

October 10, 2002

Secretary's Order 5-2002

SUBJECT: Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health

1. **Purpose.** To delegate authority and assign responsibility to the Assistant Secretary for Occupational Safety and Health.
2. **Authorities and Directives Affected.**
 - A. **Authorities.** This Order is issued pursuant to 29 U.S.C. 551 et seq.; 5 U.S.C. 301; 5 U.S.C. 5315; the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et seq.*; the Walsh-Healey Public Contracts Act of 1936, as amended, 41 U.S.C. 35, 37-41, 43-45; the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 351-354, 356-357; the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. 329, 333; the Maritime Safety Act of 1958, 33 U.S.C. 941; the National Foundation on the Arts and the Humanities Act of 1965, 20 U.S.C. 954(m)(2); 5 U.S.C. 7902 and any executive order thereunder, including Executive Order 12196 ("Occupational Safety and Health Programs for Federal Employees") (February 26, 1980); the Surface Transportation Assistance Act of 1982, 49 U.S.C. 31105; the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. 2651; the International Safe Container Act, 46 U.S.C. App.1506; the Safe Drinking Water Act, 42 U.S.C. 300j-9(i); the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851; the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9610 (a) - (d); the Federal Water Pollution Control Act, 33 U.S.C. 1367; the Toxic Substances Control Act, 15 U.S.C. 2622; the Solid Waste Disposal Act, 42 U.S.C. 6971; the Clean Air Act, 42 U.S.C. 7622; the Wendell H. Ford Aviation Investment and Reform Act For the 21st Century, 49 U.S.C. 42121; the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A.
 - B. **Directives Affected.** Secretary's Order 3-2000 is cancelled.
3. **Background.** This Order constitutes the basic Secretary's Order for the Occupational Safety and Health Administration (OSHA), superseding Order 3-2000. This Order delegates and assigns responsibility to OSHA for enforcement of Section 806 (protection for employees of publicly-traded companies providing evidence of fraud) of Public Law 107-204, the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, and makes other minor conforming modifications. All other authorities and responsibilities set forth in this Order were delegated or assigned previously to the Assistant Secretary for OSHA in Secretary's Order 3-2000, and this Order continues those delegations and assignments in full force and effect, except as expressly modified herein.
4. **Delegation of Authority and Assignment of Responsibility.**
 - A. **The Assistant Secretary for Occupational Safety and Health**
 1. The Assistant Secretary for Occupational Safety and Health is delegated authority and assigned responsibility for administering the safety and health, and whistleblower, programs and activities of the Department of Labor, except as provided in paragraph 4.a.(2) below, under the designated provisions of the following laws:
 - a. Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et seq.*
 - b. Walsh-Healey Public Contracts Act of 1936, as amended, 41 U.S.C. 35, 37-41, 43-45.
 - c. McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 351-354, 356-357.

- d. Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. 329, 333.
 - e. Maritime Safety Act of 1958, 33 U.S.C. 941.
 - f. National Foundation on the Arts and the Humanities Act of 1965, 20 U.S.C. 954(m)(2).
 - g. 5 U.S.C. 7902 and any executive order thereunder, including Executive Order 12196 ("Occupational Safety and Health Programs for Federal Employees") (February 26, 1980).
 - h. Surface Transportation Assistance Act of 1982, 49 U.S.C. 31105.
 - i. Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. 2651.
 - j. International Safe Container Act, 46 U.S.C. App.1506.
 - k. Safe Drinking Water Act, 42 U.S.C. 300j-9(i).
 - l. Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851.
 - m. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9610 (a) - (d).
 - n. Federal Water Pollution Control Act, 33 U.S.C. 1367.
 - o. Toxic Substances Control Act, 15 U.S.C. 2622.
 - p. Solid Waste Disposal Act, 42 U.S.C. 6971.
 - q. Clean Air Act, 42 U.S.C. 7622.
 - r. Wendell H. Ford Aviation Investment and Reform Act For the 21st Century, 49 U.S.C. 42121.
 - s. Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A.
 - t. Responsibilities of the Secretary of Labor with respect to safety and health, or whistleblower, provisions of any other Federal law except those responsibilities which are assigned to another DOL agency.
2. The authority of the Assistant Secretary for Occupational Safety and Health under the Occupational Safety and Health Act of 1970 does not include authority to conduct inspections and investigations, issue citations, assess and collect penalties, or enforce any other remedies available under the statute, or to develop and issue compliance interpretations under the statute, with regard to the standards on:
- a. field sanitation, 29 C.F.R. 1928.110; and
 - b. temporary labor camps, 29 C.F.R. 1910.142, with respect to any agricultural establishment where employees are engaged in "agricultural employment" within the meaning of the Migrant and Seasonal Agricultural Worker Protection Act, 29

U.S.C. 1802(3), regardless of the number of employees, including employees engaged in hand packing of produce into containers, whether done on the ground, on a moving machine, or in a temporary packing shed, except that the Assistant Secretary for Occupational Safety and Health retains enforcement responsibility over temporary labor camps for employees engaged in egg, poultry, or red meat production, or the post-harvest processing of agricultural or horticultural commodities.

