governmentattic.org

"Rummaging in the government's attic"

Description of document:	Department of Labor (DOL) Wage and Hour Division (WHD) Field Operations Handbook (FOH), Chapters 50-54, 56-63, 65, 67-71, 73, 76, and 80-86, 1982-2016
Requested date:	24-July-2017
Released date:	01-March-2018
Posted date:	07-May-2018
Source of document:	Wage and Hour Division, National Office U. S. Department of Labor Attn: Ms. Michelle Moreno WHD FOIA Coordinator, Branch Management Division Room S3013F 200 Constitution Avenue, N.W. Washington, D.C. 20210-0002 Email: foiarequest@dol.gov

The governmentattic.org web site ("the site") is noncommercial and free to the public. The site and materials made available on the site, such as this file, are for reference only. The governmentattic.org web site and its principals have made every effort to make this information as complete and as accurate as possible, however, there may be mistakes and omissions, both typographical and in content. The governmentattic.org web site and its principals shall have neither liability nor responsibility to any person or entity with respect to any loss or damage caused, or alleged to have been caused, directly or indirectly, by the information provided on the governmentattic.org web site or in this file. The public records published on the site were obtained from government agencies using proper legal channels. Each document is identified as to the source. Any concerns about the contents of the site should be directed to the agency originating the document in question. GovernmentAttic.org is not responsible for the contents of documents published on the website.

-- Web site design Copyright 2007 governmentattic.org --

U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

March 1, 2018

Sent via E-mail

RE: Freedom of Information Act Response Letter
FOIA Tracking Number 836790

The Department of Labor Wage and Hour Division (WHD) National Office is responding to your request made under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, dated July 24, 2017. You requested copies of all documents regarding the WHD Field Operations Handbook (FOH).

In accordance with the Department's regulations 29 CFR § 70.20(a), we can only include responsive documents in our possession as of the date our search began. The search began on August 3, 2017.

The WHD no longer uses the following FOH chapters: 1 – 9, 17-19, 26-29, 34-35, 37-38, 40-45, 55, 66, 70, 72, 74-75, and 77-79.

Next, the following FOH chapters 10-16, 20-25, 30-33, 36, 39, 46 and 64 have already been made available on the WHD website at http://www.dol.gov/whd/FOH/. These pages total 947.

Furthermore, we are providing you with partially redacted copies under Exemption 7(E) for FOH Chapters 50-54, 56-63, 65, 67-71, 73, 76, and 80-86. These chapters total 1,742 pages. Of these pages, we are withholding in full 139 pages and we are releasing 1,603 pages. Please refer to the attached index for a more complete description of the withholdings in each FOH Chapter.

Responsive documents withheld in full total 139 pages. Responsive documents released total 2,689 pages and have been enclosed.

If you consider this an adverse determination, you have the right to file an administrative appeal. Your appeal must be received by the Solicitor of Labor within 90 calendar days of the date of this initial denial letter. Address your appeal to the following office: Solicitor of Labor, Division of Management and Administrative Legal Services, Room N-2420, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, D.C. 20210.

Your appeal may also be sent by e-mail to FOIAAppeal@dol.gov. Appeals submitted to any other address will not be accepted. Your appeal must state in writing the grounds for the appeal.

It should also include a copy of the original request, the response to your request, and any supporting statement or arguments. The appeal letter, the envelope, and the e-mail subject line, should be clearly marked "Freedom of Information Act Appeal."

I hope this information is helpful.

Sincerely,

PATRICE TORRES Digitally signed by PATRICE TORRES
Date: 2018.03.01 15:38:48 -05'00'

Patrice Rachel Torres
Assistant Administrator
Wage and Hour Division Disclosure Officer

Enclosures

Chapter 50

GENERAL RESPONSIBILITIES AND CONDUCT OF WAGE AND HOUR INVESTIGATORS

Table of Contents

50a GENERAL

50a00 Purpose.

50b RESPONSIBILITIES AND CONDUCT OF EMPLOYEES

50b00 Responsibilities and conduct.
50b01 Adherence to written directives.

50c INQUIRIES AND CORRESPONDENCE WITH THE PUBLIC

50c00 Correspondence.
50c01 Telephone inquiries.
50c02 Inquiries regarding laws or programs not administered by the Wage and Hour Division.
50c03 Requests for approval of commercial forms.
50c04 Requests for interpretations.
50c05 Response to subpoena.

50d DISCLOSURES: GENERAL

50d00 Disclosure of information to the public.
50d01 Materials available for disclosure.
50d02 Materials which are covered by FOIA exemptions.
50d03 Location of material.
50d04 Privacy Act of 1974.
50d05 Safeguarding Personally Identifiable Information (PII) and information subject to the Privacy Act.

50e INVESTIGATION LEADS

50e00 Program.
50e01 Sources.
50e02 Reporting.

50f INTERAGENCY AGREEMENTS AND UNDERSTANDINGS

50f00 Handling written or oral inquiries: Civil Rights Act of 1964, Executive Order 11246, and Executive Order 11375.
50f01 Civil Rights Act of 1964: Title VI.
50f02 Civil Rights Act of 1964: Title VII, ADEA, and EPA.
50f03 Office of Federal Contract Compliance Programs: referrals.
50f04 National Foundation on the Arts and the Humanities Act of 1965.

NOT FOR PUBLIC DISTRIBUTION

50f05 Employee Retirement Income Security Act of 1974: cooperation with PWBP regarding violations.
50f06 (Reserved.)
50f07 Consumer Credit Protection Act: Title I, Consumer Credit Cost Disclosure.
50f08 Consumer Credit Protection Act: Title II, Extortionate Credit Transactions.
50f09 Processing matters concerning Minority Business Enterprises.
50f10 (Reserved.)
50f11 (Reserved.)
50f12 Cooperation with the National Labor Relations Board (NLRB) in handling referrals.
50f13 Tri-Agency agreement between OSHA, ETA, and ESA for migrant farm housing.
50f14 Agreement between OSHA and ESA for migrant and seasonal farmworker housing inspections.
50f15 Coordination between ESA, ETA, and OSHA concerning complaint referrals and follow-up pursuant to 29 CFR 42.
50f16 Memorandum of understanding between DOL and NRC.
50f17 Memorandum of understanding between the FBI and the WHD regarding violations of federal statutes relating to involuntary servitude and slavery.
50f18 Immediate referral to the FBI is required upon receipt of allegations of slavery (involuntary servitude) and peonage.
50f19 Referral of whistleblower complaints under the Surface Transportation Assistance Act of 1982 (section 405 of the Highway Improvement Act) to OSHA.
50f20 (Reserved.)
50f21 Agreement between OSHA and ESA for coordination of inspections of fireworks manufacturers and contractors engaged in excavation or trenching operations.
50f22 Memorandum of understanding between the DOL Office of the Inspector General (OIG) and the Wage and Hour Division of ESA.
50f23 Memorandum of understanding between the U.S. DOL OSHA and ESA/WHD.
50f24 Statement of principle between DOL and the Offices of Vocational and Adult Education, and Special Education and Rehabilitative Services of the Department of Education.
50f25 Statement of principle between DOL and community-based rehabilitation organizations.
50f26 Memorandum of understanding between the Colorado Department of Labor and Employment, and the U.S. Department of Labor.

50g RECORDING, TRANSCRIBING, AND MONITORING OF CONVERSATIONS AND STATEMENTS

50g00 Indiscriminate use of recording, transcribing, and monitoring devices prohibited.

50h INVESTIGATOR AUTHORITY

50h00 GS-5 through GS-11 WHIs.
50h01 GS-12 and non-supervisory GS-13 investigators.

NOT FOR PUBLIC DISTRIBUTION

50i EMPLOYEE DISCHARGE: COURSES OF ACTION

50i00 Prohibition against discharge and discrimination.

