Congress of the United States

Washington, D.C. 20515

March 16, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Gene L. Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Comptroller Dodaro:

On January 10, 2023, as part of the Biden administration's attempt to weaponize federal hiring and procurement processes in favor of labor unions, Office of Management and Budget (OMB) Director Shalanda Young and Secretary of Labor Martin J. Walsh issued a joint memorandum implementing two provisions of the White House Task Force on Worker Organization and Empowerment.[1] This memorandum, entitled "Strengthening Support for Federal Contract Labor Practices," directs the heads of executive departments and agencies to designate a labor advisor to advise agency officials on federal contract labor matters and to assist with federal procurement.[2] During the Obama administration,[3] Congress nullified a nearly identical scheme by passing a resolution of disapproval under the *Congressional Review Act* (CRA). The CRA was signed into law by President Trump in 2017.[4] Given the similarities between the Obama-era rule and the Young-Walsh memorandum, we request GAO review and provide a legal opinion on this matter.

The Young-Walsh memorandum raises concerns. It does not explain how the Department of Labor's (DOL) well-funded enforcement agencies—including the Wage and Hour Division (WHD) and the Office of Federal Contract Compliance Programs (OFFCP)—are failing to ensure compliance with labor standards. Assuming these agencies are performing their duties, as intended by Congress, it is unclear how labor advisors will add value to WHD's or OFFCP's ongoing efforts.

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[1] WHITE HOUSE TASK FORCE ON WORKER ORGANIZING AND EMPOWERMENT, REPORT TO THE PRESIDENT (Feb. 7, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/02/White-House-Task-Force-on-Worker-Organizing-and-Empowerment-Report.pdf.

[2] Memorandum from Shalanda D. Young, Dir., Office of Mgmt. & Budget, and Martin J. Walsh, Sec'y of Lab., for the Heads of Exec. Dep'ts & Agencies (Jan. 10, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/01/M-23-08-Labor-Advisor.pdf.

[3] Federal Acquisition Regulation; Fair Pay and Safe Workplaces, 81 Fed. Reg. 58,562 (Aug. 25, 2016).

[4] H.J. Res. 37, 115th Cong. (2017) (enacted).

The memorandum also appears to repeat a failed attempt to insert labor advisors into the federal procurement process. In 2014, President Obama attempted a similar maneuver when he signed Executive Order (EO) 13673, entitled "Fair Pay and Safe Workplaces."[5] Among other things, this EO directed agencies to designate a senior official to serve as a labor compliance officer to address and prevent labor violations and to assist in the development of regulations, policies, and guidance to address labor law compliance by federal contractors.

In March 2017, Congress passed a resolution of disapproval which nullified federal procurement regulations from the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration related to federal acquisition and procurement—a major component of EO 13673.[6] Following enactment of the resolution, President Trump revoked the EO and directed all executive departments and agencies to rescind any orders, rules, and regulations implementing or enforcing it.[7]

Under the CRA, a rule shall not take effect or continue if a joint resolution of disapproval is enacted.[8] In addition, the CRA provides that a rule may not be issued in "substantially the same form" as the disapproved rule unless it is specifically authorized by law.[9] This is troubling: the Biden administration's decision to resurrect an Obama-era policy that Congress formally vacated may be a violation of the CRA.[10]

Therefore, we ask that GAO's Office of General Counsel provide a legal opinion to Congress as to whether (1) the Biden administration's January 10, 2023, memorandum constitutes a rule for the purposes of the CRA and (2) whether the memorandum violates the prohibition against "substantially similar" rules under the CRA.

Thank you for your attention to this matter.

Sincerely,

Bill Cassidy, M.D.

Bill Cassidy
Ranking Member
Senate Committee on Health, Education, Labor, and Pensions

Virginia Foxx

Virginia Foxx
Chairwoman
House Committee on Education and the Workforce

[5] Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (July 31, 2014).
[6] Federal Acquisition Regulation; Fair Pay and Safe Workplaces, 81 Fed. Reg. 58,562, *supra* note 3; H.J. Res. 37, *supra* note 4.
[7] Exec. Order No. 13,782, 82 Fed. Reg. 15,607 (2017); *see, e.g.*, Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces," 82 Fed. Reg. 51,358 (Nov. 06, 2017).
[8] 5 U.S.C. § 801(b)(1).
[9] *Id.* § 801(b)(2).
[10] Congressional Review Act (CRA), 5 U.S.C. § 804(3) (adopting, in the CRA, the broad definition of a rule contained in the *Administrative Procedure Act* (APA)); APA, 5 U.S.C. § 551(4) (defining a rule as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . .").