

## DEPARTMENT OF LABOR

### Office of the Secretary

#### Secretary's Order 16-2006; Invoking Governmental Privileges

1. *Purpose.* To delegate authority and assign responsibility to particular U.S. Department of Labor (DOL) officers to invoke claims of Governmental privileges arising from the functions of their respective agencies.

2. *Authority and Directives Affected.* This Order is issued pursuant to 29 U.S.C. 551, *et seq.*; 5 U.S.C. 301; 5 U.S.C. 552(b).

All prior agency delegations and assignments in conflict with this Order and its Attachment are hereby superseded.

3. *Background.* Governmental, or executive, privileges are founded upon the public interest in the effective performance of the constitutional powers and responsibilities assigned to the Executive Branch. They rest largely upon common-law tradition, and have been reinforced by courts with references to the Constitution (particularly the separation of powers doctrine and the provisions on executive authority), and may also be rooted in statute. Unlike such privileges as the attorney-client or marital privilege, which are available to all litigants in a court of law, Governmental privileges may be invoked only by the Government, and solely for the purpose of preventing particular confidential information from being disclosed.

Since Governmental privileges are designed to limit information available to litigants and the public, thereby limiting "the search for truth," they are applied narrowly by the courts and invoked only in accordance with specific procedures. In order to properly assert a Governmental privilege before a court, a formal claim of privilege must be filed by affidavit or declaration. The formal claim must: (1) Be made by a high-level agency official to whom such authority has been properly delegated under this Order; (2) contain a description of the privileged material sufficient to permit a determination as to whether the claim of privilege is properly asserted; (3) state the reasons disclosure of the materials would cause harm; and (4) state that the invocation of the privilege is based on personal consideration by the delegated official.

This Order effectuates the formal delegation of authority by the Secretary to particular DOL officers for the invocation of Governmental privileges. Further redelegations of authority are not permitted.

#### 4. *Delegation of Authority and Assignment of Responsibility to DOL Officers to Invoke Governmental Privileges.*

A. Each DOL official specified in the attached Memorandum is hereby delegated authority and assigned responsibility to invoke all appropriate claims of the following Governmental privileges arising from the functions of his/her respective agency, following his/her personal consideration of the matter:

(1) *Informant's Privilege* (to protect from disclosure the identity of any person who has provided information to the particular agency in cases arising under an authority delegated or assigned to the agency). A claim of privilege may be asserted where the official has determined that disclosure of the privileged matter would: (1) Interfere with an investigative or enforcement action taken by the agency under an authority delegated or assigned to it; (2) adversely affect persons who have provided information to the agency; or (3) deter other persons from reporting a violation of law or other authority delegated or assigned to the agency.

(2) *Deliberative Process Privilege* (to withhold information that may disclose predecisional intra-agency or inter-agency deliberations, including the analysis and evaluation of facts; written summaries of factual evidence that reflect a deliberative process; and recommendations, opinions, or advice on legal or policy matters in cases arising under statutory provisions or other authorities that are delegated or assigned to the agency). A claim of privilege may be asserted where the official has determined that: (1) The information was generated prior to and in contemplation of a decision by a part of the Department; (2) the information is not purely factual and does not concern recommendations that the Department expressly adopted or incorporated by reference in its ultimate decision; and (3) disclosure of the privileged matter would have an inhibiting effect on the agency's decision-making processes.

(3) *Privilege for Investigative Documents Compiled for Law Enforcement Purposes* (to withhold information that may reveal the agency's confidential investigative techniques and procedures). A claim of privilege may be asserted where the official has determined that disclosure of the privileged matter would have an adverse impact upon the agency's enforcement of statutory provisions or other authorities that have been delegated or assigned to the agency by: (1) Disclosing investigative techniques and methodologies; (2) deterring

persons from providing information to the agency; (3) prematurely revealing the facts of the agency's case; or (4) disclosing the identities of persons who have provided information under an express or implied promise of confidentiality.

B. In addition to the privileges identified above, the Commissioner of the Bureau of Labor Statistics and the Deputy Commissioner are hereby delegated authority and assigned responsibility to invoke all appropriate claims of the following Governmental privileges arising from the functions of his/her agency, following his/her personal consideration of the matter:

(1) *Privilege for Information Provided to the Government on a Pledge of Confidentiality* (to protect from disclosure information provided to the Government under a pledge of confidentiality). A claim of privilege may be asserted where the official has determined that the information: (1) Was given to the Government on a pledge of confidentiality; and (2) disclosure of the information would hamper the efficient operation of a Government program.

(2) *Confidential Report Privilege* (to protect from disclosure information required to be provided to the Government). A claim of privilege may be asserted where the official has determined that: (1) There is a statutory basis for maintaining confidentiality of the information sought to be protected from disclosure; and (2) disclosure of the information would be harmful to a governmental interest.

#### 5. *Procedure for Invoking Claims of Governmental Privileges.*

A. Prior to filing a formal claim of privilege, the official delegated authority to invoke a claim of privilege under this Order shall personally review: (1) All the documents sought to be withheld (or, in cases where the volume is so large that all of the documents cannot be personally reviewed in a reasonable time, an adequate and representative sample of such documents); and (2) a description or summary of the litigation in which the disclosure is sought.

B. The official delegated authority to invoke a claim of privilege under this Order shall consult with the Solicitor of Labor or his/her designee(s) prior to formally invoking such a claim. In addition, the particular official may ask the Solicitor of Labor or his/her designee(s) to file any necessary legal papers or documents related to the formal invocation of a privilege. The Solicitor of Labor or his/her designee(s) will also provide legal advice and assistance to all officials of the

Department relating to the authorities of this Order.

C. The official delegated authority to invoke a claim of privilege under this Order shall consult with the Assistant Secretary for Congressional and Intergovernmental Affairs or his/her designee(s) prior to formally invoking a claim of privilege if the source of the request is a Member of Congress.

#### 6. Miscellaneous.

A. Nothing in this Order or the attached Memorandum shall: (1) Be construed to override any applicable laws or statutes; (2) apply to the Office of Inspector General; or (3) limit the Secretary's authority to perform or redelegate and/or reassign such authority and responsibility of DOL officials unless otherwise precluded by law.

B. The attached Memorandum shall be published in the **Federal Register**. It is also subject to periodic revision by the Secretary, as necessary, and is effective immediately.

C. Redelegations of authority by the DOL officer positions specified in the attached Memorandum are not permitted.

7. *Effective Date.* This Order is effective immediately.

Dated: November 9, 2006.

**Elaine L. Chao,**

*Secretary of Labor.*

### Memorandum for Department of Labor Executive Staff

November 9, 2006.

*From:* Elaine L. Chao

*Subject:* Delegation of Authority and Assignment of Responsibility to Department Officers to Invoke Governmental Privileges.

This Memorandum is issued pursuant to Secretary's Order 16-2006 and the authorities cited therein, in order to designate specific Department (DOL) officers who are delegated authority and assigned responsibility to invoke all appropriate claims of Governmental privileges arising from the functions of their respective agencies. The specific delegations are listed below. In general, the delegation is to all presidentially-appointed, Senate-confirmed heads of agencies within the Department and to certain other officials. Moreover, in the case of larger agencies more likely to face the need to invoke such privileges, generally a delegation is made to the respective first assistant, as derived from Secretary's Order 4-2003 on Order of Succession to the Secretary of Labor and Continuity of Executive Direction.

Governmental, or executive, privileges are founded upon the public interest in the effective performance of the constitutional powers and responsibilities assigned to the Executive Branch. They rest largely upon common-law tradition, and have been reinforced by courts with references to the Constitution (particularly the separation of powers doctrine and the provisions on executive authority), and may also be rooted in statute. Unlike such privileges as the attorney-client or marital privilege, which are available to all litigants in a court of law, Governmental privileges may be invoked only by the Government, and solely for the purpose of preventing particular confidential information from being disclosed. Since Governmental privileges are designed to limit information available to other litigants and the public, thereby limiting "the search for truth," they are applied narrowly by the courts and invoked subject to specific procedures.

