

Congress of the United States
Washington, DC 20515

February 2, 2018

The Honorable R. Alexander Acosta
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Secretary Acosta:

On February 1, 2018, Bloomberg BNA reported that the Department of Labor (DOL) prepared and intentionally withheld an economic analysis quantifying the loss of tip income for tipped workers as part of its Notice of Proposed Rulemaking (RIN 1235-AA21), Tip Regulations under the Fair Labor Standards Act (FLSA) (hereinafter “NPRM”). The article states that the DOL “scrubbed an unfavorable internal analysis from” the NPRM, and also states that “senior department political officials—faced with a government analysis showing that workers could lose billions of dollars as a result of the proposal—ordered staff to revise the data methodology to lessen the expected impact, several sources said.”¹

This internal economic analysis reportedly includes estimates that workers would lose billions in income as a result of the rule. If this is correct, such analysis would contradict the NPRM, which stated “[t]he potential benefits and transfers have not been quantified” for the proposed rule.²

If the Department has withheld such analysis and then misrepresented this relevant fact in the NPRM, such conduct raises serious questions about the integrity of the Department’s rule making process.³ Further, a Department spokesperson speaking to *Politico* stated, “after receiving public comment, the department intends to publish an informed cost-benefit analysis as part of any final rule.”⁴ This deviates from the requirements of Executive Order 13563.

Pursuant to our oversight responsibilities under the Rules of the House of Representatives, this letter requests the Department provide **no later than February 5, 2018** the following

¹ Ben Penn, *Labor Dept. Ditches Data on Worker Tips Retained by Businesses*, BLOOMBERG BNA, February 1, 2018, bna.com/news.bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses

² Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57395, 57404 (proposed December 5, 2017).

³ Executive Order 13563, Improving Regulation and Regulatory Review, requires agencies to “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs” and “use the best available techniques to quantify present and future benefits and costs as accurately as possible.”

⁴ Andrew Hanna, *DOL to publish tip pool analysis after comment period ends*, Politico Pro, February 1, 2018, www.politicopro.com/employment-immigration/whiteboard/2018/02/dol-to-publish-tip-pool-analysis-after-comment-period-ends-527753

information related to the economic analyses that are or have been in the possession of the DOL regarding the impacts of the proposed Tip Regulations:

1. Has there been any draft, interim, proposed or completed quantitative or economic analysis, including any cost-benefit analysis, that was prepared, procured or otherwise commissioned by the Department of Labor in the connection with or related to the NPRM?
2. A copy of each and every draft, interim, proposed or completed economic analysis covered in item #1.
3. Were the findings of any of these analyses disclosed in the NPRM?
4. A copy of the methodology used in each draft, interim, proposed or completed economic analysis covered in item #1.
5. A copy of any documents and communications, as defined in Appendix A, involving DOL personnel regarding the preparation or review of such economic analysis covered in item #1, including any communications regarding proposals or directives to change the methodology used to estimate impacts in order to lessen the potential impact of the rule.
6. A copy of all documents and communications that discussed the basis for including or excluding such economic analysis in the NPRM.
7. A list of all meetings held to discuss whether to include or exclude such economic analysis in the NPRM. Please provide the date and the participants in such meetings, whether conducted in person or by teleconference.
8. A list of the names of all DOL officials who were involved in reviewing or deciding whether to include or exclude the results of such economic analysis in the NPRM. Please provide the title and email contact information for each individual.
9. A copy of any documents and communications between the DOL and any private party outside the DOL regarding the economic analysis covered in item #1.
10. A copy of any documents and communications between the Office of Management and Budget and the DOL pertaining to the preparation or inclusion of such quantitative or economic analysis in the NPRM.

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Please contact Udochi Onwubiko with the House Committee on Education and the Workforce at Udochi.Onwubiko@mail.house.gov or (202)225-3725 in following up on this request.

Sincerely,



ROBERT C. "BOBBY" SCOTT

Ranking Member

Committee on Education and the Workforce



KEITH ELLISON

Co-Chair

Congressional Progressive Caucus



MARK TAKANO

Ranking Member

Subcommittee on Workforce Protection

Committee on Education and the Workforce



SUZANNE BONAMICI

Vice Ranking Member

Committee on Education and the Workforce

Enclosure

CC: Hon. Mick Mulvaney, Director, Office of Management and Budget

Appendix A

Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data, or information should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization, or individual denoted in the request has been or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e, CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box, or folder is produced, each CD, hard drive, memory stick, thumb drive, box, or folder should contain an index describing its contents.
6. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when they were requested.
7. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
8. It shall not be a basis of refusal to produce documents that any other person or entity also possesses, non-identical or identical copies of the same documents.
9. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
10. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
11. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of the author and addressee to each other.

12. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject, and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
13. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
14. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2017 to the present.
15. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.
16. All documents shall be date-stamped sequentially and produced sequentially.
17. Two sets of documents should be delivered, one set to the Majority Staff in Room 2181 of the Rayburn House Office Building and one set to the Minority Staff in Room 2101 of the Rayburn House Office Building.
18. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all responsive documents in your possession, custody, or control which reasonably could contain responsive documents ; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversations, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings, and motion pictures), and electronic mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business, or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.