

**Congress of the United States**  
Washington, DC 20515

January 7, 2019

The Honorable Scott S. Dahl  
Inspector General  
U.S. Department of Labor  
200 Constitution Ave. NW  
Washington, D.C. 20210

Dear Inspector General Dahl:

We write to request an audit of the Department of Labor (DOL) to determine whether the agency deviated from agency regulatory and data quality requirements when it developed a proposed rule relaxing child labor standards in health care occupations.<sup>1</sup>

Under the Fair Labor Standards Act, 16- and 17-year-olds are prohibited from working in occupations that the Secretary of Labor has declared, through Hazardous Occupation Orders (HOs), to be particularly hazardous to workers at this age or detrimental to their health or well-being. Currently under HO 7, workers under 18 years of age are prohibited from operating or assisting in the operation of several types of hoisting apparatus. A 2011 nonenforcement policy allows trained 16- and 17-year-olds to assist workers 18 years of age or older in the operation of power-driven patient lifts. This 2011 nonenforcement policy is based on a DOL-requested 2011 report from the National Institute for Occupational Safety and Health (NIOSH) that found “many 16- and 17-year-old employees cannot safely operate power-driven hoists to lift and transfer patients *by themselves*”<sup>2</sup> and recommended “that two caregivers (one of whom should be an experienced caregiver at least 18 years of age) operate a mechanical lift to transfer a non-weight bearing resident.”<sup>3</sup>

On September 27, 2018, DOL issued a Notice of Proposed Rulemaking (NPRM) to remove the operation of power-driven patient lifts from the list of prohibited activities for 16- and 17-year-old workers under HO 7, which would in effect allow untrained young workers to perform this work independently. While we have serious concerns that the Secretary of Labor is deviating from his statutory duty to protect the safety of young workers in hospitals and nursing homes, we write to draw your attention to flaws we have identified in DOL’s rulemaking process for this NPRM.

DOL’s actions in the course of this rulemaking raise serious concerns around a lack of required transparency. To justify its attempt to roll back protections for young workers, DOL argues that its current policy hinders employment and training opportunities for young people.<sup>4</sup> To support this claim, the NPRM cites exactly one piece of direct, empirical evidence: a 2012 survey of vocational schools conducted by the Massachusetts Department of Public Health’s Teens at Work Project. However, DOL did not include in its public docket for the NPRM a copy of this survey, which was conducted on Survey Monkey, or any

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<sup>1</sup> Expanding Employment, Training, and Apprenticeship Opportunities for 16- and 17-Year-Olds in Health Care Occupations Under the Fair Labor Standards Act, 83 FR 48737, 48742 (proposed September 27, 2018).

<sup>2</sup> Centers for Disease Control and Prevention (CDC), National Institute for Occupational Safety and Health (NIOSH), *NIOSH Assessment of Risks for 16- and 17-Year Old Workers Using Power-Driven Patient Lift Devices*, p. 10 (2011), [https://www.dol.gov/whd/CL/NIOSH\\_PatientLifts.pdf](https://www.dol.gov/whd/CL/NIOSH_PatientLifts.pdf).

<sup>3</sup> *Id.* at 11.

<sup>4</sup> *Id.*



information regarding its methodology.<sup>5</sup> In October 2018, Representatives Bobby Scott, Mark Takano, Rosa DeLauro, and Lucille Roybal-Allard wrote DOL requesting that the 2012 survey results be publicly disclosed, along with any other data on which the NPRM relies.<sup>6</sup> As of the December 11, 2018 comment period deadline, DOL has failed to make the survey publicly available.

Section 2(b) of Executive Order 13563, Improving Regulation and Regulatory Review, states:

To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

DOL's failure to publicly disclose the 2012 survey during the public comment period deviates from EO transparency requirements that ensure the public is able to make meaningful, informed comments on proposals.