At the Department of Labor, in order to assert a Governmental privilege before a court, a formal claim of privilege must be filed by affidavit or declaration. The formal claim must: (1) Be made by a high-level agency official to whom such authority has been properly delegated under this Order; (2) contain a description of the privileged material sufficient to permit a determination as to whether the claim of privilege is properly asserted; (3) state the reasons disclosure of the materials would cause harm; and (4) state that the invocation of the privilege is based on personal consideration by the delegated official.

This Memorandum supersedes all prior inconsistent agency delegations and assignments. Agency heads shall assure that agency position descriptions and other pertinent documents are maintained consistently with the designations provided below. Any modifications to the delegation of authority and assignment of responsibility specified in this memorandum are reserved to the Secretary.

This Memorandum shall be published in the **Federal Register** and codified in the Department of Labor Manual Series. This Memorandum is subject to periodic revision by the Secretary, as necessary, and is effective on the date indicated above.

#### Designation of Agency Officers Delegated Authority and Assigned Responsibility To Assert Governmental Privileges

*Office of the Secretary, and any other DOL component not listed below:* Deputy Secretary of Labor.

*Office of the Assistant Secretary for Administration and Management:* Assistant Secretary for Administration and Management; Deputy Assistant Secretary for Operations.

*Office of the Solicitor:* Solicitor of Labor; Deputy Solicitor.

*Employee Benefits Security Administration:* Assistant Secretary for the

Employee Benefits Security Administration; Deputy Assistant Secretary for Policy.

*Employment Standards Administration:* Assistant Secretary for the Employment Standards Administration; Deputy Assistant Secretary.

*Wage and Hour Division:* Administrator.

*Office of Labor-Management Standards:* Deputy Assistant Secretary.

*Federal Contract Compliance Programs:* Deputy Assistant Secretary.

*Office of Workers' Compensation Programs:* Director.

*Employment and Training Administration:* Assistant Secretary for the Employment and Training Administration; Deputy Assistant Secretary for Employment and Training (organizationally, position known as Deputy Assistant Secretary for the Workforce Investment System).

*Mine Safety and Health Administration:* Assistant Secretary for the Mine Safety and Health Administration; Deputy Assistant Secretary for Mine Safety and Health (organizationally, position known as Deputy Assistant Secretary for Policy).

*Occupational Safety and Health Administration:* Assistant Secretary for the Occupational Safety and Health Administration; Deputy Assistant Secretary (position primarily responsible for Congressional and Intergovernmental liaison activity).

*Veterans' Employment and Training Service:* Assistant Secretary for the Veterans' Employment and Training Service; Deputy Assistant Secretary.

*Office of the Assistant Secretary for Policy:* Assistant Secretary for the Office of the Assistant Secretary for Policy.

*Office of Congressional and Intergovernmental Affairs:* Assistant Secretary for the Office of Congressional and Intergovernmental Affairs.

*Office of Disability Employment Policy:* Assistant Secretary for the Office of Disability Employment Policy.

*Office of Public Affairs:* Assistant Secretary for the Office of Public Affairs.

*Bureau of Labor Statistics:* Commissioner of the Bureau of Labor Statistics; Deputy Commissioner.

*Office of the Chief Financial Officer:* Chief Financial Officer; Deputy Chief Financial Officer.

*Women's Bureau:* Director of the Women's Bureau.

*Bureau of International Labor Affairs:* Deputy Under Secretary for International Affairs.

*Office of the Chief Information Officer:* Chief Information Officer.

*Office of the Chief Acquisition Officer:* Chief Acquisition Officer.

*Office of the Chief Human Capital Officer:* Chief Human Capital Officer.

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