Nothing in this Order shall be construed as derogating from the right of States operating OSHA-approved State plans under 29 U.S.C. 667 to continue to enforce field sanitation and temporary labor camp standards if they so choose. The Assistant Secretary for OSHA retains the authority to monitor the activity of such States with respect to field sanitation and temporary labor camps. Moreover, the Assistant Secretary for OSHA retains all other agency authority and responsibility under the Occupational Safety and Health Act with regard to the standards on field sanitation and temporary labor camps, such as rulemaking authority.

3. The Assistant Secretary for OSHA is hereby delegated authority and assigned responsibility to invoke all appropriate claims of governmental privilege, arising from the functions of OSHA, following personal consideration of the matter, and in accordance with the following guidelines:
 - a. Informant's Privilege (to protect from disclosure the identity of any person who has provided information to OSHA in matters arising under an authority delegated or assigned in this paragraph): A claim of privilege may be asserted where the Assistant Secretary has determined that disclosure of the privileged matter may: (1) interfere with an investigative or enforcement action taken by OSHA under an authority delegated or assigned to OSHA in this paragraph; (2) adversely affect persons who have provided information to OSHA; or (3) deter other persons from reporting a violation of law or other authority delegated or assigned to OSHA in this paragraph.
 - b. Deliberative Process Privilege (to withhold information which may disclose pre-decisional intra-agency or inter-agency deliberations, including the analysis and evaluation of fact, written summaries of factual evidence, and recommendations, opinions or advice on legal or policy matters in matters arising under this paragraph): A claim of privilege may be asserted where the Assistant Secretary has determined that disclosure of the privileged matter would have an inhibiting effect on the agency's decision-making processes.
 - c. Privilege for Investigational Files Compiled for Law Enforcement Purposes (to withhold information which may reveal OSHA's confidential investigative techniques and procedures): The investigative file privilege may be asserted where the Assistant Secretary has determined the disclosure of the privileged matter may have an adverse impact upon OSHA's implementation of an authority delegated or assigned in this paragraph, by: (1) disclosing investigative techniques and methodologies; (2) deterring persons from providing information to OSHA; (3) prematurely revealing the facts of OSHA's case; or (4) disclosing the identities of persons who have provided information under an express or implied promise of confidentiality.
 - d. Prior to filing a formal claim of privilege, the Assistant Secretary shall personally review all documents sought to be withheld (or, in case where the volume is so large that all of them cannot be personally reviewed in a reasonable time, an adequate and representative sample of such documents), together with a description or summary of the litigation in which the disclosure is sought.
 - e. In asserting a claim of governmental privilege, the Assistant Secretary may ask the Solicitor of Labor, or the Solicitor's representative, to file any necessary legal papers or documents.
4. The Assistant Secretary for Occupational Safety and Health is also delegated authority and

assigned responsibility for:

- a. Serving as Chairperson of the Federal Advisory Council on Occupational Safety and Health, as provided for by Executive Order 12196.
 - b. Coordinating Agency efforts with those of other officials or agencies having responsibilities in the occupational safety and health area.
- B. The Assistant Secretary for Occupational Safety and Health and the Assistant Secretary for Employment Standards are directed to confer regularly on enforcement of the Occupational Safety and Health Act with regard to the standards on field sanitation and temporary labor camps (see paragraph 4.a.(2) of this Order), and to enter into any memoranda of understanding which may be appropriate to clarify questions of coverage which arise in the course of such enforcement.
- C. The Solicitor of Labor is responsible for providing legal advice and assistance to all Department of Labor officials relating to implementation and administration of all aspects of this Order. The bringing of legal proceedings under those authorities, the representation of the Secretary and/or other officials of the Department of Labor, and the determination of whether such proceedings or representations are appropriate in a given case, are delegated exclusively to the Solicitor.
- D. The Commissioner of Labor Statistics is delegated authority and assigned responsibility for:
 1. Furthering the purpose of the Occupational Safety and Health Act by developing and maintaining an effective program of collection, compilation, analysis, and publication of occupational safety and health statistics consistent with the provisions of Secretary's Orders 4-81 and 5-95.
 2. Making grants to states or political subdivisions thereof in order to assist them in developing and administering programs dealing with occupational safety and health statistics under Sections 18, 23, and 24 of the Occupational Safety and Health Act.
 3. Coordinating the above functions with the Assistant Secretaries for Occupational Safety and Health and Employment Standards.
5. **Reservation of Authority and Responsibility.**
 - A. The submission of reports and recommendations to the President and the Congress concerning the administration of the statutory provisions and Executive Orders listed in paragraph 4.a. above is reserved to the Secretary.
 - B. The commencement of legal proceedings under the statutory provisions listed in paragraph 4.a. above, except proceedings before Department of Labor administrative law judges and the Administrative Review Board under the statutes identified in paragraph 4.a.(1)(h) or paragraphs 4.a.(1)(k-t) above, is reserved to the Secretary. The Solicitor will determine in each case whether such legal proceedings are appropriate and may represent the Secretary in litigation as authorized by law.
 - C. Nothing in this Order shall limit or modify the delegation of authority and assignment of responsibility to the Administrative Review Board by Secretary's Order 1-2002 (September 24, 2002).
6. **Redelegation of Authority.** The Assistant Secretary for Occupational Safety and Health, the Solicitor of Labor, and the Commissioner of Labor Statistics may redelegate authority delegated in this Order.
7. **Effective Date.** This delegation of authority and assignment of responsibility is effective immediately.

Elaine L. Chao, Secretary of Labor

Date