50j WAGE AND HOUR DIVISION MEDIA POLICY

50j00 Purpose.
50j01 Coordination with OPA.
50j02 Coordination with the National Office (NO).
50j03 Responding to inquiries from the media.
50j04 Developing a proactive media strategy.

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTION

50a GENERAL

50a00 Purpose.

The purpose of this chapter is to provide a place for miscellaneous instructions, such as those relating to the general responsibilities and conduct of employees, correspondence, disclosures of information, and investigation leads, which are not elsewhere included in the FOH.

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTION

50b RESPONSIBILITIES AND CONDUCT OF EMPLOYEES

50b00 Responsibilities and conduct.

This subject is covered in the Department of Labor (DOL) Employee Handbook, Appendix A, "Ethics and Conduct of Department of Labor Employees."

50b01 Adherence to written directives.

Experience has indicated that there may exist misunderstanding on the part of some field personnel concerning the validity and applicability of existing written directives, instructions, and interpretations. In order to resolve any misunderstanding, and in the interest of uniform and proper administration and enforcement of the acts administered by the Wage and Hour Division (WHD), it is necessary to emphasize that the WHD Field Operations Handbook and other similar program directive series continue to provide the official operating policies and procedures to be followed in the conduct of enforcement activities (of course, concomitant with this is the responsibility on the part of the National Office (NO) to keep such program directive series current and responsive). There is, of course, no latitude in adherence to legal interpretative positions. Any existing oral instruction authorizing deviation from established policies and procedures must be confirmed in writing. Where there is a need to change existing written instructions, the established orderly means for accomplishing this shall be utilized.

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTION

50c INQUIRIES AND CORRESPONDENCE WITH THE PUBLIC

50c00 Correspondence.

(a) WHD personnel may correspond with the public in connection with appointments related to their own investigative or public information activities or to handle routine requests for publications. They may also correspond with employers or their representatives to request the status of a matter being negotiated to determine whether back wages will be paid, or to secure back wage receipts. WHD personnel will not transmit any written public communication, including email and text messages, which expresses an interpretative position or states a general policy or procedure of the WHD or the DOL. All such written communications will be transmitted by the district director (DD) or by higher authority. Any requests for interpretive positions or opinions received by WHD personnel will be forwarded to the DD for response. This includes requests received by mail, email or facsimile and requests related to specific investigations.

(b) To avoid possible embarrassment to an employee, particularly a complainant, written communications will be directed to his or her home address unless otherwise requested. If necessary, a plain stamped envelope may be used if the official envelope might adversely affect the status of an employee or complainant. It is WHD policy that the identity of complainants and all individuals who cooperate in the investigative process not be disclosed.

(c) For purposes of this subsection, *correspondence includes written communications whether transmitted by email, mailed, hand delivered or transmitted by facsimile (fax).*

50c01 Telephone inquiries.

As part of their professional duties, WHD personnel routinely handle telephone calls about the laws enforced by the WHD. It is each WHD employee's responsibility to provide honest, prompt, responsive, and courteous service to the public.

(a) In order to ensure that the WHD is responsive to the public, district offices (DOs) and area offices (AOs) may use voice mail only as a back-up for calls that cannot be immediately answered. In no case may a DO or AO use voice mail as the primary method of answering telephone calls during normal business hours.

(b) Every office must retrieve messages left on voice mail on public lines at least one time each business day. This includes the NO, regional offices (ROs), and field offices (FOs). Messages left on FO voice mail will normally be retrieved by DO or AO staff. Messages retrieved from voice mail must be recorded along with all attempts to return the call. This record will be retained according to WHD records retention rules. There is no set form for retaining this information, but offices will retain this information in a manner so that data can be retrieved when needed.

(c) Messages must be screened for high priority calls. For example, messages that indicate situations involving child labor hazardous occupations, urgent Family and Medical Leave Act (FMLA) matters, and potential "hot goods" situations will have a high priority and will be returned immediately. Staff must attempt to return all messages within two business days. No fewer than three attempts will be made to return each call. The attempts must be at different times of day and on different days. If the caller is not available but a message can

NOT FOR PUBLIC DISTRIBUTION

be left, WHD staff will ask that the caller indicate in future calls a time and date when it is best for the WHD to call.

50c02 **Inquiries regarding laws or programs not administered by the Wage and Hour Division.**

(b) (7)(E)

[redacted]

50c03 **Requests for approval of commercial forms.**

Some firms prepare forms (such as payroll forms) for sale to employers. The WHD does not give official endorsement to such forms. However, if an employer asks a direct question as to the adequacy of a form which he or she presents to a WHD employee, the WHD employee may advise the employer as to whether the form is in compliance with statute or regulation.

50c04 **Requests for interpretations.**

Most of the inquiries received by DOs raise questions that have been answered before in a manner directly on point. Responses to such inquiries will be given by providing a copy of an earlier public opinion or by paraphrasing the previous opinion. These responses must be signed by the regional administrator (RA) or the DD.

If the request is for a response that will constitute a Portal-to-Portal Act "good faith" defense or the question cannot be resolved by existing interpretations or instructions, the inquiry will be forwarded directly to the Office of the Administrator of the WHD.

50c05 **Response to subpoena.**

(a) WHD employees, upon being served with a subpoena, will immediately notify the DD and/or assistant district director (ADD) and provide all pertinent information.

(b) The DD and/or ADD will immediately advise the regional solicitor of Labor (RSOL), via the RA, if possible, so that appropriate action can be taken.

(c) When time is a critical factor, the WHD employee may communicate directly with the RA or RSOL by the most expeditious means available (usually by telephone).

(d) This procedure applies to subpoenas served for cases in which DOL is directly involved as well as to third-party subpoenas resulting from private litigation or involving other government agencies.

50d DISCLOSURES: GENERAL

50d00 Disclosure of information to the public.

The Freedom of Information Act (FOIA) was amended by Pub. L. No. 93-502, effective 02/19/1975, to clarify and liberalize the requirements for, and to expedite, the disclosure of information. 29 CFR 70 contains the DOL Rules and Regulations. These FOH sections supplement 29 CFR 70.

Disclosure under the FOIA is to be made only by the appropriate disclosure officer. WHD staff who are not the authorized disclosure officer (RA in the regions), or the disclosure officer's designee, do not have the authority to disclose any information under the FOIA.

50d01 Materials available for disclosure.

(a) Materials normally made available to the public such as publications, etc., will continue to be made available. Additionally, the following general types of materials will be available to the public:

(1) Letters written in the NO to the public and signed by the Administrator or other WHD official that amount to a statement of policy or interpretation adopted by the WHD and not published in the Federal Register. These letters are those currently identified and indexed through the existing WHD and Solicitor of Labor (SOL) procedures as "public domain" letters (these letters should be filed in the RO for five years except that those having continuing reference value may be retained for a longer period at the discretion of the RA and/or WHD. Requests for inspection of "public domain" letters no longer available in the region are to be referred to the NO, Office of Policy (OP), Division of Enforcement Policy and Procedures (DEPP).

In some instances, legal opinions issued by the Office of the Solicitor have been intermixed (under the same file code) with "public domain" letters. Because such legal opinions are interoffice memoranda not subject to WHD disclosure, RAs will insure that legal opinions are not disclosed to satisfy requests from the public relating to the subject matter of the "public domain" letters (*see* 29 CFR 70.25).

(2) Printed speeches of the Administrator or other WHD officials

(3) Statements of position which represent a statement of policy or interpretation which has been adopted by the WHD and is not published in the Federal Register

(4) Volume II of the FOH

(5) Wage determinations and the summary of information upon which they are made under the Davis-Bacon and Related Acts (DBRA) and the McNamara-O'Hara Service Contract Act (SCA)

(6) Records of hearings held pursuant to or material received (except certain inter- or intra-agency memoranda or letters) in connection with the adoption of proposed regulations or determinations

NOT FOR PUBLIC DISTRIBUTION

(7) Subminimum wage certificates and the supporting information supplied by applicants with the exception of that material listed in FOH 50d02

(8) Records concerning the reports and hearings of Industry Committees in Puerto Rico, the Virgin Islands, and American Samoa pursuant to 29 CFR 511

(9) Published research and statistical studies relating to WHD activities

50d02 Materials which are covered by FOIA exemptions.

