



March 7, 2012

The Honorable John Kline  
Chairman  
Committee on Education and the Workforce

The Honorable Tim Walberg  
Chairman  
Subcommittee on Workforce Protections

The Honorable Kristi Noem  
U.S. House of Representatives  
2181 Rayburn House Office Building  
Washington, D.C. 20515-6100

Dear Chairman Kline, Chairman Walberg, and Representative Noem:

I am writing in response to your February 17, 2012, letter to Secretary Hilda L. Solis regarding the Department of Labor, Wage and Hour Division's (WHD) Notice of Proposed Rulemaking entitled *Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations--Civil Money Penalties* (the proposed rule). The proposed rule was published in the *Federal Register* on September 2, 2011.<sup>1</sup> Since the publication of the proposed rule, the Department announced on February 1, 2012, that it will repropose the portion of its regulation on child labor in agriculture addressing the "parental exemption" in agricultural employment.<sup>2</sup> The Department currently anticipates that it will publish the reproposal of the parental exemption portion of the proposed rule in early summer 2012.

### **Background**

In 1970, the Department first promulgated hazardous occupation orders addressing the employment of children in agriculture.<sup>3</sup> Those regulations have never been updated.<sup>4</sup> The Department is authorized to promulgate these regulations to protect child workers pursuant to 29 U.S.C. §§ 203(l), 212, and 213(c).

The Department began the process of revisiting the regulation of the employment of children more than a decade ago. In 1998, the Department commissioned the National Institute for

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<sup>1</sup> 76 Fed. Reg. 54836.

<sup>2</sup> Dep't of Labor, News Release: US Labor Department to re-propose 'parental exemption' of child labor in agriculture rule: Additional review will ensure protection of both children and rural values (Feb. 1, 2012), available online at <<http://s.dol.gov/OD>> (visited Mar. 7, 2012).

<sup>3</sup> 35 Fed. Reg. 221 (Jan. 7, 1970).

<sup>4</sup> These rules currently are codified at 29 C.F.R. 570.71.

Occupational Safety and Health (NIOSH) to conduct a comprehensive review of scientific literature and available data to assess current workplace hazards and the adequacy of the current youth employment hazardous occupation orders (HOs) in addressing those hazards. NIOSH issued its report, *National Institute for Occupational Safety and Health (NIOSH) Recommendations to the U.S. Department of Labor for Changes to Hazardous Orders*, in 2002.<sup>5</sup> Since meeting with NIOSH researchers in 2003 after the NIOSH report was released,<sup>6</sup> the Department has not had further communication with NIOSH about the subject of this proposed rule other than receiving an official written comment from NIOSH on the proposed rule in response to the NPRM. NIOSH's comments can be viewed on the web site for this rulemaking proceeding.<sup>7</sup>

After publication of the NIOSH Report, the Department initiated a number of rulemakings to address the NIOSH recommendations to update the rules governing child labor in nonagricultural employment. In May 2010, the Department issued final regulations that updated the child labor protections in employment other than in agriculture.<sup>8</sup> Having accomplished the goal of better protecting children working in nonagricultural fields, the Department turned to achieving the same outcome in updating the 1970 regulations covering the employment of children in agriculture.

### **Revisiting the Regulation of the Employment of Children in Agriculture**

The Department met with a number of stakeholders during the development of the proposed rule. The Department convened a listening session on July 21, 2010, for worker advocates. Participants in this meeting included, the Association of Farmworker Opportunity Programs; California Rural Legal Assistance; Farmworker Justice; the Government Accountability Project, the Food Integrity Campaign; the National Consumers' League, Child Labor Coalition; the National Farm Worker Ministry; the Oregon Law Center Farmworker Program; South Carolina Legal Services; the Worker Rights Law Center of New York; and the United States Department of Agriculture (USDA). On July 30, 2010, USDA participated in a listening session with the Department to which the Department invited a wide-range of stakeholders in the agricultural

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<sup>5</sup> NIOSH, *National Institute for Occupational Safety and Health (NIOSH) Recommendations to the U.S. Department of Labor for Changes to Hazardous Orders* (May 3, 2002), available online at <<http://s.dol.gov/OB>> (visited Mar. 7, 2012). As an adjunct to its review of these issues, the Department also contracted with a private consulting firm, SiloSmashers, Inc., to construct a model that, using quantitative analysis, would help determine the costs and benefits associated with implementing, or not implementing, each of the report's recommendations. Because of data limitations and methodological flaws, the Department does not consider the individual analyses prepared by SiloSmashers to be influential for rulemaking purposes. Nonetheless, SiloSmashers' report, *Determination of the Costs and Benefits of Implementing NIOSH Recommendations Relating To Child Labor Hazardous Orders*, is available online at <<http://s.dol.gov/OC>> (visited Mar. 7, 2012).

<sup>6</sup> The meeting with NIOSH researchers was one of three meetings the Department held in 2003 after NIOSH issued its report. The other two meetings were with employee advocates and employers.