Beyond DOL's failure to disclose, the agency's reliance on the survey also raises questions about whether DOL used reliable, accurate data in the rulemaking process. After reviewing an obtained copy of the 2012 survey results, we are concerned the use of this data in the NPRM may violate DOL's data quality guidelines. DOL's data quality guidelines require that supporting data be made available for the public to review and analyze to determine if it is "accurate and reliable."<sup>7</sup> Beyond its failure to comply with transparency requirements under EO 13563, the failure to abide by the transparency requirements under the data quality guidelines ensures there is no way for the public to assess the accuracy and reliability of this data.

Moreover, there is serious doubt as to whether this survey applies "sound statistical and research methods" given the small number of respondents to survey questions on which DOL relies.<sup>8</sup> For example, DOL cites that the survey found 60 percent of respondents said employers commented about increased burden due to DOL policies. However, only 22 of 42 respondents answered this survey question. Moreover, nearly half of the survey respondents to this question said they were unaware of the 2011 nonenforcement policy that still allows 16- and 17-year-olds to assist in the use of patient lifts in conjunction with a trained adult. Considering that these respondents were evidently not aware of the option to have 16- and 17-year-olds operate lifts with a trained adult, their responses do not support DOL's contention that its 2011 nonenforcement policy hindered employment and training opportunities.

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<sup>5</sup> The NPRM cites to, and DOL included in the public docket, a seemingly unfinalized version of a fact sheet from the Massachusetts Department of Public Health's "Teens at Work Project" that also makes reference to the survey, but the underlying survey data, or any information regarding its methodology, were not included.

<sup>6</sup> Letter from Ranking Member Bobby Scott, Ranking Member Mark Takano, Ranking Member Rosa DeLauro, and Rep. Lucille Roybal-Allard, to R. Alexander Acosta, U.S. Secretary of Labor (October 30, 2018), <https://democrats-edworkforce.house.gov/imo/media/doc/2018-10-30%20Letter%20to%20Acosta%20re%20Child%20Labor%20Data%20and%20Comment%20Period%20Extension.pdf>.

<sup>7</sup> U.S. Department of Labor, Office of the Chief Information Officer, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Department of Labor* (October 1, 2002),

<https://www.dol.gov/oasam/ocio/programs/InfoGuidelines/informationqualitytext.htm#SCOPE%20AND%20APPLICABILITY>.

<sup>8</sup> *Id.*

Given the importance of DOL's commitment to transparent rulemaking based on reliable and accurate evidence, we urge you to conduct an audit of DOL's ongoing rulemaking process on the operation of power-driven patient lifts by 16- and 17-year-olds. Specifically, we ask that you investigate the following:

1. Review whether DOL complied with public transparency requirements under the above-mentioned or other relevant executive orders, including with regard to DOL's failure to enter the 2012 Massachusetts Department of Health survey into the formal rulemaking record during the public comment period.
2. Review whether DOL adhered to its data quality guidelines, as informed by OMB guidelines, especially in its reliance on the 2012 Massachusetts Department of Health survey.
3. Review whether DOL found additional evidence, independently or through a formal or informal consultation with NIOSH, supporting—
  - a. DOL's 2011 nonenforcement policy and/or the option to codify the policy, as noted as a regulatory alternative to its NPRM.<sup>9</sup>
  - b. DOL's contention that independent use of power-driven patient lifts no longer poses risks to 16- and 17-year-olds.

Thank you for your attention to this important matter.

Sincerely,



**ELIZABETH WARREN**  
Senator  
U.S. Senate



**ROBERT C. "BOBBY" SCOTT**  
Chairman  
House Committee on Education and Labor



**ROSA L. DELAURO**  
Member of Congress  
U.S. House of Representatives



**MARK TAKANO**  
Member of Congress  
U.S. House of Representatives



**LUCILLE ROYBAL-ALLARD**  
Member of Congress  
U.S. House of Representatives

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<sup>9</sup> The Department notes that it "considered codifying into the regulations the restrictions and conditions in its 2011 nonenforcement policy concerning power-driven patient lifts." 2017 Child Labor Regulations, 83 Fed. Reg. at 48746 (proposed September 27, 2018).