hiring career attorneys... favored applicants with conservative political or ideological affiliations and disfavored applicants with civil rights or human rights experience."²⁰

¹⁸ Department of Labor, Agency Financial Report: FY 2016. Online at https://www.dol.gov/sites/default/files/media_0/Sec/2016annualreport.pdf

¹⁹ An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division, DOJ Inspector General and DOJ Office of Professional Responsibility (July 2, 2008). Online at <https://oig.justice.gov/special/s0901/final.pdf>

²⁰ An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division, DOJ Inspector General and DOJ Office of Professional Responsibility (July 2, 2008). Online at <https://oig.justice.gov/special/s0901/final.pdf>

This scandal occurred – at least in part – because of your management failures. The DOJ Inspector General report found that you “had indications of potential problems in Schlozman’s actions and judgment, and ... had sufficient information ... to have raised red flags warranting closer supervision of him.”²¹ According to the IG, your Special Litigation Section Chief directly informed you that unqualified applicants were routinely being hired; attorneys filed grievances against Schlozman during performance appraisals; and you knew that Schlozman “forwarded an inappropriate, racially insensitive e-mail to other Department officials.”²²

But you failed to stop these egregious abuses. There is no ambiguity in the Inspector General’s conclusion that you “did not sufficiently supervise” your own deputy.²³

Your management of the Civil Rights Division created a corrosive environment for the career attorneys dedicated to protecting the civil rights of all Americans. As you ask to lead a notably larger group of equally dedicated and experienced civil servants, I have the following questions:

Do you agree with the DOJ Inspector General that you failed to appropriately supervise your staff? If so, to what do you attribute this failure?

During your confirmation hearing for your DOJ position, Senator Kennedy asked you about preventing such a politicized hiring process. You answered by saying: “I would hope that the hiring process looks for the best qualified individuals... by ensuring that those who are participating in the process, those who do the interviewing understand what the role is and what the role is not. That’s something I think should be emphasized to all participants in the hiring process, and certainly if confirmed I would do that.”²⁴

Given your explicit commitment to Senator Kennedy, how did you let this scandal happen under your watch?

If you are confirmed as Secretary, will you commit to actively preventing politicization of DOL? How will you do so?

VOTER SUPPRESSION AND DISCRIMINATION

²¹ An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division, DOJ Inspector General and DOJ Office of Professional Responsibility (July 2, 2008). Online at <https://oig.justice.gov/special/s0901/final.pdf>

²² An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division, DOJ Inspector General and DOJ Office of Professional Responsibility (July 2, 2008). Online at <https://oig.justice.gov/special/s0901/final.pdf>

²³ An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division, DOJ Inspector General and DOJ Office of Professional Responsibility (July 2, 2008). Online at <https://oig.justice.gov/special/s0901/final.pdf>

²⁴ United States Senate, Committee on the Judiciary, July 2003. Online at <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg91833/pdf/CHRG-108shrg91833.pdf>

As Secretary, you will be expected to proactively defend the rights of American workers. But your record as the head of the Civil Rights Division – where you had the job of defending the civil rights of *all* Americans – raises questions about your ability to put the public interest ahead of political ideology.

As Senator Ted Kennedy noted in a 2007 Senate Judiciary oversight hearing, the Voting Rights Section under President George W. Bush took “actions in Section 5 cases that seem intended to advance the electoral prospects of the President’s party, rather than protect against discriminatory voting changes.”²⁵ By the end of your tenure as Assistant Attorney General, “prosecutions for the kinds of racial and gender discrimination crimes traditionally handled by the division [had] declined 40 percent... [and] dozens of lawyers [found] themselves handling deportation orders and other immigration matters instead of civil rights cases.”²⁶

For example, when the Texas State Legislature proposed a redistricting plan that the U.S. Supreme Court later ruled “failed to protect minority rights,”²⁷ you were absent on the job. You recused yourself from the case with no explanation, and gave no explanation to Congress when asked.²⁸ Instead, you left important decisions relating to this case to a deputy who we now know played a role in the politicization of the Civil Rights Division.²⁹ He, in turn, disregarded the opinion of six career attorneys and two analysts in the Voting Rights Section who concluded that the Texas redistricting plan “illegally diluted black and Hispanic voting power in two congressional districts”³⁰ and that Texas “ha[d] not met its burden in showing that the proposed congressional redistricting plan does not have a discriminatory effect.”³¹ In effect, he overrode the experienced opinion of apolitical career attorneys and allowed the redistricting plan that disenfranchised minority voters to proceed.³²

In another case, you defended an Ohio voter challenge law that disproportionately disenfranchised African-American voters. In that case, an African-American couple sued to overturn a Jim Crow-era Ohio law that allowed private individuals to challenge voter eligibility at polling places on the basis that the law discriminated against African-American voters.³³

²⁵ Ted Kennedy, “Restoring the Civil Rights Division,” Harvard Law and Policy Review.

²⁶ Dan Eggen, “Civil Rights Focus Shift Roils Staff at Justice,” Washington Post. Nov. 13, 2005. Online at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/12/AR2005111201200.html>

²⁷ “Justices Back Most G.O.P. Changes to Texas Districts,” The New York Times. June 28, 2006. Online at <http://www.nytimes.com/2006/06/28/washington/28cnd-scotus.html>

²⁸ House Committee on the Judiciary, Subcommittee on the Constitution, March 2004. Online at <https://www.gpo.gov/fdsys/pkg/CHRG-108hhrg92346/html/CHRG-108hhrg92346.htm>

²⁹ House Committee on the Judiciary, Subcommittee on the Constitution, March 2004. Online at <https://www.gpo.gov/fdsys/pkg/CHRG-108hhrg92346/html/CHRG-108hhrg92346.htm>; An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division, DOJ Inspector General and DOJ Office of Professional Responsibility (July 2, 2008). Online at <https://oig.justice.gov/special/s0901/final.pdf>

³⁰ Dan Eggen, “Justice Staff Saw Texas Districting as Illegal,” Dec. 2, 2005. Online at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120101927.html>

³¹ Dan Eggen, “Justice Staff Saw Texas Districting as Illegal,” Dec. 2, 2005. Online at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120101927.html>

³² Dan Eggen, “Justice Staff Saw Texas Districting as Illegal,” Dec. 2, 2005. Online at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120101927.html>

³³ John Nichols, Trump’s Labor Pick Has a History of Attacking Voting Rights, The Nation, Feb. 16, 2017, available at <https://www.thenation.com/article/trumps-labor-pick-has-a-history-of-attacking-voting-rights/>.

