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Executive Director

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February 11, 2019

The Honorable Mick Mulvaney  
Director of the Office of Management and Budget  
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By mail and email: [Benjamin.B.Cantrell@omb.eop.gov](mailto:Benjamin.B.Cantrell@omb.eop.gov)

The Honorable Alexander Acosta  
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Dear Secretary Acosta, Director Mulvaney and Ms. Johnson,

The National Employment Law Project (NELP) on behalf of and along with the Service Employees International Union (SEIU) and the Child Labor Coalition (CLC) file this complaint against the Department of Labor (DOL) for violating the Information Quality Act (IQA) in its published proposal to relax protections for young workers in health care occupations.<sup>1</sup> NELP, SEIU and CLC are entitled to file this complaint and request a correction or retraction of agency documents that fail to meet the IQA's standards. NELP is a nonprofit, research and policy organization that for more than 45 years has sought to ensure that America upholds the promise of opportunity and economic security for all workers. NELP works for and with a host of organizations representing workers and patients in the health care industry that are impacted by this rule, and educates the public and the worker advocacy community on workplace safety and health issues, including Department Policy on child labor protections.

SEIU represents more than two million workers advocating to improve their lives and the services they provide. SEIU is the largest healthcare union with more than 1.0 million members in the field. Our members work in hospitals, nursing homes, home care, ambulatory care, mental health services, and other health care settings. As the largest nursing home union, we represent more than 150,000 nursing home workers, most of whom are certified nursing assistants (CNA) who provide the frontline care that is crucial to a

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<sup>1</sup> 83 FR 48737-48748

high-quality healthcare system and are directly impacted by this proposed rule. Our members are consumers of healthcare, providers of healthcare and public workers who help monitor the quality of health care providers. Given the multitude of roles our members play in the healthcare system, we have a deep interest in the issue of young workers and the use of powered lifting devices in health care occupations, which will impact resident and patient safety, as well as the safety of certified nursing assistants in skilled nursing facilities and hospitals.

The Child Labor Coalition (CLC) represents 38 groups, creating a powerful voice to promote public education, research, and advocacy to end child slavery, child labor, and child trafficking.

DOL's Information Quality Requirements, as well as the Information Quality Guidelines from the Office of Management and Budget (OMB), require agencies to ensure and maximize the quality, objectivity, utility and integrity of information disseminated by the agency. The principles clearly state that, "where agencies are disseminating information of a scientific, financial, or statistical nature, they should use sound statistical and research methods to develop and analyze the data. They should identify the sources of the information and where appropriate, the supporting data models and error sources."<sup>2</sup> Further, "where agencies disseminate 'influential' scientific, financial, or statistical information, they should provide a higher level of transparency about data and methods."<sup>3</sup>

The preamble to the OMB Information Quality Guidelines state, "If an agency, as an institution, disseminates information prepared by an outside party in a manner that reasonably suggests that the agency agrees with the information, this appearance of having the information represent agency views makes agency dissemination of the information subject to these guidelines." (67 FR 8454)

The information disseminated by the Department in its published proposal to relax protections for young workers in health care occupations fails to comply with both the Department's and OMB's long standing data quality principles. (83 FR 48737-48748) The proposal contains false and misleading information about the need for and the impact of the Department's proposed changes to child labor policies, and it fails the transparency standards embedded in the guidelines. By disseminating information that violates the IQA in its proposal, DOL is acting in an arbitrary and capricious manner which would violate the Administrative Procedure Act.

The Department administers the Fair Labor Standards Act (FLSA). To protect children from hazardous employment, the FLSA provides for a minimum age of 18 years for occupations found and declared by the Secretary of Labor, through Hazardous Orders (HOs), to be particularly hazardous or detrimental to the health or well-being of children 16 and 17 years of age. On September 27, 2018 the DOL published a proposal to roll back child labor protections in health care occupations (83 FR 48737-48748). In specific, the published DOL proposal would remove the operation of power-driven patient lifts from the list of activities that the Department's Hazardous Order Number 7 prohibits. It would also repeal the current DOL non-enforcement policy implemented by the Department on July 13, 2011, known as the 2011 Field Assistance Bulletin (2011 FAB).<sup>4</sup> The hoisting devices that are the subject of this proposal are complicated pieces of powered

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<sup>2</sup> <https://www.dol.gov/oasam/ocio/programs/InfoGuidelines/informationqualitytext.htm>

<sup>3</sup> <https://www.dol.gov/oasam/ocio/programs/InfoGuidelines/informationqualitytext.htm>

<sup>4</sup> [https://www.dol.gov/whd/FieldBulletins/fab2011\\_3.htm](https://www.dol.gov/whd/FieldBulletins/fab2011_3.htm)

equipment that are used to lift and transfer the most vulnerable patients who cannot bear weight.<sup>5</sup> The Department's current policy, based upon the current and uncontroverted National Institute for Occupational Health and Safety (NIOSH) recommendations,<sup>6</sup> allows trained 16- and 17-year-old teens to operate powered patient hoisting devices "only if they are assisting in the use of lifting devices as a junior member of at least a two person team that is headed by an employee who is at least 18 years of age. All members of the team must be trained in the safe operation of the lifting device being used." The DOL has proposed to repeal this current policy and allow young workers in nursing homes and hospitals to operate these complicated hoisting devices unsupervised and by **themselves**.