<sup>7</sup> Document ID WHD-2011-0001-4503, Rulemaking Docket ID WHD-2011-0001, REGULATIONS.GOV, available online at <<http://s.dol.gov/OE>> (visited Mar. 7, 2012).

<sup>8</sup> 75 Fed. Reg. 28404 (May 20, 2010).



industry. Finally, on September 7, 2011, USDA hosted a listening session with interested agricultural stakeholders where the Department presented on its proposed rule.

As they would whenever the Department develops regulations that might implicate another Federal agency's program area, Department staff engaged in conversations with their counterparts at the USDA about the proposed rule. The Department did not keep records of these meetings or telephone calls or of lists of participants.

Responding to a USDA suggestion, the Department convened a public hearing on October 14, 2011, on the proposed rule. The Department chose Tampa, Florida, as the location because it was conducive to participation from a wide variety of stakeholders, including farmers, farmworkers, farmer organizations, worker advocacy organizations, and educational systems likely to provide vocational agriculture programs. The Department chose the time for the hearing, mid-October, to give attendees time to submit written comments after the hearing based on the testimony presented. Because of the great diversity of our nation's agricultural sector, it is planting or harvesting season at any given time of the year somewhere in our country. Nonetheless, the Department also favored a mid-October hearing because that time of year falls between harvest and replanting of crops throughout much of the country, making it the least inconvenient time for many stakeholders to participate. The Department did not hear from anyone who would have liked to participate but alleges that they were unable to because of the location or timing. The notice announcing the hearing and the hearing transcript are part of the rulemaking docket.<sup>9</sup>

The Department originally submitted the proposed rule (RIN: 1235-AA06) to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) on August 24, 2010. On September 28, 2010, the Department withdrew the proposed rule from OIRA to amend the NPRM to address two areas that were not initially included in the proposal -- distracted driving and children employed in large grain elevators. On November 10, 2010, the Department re-submitted the proposed rule to OIRA, which concluded its review on August 18, 2011. Prior to receiving the Secretary of Labor's clearance to submit the proposed rule to OIRA in both instances, the proposed rule was reviewed internally by the Office of the Solicitor, the Office of the Assistant Secretary for Policy, the Office of the Chief Economist, the Employment Training Administration, the Occupational Safety and Health Administration, the Bureau of International Labor Affairs, and the Office of Congressional and Intergovernmental Affairs. I am including with this response a copy of the Department's rulemaking proposals, including its economic and regulatory analyses, as they were submitted to OIRA for regulatory review, along with a copy of the Department's proposal and supporting analysis upon completion of OIRA's review.<sup>10</sup> The

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<sup>9</sup> Notice of Public Hearing, Document ID WHD-2011-0001-0085, Rulemaking Docket ID WHD-2011-0001, REGULATIONS.GOV, available online at <<http://s.dol.gov/OF>> (visited Mar. 7, 2012) (also published at 76 Fed. Reg. 61289 (Oct. 4, 2011)); Public Hearing Transcript, Document ID WHD-2011-0001-0695, Rulemaking Docket ID WHD-2011-0001, REGULATIONS.GOV, available online at <<http://s.dol.gov/OG>> (visited Mar. 7, 2012).

<sup>10</sup> The original August 2010 submission is reproduced at DOL E&W WHD CHILD 0001-161. The November 2011 resubmission is reproduced at DOL E&W WHD CHILD 0162-340. The version upon the completion of OIRA review is reproduced at DOL E&W WHD CHILD 0341-551.

Department does not have a list of meetings and telephone conversations between the Department and OMB relating to RIN 1235-AA06.

### **The Proposed Rulemaking to Update the 1970 Regulations**

The proposed rule was published in the *Federal Register* on September 2, 2011, with comments originally due by November 1, 2011.<sup>11</sup> Because of numerous requests for additional time to comment, including from members of Congress, the Department extended the comment period by an additional 30 days to December 1, 2011.<sup>12</sup> During this 90-day comment period, the Department received over 10,000 comments, including one that was signed by 8,000 individuals.<sup>13</sup>

The Department's proposed rule would update the 1970 regulations based on WHD's enforcement experience and NIOSH recommendations. Among other things, the proposal would: strengthen current child labor prohibitions regarding agricultural work with animals in timber operations, manure pits, storage bins and pesticide handling; prohibit hired farm workers under the age of 16 from employment in the cultivation, harvesting and curing of tobacco; prohibit youth in both agricultural and nonagricultural employment from using electronic devices, including communication devices, while operating power-driven equipment; prohibit hired farm workers under the age of 16, unless an exempt student-learner, from operating almost all power-driven equipment; and prevent children under 18 years of age from being employed in the storing, marketing and transporting of farm-product raw materials.

### **The "Parental Exemption" in the Proposed Rule**

Section 13(c)(2) of the Fair Labor Standards Act (FLSA), as amended, prohibits youth under the age of 16 from performing work in agriculture in an occupation that the Secretary of Labor has declared to be "particularly hazardous."<sup>14</sup> That same section of the statute contains a "parental exemption" that exempts from the hazardous occupation order a child who is employed in agriculture by his or her parent, or a person standing in the place of a parent. The parental exemption was added to the FLSA in 1966.<sup>15</sup> As originally proposed, the proposed rule would have codified WHD's then-current enforcement position with respect to the parental exemption.