Significantly, that year, the Ohio Republican Party announced that it planned to deploy representatives in as many precincts as possible to act as challengers, focusing primarily on majority African-American precincts.³⁴

Although your Division had not formally intervened in the case nor submitted an amicus brief, just four days before the 2004 presidential election, you took the unusual step of submitting a letter-brief to the judge in the case arguing that challenge statutes like the one at issue did not violate federal law. In your letter-brief, you stated that the Ohio law helped maintain “the balance between ballot access and ballot integrity.” You also asserted that these challenge statutes do not violate the Voting Rights Act because they are based on objections to citizenship, residency, and legal voting age, and are “not tied to race.”³⁵ Your intervention in the case was criticized as a politically-motivated decision aimed at boosting the Republican Party’s prospects in the 2004 election.³⁶

These cases reveal a willingness to overrule agency experts based on political considerations and a failure to impartially defend the civil rights of *all* Americans, particularly minorities and other historically disenfranchised groups. Therefore, I have the following questions on this subject:

Why did your office overrule DOJ career appointees’ recommendations with regard to the Texas voting rights cases? Will you commit to respect the policy findings and conclusions of DOL experts and career staff?

Will you commit to transparently acknowledging and explaining disagreement between political and career recommendations when there is a notable contrast?

Why did you submit a letter-brief in the 2004 Ohio challenge law case just four days before the 2004 presidential election? In how many other voting rights cases in which DOJ did not formally intervene nor submit an amicus brief did you submit a letter-brief?

What key challenges do you see in enforcing labor laws that protect workers’ civil rights? Which areas of enforcement will you prioritize?

What metrics will you use to determine whether DOL is fulfilling its role in protecting workers’ rights and stamping out discrimination?

What key challenges do you see in enforcing labor laws that protect workers against discrimination? Which areas of enforcement will you prioritize?

Which workers do you believe are at greatest risk of discrimination?

³⁴ Spencer v. Blackwell, 347 F. Supp. 2d 528, 530 (S.D. Ohio 2004).

³⁵ Letter from R. Alexander Acosta, Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to The Honorable Susan J. Dlott, Judge of the United States District Court for the Southern District of Ohio, RE: Spencer v. Blackwell, Case No. 04CV738, Oct. 29, 2004.

³⁶ John Nichols, Trump’s Labor Pick Has a History of Attacking Voting Rights, The Nation, Feb. 16, 2017, available at <https://www.thenation.com/article/trumps-labor-pick-has-a-history-of-attacking-voting-rights/>.

ENFORCEMENT AND REGULATION OF WAGE AND HOUR LAWS

DOL is responsible for implementing and enforcing more than 180 federal laws that have been passed by Congress. These laws include the Fair Labor Standards Act (FLSA), which sets a federal minimum wage and provides overtime protections; the Occupational Safety and Health Act (OSHA), which requires that workplaces are free from safety hazards; the Family and Medical Leave Act (FMLA), which grants workers up to 12 weeks of leave for births or serious illnesses; several laws that require government contractors to pay “prevailing wages;” and the Employee Retirement Income Security Act (ERISA), which contains various requirements for retirement plans.³⁷

If confirmed, your job will be to ensure that employers follow these laws, whether or not you personally agree with them. Your career has included little engagement with labor law, regulation, and enforcement, and, to my knowledge, you have not conveyed your views on federal labor law in public statements or publications to any significant extent. While I am eager to hear more about your stances on these important issues at your upcoming HELP Committee hearing and in your written responses to my questions, I am very concerned about the possibility that you will simply fall in line with President Trump’s anti-worker statements and policies, which would be disastrous for the millions of American workers who rely on the Department of Labor’s enforcement of labor law.

Since 1938, the federal minimum wage has protected working families by ensuring that workers are fairly compensated for their time and effort.³⁸ As one of our nation’s most fundamental labor protections, the minimum wage has been periodically raised through the years to keep up with the rising cost of living. While President Trump has expressed numerous and conflicting opinions regarding the minimum wage, he said at one point that he wanted “to keep the minimum wage pretty much where it is right now,” and, at another point, that the federal government ought to “let the states decide” what to do about the minimum wage. Despite then-Candidate Trump’s comments, today’s federal minimum wage of \$7.25 is 17% below the poverty line for a family of four, and an increase to just \$10.10 per hour would lift at least 4.6 million people out of poverty.³⁹

The Trump administration has already indicated it does not support the Obama administration’s Overtime Rule, which would allow all workers making less than \$47,500 per year to receive overtime pay, securing protections for 4.2 million workers after no updates of the threshold for overtime protections since 2004.⁴⁰ In August, President Trump expressed support

³⁷ “Summary of the Major Laws of the Department of Labor.” *United States Department of Labor*. Online at: <https://www.dol.gov/general/aboutdol/majorlaws>.

³⁸ “Minimum Wage—U.S. Department of Labor.” *United States Department of Labor*. Online at: <https://www.dol.gov/whd/minwage/chart.htm>.

³⁹ “Raising the Minimum Wage: A Progress Update.” *Executive Office of the President* (October 2016). Online at: https://www.whitehouse.gov/sites/default/files/6_october_2016_min_wage_report.pdf

⁴⁰ “Fact Sheet: Final rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative, and Professional Employees.” Wage and Hour Division. *United States Department of Labor* (May

for “rolling back the overtime regulation,” even though the Congressional Budget Office estimated that doing so would reduce workers’ earnings by hundreds of millions of dollars per year without preserving or creating any significant number of jobs.⁴¹

I am also concerned about DOL’s duty to ensure that all employers are held accountable for abuses of their employees—including large corporations that try to shirk responsibility through franchises, over whose policies and balance sheets they maintain significant control. Those corporations are already lobbying against the National Labor Relations Board’s recent “joint employer” decision, but it will be up to the DOL to stand with workers, not lobbyists, in fully enforcing protections for the increasing number of Americans employed at franchises or as contractors or subcontractors.⁴²

Although President Trump’s statements call into question his commitment to lawfully enforcing federal wage and hour laws, millions of working families will be relying on you, if confirmed as Labor Secretary, to do so regardless of the President’s opinions. In order to ensure that you are willing and able to fulfill the Secretary’s duty to implement and enforce federal labor law, please provide answers to the following questions:

Will you commit to continuing enforcement of DOL wage and hour and workplace safety standards? What metrics will you use to assess the effectiveness of your enforcement efforts?

If President Trump’s 20.7% proposed budget cut is enacted, it will be virtually impossible to maintain the level of enforcement the previous administration obtained. How will you prioritize enforcement activities and investigations in the Wage and Hour Division if this budget is enacted?

President Trump has expressed criticism of the DOL Overtime Rule. Will you commit to defending the Rule, which would extend overtime protections for millions of American workers, in court, starting by appealing the injunction?

If not, what are your specific plans for updating regulations so that only bona fide executives, rather than low-income workers, are exempt from overtime protections, as the FLSA requires?

2016). Online at: <https://www.dol.gov/whd/overtime/final2016/overtime-factsheet.htm>; Opfer, C. “Trump Freezes Overtime, Pay Data Regulations.” *Bloomberg BNA* (Jan. 24, 2017). Online at: <https://www.bna.com/trump-freezes-overtime-n73014450151/>.

⁴¹ Schneier, C. “Trump v. overtime.” *Morning Shift. Politico* (Aug. 15, 2016). Online at: <http://www.politico.com/tipsheets/morning-shift/2016/08/trump-v-overtime-rule-215883>; “The Economic Effects of Canceling Scheduled Changes to Overtime Regulations.” *Congressional Budget Office* (Nov. 2016). Online at: <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51925-overtimeregulations.pdf>.