(a) Specific supporting information

Some types of supporting information in connection with FOH 50d01 general categories of records are exempt from disclosure under the FOIA and 29 CFR 70, and are not to be divulged to the public. An example of the foregoing would be contractor and union confidential wage or fringe benefit information used in the formulation of DBRA wage determinations.

(b) Medical records

Pursuant to 29 CFR 70.26 personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, are exempt from disclosure. Accordingly, WH-242: Report of Medical Examination (WH-242) comes within this exemption and will not be revealed to the public. In addition, the name of the worker will be blocked out or deleted on the following forms before making them available to the public:

- WH-222: Application for Handicapped Worker Certificate (WH-222)
- WH-223: Certificate Authorizing Special Minimum Wage Rate for Handicapped Worker or Trainee (WH-223)
- WH-224: Temporary Certificate (WH-224)
- WH-225: Attachment to Temporary Certificate Form WH-224 (WH-225)
- WH-227: Supplemental Data Sheet for Sheltered Workshop Certificate (WH-227)
- WH-228: Sheltered Workshop Certificate (WH-228)
- WH-247: Application for a Certificate for Training or Evaluation Program (WH-247)
- WH-249: Application for Special Individual Rate (WH-249)

(c) Financial information

Pursuant to 29 CFR 70.24, “records of matters that are trade secrets, and of commercial and financial information obtained from a person and privileged or confidential” are exempt from disclosure. Therefore, data from individual copies of WH-1: Economic Survey Schedule (Puerto Rico) (WH-1) will not be made available to the public. Likewise, the financial

NOT FOR PUBLIC DISTRIBUTION

information for the most recent fiscal year contained on individual copies of WH-226: Application for Sheltered Workshop Certificate (WH-226) will not be revealed to the public.

(d) Other materials not to be disclosed

Materials maintained by the WHD which may be withheld from the public include:

(1) Investigatory (including conciliation) records and case files and related papers as provided in FOH 50d02(e) below (*see* 29 CFR 70.27)

(2) Staff manuals dealing with procedural instructions and the internal practices of the WHD. This includes certain portions of Volumes III and IV of the FOH (*see* 29 CFR 70.23).

(e) Policy on investigatory (including conciliation) records and case files

29 CFR 70.27 sets forth the DOL position with regard to disclosure of material in investigation and conciliation case files. Basically our policy is as follows:

(1) Disclosure of any information from "open" files (*i.e.*, files upon which final action has not yet been taken (this may or may not coincide with statistical closing), including those for which litigation is being considered or undertaken) should be refused. As provided in 29 CFR 70.27(a), exemption seven protects from the public access requirements of the FOIA investigatory records compiled for law enforcement purposes because such disclosure will interfere with enforcement proceedings.

(2) Material from "closed" case files may be disclosed but only to the extent that it would not result in any of the consequences in 29 CFR 70.27, such as disclosing the identity of a confidential source or disclosing investigative techniques and procedures, and does not contain trade secrets or privileged or confidential commercial and financial information (*see* 29 CFR 70.24) or contain personnel, medical or similar files (*see* 29 CFR 70.26). Thus, for example, a statement of the annual gross volume of sales of a firm should not be disclosed. Generally, material that is factual in nature may be disclosed (within the guidelines set out in 29 CFR 70.24 -.27) while that which contains an opinion or recommendation of the WHI, DD, RA, etc., may not be disclosed.

(3) Material in case files:

a. Transmittal memoranda: not disclosable. *See* 29 CFR 70.25.

b. Letters, memoranda, documents, and other correspondence received subsequent to submission of the file to the DD and which are not referred to in the narrative: *see* 29 CFR 70.24 -.27 and 29 CFR 70.29.

c. WH-51: WHISARD Compliance Action Report (WH-51) statistical: not disclosable.

d. Narrative: disclosable as provided above.

e. WH-321: not disclosable.

NOT FOR PUBLIC DISTRIBUTION

f. WH-103: Notice to Employer-Employment of Minors Contrary to Federal Minimum-Age Standards (WH-103): not disclosable.

g. Notice of award of government contract and wage determinations: disclosab1e.

h. Complaint: not disclosable.

i. WH-58: Receipt for Payment of Back Wages, Liquidated Damages, Employment Benefits, or Other Compensation (WH-58) and other evidence of payment: not disclosable.[1]

j. WH-56: Summary of Unpaid Wages (WH-56): not disclosable.[1]

k. WH-55: Wage Transcription and Computation Sheet (WH-55) computations and transcripts: not disclosable.[1]

L. Employee interviews: disclosable to the extent that they do not disclose the identity of a confidential source (*see* 29 CFR 70.24(a)(4), 70.24(d), and 70.29). It should be noted that the information in the interview is not protected from disclosure generally, but the identity of a confidential source is protected. In situations where the disclosure of information would lead to the identity of a confidential source, the interview should not be disclosed. Of course, an employee may be given a copy of his or her written statement at the time the statement is taken. Any subsequent request for a copy of such a statement shall be referred through channels to the RA.

m. Coverage exhibits: disclosable to the extent that trade secrets or privileged or confidential information is not disclosed.

n. Miscellaneous correspondence and work papers (*see* 29 CFR 70.24 -.27 and 29 CFR 70.29).

Any parts of a case file not listed here must be considered in the light of 29 CFR 70.24 -.27 and 29 CFR 70.29.

Exemption seven of the FOIA recognizes the necessity for the government not only to protect its investigation files with respect to a particular case but also to protect its ability to conduct investigations in the future. Thus, an item should not be released from the case file if its entry into the public domain would in any way diminish or inhibit the future free and full disclosure of that type of information obtained in the ordinary performance of the WHD's statutory functions (*see* 29 CFR 70.27).

If a decision is made to disclose portions of a closed investigation file it may be necessary to block out certain portions prior to copying.

(4) a. The RA may allow representatives of Equal Employment Opportunity Commission (EEOC), Department of Health, Education, and Welfare

[1] May be disclosed *only to subject employer*.

NOT FOR PUBLIC DISTRIBUTION

(HEW)/Office of Civil Rights (OCR), Internal Revenue Service (IRS)/Office of Retirement Services (ORS), and other federal equal employment opportunity (EEO) enforcement agencies to examine entire investigation and conciliation files. However, the WHD's policy of maintaining the confidentiality of all records obtained during the course of our compliance actions should be made clear to these EEO agencies. In addition, only those file materials which are disclosable to the general public (*see* FOH 50d02(e)(3)) may be copied or reproduced by or for these agencies. Where such an enforcement agency is contemplating litigation, the RSOL should be advised so that consideration can be given to coordination of legal action and interpretation.

b. The policy stated in FOH 50d02(e)(4)a. above in no way modifies coordination agreements with other federal enforcement agencies under which the WHD notifies those agencies of our investigation findings. *See* FOH 50f10.

50d03 <u>Location of material.</u>

(a) NO

The following offices in the NO are responsible for maintaining the materials described in FOH 50d01 under their respective areas of jurisdiction, for inspection and copying:

(1) The DEPP: FOH 50d01(1), (3), (4), (6), (7), (8), and (9)

(2) The Office of Information and Consumer Affairs: FOH 50d01(2)

(3) The Assistant Administrator (AA) for the Office of Government Contracts (OGC): FOH 50d01(5) -(6)

(b) RO

RAs are responsible for maintaining materials for inspection and copying described in FOH 50a01(a)(1) -(5), with the exception of information on which SCA and DBRA wage determinations are based. In addition, they will make available the certificates and records connected with the issuance of subminimum wage certificates issued by the RO (*see* specific exceptions contained in FOH 50d02). Suitable facilities will be maintained in ROs for the public to review the above material. Any questions pertaining to the disclosure of information or requests for information not available in the field are to be addressed to the appropriate office in the NO or to the AA for the OP.

(c) DO

DDs and WHIs will disseminate such material as regulations, non-technical pamphlets and booklets, forms, and similar "public domain" materials maintained at the DO level. Requests for other materials, such as statements of policy or interpretations adopted by the WHD but not published in the Federal Register, or other records including case files, shall be referred to the RO.

NOT FOR PUBLIC DISTRIBUTION

50d04 **Privacy Act of 1974.**

(a) In order to insure against the invasion of personal privacy, federal agencies which maintain records identifying individuals are required to 1) insure that information is accurate, complete, relevant, and necessary, 2) permit an individual to have access to records pertaining to him or her and to amend such records, and 3) disclose information for any purpose other than the one for which it was obtained only with the permission of the individual or as provided in a routine use. Covered records are those "from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular…"

(1) All Personally Identifiable Information (PII) and records covered by the Privacy Act must be secured under lock and key when not in use.

(2) Documents that contain PII or information subject to the Privacy Act may not be copied to data collection devices that are not encrypted or otherwise secured under lock and key.

(3) All staff are responsible for the security and safe keeping of PII and information subject to the Privacy Act, as defined by FOH 50d04.

(b) The Privacy Act also prohibits any agency from denying any benefit or right to an individual because he or she refuses to submit his or her social security number unless its submission is required by statute or regulation adopted prior to 01/01/1975.

(c) For WHD purposes, Farm Labor Contractor Employee (FLCE) Certificate of Registration records are considered "covered records" as defined in FOH 50d04(a) above. Conversely, Farm Labor Contractor (FLC) registration files, regardless of whether the FLC is a sole-proprietorship, a partnership, a corporation, or some other form of organization, are not considered as covered records since the Privacy Act does not apply to businesses.

FLCE registration records should be maintained separately from files on FLC registration records (which are not covered by the Privacy Act).

(d) Case files, including those on sole proprietorships, are not considered covered records as the Privacy Act does not apply to businesses.

(e) The only present concerns in the WHD with the Privacy Act are with regard to 1) forms filled out by full-time or regular employees of FLCs, and 2) any other forms that request a social security number from an individual. The WHD Forms which have been affected are:

- WH-60 (revised August, 1980) has a Privacy Act statement printed on it
- WH-410 (revised March, 1979) has a Privacy Act statement printed in item 3 on the "Instructional and Information Guide for Applying for a Certificate of Registration"
- WH-412 (revised March, 1979) has a Privacy Act statement printed on it
- WH-415 requires a supplemental sheet since this form becomes part of a covered system of records. The supplemental sheet for this form is attached. WH-415 may

NOT FOR PUBLIC DISTRIBUTION

be required for either an FLC or an FLCE. However, the supplemental sheet will be provided *only* when the WH-415 is to be used by an FLCE.

- FD-258: Fingerprint Card (FBI Form) (FD-258) becomes part of our FLC records and must therefore have a Privacy Act statement accompanying it. The statement printed on WH-410 (above) also applies to FD-258 when used by an FLC. The statement on the WH-412 applies to FD-258 when used by an FLCE. When the FD-258 is issued with the WH-410 a reference should be added to the FD-258 stating "see Privacy Act statement on WH-410." When the FD-258 is issued with the WH-412 a reference should be added to the FD-258 stating "see Privacy Act statement on WH-412."

(f) If appropriate, offices which distribute WH-410, WH-415, and FD-258 in bulk to United States Employment Service (USES) offices may provide masters of the Privacy Act statements and instructions for their use to those USES offices rather than reproduce and attach the statements to each and every form.

(g) 29 CFR 70 subpart A implementing the Privacy Act was published in the Federal Register at 42 FR 6106 on 02/01/1977.

(h) The attached supplemental sheet should be reproduced locally.

NOT FOR PUBLIC DISTRIBUTION

FORM WH-415

SUPPLEMENTAL SHEET

1. Section 4(b) of the Farm Labor Contractor Registration Act authorizes the solicitation of this information and requires its submission.

2. The purpose of this form is to provide the Department of Labor with sufficient information to issue the required Farm Labor Contractor Employee Identification Card.

3. Information from this form may be used in the course of presenting evidence to a court or administrative tribunal or in the course of settlement negotiations.

4. Failure to provide the information precludes the issuance of the required identification card.

NOT FOR PUBLIC DISTRIBUTION

50d05 Safeguarding Personally Identifiable Information (PII) and information subject to the Privacy Act.

(a) Statement of policy regarding PII and information subject to the Privacy Act

All staff members have a responsibility to protect the confidentiality of all information obtained in the performance of their duties, including, but not limited to PII. Disclosure of any information obtained in the course of ones duties is governed by the FOIA, the Privacy Act of 1974, and departmental regulation and policy.

(b) Definitions of PII and information subject to the Privacy Act

PII is any representation of information that permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means. Further, PII is defined as information:

(1) that directly identifies an individual (*e.g.*, name, address, social security number or other identifying number or code, telephone number, email address, etc.); or

(2) by which an agency intends to identify specific individuals in conjunction with other data elements (*i.e.*, indirect identification). These data elements may include a combination of gender, race, birth date, geographic indicator, and other descriptors. Additionally, information permitting the physical or online contacting of a specific individual is the same as PII. This information can be maintained in either paper, electronic, or other media.

In addition to PII, any other sensitive information that may come into the possession of a WHD employee during the course of his or her official duties is subject to the Privacy Act.

(c) Reasons to safeguard PII

The Privacy Act of 1974, 5 USC 552(a), promotes the observance of valued principles of individual privacy. The Congress recognized that individuals have a right to determine the extent to which their personal information shall be communicated to others. The purpose of the act is to provide certain safeguards for an individual against arbitrary or capricious invasion of personal privacy. To accomplish this purpose, all departments and agencies of the Executive Branch and their employees are required to observe regulations governing the computerization, collection, management, use, and disclosure of personal information about individuals. In particular, the act requires federal agencies which maintain systems of records containing information of a personal nature which is retrieved by name, social security number, or other personal identifying designation to establish rules of conduct for employees involved in the design, development, maintenance, or operation of any such system. The act also requires agencies to instruct each employee with respect to the rules of conduct, the provisions of the act, and other rules and procedures adopted pursuant to the act, and the penalties for non-compliance.

(d) Responsibility for safeguarding PII and information subject to the Privacy Act

All employees who have access to PII and information subject to the Privacy Act are personally responsible for the security of this information. Information subject to the Privacy

NOT FOR PUBLIC DISTRIBUTION

Act includes PII and any other sensitive information that may come into the possession of a WHI during the course of his or her official duties.

(e) Common types of PII and information subject to the Privacy Act that frequently are in the possession of WHD staff

(1) Copies of employer records

(2) Employer Identification Numbers (EIN)

(3) Transcriptions of records with employee names and addresses

(4) Interviews with employee names and addresses

(5) Correspondence and e-mails from employers or employees

(6) WH-3: WHISARD Complaint Information Form (WH-3) or other complainant information

(7) Computations of back wages, both in paper and electronic form

(8) Case files

(9) Laptop computers

(10) CD discs and other electronic or digital information storage devices containing data

This list is intended to provide examples and is not meant to be exhaustive.

(f) Secure handling of PII and information subject to the Privacy Act

PII and information subject to the Privacy Act must always be under lock and key or properly encrypted when not in use. Information that is in paper form must be secured under lock and key when not in use. Compact disks, floppy diskettes, flash or thumb drives that are not encrypted must be secured under lock and key when not in use. Encrypted data must also be kept in a secure location when not in use.

PII and information subject to the Privacy Act in the possession of WHD staff must always be treated and handled in a manner which will not permit its loss or misuse. It should be secured as one would secure their own personal information. When performing work outside of the office, PII and information subject to the Privacy Act obtained by a WHD staff member shall remain in the possession and control of the WHD staff member and when not in use shall be under lock and key; including, but not limited to, situations where this information is in the WHD employee's home, automobile or in a government owned vehicle (GOV) (*i.e.*, locked in the trunk and/or out of sight in a locked GOV or the WHD employee's privately owned vehicle (POV), or contained in a brief case or other container in the WHD employee's home). PII information, however, should under no circumstances be left in a vehicle overnight.

WHD employees who perform work away from their office and have control of PII and information subject to the Privacy Act must do so only with the expressed knowledge and

NOT FOR PUBLIC DISTRIBUTION

consent of their immediate supervisor. In the case of WHIs, this consent is implicit in their duties and unless limited by management it is presumed that WHIs have permission to have and control PII and information subject to the Privacy Act related to the cases WHI are currently assigned and working on during the course of their official duties.

PII and information subject to the Privacy Act which will not remain in the case file after the conclusion of the case or is no longer necessary to maintain will be shredded or otherwise destroyed.

(g) Reporting incidents of theft or loss of PII and/or information subject to the Privacy Act

Any theft or loss of PII and information subject to the Privacy Act, whether paper or electronic, should be immediately reported by the responsible WHD employee(s) to their supervisor. This report should be forwarded, through appropriate channels, to the Deputy Administrator for Operations within two working days, along with a description of actions taken to recover the stolen or lost PII.

In circumstances involving the theft or loss of PII and information subject to the Privacy Act from WHD electronic data systems, the WHD supervisor to whom the initial report is given must immediately inform the WHD Program Information Technology Security Officer (PITSO) listed on the ESA intranet at the following URL: http://esa/omap/ditms/user/policy/security/ESA_SecurityOfficers.htm or by sending an email to zzESA-WHD-INFORMATION-SECURITY-ALL. If the WHD PITSO is not available, the report should be given to the ESA ISO, identified at the following URL: http://labornet.dol.gov/html/ITSecurityOfficers.htm.

(h) Consequences or failure to report theft or loss of PII

Failure to report theft or loss of PII will result in 1) WHD not being compliant with federal privacy directives, 2) compromise of privacy data, and 3) possible substantial harm to individuals.

Responsible WHD staff may be subject to disciplinary actions in the event that a theft or loss of PII is not reported.

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTION

50e INVESTIGATION LEADS

50e00 Program.

(a) An investigation lead is:

(1) information of probable violations in a particular establishment, or

(2) identification of an establishment as being of a kind in which experience indicates there is a probability of violations existing.

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

50e01 Sources.

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

- (b) (7)(E) [redacted]
  - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
- (b) (7)(E) [redacted]
  - [redacted]
- [redacted]
  - [redacted]
  - [redacted]
- [redacted]
  - [redacted]

50e02 **Reporting.**

Leads should not be submitted on establishments which are excluded from the regular investigation program (*see* FOH 59) or on establishments for which FOH instructions provide a suspension of investigative activity because the WHD position is under current consideration. WHIs will submit leads to their DDs. The WHI shall note whether the sending of WH-45 to the employer is recommended.

NOT FOR PUBLIC DISTRIBUTION

50f INTERAGENCY AGREEMENTS AND UNDERSTANDINGS

50f00 Handling written or oral inquiries: Civil Rights Act of 1964, Executive Order 11246, and Executive Order 11375.

(a) In the course of operations, DOs, ROs, and WHIs may receive written inquiries or oral requests for information regarding Title VI or Title VII of the Civil Rights Act of 1964, or Executive Orders 11246 or 11375. Written inquiries received by WHIs shall be referred to the DD. As appropriate written inquiries shall be acknowledged by the DO or RO and shall be handled as set out in FOH 50f01 -03. Persons who make oral inquiry shall be advised to contact the federal department or agency having responsibility for handling the subject of the inquiry.

(b) In case an inquiry concerning any civil rights matter is received and it is not clear as to the proper referral to make, the inquiry shall be submitted by the RO to the AA for the OP.

(c) Written or oral inquiries received in the NO shall be handled in the same general manner as those received in the field.

50f01 Civil Rights Act of 1964: Title VI.

(a) Title VI of the Civil Rights Act of 1964 provides that no person in the United States (U.S.) shall, on the ground of race, color, or national origin, be excluded from participation in, or denied the benefits of or be subjected to discrimination under any program or activity receiving federal financial assistance. Each federal department and agency empowered to extend such assistance by way of grant, loan, or contract is required to issue regulations to effectuate this provision. If written inquiries relating to Title VI are received, they shall be referred by the receiving office to the agency furnishing the financial assistance. If more than one agency is furnishing funds, the matter shall be referred to the one which appears to have major interest in the activity or project.

(b) In the case of a written inquiry relating to an activity or project receiving financial assistance from the U.S. DOL (state employment service offices, state unemployment insurance offices, or any of the various programs authorized under the Comprehensive Employment and Training Act (CETA), etc.), such inquiry shall be referred by the receiving office to the Employment and Training Administration (ETA), 601 D Street, NW., Washington, DC 20213.

50f02 Civil Rights Act of 1964: Title VII, ADEA, and EPA.

(a) Title VII of the Civil Rights Act provides (with certain specific exceptions and limitations) that employers, labor unions, and employment agencies shall not discriminate on the basis of race, color, religion, sex, or national origin in all phases of employment, including hiring, promoting, firing, apprenticeship and other training programs, and job assignment. If a written inquiry is received which relates to Title VII (other than an inquiry or complaint concerning a matter included in FOH 50f01(b) which is handled by the ETA), the inquiry shall be referred by the receiving office to the nearest EEOC office.

(b) Effective 07/01/1979 enforcement authority for Age Discrimination in Employment Act (ADEA) and Equal Protection Act (EPA) were transferred to the EEOC. All inquiries and

NOT FOR PUBLIC DISTRIBUTION

complaints pertaining to age discrimination in any phase of employment against the protected age group (40 to 70 years of age), and all inquiries and complaints involving section 6(d) of the Fair Labor Standards Act (FLSA), discrimination on the basis of sex in the payment of wages, shall be referred by the receiving office to the nearest EEOC office. This applies to oral and written inquiries and complaints. Additionally, if possible violations of ADEA or EPA come to the attention of the WHIs during the course of their work, they shall notify the nearest EEOC office.

50f03 **Office of Federal Contract Compliance Programs: referrals.**

(a) The Office of Federal Contract Compliance Programs (OFCCP) administers the following programs:

(1) *Executive Order 11246*

Executive Order 11246, as amended by Executive Order 11375, applies to employers with federal contracts or subcontracts of specified amounts, and prohibits discrimination in employment because of race, color, religion, sex, or national origin. Subject employers are required to take affirmative action to ensure equal employment opportunity.

(2) *Section 503 of the Rehabilitation Act of 1973*

Section 503 of the Rehabilitation Act of 1973 and implementing regulations prohibit employers with federal contracts or subcontracts (in excess of $2,500) from discriminating in employment because of physical or mental handicap. Subject employers are required to take affirmative action to employ and advance in employment qualified handicapped individuals.

(3) *Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974*

Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 and implementing regulations apply to federal contractors and/or subcontractors with contracts and/or subcontracts of $10,000 or more and prohibit discrimination in the employment of these particular veterans. Subject employers are required to take affirmative action to employ and advance in employment certain qualified veterans.

(b) Inquiries pertaining to the above programs will be forwarded by the receiving WHD office to the appropriate OFCCP RO for consideration and further action.

50f04 **National Foundation on the Arts and the Humanities Act of 1965.**

(a) A copy of the National Foundation on the Arts and the Humanities Act of 1965, and a copy of 29 CFR 505 (Labor Standards on Projects or Productions Assisted by Grants from National Endowment for the Arts (Publication 1208)) have been distributed to each FOH holder.

(b) Inquiries or complaints relative to the application of 29 CFR 505 (except part 505.6 (Safety and Health Standards) (*see* FOH 60)) may be accepted locally and referred to the DEPP. Upon a specific request, the NO will obtain from the Chairman of the National Endowment of the Arts the original signed ESA-38 (Assurances as to Labor Standards under section 5(j) National Foundation on the Arts and Humanities Act), and a copy of the grant letter, together

NOT FOR PUBLIC DISTRIBUTION

with any supplementary documents needed to give a description of the project or production to be financed in whole or in part under the grant. Because of the assurance of compliance, it is expected that little WHD activity will be required.

50f05 **Employee Retirement Income Security Act of 1974: cooperation with PWBP regarding violations.**

(a) The Employee Retirement Income Security Act (ERISA) requires administrators of employee pension benefit plans and employee welfare benefit plans to meet certain reporting and disclosure requirements. Within 120 days after a new plan comes into existence, plan administrators are to file a summary plan description with the Secretary of Labor (Secretary). A summary plan description also must be provided to each plan participant and beneficiary within 120 days after the establishment of a plan. However, certain fully insured welfare plans with fewer than 100 participants are exempt from the requirement to file a summary plan description with the Secretary. The Office of Pension and Welfare Benefit Programs (PWBP) has requested WHD cooperation in obtaining information concerning any alleged violation of the above.

(1) During the course of regular investigation activity, the WHI will ask the employer if there is any employee welfare benefit plan or pension benefit plan which is covered under ERISA.

[redacted] (b) (7)(E) [redacted]

(b) This plan of cooperation does not contemplate any interpretation of or comment on the provisions of ERISA. Questions or inquiries about ERISA shall be referred to PWBP.

50f06 **(Reserved.)**

50f07 **Consumer Credit Protection Act: Title I, Consumer Credit Cost Disclosure.**

Because Title III, Restriction on Garnishment, is enforced by the WHD, inquiries concerning Title I, Consumer Credit Cost Disclosure, may also be received. By way of background, the purpose of Title I, which may also be cited as "Truth in Lending Act" or "Truth in Advertising Act," is stated in part as: "The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this Title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." The Board of Governors of the Federal Reserve System has prepared "Regulation Z" (12 CFR 226) dealing with Title I. Also, a nontechnical pamphlet "What Truth In Lending Means To You" has been prepared. It is expected that many inquiries received by the WHD will relate to credit extended for retail purchases or by consumer finance companies. WHIs may also note possible violations of Title I during investigations under Title III. This aspect of Title I is the responsibility of the Federal Trade Commission.

50f08 **Consumer Credit Protection Act: Title II, Extortionate Credit Transactions.**

Inquiries may also be received by the WHD concerning Title II of the Consumer Credit Protection Act. The basic thrust of Title II is aimed at organized crime and "extortionate credit transactions characterized by the use or the express or implicit threat of the use, of violence or other criminal means of enforcing payment." Inquiries concerning Title II shall be referred to the United States Attorney for the district involved.

50f09 **Processing matters concerning Minority Business Enterprises.**

The Minority Business Development Agency, U.S. Department of Commerce, is concentrating on the localization of resources. In this connection, it has requested the DOL to designate certain persons to serve as Minority Business Coordinators. The Office of the Secretary has assigned this function to its Small Business Specialist in each RO and the NO. They handle inquiries, refer requests, and take appropriate action on matters relating to minority business enterprises. All inquiries received concerning WHD matters shall be answered and the appropriate Small Business Specialist advised. All other inquiries shall be referred by the receiving office to the appropriate Small Business Specialist.

50f10 **(Reserved.)**

50f11 **(Reserved.)**

50f12 **Cooperation with the National Labor Relations Board (NLRB) in handling referrals.**

(a) The NLRB administers the National Labor Relations Act (NLRA), which regulates certain labor relations for industries involved in interstate commerce. Exceptions include the railroad and airline industries which are covered by the Railway Labor Act. The NLRA provides orderly processes for protecting and implementing the respective rights of employees, employers, and unions in their relations with one another. The NLRB processes only those charges of unfair labor practices (and petitions for employee elections) that are filed at one of its offices. Since the FLSA and the NLRB protect employee rights in certain concurrent or overlapping areas (*e.g.*, discriminatory discharges), the NLRB and the WHD have agreed to share investigatory material in such cases and to mutually determine under which statute the employee's rights would be most feasibly and advantageously pursued. Such coordination should help to avoid duplication of effort and conserve resources.

(b) Prior to any NLRB deferral to the WHD by one of their ROs or by their Office of the General Counsel, the unfair labor practice charge will have been thoroughly investigated under the NLRA and a determination made that there is reasonable cause to believe that there is merit to the alleged violation of the NLRA. Where the case also indicates probable FLSA violations such a deferral will be considered by the NLRB. Absent deferral the NLRB would have proceeded in seeking an appropriate remedy under the NLRA. Where such deferrals take place the following sequence of events shall occur:

(1) a. The DD of the DO receiving the deferral will arrange a meeting with appropriate officials of the NLRB to discuss the complaint, the evidence disclosed by the NLRB investigation, strategy in the subsequent FLSA investigation, and any other matters necessary to coordinate an appropriate course of action.

NOT FOR PUBLIC DISTRIBUTION

b. Copies of NLRB evidence may be obtained if appropriate. Requests for copies of NLRB file materials can be obtained by submitting a written request to the Board's General Counsel pursuant to section 102.118 of the Board's Rules and Regulations. However, our representatives can informally review their case files prior to making a 102.118 request of the General Counsel.

(2) The WHD will conduct the factfinding investigation on a priority basis and within the boundaries suggested by the meeting referred to in FOH 50f12(b)(1)a. above.

(3) Upon completion of the investigation the DD will arrange another meeting with the NLRB officials to determine under which statute the case should be pursued to a conclusion. The case will be handled accordingly and copies of evidence may be shared with the NLRB if final action is under the NLRA.

(c) It shall be the responsibility of each DD to ensure that there is an appropriate exchange of information with the NLRB office situated in their jurisdiction. Consequently, DDs should initiate contact with the officials in charge of such offices as soon as feasible in order to set up an appropriate working arrangement.

50f13 **Tri-Agency agreement between OSHA, ETA, and ESA for migrant farm housing.**

(a) The tri-agency agreement which follows was issued in January 1984 and applies to migrant housing safety and health inspections conducted by OSHA, ETA, and ESA (WHD). The agreement was promulgated in an effort to avoid duplication and to achieve the broadest possible safety and health inspection coverage for migrant housing.

(b) Implementation instructions for the agreement are in FOH 57h.

NOT FOR PUBLIC DISTRIBUTION

Agreement between the Occupational Safety and Health Administration (OSHA), the Employment Standards Administration (ESA), and the Employment and Training Administration (ETA) for Inspections of Migrant Agricultural Worker Housing

NOT FOR PUBLIC DISTRIBUTION

It is recognized that ESA, OSHA and ETA each has statutory responsibilities with respect to housing safety and health for migrant agricultural workers. Under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which replaced the Farm Labor Contractor Registration Act (FLCRA) effective April 14, 1983, ESA's role in the enforcement of standards for migrant housing has been expanded. It is expected, however, that each of the concerned Agencies, within its statutory jurisdiction, will work to avoid duplication and to provide the greatest degree of communication and coordination with the other Agencies. In line with this objective, and to address issues raised by the new legislation, this Agreement supercedes the Agreement of 1979 and establishes the following priorities:

ETA's scheduling system will remain unchanged. The State Employment Service(s) will continue to conduct pre-occupancy inspections of migrant housing facilities on all agricultural orders extended into the Intra and Interstate Clearance System.

ESA through the Wage-Hour Division is responsible for enforcing the Migrant and Seasonal Agricultural Worker Protection Act which contains safety and health standards which apply to facilities used as housing for migrant workers. The Wage-Hour Divison will target for investigation a selected group of housing facilities determined to have the greatest potential for non-compliance with Departmental housing standards. In cases where such housing has already been inspected prior to occupancy by the local State Employment Security Administration (SESA) personnel, Wage

NOT FOR PUBLIC DISTRIBUTION

and Hour Division Compliance Officers shall avoid conducting a safety and health inspection during the subsequent occupancy period unless evidence indicates that substantive housing standards are being violated.

Under this system, OSHA will schedule migrant housing inspections only in those camps not previously inspected by SESA personnel and not programmed as likely candidates for ESA (Wage-Hour) inspections.

To facilitate OSHA and ESA inspection scheduling, ETA will provide OSHA and ESA/RA's in all Regions with current information on crop seasons in each State, including anticipated annual start up and shut down dates.

These priorities have been established with the intent of maximizing resources, avoiding unnecessary duplication and expanding Departmental coverage of migrant housing facilities.

Coordination and implementation within the regions will be the responsibility of the Regional Farm Labor Coordinated Enforcement Committees.

Regional Responsibilities

The Regional Committees have responsibility for ensuring the effective application of these coordinated enforcement efforts. Under this policy, ESA, OSHA and ETA Regional Administrators shall adhere to the following directives:

NOT FOR PUBLIC DISTRIBUTION

ETA

ETA/RA's in each Region will provide on a continuing basis to the ESA/RA in their region a listing of all migrant camps inspected prior to occupancy by the State Employment Service Agencies (SESA's) within the region. Camps shall be identified by employer name and location. Listings shall be made available promptly to ESA/RA's prior to occupancy for each camp certified on a continuing basis as part of the regular monthly meeting of the Regional Farm Labor Coordinated Working Group.

ESA

Upon receipt of the listed housing information, ESA shall review and disseminate to the appropriate Wage-Hour Division Area Office a list of camps within the office's geographical jurisdiction. This shall be accomplished within 15 days of receipt of the ETA list.

It will then be the responsibility of the Wage-Hour Area Director (WH/AD) to compile a list of housing to be scheduled for inspection (by location, identity of the owner/provider and identity of the farm labor contractor, if known and if applicable) by the Area Office for the upcoming season. This list should emphasize any migrant housing believed to present a potential for unsafe living conditions, as well as labor camps which will be checked as a result of directed MSPA investigations. The list should not include camps inspected by SESA's, although such camps may be inspected as provided below.

NOT FOR PUBLIC DISTRIBUTION

WH/AD's will prepare a list which contains the identity of camps in their geographical jursidiction which (1) do not appear on the ETA listing and (2) do not appear on the MSPA scheduled investigation listing. This third list will be provided to OSHA for use in scheduling during the current season and should contain the location of the camp, the owner/provider's identity and any available information on occupancy periods.

The three lists shall be completed by the WH/AD and forwarded to the Wage-Hour Regional Office (RO). Each crop season the above-described selection process will be completed in a timely manner so as to provide OSHA with the information necessary for its program.

The RO will, upon receipt, provide the lists to the OSHA/RO for distribution to their local offices. The entire process should be completed promptly for each crop season.

In cases where the housing has already been inspected prior to occupancy by the local SESA pursuant to an interstate clearance order, Wage-Hour Compliance Officers will conduct a limited visual walk through safety and health inspection and determine if a certificate of occupancy has been issued and is posted at the site. If the walk-through inspection does not disclose any substantive violation of State or Federal standards, no further action is necessary with regard to housing safety and health. Where substantive violations are observed the Wage-Hour Compliance Officer will immediately make a full housing safety and health inspection.

NOT FOR PUBLIC DISTRIBUTION

OSHA

OSHA/RA's will be responsible for expeditiously forwarding the ESA lists to affected AD's and State designees. The AD's will be instructed to schedule programmed housing inspections in those camps not previously inspected by SESA and not earmarked for MSPA priority attention. This system will only apply to scheduled inspections. OSHA will continue to conduct mandated complaint and accident investigations in migrant camps in accordance with established agency procedures.

Referrals

During the course of a crop season, Wage-Hour CO's may become aware of migrant camps outside ESA jurisdiction containing hazardous or unsanitary conditions. These facilities should be referred immediately to the appropriate OSHA/AD or OSHA State designee for inspection, regardless of whether the facility has been inspected by SESA staff prior to occupancy. Resources permitting, such referrals will be handled as expeditiously as possible.

Results of housing inspections conducted during ETA post-occupancy field checks shall be forwarded immediately to the local ESA/RA through the ETA/RA. If ETA findings indicate non-compliance with DOL housing standards, the camp shall be referred to ESA for a compliance inspection.

Dual Citations and Reporting

In instances where Wage-Hour CO's determine during the course of MSPA investigations that housing not included on the ESA priority list is

NOT FOR PUBLIC DISTRIBUTION

substantially out of compliance with DOL housing standards, a safety and health inspection will be conducted in conjunction with the MSPA investigation. This will be done regardless of whether the camp has been previously inspected by SESA or OSHA. In such cases, ESA will comply with the following procedures in order to avoid duplication with OSHA:

Should camp operators indicate that there has been an OSHA inspection within the 30 days preceding the MSPA investigation, the OSHA/AD (for the area in which the camp exists) shall be contacted for information on violations cited and abatement dates.

In determining sanctions under MSPA, civil money penalties will only be imposed for, (1) violations not cited by OSHA within the past 60 days, and/or (2) violations cited under OSHA for which abatement periods have expired. When MSPA actions are undertaken the Solicitor shall utilize all safety and health violations found by all DOL agencies as supportive evidence.

Immediately following safety and health inspections conducted under the circumstances described above, the local OSHA/AD will be notified and given the results of the investigation.

NOT FOR PUBLIC DISTRIBUTION

ESA Reporting Instructions

When a migrant labor housing inspection is made by a Wage-Hour CO, a copy of the housing inspection report shall be forwarded to the OSHA/AD

by the WH/AD. If civil money penalties are assessed for housing violations, the ESA/RO will send a copy of the assessment notice and a copy of the housing inspection report to the OSHA/RO. ESA/ROs will identify to ETA/ROs all camps inspected pursuant to MSPA which were found in violation of safety and health standards. Housing inspection reports will be provided to ETA/ROs by the ESA/ROs following closure of the case.

OSHA Reporting Instructions

A. The OSHA/AD shall forward a copy of the OSHA 1 and any OSHA citation issued, to the WH/AD and the Manager of the SESA, for the area in which the migrant housing is located.

B. The OSHA/AD shall report any other apparent violation of the MSPA, by appropriate means to the WH/AD for the area involved. (For example, noting that a farm labor contractor is not registered under MSPA.)

C. OSHA/ADs shall provide State designees with pertinent information on camp inspections conducted by ESA (MSPA) and SESA. State designees will in turn be encouraged to keep local WH/ADs and SESA Managers apprised of the results of migrant housing inspections conducted by State occupational safety and health compliance personnel.

NOT FOR PUBLIC DISTRIBUTION

Note: Internal memoranda between USDOL agencies should not be sent to OSHA 18(b) designees. Information of this nature should be communicated verbally by the Area Director.

Assistant Secretary for
Occupational Safety and
Health Administration

JAN 25 1984
Date

Deputy Under Secretary for
Employment Standards

1-13-84
Date

Assistant Secretary
for Employment and Training
Administration

31 January 1984
Date

NOT FOR PUBLIC DISTRIBUTION

50f14 **Agreement between OSHA and ESA for migrant and seasonal farmworker housing inspections.**

The agreement which follows was finalized in April 1978. The January 1984 tri-agency agreement (*see* FOH 50f13) contains more detailed procedures, but does not entirely supersede the agreement between OSHA and ESA. Certain items within the agreement remain applicable to the enforcement of housing safety and health standards under both OSHA and FLCRA.