After a preliminary review of the comments received in response to the proposed rule, the Department announced on February 1, 2012, that it will repropose the portion of its proposal on child labor in agriculture interpreting the "parental exemption."<sup>16</sup> In the interim, WHD will enforce the standard articulated in the *Field Operations Handbook* (FOH), which permits the "owned by" prong of the parental exemption in agriculture to apply when a parent or person

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<sup>11</sup> 76 Fed. Reg. at 54836.

<sup>12</sup> Notice and Extension of Comment Period, 76 Fed. Reg. 67104 (Oct. 31, 2011).

<sup>13</sup> Public Submissions, Rulemaking Docket ID WHD-2011-0001, REGULATIONS.GOV, available online at <<http://s.dol.gov/OQ>> (visited Mar. 7, 2012).

<sup>14</sup> 29 U.S.C. § 213(c)(2); *see also* 29 U.S.C. § 213(c)(1)(A) (creating a similar parental exemption for the agricultural minimum age requirements).

<sup>15</sup> Section 203, *Fair Labor Standards Amendments of 1966*, Pub. L. 89-601, 80 Stat. 833-34 (Sept. 23, 1966).



standing in place of a parent has “part ownership as a partner in a partnership or as an officer of a corporation which owns the farm if the ownership interests in the partnership or corporation is substantial.”<sup>17</sup> Through the reproposal process, the Department will seek additional input as to how the department can most effectively comply with statutory requirements to protect children, while still respecting important opportunities for children to participate in the operation of their families’ farms. The Department will continue to review the other comments received regarding the remaining portions of the proposed rule as it contemplates a final rule.

### **Further Background Information Related to the Parental Exemption**

WHD records indicate that the current interpretation of “owned by,” now appearing in Section 33d03 of the FOH, first appeared in Revision No. 239 of the FOH, which was published in 1970. Records further indicate that this was the first time that any interpretation of “owned by” appeared in the FOH.

Since the beginning of fiscal year 2001, WHD has cited a child labor agricultural hazardous occupation violation in 65 investigations. WHD’s data management system does not record child labor violations in a manner that would allow the agency to definitively identify every instance in which the agricultural parental exemption was allowed or denied when a young worker was found working in a hazardous occupation on a farm not wholly owned or operated by the child’s parent. The agency, however, has examined all available electronic records for investigations in which a child labor hazardous occupation order violation was cited, beginning with fiscal year 2001.

WHD has identified four instances between 2001 and 2004 in which it cited a violation of an agricultural hazardous occupation order when the young worker was the child of a parent that was part owner of the farm or partner in the farming operation.

- In 2001, WHD cited Grabemeyer Farms, owned by William, David, and Donald Grabemeyer, for employing the 15-year-old youth with the same last name as the owners.
- In 2002, WHD cited Aycock Brothers, Inc. for allowing the 14-year-old child of one of the owners to drive a tractor in an agricultural hazardous occupation.
- In 2004, WHD cited Welby Gardens Co. for employing the 14-year-old son of one of six related business owners in a hazardous occupation.
- In 2004, WHD cited Turbeville Brothers Partners, Inc., for allowing the 15-year-old son of one of the three brothers that comprise the partnership to operate a tractor that exceeded 20 PTO horsepower.

If you or members of your staff have any questions about this response, please contact Patrick

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<sup>16</sup> Dep’t of Labor, News Release: US Labor Department to re-propose ‘parental exemption’ of child labor in agriculture rule: Additional review will ensure protection of both children and rural values (Feb. 1, 2012), available online at <<http://s.dol.gov/OD>> (visited Mar. 7, 2012).

<sup>17</sup> Section 33d03, *Field Operations Handbook* (Rev. 599, Dec. 28, 1993), available online at <<http://s.dol.gov/OM>> (visited Mar. 7, 2012).

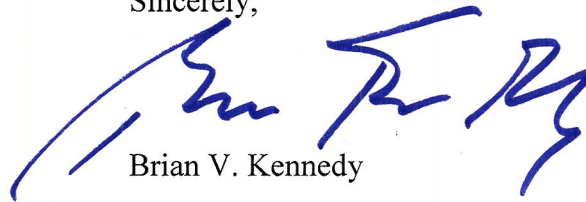
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Findlay in the Department's Office of Congressional and Intergovernmental Affairs. He may be reached at (202) 693-4600.

Sincerely,



Brian V. Kennedy

Enclosure: One disc containing documents Bates stamped DOL E&W WHD CHILD 0001-551 in PDF.

cc: The Honorable George Miller  
Senior Democratic Member, Committee on Education and the Workforce

The Honorable Lynn Woolsey  
Senior Democratic Member, Subcommittee on Workforce Protections