⁴² Wheeler, L. “Trade groups push Congress to reverse NLRB joint employer ruling.” *The Hill* (Feb. 14, 2017). Online at: <http://thehill.com/regulation/319373-trade-groups-push-congress-to-reverse-nlrb-joint-employer-ruling>; “Franchise Business Economic Outlook for 2017.” *HIS Markit & Franchise Education and Research Foundation* (Jan. 2017). Online at: http://franchise.org/sites/default/files/Franchise_Business_Outlook_Jan_2017.pdf.

Will you hold parent companies responsible for violations of the minimum wage or overtime laws of the workers in their franchises where the parent company is legally culpable?

What are your specific plans to protect the rights of workers of franchised companies?

What will you do to improve the implementation and enforcement of federal labor law and ensure that all American workers can work in a safe and healthy environment, achieve financial security, and retire in old age?

WELLS FARGO, RESTAURANT ASSOCIATES, AND OTHER ONGOING INVESTIGATIONS

The Obama administration secured nearly \$1.6 billion in back wages for more than 1.7 million American workers between 2009 and 2016.⁴³ Because of robust DOL Wage and Hour Division enforcement of wage and hour laws, these hardworking Americans were finally paid the wages they were owed for their work. During my time in the Senate, I have joined my colleagues to initiate two major wage and hour investigations. The first investigation involved Restaurant Associates, the company that holds the federal contract for the United States Senate Cafeteria.

In the summer of 2015, a series of reports featured United States Senate Cafeteria workers that were living below the poverty line, in part because they were not being paid the wages they were owed.⁴⁴ After speaking with a number of these workers in my office, and consulting the Architect of the Capital, I joined the entire Democratic caucus in sending a letter to DOL, asking them to investigate these alleged wage and hour violations by Restaurant Associates in the Senate cafeteria, and in their other contracts throughout the federal government.⁴⁵

On July 26th, 2016, DOL found that Restaurant Associates owed more than \$1 million in back wages to 674 employees for violations of the McNamara-O'Hara Service Contract Act, which governs wages for contract workers.⁴⁶ Because of these labor violations, DOL initiated debarment proceedings against Restaurant Associates and their principal officer, Dick Cattani,

⁴³ Secretary Thomas E. Perez. "Department of Labor: Memorandum to the American People" Online at: <https://www.dol.gov/sites/default/files/dol-exit-memo.pdf>

⁴⁴ Mike DeBonis. "National Push for \$15 Minimum Wage Hits Home for U.S. Senate Workers." The Washington Post. Online at: https://www.washingtonpost.com/politics/national-push-for-15-minimum-wage-hits-home-for-us-senate-workers/2015/07/21/54dd7e14-2fc0-11e5-8f36-18d1d501920d_story.html?utm_term=.ff6fce0039db & Bertrand Olatara. "I'm a Cook in the US Senate but I still need food stamps to feed my children." Guardian Opinion. Online at: <https://www.theguardian.com/commentisfree/2015/apr/22/i-am-a-cook-in-the-us-senate-but-i-still-need-food-stamps-to-feed-my-children>

⁴⁵ Bridget Bowman, "Senators Want Labor Department Audit of Food Vendor." (Mar. 22, 2016) (Online at: <http://www.rollcall.com/news/policy/senators-call-labor-department-audit-food-vendor>)

⁴⁶ Department of Labor. News Release. (July 7, 2016) (online at: <https://www.dol.gov/newsroom/releases/whd/whd20160726>)

on December 30th, 2016.⁴⁷ If debarred, the company could be unable to bid for federal contracts for three years.⁴⁸

Federal contractors who steal wages from workers should not be eligible for a single additional federal dollar. Companies like these are bad for American workers, and their contracts are an irresponsible use of taxpayer money.

The second investigation pertains to alleged wage and hour violations at Wells Fargo. On September 22, 2016, shortly after the Consumer Financial Protection Bureau (CFPB) fined Wells Fargo \$100 million for opening 1.5 million unauthorized deposit accounts,⁴⁹ I wrote to DOL with seven of my Senate colleagues asking them to open an investigation into potential violations of the FLSA at the company.⁵⁰

The CFPB's agreement cited a sales culture at Wells Fargo characterized by stringent quotas, and, in the wake of the scandal, current and former employees came forward in droves to describe threats of termination, mandated unpaid overtime, harassment, and other forms of retaliation that they experienced when these quotas weren't met.⁵¹ Given these first-hand accounts, academic reports describing similar incidents at Wells Fargo and at other retail banks across the industry, and a number of legal cases citing wage and hour violations at Wells Fargo, I asked DOL to open a formal investigation to ensure that all current and former employees were fully being paid for every hour they worked.⁵²

DOL replied on September 26 agreeing to begin a "top to bottom" review⁵³ of all labor violations at the company and opened a webpage, www.dol.gov/wellsfargo to help current and former Wells Fargo employees become aware of their rights under labor law.⁵⁴ As of early January, DOL's investigations into possible wage and hour violations at Wells Fargo were ongoing; however, reports indicated that they were being hampered by Tammy McCutchen, an

⁴⁷ Theodore Schleifer. "Feds to Ban Firms that stiffed Senate cafeteria workers over \$1 million in wages." CNN. Online at: <http://www.cnn.com/2016/12/30/politics/senate-cafeteria-department-of-labor/> & Department of Labor. News Release. Online at: <https://www.dol.gov/newsroom/releases/whd/whd20160726>

⁴⁸ Federal Acquisitions Regulation. Subpart 9.4—Debarment, Suspension, and Ineligibility. (online at: https://www.acquisition.gov/far/html/Subpart%209_4.html)

⁴⁹ Consumer Financial Protection Bureau, (Sep. 8, 2016) (Online at: <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/>)

⁵⁰ Elizabeth Warren. (Sep. 22, 2016). (Online at: http://www.warren.senate.gov/files/documents/2016-9-22WellsFLSAletter_OCR.pdf)

⁵¹ Matt Egan, "Workers tell Wells Fargo horror stories," Time (September 9, 2016)

"Wells Fargo settled over its bogus accounts. but it still faces a fight from customers and ex-employees," Los Angeles Times (September 10, 2016) (on line at <http://www.latimes.com/business/la-fi-wells-lawsuits-20160909-snap-story.html>):

⁵² Anastasia Christman, "Banking on the Hard Sell: Low Wages and Aggressive Sales Metrics Put Bank Workers and Customers at Risk," National Employment Law Project (June 2016). & Elizabeth Warren. Letter to DOL. http://www.warren.senate.gov/files/documents/2016-9-22WellsFLSAletter_OCR.pdf

⁵³ Elizabeth Dexheimer "Wells Fargo Faces Top to Bottom Review" Labor Department Says." Bloomberg. Online at: <https://www.bloomberg.com/news/articles/2016-09-27/wells-fargo-faces-top-to-bottom-review-labor-department-says>

⁵⁴ Department of Labor. Online at: <https://www.dol.gov/wellsfargo>

attorney with possible ties to the Trump administration who was also representing Wells Fargo during the presidential transition period.⁵⁵

To determine whether you are committed to following through with these and other ongoing investigations at the Wage and Hour Division, I ask that you answer the following questions:

Will you continue all ongoing investigations at the Wage and Hour Division of DOL to ensure that workers will not suffer setbacks in their effort to recover lost wages as a result of the change in leadership?

Will you continue with debarment proceedings of Restaurant Associates to ensure that the workers who feed federal workers and Senate employees aren't cheated out of their wages and to ensure that federal taxpayer dollars are being used responsibly?

Will you continue with any other ongoing debarment proceedings?

Will you promise to continue the Department's ongoing investigation of wage and hour violations at Wells Fargo?

Will you ensure that Tammy McCutchen, and any other individuals who have defended parties to ongoing labor investigations and therefore have conflicts of interest with ongoing federal labor investigations, are not given positions in the Department or are recused from any and all involvement in the Wells Fargo case and any other related case?

IMPLEMENTING DOL'S CONFLICT OF INTEREST RULE

If confirmed as Labor Secretary, you will be responsible for overseeing the Employee Benefit Security Administration (EBSA), the agency at DOL charged with “foster[ing], promote[ing], and develop[ing] the welfare...of retirees.”⁵⁶ EBSA enforces ERISA, the federal law that sets standards for and protects employees in employment-based pensions and retirement plans.⁵⁷

One-third of households on the verge of retirement don't have a single dollar saved for retirement, and nearly two-thirds have saved less than one year's income.⁵⁸ With 10,000 of these baby boomers expected to turn 65 every single day for the next twenty years, we are on the

⁵⁵ Emily Glazer. “Wells Fargo Investigation Hampered by Outside Attorney Citing a Trump Tie, Labor Department Claims.” Wall Street Journal. Online at: <http://www.wsj.com/articles/wells-fargo-investigation-hampered-by-outside-attorney-citing-a-trump-tie-labor-department-claims-1483646713>

⁵⁶ “Our Mission,” *United States Department of Labor* (online at <https://www.dol.gov/opa/aboutdol/mission.htm>).

⁵⁷ 29 US Code Chapter 18. Employee Retirement Income Security Program. Online at: <https://www.law.cornell.edu/uscode/text/29/chapter-18>

⁵⁸ Nanci Hellmich. “One-third have almost no retirement savings.” USA Today. Online at: <http://www.usatoday.com/story/money/2015/04/21/no-retirement-savings/26070017/>

precipice of a deep retirement crisis.⁵⁹ Given the size of the pension and retirement savings shortfall in the United States, it is critical that we have strong EBSA enforcement at DOL.

Part of your job as Labor Secretary will be to ensure that DOL's rule to protect savers from financial adviser conflicts of interest is fully implemented and enforced. In April of 2016, DOL finalized this rule to require all investment advisers to give retirement investment advice in their clients' best interest.⁶⁰ Conflicts of interest in retirement investment advice are costing Americans more than \$17 billion in lost retirement savings every year.⁶¹ Implementation of the rule begins April 10, 2017 unless the Department's proposed sixty-day delay is finalized.⁶²

Even before the rule has been implemented, major financial institutions such as Fidelity, Charles Schwab, BlackRock, and others have *already* announced that they are slashing fees for their funds.⁶³ That money, which used to be going to giant financial institutions and financial advisers, is now going straight to the retirement accounts of hardworking Americans.

In addition to bringing down sky-high fees, the rule also puts a stop to kickbacks, fancy vacations, and other problematic incentives that benefit financial advisors but not retirees. Several large Fortune 500 companies have already announced that they will no longer offer investment advisory services on a commission basis—effectively removing the incentive for financial advisers to sell products that net the adviser a bigger payday but are not in the consumer's best interest.⁶⁴

On Friday, February 3, 2017, President Trump issued a memorandum directing DOL to “examine the Fiduciary Duty Rule,” and “prepare an updated economic and legal analysis concerning [its] likely impact.”⁶⁵ The memorandum also directs DOL to “publish for notice and comment a proposed rule rescinding or revising the Rule” should it determine that the rule is “inconsistent” with “administration priorities.”⁶⁶ On March 1, DOL announced that, in

⁵⁹ D'Vera Cohn and Paul Taylor. “Baby Boomers Approach 65—Glumly.” Pew. Online at: <http://www.pewsocialtrends.org/2010/12/20/baby-boomers-approach-65-glumly/>

⁶⁰ Federal Register. Vol. 81. No. 68. April 8, 2016. Online at:

<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28806>

⁶¹ The White House. “Fact Sheet: Middle Class Economics: Strengthening Retirement Security by Cracking Down on Backdoor Payments and Hidden Fees.” Online at: <https://obamawhitehouse.archives.gov/the-press-office/2015/02/23/fact-sheet-middle-class-economics-strengthening-retirement-security-crack>

⁶² Sarah Lynch. “Labor Department to Delay, Revisit fiduciary rule.” Reuters. Online at: <http://www.reuters.com/article/us-usa-brokerage-regulation-exclusive-idUSKBN15P007>

⁶³ Tom Anderson. “Fidelity joins BlackRock, Schwab in cutting ETF expenses.” CNBC. Online at: <http://www.cnbc.com/2016/10/05/what-blackrocks-fee-cuts-mean-for-index-investors.html>

⁶⁴ Investment News, Bank of America Merrill Lynch tells advisers to stop selling mutual funds in brokerage IRAs now (Nov. 1, 2016) (<http://www.investmentnews.com/article/20161101/FREE/161109984/bank-of-america-merrill-lynch-tells-advisers-to-stop-selling-mutual>); Investment News, JPMorgan Chase will stop charging commissions on IRAs due to DOL fiduciary rule (Nov. 10, 2016) (<http://www.investmentnews.com/article/20161110/FREE/161119998/jpmorgan-chase-will-stop-charging-commissions-on-iras-due-to-dol>)

⁶⁵ “Presidential Memorandum on Fiduciary Duty Rule.” The White House. Online at:

<https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule>

⁶⁶ *Id*

accordance with this memorandum, it had proposed a 60-day delay of the Rule and invited comment on the economic analysis the agency was directed to prepare in the memorandum.⁶⁷ If confirmed as Labor Secretary, you will be charged with overseeing this examination and analysis, which is already underway at the Department by Acting Secretary Hugler. You may also be responsible for determining whether to go forward with finalizing the delay, which just last week the Economic Policy Institute estimated will cost Americans saving for their retirement \$3.7 billion dollars.⁶⁸

Given the positive changes in the market identified above, and the most recent estimate from the Economic Policy Institute, any efforts to roll back these new protections will be devastating to consumers.

Rollbacks would also disadvantage those honest and hardworking financial advisers and broker dealers who will now be able to compete on a level playing field. Dismantling this rule would mean that advisers who already put their customers' interests first will once again have to compete against the ones who don't.

To determine whether you will enforce the laws that protect hardworking Americans who are saving money for their retirement in employment-based retirement accounts, I have the following questions on this subject:

The memorandum President Trump issued on February 3 requires you to conduct a new economic and legal analysis of the Fiduciary Rule, and, depending on the results of this analysis, publish a new rule or rescind the rule. And, DOL has already asked for public comment on this analysis.

Did the President or anyone in the White House, on the transition team, or at DOL consult you about the contents of his memorandum? If so, please list the names of all parties you consulted with and send any correspondence on this topic.

What information will you review as part of this assessment? Will you commit to only reviewing information that is independent and is not funded or otherwise compromised by financial industry players with a vested interest in the findings?

Please identify all career and political staff at DOL that will conduct the analysis.

Do you have any reason to believe that the findings of the new analysis will be any different from the detailed, multi-year analysis of the costs and benefits of the rule that was already conducted by DOL before the proposed rule was issued or in the extensive Regulatory Impact Analysis that was issued at the time the rule was finalized? If so, why?

⁶⁷ Jamie Hopkins. "Under President Trump's Direction DOL Moves to Delay Fiduciary Rule." Forbes. Online at: <https://www.forbes.com/sites/jamiehopkins/2017/03/01/under-president-trumps-direction-dol-moves-to-delay-fiduciary-rule/#5821df8443e5>

⁶⁸ Heidi Shierholz. "EPI Comment on the proposal to extend the applicability date to the fiduciary rule." Economic Policy Institute. Online at: <http://www.epi.org/publication/epi-comment-on-the-proposal-to-extend-the-applicability-date-to-the-fiduciary-rule/>

The memorandum asks you to consider litigation costs and possible disruptions to the financial services sector in your economic and legal analysis, Will you also consider the full benefits of the rule for retirees and consumers in addition to any potential costs for the financial industry?

Will you refrain from taking any additional action to delay or limit the rule until your analysis is complete?

Will you inform Congress on an ongoing basis of the status of your efforts?

On February 14, I sent a letter to the White House and DOL asking about reported involvement by a Financial Services Roundtable lobbyist in the development and drafting of President Trump's memorandum. I have not heard back from either the White House or DOL.⁶⁹

Will you commit to responding the questions I asked in that letter about the potential involvement by a Wall Street lobbyist from a leading advocacy organization for the financial services industry?

My office has issued two reports on kickbacks like lavish vacations, tropical cruises, and other prizes that are offered as incentives to salespersons in the annuities industry.⁷⁰ Do you believe that these incentives could encourage a salesperson to recommend a product that is not in the best interest of the customer?

PROTECTING WORKERS FROM DISCRIMINATION

As Labor Secretary, you would be responsible for enforcing the laws that protect female and minority employees from discrimination and harassment. Sexual harassment is a form of sex discrimination that violates the Civil Rights Act.⁷¹ DOL is responsible for issuing guidelines and implementing rules that target “a variety of barriers to equal opportunity and fair pay, including pay discrimination, sexual harassment, hostile work environments, [and] gender identity and family caregiving discrimination.”⁷² In addition, DOL oversees Equal Employment Opportunity (EEO) programs—which prohibit discrimination on the basis of race, religion, sex, national

⁶⁹ Elizabeth Warren. “Warren Questions White House, Labor, Financial Services Roundtable on Report that Wall Street Lobbyist Reviewed Drafts of Trump Executive Orders and Memorandums.” Online at: https://www.warren.senate.gov/?p=press_release&id=1451

⁷⁰ Elizabeth Warren. “Villas, Castles, and Vacations: How Perks and Giveaways Create Conflicts of Interest in the Annuity Industry.” Online at: http://www.warren.senate.gov/files/documents/2015-10-27_Senator_Warren_Report_on_Annuity_Industry.pdf

⁷¹ American Association of University Women, “Know Your Rights: Workplace Sexual Harassment” (online at <http://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/workplace-sexual-harassment/>)

⁷² See Donna Lenhoff, “That Was Then. This is Now,” *U.S. Department of Labor Blog* (January 28, 2015) (online at <https://blog.dol.gov/2015/01/28/was-then-now>); Office of Federal Contract Compliance Programs, “OFCCP Proposes Updated Sex Discrimination,” *U.S. Department of Labor* (January 28, 2015) (online at <https://www.dol.gov/ofccp/sdnprm/>).

origin, disability, or genetic information—funded with federal dollars through its Civil Rights Center.⁷³

You have a mixed record when it comes to adequately enforcing anti-discrimination statutes. You served as Assistant Attorney General for the Department of Justice’s Civil Rights Division from 2003 to 2005. During your confirmation process, you “assure[d]” Senator Ted Kennedy that “employment cases will be pursued...vigorously” under your tenure, including “pattern and practice cases [and] disparate impact cases.”⁷⁴ Yet the Civil Rights Division, in part under your leadership, saw a dramatic decline in employment enforcement actions. From 2001 to 2007, the number of cases taken up by the Civil Rights Division “challenging the systemic discrimination experienced by African-Americans, Latinos, and women...plummeted to less than a third of what it was previously.”⁷⁵ Given this record, I am concerned about your ability to lead the Department of Labor’s efforts to combat workplace discrimination and harassment.

You also, however, appear to understand the adverse effects of systemic discrimination on employees. During your tenure at the Department of Justice’s Civil Rights Division, you described religious intolerance as “morally despicable” and “un-American” and stated that “racial profiling is immoral, [...] wrong, [and] should be ended.”⁷⁶ While serving on the board of the American Bar Association’s Commission for Hispanic Rights and Responsibilities (the “Commission”), the Commission released a report highlighting the “legal obstacles” faced by members of the Latino community. The report acknowledged that “in the area of employment, Latinos continue to face discrimination based on race, national origin, language, sex, gender identity, and immigration status” and argued that “Latino workers are the targets of discriminatory practices that...relegate them to low paying jobs” and “dangerous and unhealthy environments.” The report also condemned gender-based discrimination, noting that “Latinas are subject to sexual harassment and adverse treatment based on their gender and race/ethnicity.”⁷⁷ I am encouraged by these acknowledgements, and would hope that, if confirmed as Labor Secretary, they would guide your efforts to combat workplace discrimination.

⁷³ United States Department of Labor, “Equal Employment Opportunity” (online at <https://www.dol.gov/general/topic/discrimination>).

⁷⁴ Senate Committee on the Judiciary, *Confirmation Hearing on the Nominations of Daniel J. Bryant to be Assistant Attorney General, Office of Legal Policy, Department of Justice, and Rene Alexander Acosta to be Assistant Attorney General, Civil Rights Division, Department of Justice* (July 23, 2003) (online at <https://www.congress.gov/108/chrq/shrg91833/CHRG-108shrg91833.htm>).

⁷⁵ Democratic Policy Committee, “Senate Oversight Highlights Week of June 18, 2007” (June 29, 2007) (online at http://www.dpc.senate.gov/dpcdoc.cfm?doc_name=or-110-1-109).