The Department cites misleading and false information in the proposed rule to justify this policy change. Further, the Department failed to make much of the information available for the public for review. The Department has violated the Information Quality Act by knowingly and willfully failing to follow both its own, and the Office of Management and Budget's, data information principles that seek to assure the quality of information it disseminates, as follows:

**Disseminating misleading information, information that is not reproducible and again failing to make information available to the public for review.**

DOL claims that the proposed rule is necessary because current DOL child labor protections unnecessarily restrict programs that train young workers to become nursing assistants.

The only scant evidence, if it can even be called evidence, that the Department provides to support its claim that current policies are placing burdens on vocational programs attempting to place young workers in health care occupations, is a 2012 draft fact sheet (with redacted segments), by the Massachusetts Department of Health Teens at Work Program.<sup>7</sup> We want to make it clear that this was a draft of a fact sheet, and the Department never provided a 'final' copy or any confirmation that this fact sheet was ever actually finalized and distributed. Further, upon closer examination of this draft fact sheet, it is clear that the Massachusetts Department found that any burdens that arose in placement of young teens in health care occupations were from "misperceptions" about HO 7 and the 2011 enforcement policy, and uncertainty about what tasks co-op students or other minors could legally perform with powered patient lifting devices. The draft fact sheet in no way at all proffered that there were any burdens in placement that arose from the current policy itself.

Most notably, the 2012 draft fact sheet references a survey of vocational schools that contained responses from a scant 22 programs in which the Massachusetts Department found that "only about half of the survey respondents had seen the Wage and Hour Division's Field Assistance Bulletin." In other words, the survey found that about half of the 22 respondents were not even aware of the Department's current requirements regarding young workers and the use of powered lifting devices in health care occupations. In fact, the MA Teens at Work Project prepared the fact sheet precisely because so many schools and employers did not know about the 2011 new enforcement policy. The fact sheet was prepared to help address the "uncertainty" and clarify the criteria required for teens to use patient lifts, **not** to justify allowing 16 and 17 year olds to use the machines unaided by a trained adult.

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<sup>5</sup><https://www.fda.gov/downloads/medicaldevices/productsandmedicalprocedures/homehealthandconsumer/homeusedevices/ucm386178.pdf>

<sup>6</sup>[https://www.dol.gov/whd/CL/NIOSH\\_Patientlifts.pdf](https://www.dol.gov/whd/CL/NIOSH_Patientlifts.pdf)

<sup>7</sup><https://www.regulations.gov/document?D=WHD-2018-0002-0015>

The Department claims that this survey supports its claim that current policy is restricting employment opportunities in health care for young workers. This survey, however, is unpublished, it was never peer reviewed and the Department failed to include the survey in the record of the rule, despite many requests from Congress and the public.<sup>8</sup> NELP obtained the survey through a records request, and determined that the survey questions had only 22 respondents, of which almost 50% were unfamiliar with the specifics of current DOL policy regarding young workers and the use of powered lifting devices in health care occupations.

The entire purpose of the Administrative Procedure Act's notice and comment requirement is so that the public can accurately assess the government's proposed regulations and the facts, evidence and law upon which those proposals are based. But in this case, the Department has failed to provide the public with this survey, upon which it relies quite heavily to support its contention that teens are missing out on training and apprenticeship opportunities. Without information as to the survey methodology, the questions asked, and the quantity and substance of the responses, the public is unable to evaluate the Department's claim that current policy unnecessarily restricts programs that place high school students in health care jobs.

By failing to provide the Massachusetts survey in the proposed rule docket, the Department fails the information quality test in the OMB Information Quality Guidelines in that it violates both the utility (lack of transparency) and objectivity components of information quality. The Massachusetts survey also fails the information quality test in that it is not reproducible because of the small sample size. The survey also fails the DOL guideline's requirements "to use the best available peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices."

Hiding key information from the public is clear evidence that DOL is also completely failing to meet even the most basic principles of transparency embedded in the DOL guidelines. There is clearly a pattern at the Department's Wage and Hour Division of hiding information that is inconvenient and does not support the Department's position. The Department's OIG is already investigating this pattern in the DOL's proposal to rescind portions of its tip regulation, and the OIG just announced it will be expanding that investigation to take a look at the proposed rule relaxing child labor protections in health care occupations.<sup>9</sup>

Clearly the Department relies on merely anecdotal evidence at best to make its claim that its proposal will increase the participation of young workers in health care occupations. The Department cites no empirical evidence that the current policy has hurt the employment of 16 and 17 year olds. Since there is no empirical evidence that the current policy (the current H07 regulation and the non-enforcement policy) hurt the employment of 16-and 17-year olds, there is also no evidence that the proposed rule would improve the employment opportunities of 16 and 17-year old.

The Department of Labor is in clear violation of the Information Quality Act. DOL is not transparent about the information it is relying on in the proposed rule. The survey cited by DOL in defending the proposal is not reproducible. We therefore request that the proposal be retracted and corrected.

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<sup>8</sup> <https://www.regulations.gov/document?D=WHD-2018-0002-0101>.

<sup>9</sup> [https://www.oig.dol.gov/public/oaprojects/Engagement\\_Letter\\_Rulemaking.pdf](https://www.oig.dol.gov/public/oaprojects/Engagement_Letter_Rulemaking.pdf)

Sincerely,

/s/Christine Owens

Christine Owens, Executive Director  
National Employment Law Project

/s/Rebecca Wasserman

Rebecca Wasserman, Director of Government Relations  
Service Employees International Union

/s/Reid Maki

Reid Maki, Coordinator  
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