

United States Senate
WASHINGTON, DC 20510

October 1, 2012

Via Electronic Transmission

The Honorable Jeffrey Zients
Acting Director
Executive Office of the President
Office of Management and Budget
Washington, DC 20503

Dear Mr. Zients:

We write regarding the Memorandum for the Chief Financial Officers and Senior Procurement Executives of Executive Departments and Agencies issued by the White House's Office of Management and Budget (OMB) on September 28, 2012. The OMB memorandum purports to provide "guidance on allowable contracting costs with the Worker Adjustment and Retraining Notification (WARN) Act."

In general, the WARN Act, 29 U.S.C. § 2101 *et seq.*, requires employers with at least 100 employees to provide written notice to employees 60 days before ordering certain plant closings or mass layoffs. Failure to provide this notice, subject to very limited exceptions, triggers civil liability for the employer. Under the WARN Act, each aggrieved employee may sue their employer and may be awarded back pay, benefits and attorneys' fees.

As the OMB memorandum explains, on July 30, 2012, the Department of Labor (DOL) issued Training and Employment Guidance Letter No. 3-12, which examined the WARN Act's requirements in the context of the sequestration (budget cuts) scheduled to take place on January 2, 2013. The DOL opined that it was neither necessary nor appropriate for federal contractors to issue WARN Act notices to employees 60 days in advance of the potential sequestration because of uncertainty about whether sequestration will occur and, if it did, what effect it would have on particular contracts.

The DOL's speculation about the applicability of the WARN Act notwithstanding, some contractors indicated that they were still considering issuing notices. Those notices would be received by employees and their families days before the Presidential election in November. For example, according to a news report, Lockheed Martin initially indicated that it might send notices to all of its 123,000 employees.¹

On the afternoon of Friday, September 28, the White House's OMB issued its memorandum. In relevant part, that memorandum states:

¹ Jeremy Herb, "Obama administration tells contractors again: Don't issue layoff notices," THE HILL (Sept. 28, 2012).

To further minimize the potential for waste and disruption associated with the issuance of unwarranted layoff notices, this memorandum provides guidance regarding the allowability of certain liability and litigation costs associated with WARN Act compliance. Specifically, if (1) sequestration occurs and an agency terminates or modifies a contract that necessitates that the contractor order a plant closing or mass layoff of a type subject to WARN Act requirements, and (2) that contractor has followed a course of action consistent with DOL guidance; then any resulting employee compensation costs for WARN Act liability as determined by a court, as well as attorneys' fees and other litigation costs (irrespective of litigation outcome), would qualify as allowable costs and be covered by the contracting agency, if otherwise reasonable and allocable.

The OMB memorandum concludes by stating that its representations do “not alter existing rights, responsibilities, obligations, or limitations under individual contract provisions or the governing cost principles set forth in the Federal Acquisition Regulation (FAR) and other applicable law.” Thus, “agencies may treat as allowable other costs potentially associated with sequestration, including WARN Act-related costs arising under circumstances not specified in th[e] memorandum], based on the usual cost principles of allocability, allowability, and reasonableness as set forth in the FAR.”

According to one news report, the OMB memorandum tells contractors that “they would be compensated for legal costs if layoffs occur due to contract cancellations under sequestration – but only if the contractors follow the [DOL’s] guidance [from July].”² As noted above, the DOL has advised contractors not to provide their employees with notices under the WARN Act.

In reliance on the promises in the OMB memorandum, Lockheed Martin has now indicated that it will not send out the notices.³ Other contractors have yet to indicate whether they will send out the WARN Act notices to their employees, in light of the Administration’s promises.

We are seriously concerned about the OMB’s memorandum and the DOL’s letter. In particular, we are concerned about the authority of the Executive Branch to instruct private employers not to comply with federal law and to promise to pay the monetary judgments and litigation costs that arise out of the lawsuits that may follow. Although the precise amounts of the judgments and costs are unknown, they could potentially reach tens or hundreds of millions of dollars, if not billions of dollars, all of which would be paid for with taxpayers’ dollars.

Accordingly, respond to the following questions and requests for information:

1. Identify the legal authority for the DOL to instruct federal contractors that they are not required to provide WARN Act notices to their employees in light of the pending sequestration.

² *Id.*

³ Jeremy Herb, “After Obama guidance, Lockheed won’t issue layoff notices this year,” THE HILL (Oct. 1, 2012).

2. Identify the legal authority for the OMB to instruct federal contractors that they are not required to provide WARN Act notices to their employees in light of the pending sequestration.
3. Identify the legal authority for the OMB to promise to pay the monetary judgments and litigation costs that arise out of the lawsuits that could follow from employers' failure to comply with the WARN Act.
4. Set forth the analysis and supporting legal authority for the representation in the OMB's memorandum that "any resulting employee compensation costs for WARN Act liability as determined by a court, as well as attorneys' fees and other litigation costs (irrespective of litigation outcome), would qualify as allowable costs and be covered by the contracting agency, if otherwise reasonable and allocable."
5. Explain in detail why you maintain that the Obama Administration did not have to first obtain approval from Congress before committing to pay tens or hundreds of millions of dollars (if not billions of dollars) in judgments, settlements and/or attorneys' fees that may be incurred by private employers.
6. Identify in detail the costs that the OMB's memorandum represents the Administration will "cover" for contractors who are sued based on their failure to provide notices under the WARN Act. For example, do the "costs" include reimbursing the contractors for the attorneys' fees they incur from defending themselves in WARN Act lawsuits? What other "costs" will be "covered"?
7. How many millions or billions of dollars has the OMB's memorandum obligated the federal government to pay, if WARN Act notices are not provided and layoffs and lawsuits do occur?
8. What will be the source of the funds used to pay the monetary judgments and litigation costs that arise out of the lawsuits that follow from employers' failure to comply with the WARN Act? Does the Administration maintain that these funds have already been appropriated by Congress?
9. Before the release of OMB's memorandum, was any analysis done to determine how much the federal government would have to pay to "cover" the costs of these lawsuits, including potential attorneys' fees? If so, provide that analysis and provide copies of all documents related to that analysis.
10. Provide copies of any and all written analyses that were done in connection with the OMB's memorandum.
11. According to the DOL's July 30, 2012 letter, if contractors provide WARN Act notices, it "would be inconsistent with the purpose of the WARN Act." By contrast, 29 U.S.C. § 2106 (the WARN Act) provides that "[i]t is the sense of Congress that an employer who is not required to comply with the notice requirements of section 2102 of this title should, to the extent possible, provide notice to its employees about a proposal to close a plant or

permanently reduce its workforce.” How does OMB justify DOL’s statement in light of the plain language of section 2106 of the WARN Act?

12. According to the OMB’s memorandum, “some [contractors] have inquired about whether Federal contracting agencies would cover WARN Act-related costs in connection with the potential sequestration.” Identify each of those contractors and produce all documents related to communications between the White House, DOL or any other federal agency and the contractors regarding this issue.
13. Does the Administration maintain that the OMB’s memorandum constitutes a binding legal promise to contractors that the federal government will fully indemnify them for any and all liability and legal defense fees that they incur as a result of their not providing WARN Act notices? If not, explain in detail whether the OMB’s memorandum makes any binding commitments and if it does, describe those commitments in detail.
14. Were any other federal agencies consulted prior to the issuance of the OMB memorandum? If so, identify each agency consulted and indicate whether any agency disagreed about whether the legal authority exists for the Administration to promise to pay the costs and legal fees associated with the failure to issue WARN Act notices.

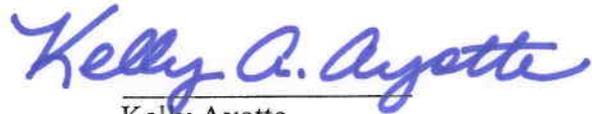
If the OMB or any other office in the White House possesses documents relating to the subject matter of any of the foregoing questions, provide copies of those documents.

We ask that you provide written answers and documents by October 8, 2012.

Sincerely,



Charles E. Grassley
Ranking Member
Senate Judiciary Committee



Kelly Ayotte
Member
Senate Armed Services Committee