⁷⁶ Department of Justice, “Justice Department Reaches Settlement Agreement With Oklahoma School District in Muslim Student Headscarf Case” (May 19, 2004) (online at https://www.justice.gov/archive/opa/pr/2004/May/04_crt_343.htm); Senate Committee on the Judiciary, *Confirmation Hearing on the Nominations of Daniel J. Bryant to be Assistant Attorney General, Office of Legal Policy, Department of Justice, and Rene Alexander Acosta to be Assistant Attorney General, Civil Rights Division, Department of Justice* (July 23, 2003) (online at <https://www.congress.gov/108/chrq/shrg91833/CHRG-108shrg91833.htm>).

⁷⁷ American Bar Association, Commission on Hispanic Legal Rights and Responsibilities, *Latinos in the United States: Overcoming Legal Obstacles, Engaging in Civic Life* (2013) (online at http://www.americanbar.org/content/dam/aba/images/commission_on_hispanic_legal_rights_responsibilities/hispani creportnew.pdf).

Americans of all races and genders deserve to know whether you will enforce the laws that protect them at their jobs. To help me understand your positions, I have the following questions on this subject:

On June 14, 2016, the Office of Federal Contract Compliance Programs (OFCCP) at DOL issued a final rule, Discrimination on the Basis of Sex, which updated OFCCP's sex discrimination regulations to explicitly include "the protections against compensation discrimination; sexually hostile work environments; discrimination based on pregnancy, childbirth or related medical conditions; and discrimination based on unlawful sex stereotypes, gender identity, and transgender status."⁷⁸

Do you agree with the substance of these regulations? Would you commit to fully enforcing this rule, should you be confirmed as Labor Secretary? Please describe the specific steps you would take to improve enforcement of this rule, and the specific metrics you will use to measure the effectiveness of the rule and its enforcement by DOL.

DOL's Civil Rights Center "oversees EEO in programs and activities receiving federal financial assistance" from DOL. The Office of Federal Contract Compliance Programs, meanwhile, oversees EEO programs among "employers holding federal contracts and subcontracts."⁷⁹

Will you ensure that DOL's Civil Rights Center is fully funded, so that Americans are protected from discrimination on the basis of race, religion, sex, national origin, disability, or genetic information?

Will you ensure that DOL's Office of Federal Contract Compliance Programs is fully funded, so that employees of federal contractors are protected from discrimination on the basis of race, religion, sex, national origin, disability, or genetic information?

FEDERAL CONTRACTORS

A large fraction of the American workforce—around 22%, as estimated in 2002—is employed by contractors of the federal government, and taxpayers dole out around \$500 billion every year to these companies.⁸⁰ DOL is responsible for enforcing several laws specific to these contractors, including the Davis-Bacon and Related Acts, McNamara-O'Hara Service Contract

⁷⁸ United States Department of Labor, "U.S. Labor Department Announces Updated Sex Discrimination Regulations for Federal Contractors" (June 14, 2016) (online at <https://www.dol.gov/newsroom/releases/ofccp/ofccp20160614>).

⁷⁹ U.S. Department of Labor, "Equal Employment Opportunity" (online at <https://www.dol.gov/general/topic/discrimination>).

⁸⁰ O'Leary, A. "Making Government Work for Families: The federal government's role as employer and contractor in improving family-friendly policies." *Center for American Progress & UC Berkeley School of Law* (July 2009). Online at: https://ncar.ucar.edu/sites/default/files/images/Making_Govt_Work_for_Families%20Article.pdf; "Overview of Awards by Fiscal Year." *USASpending.gov* (2016). Online at: <https://www.usaspending.gov/transparency/Pages/OverviewOfAwards.aspx>.

Act, and the Contract Work Hours and Safety Standards Act.⁸¹ Enforcement of these laws is particularly important because they protect the rights of an estimated one-fifth of the American workforce and ensure that taxpayer dollars that pay for federal contracts are used responsibly.⁸²

Contractors provide a wide variety goods and services, from building airplanes for our military to conducting cutting-edge medical research to serving the food at cafeterias on federal property. Unfortunately, many federal contractors, including some of the largest, have been caught in repeated and serious violations of labor laws. A 2010 Government Accountability Office Report found that half of the largest wage theft penalties were paid by 20 federal contractors.⁸³ And a report by the staff of the Senate HELP Committee found that between 2007 and 2012, nearly half of the penalty dollars assessed by OSHA were paid by federal contractors, and that 42 Americans died as a result of OSHA violations by contractors.⁸⁴ My staff found this year that these patterns have continued, as many of the largest OSHA penalties since 2015 were assessed against federal contractors, and the DOL has caught most of the 100 largest contractors violating wage and hour laws over the past decade.⁸⁵

The executive branch maintains significant control over the procurement process, and President Obama took several steps (mostly via executive order) to address the rampant labor abuses by the federal government's contractors. The 2014 Fair Pay and Safe Workplaces Executive Order, for example, standardized acquisition regulations across agencies, allowing contracting officers to assess companies in light of their labor violations over the prior three years.⁸⁶ Other rules have established basic protections such as paid sick leave, a \$10.10 minimum wage, and discrimination protections for employees of contractors.⁸⁷ Ending labor abuses by contractors will require continued strong leadership at the Department to protect and build on these steps and cooperation by all government entities that award federal contracts.

⁸¹ "Government Contracts." Department of Labor. Online at: <https://www.dol.gov/general/topic/wages/govtcontracts>

⁸² O'Leary, A. "Making Government Work for Families: The federal government's role as employer and contractor in improving family-friendly policies." *Center for American Progress & UC Berkeley School of Law* (July 2009).

⁸³ "Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors." *U.S. Government Accountability Office* (September 17, 2010). Online at: <http://www.gao.gov/products/GAO-10-1033>.

⁸⁴ "Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk" [Majority Committee Staff Report]. *Health, Education, Labor, and Pensions Committee, United States Senate*. Online at: <http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf>.

⁸⁵ "Breach of Contract: How Federal Contractors Fail American Workers on the Taxpayer's Dime." Office of Senator Elizabeth Warren. *United States Senate* (March 6, 2017). Online at: https://www.warren.senate.gov/files/documents/2017-3-6_Warren_Contractor_Report.pdf.

⁸⁶ "Executive Order--Fair Pay and Safe Workplaces." *The White House, Office of the Press Secretary* (July 31, 2014). Online at: <https://www.whitehouse.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces>.

⁸⁷ "Final Rule: Executive Order 13706, Establishing a Paid Sick Leave for Federal Contractors." *Wage and Hour Division, United States Department of Labor*. Online at: <https://www.dol.gov/whd/govcontracts/eo13706/>; "OFCCP's Sex Discrimination Final Rule, Fact Sheet." *United States Department of Labor*. Online at: https://www.dol.gov/ofccp/SexDiscrimination/SexDiscrimFinalRuleFactSheet_JRFOA508c.pdf; "Amended Regulation: Executive Order 11246 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity." *Office of Federal Contract Compliance Programs (OFCCP), United States Department of Labor*. Online at: <https://www.dol.gov/ofccp/lgbt.html>; "Fact Sheet: Final Rule to Implement Executive Order 13658, Establishing a Minimum Wage for Contractors." *Wage and Hour Division, United States Department of Labor*. Online at: <https://www.dol.gov/whd/flsa/eo13658/fr-factsheet.htm>.

Despite this recent progress and the troubling trends that prompted actions to address them, some have predicted that the Trump administration would target these basic protections. Congressional Republicans have already revoked the Fair Pay and Safe Workplaces Executive Order with a disapproving resolution under the Congressional Review Act, a move that the White House endorsed, arguing that requiring prospective large contractors to disclose violations involving stolen wages and killed or injured workers might result in “delays.”⁸⁸

As another ominous sign of the Trump administration’s willingness to turn its back on workers, it hired Geoffrey Burr, formerly the head lobbyist for the construction industry’s trade group, on its DOL “beachhead” team.⁸⁹ On behalf of some of the massive contractors that rely on taxpayer money, Burr lobbied in favor of a bill that would prohibit enforcement of the Davis-Bacon Act, one of the foundational federal labor laws that requires contractors to pay their employees fairly. And another member of the Department’s “beachhead team” has supported the repeal of the Davis-Bacon Act.⁹⁰

I am deeply concerned by the prospect of placing the responsibility of enforcing labor laws that protect the employees of contractors into the hands of individuals who have advocated against their enforcement, and have even been paid by corporations wanting to get big government checks with no strings attached to do so. Tens of millions of workers rely on the DOL to enforce these laws, and your fitness to serve as Secretary of Labor depends in part on your willingness to continue and improve enforcement efforts.

To determine how you will enforce the labor laws that protect the Americans who work for federal contractors, and whether you will ensure that taxpayer dollars are spent responsibly, I have the following questions on this subject:

*Now that Congressional Republicans and President Trump have rescinded the Fair Pay and Safe Workplaces Executive Order, please describe how you will ensure that contracting agencies can consider prior labor violations in procurement decisions, as federal law and acquisition regulation requires.*⁹¹

The Establishing Paid Sick Leave for Federal Contractors Executive Order (Executive Order 13706) requires federal contractors to offer covered employees up to 7 days of paid sick leave each year, giving sick leave to around 1.15 million workers.⁹²

⁸⁸ “H.J. Res. 38, H.J. Res. 36, H.J. Res. 41, H.J. Res. 40, H.J. Res. 37 - Statement of Administration Policy.” *The White House* (Feb. 1, 2017). Online at: <https://www.whitehouse.gov/the-press-office/2017/02/01/statement-administration-policy>.

⁸⁹ Penn, B. “Construction Lobbyist Plays Lead Role at Labor Department.” *Bloomberg BNA* (Feb. 8, 2017). Online at: <https://www.bna.com/construction-lobbyist-plays-n57982083494/>.

⁹⁰ Elliott, J. “Labor Department Hire Could Presage Collision Between Trump and Construction Unions.” *ProPublica* (Feb. 8, 2017). Online at: <https://www.propublica.org/article/labor-department-hire-could-presage-collision-trump-construction-unions>.

⁹¹ 41 U.S.C. §6706; 41 U.S.C. §6504; 41 U.S.C. §3144; Manuel, K. “Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures.” Congressional Research Service (January 4, 2013). Online at: <https://fas.org/sgp/crs/misc/R40633.pdf>.

⁹² “Final Rule: Executive Order 13706, Establishing a Paid Sick Leave for Federal Contractors.” *Wage and Hour Division, United States Department of Labor*. Online at: <https://www.dol.gov/whd/govcontracts/eo13706/>;

Would you advise President Trump to retain this Executive Order?

Will you commit to enforcing this Executive Order?

The Establishing a Minimum Wage for Contractors Executive Order (Executive Order 13658) gave 200,000 workers raises by setting the minimum wage for federal contractors at \$10.10, with modest cost-of-living increases going forward.⁹³

Would you advise President Trump to retain this executive order?

Will you commit to enforcing this executive order?

The Sex Discrimination Regulations Executive Order (Executive Order 11246) prohibited discrimination on the basis of pregnancy and childbirth, gender identity, and sexual orientation, and updated guidelines on fair pay and sexual harassment for contractors.⁹⁴

Would you advise President Trump to retain this executive order?

Will you commit to enforcing this executive order?

In addition to the Executive Orders described above, what are your specific plans to address the widespread labor law violations by contractors of the federal government? If confirmed as Labor Secretary, what will you do to ensure that taxpayer dollars are spent more responsibly?

WORKPLACE HEALTH AND SAFETY

If confirmed Labor Secretary, you will be charged with enforcing OSHA. This law—which was created in 1970 after a decade of public outcry about surging rates of disabling injuries and deaths in workplaces across America—ensures that workers are safe on the job by requiring employers to eliminate and remove serious hazards.⁹⁵ Although injury and fatality rates have fallen dramatically since the law was passed, there were 2.9 million workplace injuries and 4,836 deaths reported by private industry employers in 2015.^{96,97}

⁹³ “Fact Sheet: Final Rule to Implement Executive Order 13658, Establishing a Minimum Wage for Contractors.” Wage and Hour Division, United States Department of Labor. Online at: <https://www.dol.gov/whd/flsa/eo13658/fr-factsheet.htm>.

⁹⁴ “OFCCP’s Sex Discrimination Final Rule, Fact Sheet.” United States Department of Labor. Online at: https://www.dol.gov/ofccp/SexDiscrimination/SexDiscrimFinalRuleFactSheet_JRFQA508c.pdf;

⁹⁵ “OSHA’s 30th Anniversary.” OSHA. Online at: <https://www.osha.gov/as/opa/osha-at-30.html>

⁹⁶ Bureau of Labor Statistics. “Employer Reported Workplace Injuries and Illnesses 2015.” Online at: https://www.bls.gov/news.release/archives/osh_10272016.pdf

⁹⁷ Bureau of Labor Statistics. “National Census of Fatal Occupational Injuries in 2015.” Online at: <https://www.bls.gov/news.release/pdf/cfoi.pdf>

President Trump's administration has already expressed a willingness to put workers in harm's way by rolling back and delaying protections that keep workers safe on the job. His administration just ordered a 60-day extension of the newly finalized rule to protect workers from exposure to beryllium, a chemical that can cause lung cancer and chronic beryllium disease.⁹⁸ This rule was supposed to go into effect late last month, and the delay will expose construction and shipyard workers to harmful levels of beryllium for an additional two months, putting their health and their lives at risk.

And just last week, President Trump released a budget that would cut funding for DOL by 20.7%, a move that would hobble OSHA's ability to fulfill its investigative and enforcement duties.⁹⁹ The proposed DOL budget also specifically targeted funding for workplace safety by proposing the elimination of a grant program administered since the Carter Administration that provides vital training to workers on identifying and preventing job hazards that can injure or kill them.¹⁰⁰ These funds are administered to non-profit employer- and local- and national- organizations to reach workers in the highest risk jobs such as logging and roofing.¹⁰¹ Over 2.1 million workers have received this free training.¹⁰²

Given OSHA's limited size, it would take over 140 years to visit every workplace under its jurisdiction even once.¹⁰³ These grants are a cost-effective way to reach workers in dangerous jobs who may never see an OSHA inspector.¹⁰⁴

If confirmed, you will be charged with ensuring the health and safety of all American workers. To help me understand how you will enforce OSHA and conduct inspections to ensure that workplaces are in compliance with OSHA standards, I have the following questions on this subject:

Will you commit to pursue all penalties allowed by law for employers who put their workers in harm's way? Will you commit to pursuing criminal penalties, including jail time, for employers who willfully violate OSHA and cause the death of an employee?

Will you commit to ensuring that OSHA is fully funded so that it can continue its inspection and enforcement efforts?

⁹⁸ Department of Labor. "US Labor Department Proposes delay to beryllium rule effective date." Online at: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=33780

⁹⁹ The White House "America First: A budget blueprint to make America Great Again." Online at: https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf

¹⁰⁰ The White House "America First: A budget blueprint to make America Great Again." Online at: https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf

¹⁰¹ Susan Harwood Training Grant Program. OSHA. Online at: <https://www.osha.gov/dte/sharwood/>

¹⁰² Department of Labor. "US Labor Department awards \$10.5M in workplace safety and health training grants to 80 nonprofit organizations to help high-risk workers, employers." Online at: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=28650

¹⁰³ "Workers Memorial Day Message: Improve OSHA." Health and Safety Magazine. Online at: <http://www.safetyandhealthmagazine.com/ext/resources/files/newsletters/osha-up-to-date/OSHA-Up-to-Date-July15.pdf>

¹⁰⁴ Susan Harwood Training Grant Program. OSHA. Online at: <https://www.osha.gov/dte/sharwood/>

Even when OSHA is fully funded, it can't inspect every workplace every year. What types of inspections will be the highest priority to the agency, and what industries will you prioritize?

In June, OSHA's new Silica Rule, which will save hundreds of lives by protecting the 2.2 million workers exposed to silica in their workplaces from diseases like silicosis and lung cancer, went into effect. Will you commit to ensuring that the upcoming compliance dates for industry are implemented as currently set forth in the final rule? Will you commit to enforcing this rule and inspecting workplaces to ensure that this rule is being properly implemented? And, will you defend the rule against any ongoing legal challenges in the courts?¹⁰⁵

Will you enforce the beryllium rule if you are confirmed? Will you commit to adhere to the currently scheduled compliance dates and not delay compliance of this life-saving rule any further?

Do you support President Trump's proposed elimination of the OSHA-funded small grant programs that provide workers in dangerous jobs with life-saving information such as how to protect themselves from chemical hazards, prevent falls, and guard themselves against dangerous machines?

FAIR SCHEDULING LEGISLATION

The use of on-demand scheduling practices has increased in recent years, particularly in service sector jobs in the restaurant, retail, and cleaning sectors. On-demand scheduling includes calling workers into work at a moment's notice, or sending workers home unexpectedly before the end of their scheduled shift when business is slow. These practices are particularly problematic for women, who are the primary or co-breadwinners in almost two-thirds of working families, and are more likely than men to work in jobs with nonstandard hours.¹⁰⁶

On-call and on-demand scheduling makes it virtually impossible for workers to plan a monthly budget, to accommodate a second job or go back to school, or to arrange for childcare or other family obligations. Recent research suggests that unstable and unpredictable schedules are associated with income volatility, psychological stress, and less time spent with children.¹⁰⁷

In 2015, I reintroduced the *Schedules that Work Act* with 18 of my colleagues in the Senate to bring some basic fairness back to work schedules. This bill provides for two weeks advance notice of schedules for workers in the food service, retail, and cleaning sectors and

¹⁰⁵ "OSHA's Final Rule to Protect Workers from Exposure to Respirable Crystalline Silica." Occupational Safety and Health Administration. *United States Department of Labor*. Online at: https://www.osha.gov/silica/factsheets/OSHA_FS-3683_Silica_Overview.html.

¹⁰⁶ National Partnership for Children and Families, *Schedules That Work Fact Sheet* (July 2015) (online at <http://www.nationalpartnership.org/research-library/workplace-fairness/equal-opportunity/schedules-that-work-act-fact-sheet.pdf>).

¹⁰⁷ Bridget Ansel, "Are Unpredictable Schedules Harming U.S. Workers' Health?" Washington Center for Equitable Growth. Online at: <http://equitablegrowth.org/equitablog/unpredictable-schedules-us-workers-health/>

allows workers to request changes to their schedules to accommodate family obligations, a second job, or continued education without fear of retaliation.¹⁰⁸ In a recent focus group on work-family policy with working-class parents in Ohio, mostly supporters of President Trump, the Schedules that Work Act was by far the most popular policy option among the participants.¹⁰⁹

I have the following questions for you on this matter:

As Secretary of Labor, what specific steps would you take to improve the working conditions of low-wage workers in the food service, retail, and cleaning sectors?

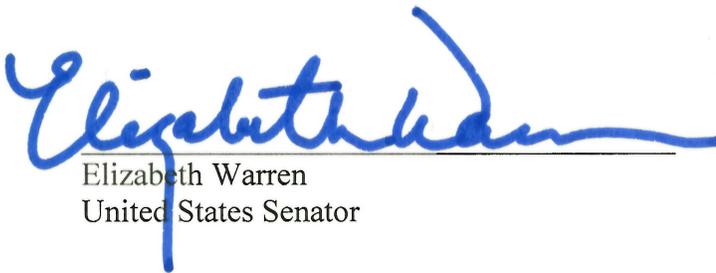
Will you support the passage of the Schedules that Work Act? If not, what are your plans for introducing fairness into work schedules so that workers are able to arrange for childcare, juggle a second job, or go back to school?

CONCLUSION

If confirmed as Labor Secretary, your decisions will profoundly impact the lives of 150 million American workers. Your policy choices will affect their paychecks, their ability to build financial security for themselves and their families, and their health and safety. It will be your job to enforce the hard-won labor protections that keep workers out of harm's way and ensure that they are paid a fair day's wage for a hard day's work.

America's labor force built this country, and America's labor force is essential to the future success of our economy and our nation. I look forward to hearing from you and to reviewing your answers to my questions during your confirmation hearing.

Sincerely,



Elizabeth Warren
United States Senator

¹⁰⁸ The Schedules that Work Act. Introduced in the 114th Congress. Online at: <https://www.congress.gov/bill/114th-congress/senate-bill/1772>

¹⁰⁹ Institute for Family Studies. "Work-family Policy in Trump's America: Insights from a Focus Group of Working Class Millennial Parents in Ohio." Online at: <http://ifstudies.org/wp-content/uploads/2016/12/FINAL2-LappFocusGroupReportonWorkingClass.pdf>