NOT FOR PUBLIC DISTRIBUTION

Agreement between OSHA and ESA for Migrant and Seasonal Farmworker Housing Inspections

I. Purpose

To secure the highest level of compliance with the safety and health housing standards requirements of the Farm Labor Contractor Registration Act; Regulation 29 CFR Part 40, Farm Labor Contractor Registration; the Occupational Safety and Health Act; and the applicable OSHA regulation issued pursuant thereto.

II. Policies

1. There will be the fullest possible cooperation and coordination between ESA and OSHA at all levels in developing and carrying out an effective and continuing safety and health program for seasonal and migrant farmworkers with respect to their housing. The Regional Administrators for ESA and OSHA will develop procedures designed to implement these policies in their respective regions.

2. For enforcement purposes, OSHA and ESA will accept compliance with Department of Labor standards covering seasonal farmworker housing in effect at the time of this agreement or any such standards which may become effective at any subsequent date in the future.

3. Where ESA lacks jurisdiction because the farm labor contractor neither owns nor controls the housing, ESA will refer violations of the housing standards to OSHA or to the appropriate State agency in States with approved occupational safety and health plans. OSHA and ESA Regional Administrators shall establish a continuing working relationship with approved plan State agencies in order to facilitate violation referrals.

4. OSHA will respond to referrals from ESA concerning housing safety and health violations and conduct inspections based upon such referrals in a timely manner, attempting to do so before the workers depart the premises. OSHA will encourage States with approved plans to do likewise. ESA will advise OSHA of the anticipated departure date of migrants at the time of referral of the complaint.

5. When FLCRA applies, ESA's Wage and Hour Division will conduct housing inspections to completion and, when violations are found, obtain compliance, assess civil money penalties and/or recommend litigation as appropriate. OSHA will undertake a program of general schedule

NOT FOR PUBLIC DISTRIBUTION

inspections and will make appropriate enforcement action when violations are found. OSHA will insure that States with plans approved by OSHA will maintain a program of inspections which is at least as effective as the Federal Program.

6. When expert witnesses are needed in connection with administrative hearings or court actions on housing safety and health violations under the FLCRA, OSHA will provide them.

7. OSHA will cooperate with ESA in developing and conducting a training program for Wage Hour Compliance Officers in making housing inspections. ESA will cooperate with OSHA in developing and providing training on the housing requirements under the FLCRA.

8. ESA and OSHA agree to exchange information relating to complaints, inspections, violations discovered, imposition of civil money penalties or other legal actions to enforce migrant farmworker housing standards; location and period of use of migrant farm labor camps; and all other information necessary to insure coordinated enforcement of migrant and seasonal farmworker housing standards and to avoid duplication of inspection and enforcement activities. Further, OSHA will encourage States with approved plans to exchange such information with ESA.

9. OSHA subscribes to the provisions of the Memorandum of Understanding between ETA and ESA signed March 1975, relating to stranded migrants, and agrees to abide by the procedures outlined in that agreement for referring such situations to ETA and ESA. OSHA Regional Administrators will notify approved plan States of the Memorandum of Understanding and request their cooperation in implementing its procedures.

10. Each Agency will publish this agreement for implementation by its field personnel.

11. The parties in carrying out this agreement shall follow existing delegations of authority from the Secretary of Labor, the pertinent laws, regulations, interpretations and guidelines issued thereunder.

NOT FOR PUBLIC DISTRIBUTION

Donald Elisburg
Assistant Secretary for
Employment Standards
Administration

April 3, 1978
Date

Eula Bingham
Assistant Secretary for
Occupational Safety and
Health

April 19, 1978
Date

50f15 **Coordination between ESA, ETA, and OSHA concerning complaint referrals and follow-up pursuant to 29 CFR 42.**

(a) In March 1975 a memorandum of understanding (MOU) was signed by the Assistant Secretaries for Manpower (now the ETA) and ESA. This memorandum implemented a consent decree which was entered on 08/13/1974 with the U.S. District Court for the District of Columbia in the *NAACP v. Brennan* case. As part of a settlement agreement concluding litigation in *NAACP v. Marshall*, DOL established a National Farm Labor Coordinated Enforcement Program. 29 CFR 42, issued pursuant to the settlement of the case, details the requirements for the coordination of activities between ESA, OSHA, and ETA. Certain prior court orders were dissolved upon publication of 29 CFR 42 and other regulations published at the same time by USES (*see* 20 CFR 651, 20 CFR 653, and 20 CFR 658). Portions of the MOU concerning complaint referrals and follow-up of complaints have been superseded by 29 CFR 42 as outlined below. Those portions concerning refusal of Employment Service (ES) services to employers and contractors who are in violation of FLSA and FLCRA, exchange of information, and stranded workers remain unchanged.

(b) 29 CFR 42 established a National Farm Labor Coordinated Enforcement Committee for the purpose of reviewing the policies of OSHA, ESA, USES, and the Office of the Solicitor and to assist the respective agencies in coordination of all assigned responsibilities related to migrant farmworkers. The National Committee also oversees the operation of a system of coordinated complaint and/or directed action logs which are maintained by each DOL agency and appropriate State Employment Security Administration (SESA) and OSHA state agencies. This system is designed to facilitate speedy referral and follow-up of complaints as well as to monitor the processing of migrant farmworker enforcement cases. The logs record the number of compliance actions initiated as a result of complaints and those initiated on the basis of directed activity. They also include a statistical record of all original referrals both from and to other DOL agencies or federal or state authorities.

(c) To facilitate the operation of the coordinated enforcement procedures established by 29 CFR 42, the state agency shall take in writing non-Job Service (JS) related complaints from migrant and seasonal farm workers (MSFW) which allege violations of employment-related laws enforced by ESA or OSHA. The official shall immediately refer the complaint to ESA or OSHA for prompt action. The JS official shall inform the MSFW to which enforcement agency (and individual if known) the complaint will be referred and also refer the complainant to other agencies, attorneys, consumer advocates and/or other assistance where appropriate.

(d) Upon receipt of all other non-JS-related complaints, the JS official shall refer the complainant to the appropriate enforcement agency, another public agency, an attorney, a consumer advocate and/or other appropriate assistance.

(e) For all non-JS-re1ated complaints received pursuant to paragraphs (c) and (d) above, the appropriate JS official shall record the referral of the complainant and the complaint where violations of ESA or OSHA are alleged, and the agency or agencies (and individual(s), if known) to which they were referred, on a central complaint log. The complaint log shall specify for each complaint:

(1) The name of the complainant

(2) The name of the respondent (employer or state agency)

NOT FOR PUBLIC DISTRIBUTION

(3) The date the complaint is filed

(4) Whether the complaint is by or on behalf of an MSFW

(5) Whether the complaint is JS-re1ated

(6) If the complaint is non-JS-related, the complainant and the complaint where violations of ESA or OSHA are alleged, and the agency or agencies (and individual(s), if known) to which they were referred

(7) The action taken, including for JS-related complaints, whether the complaint has been resolved

(f) All field personnel will take steps to ensure that JS-related complaints received from the ES are promptly serviced and that the ES is notified of the results. WH-39 has been provided for use in such notification. Notification to the JS is required for *all* complaints forwarded by the ES regardless of whether violations were disclosed and regardless of whether an investigation was actually made. WH-39 shall be signed by the DD and sent back to the JS office that forwarded the complaint. In any situation where the completion or disposition of an investigation is delayed beyond a reasonable or normal length of time, the JS will be notified. Follow-up reports on complaint resolution should be provided to the ES office monthly for MSFWs and quarterly for non-MSFWs.

(g) Whenever a complaint is received and/or an investigation is completed by a DOL agency, the appropriate official of that agency shall enter the matter on the complaint and/or directed action log. Wherever possible, the complainant shall, upon request, be informed of the status of the actions pending.

(h) WH-400 will continue to be marked so as to designate a complaint received from the JS. This enables the NO to provide a statistical summary to ETA of the results of such complaints.

NOT FOR PUBLIC DISTRIBUTION

MEMORANDUM OF UNDERSTANDING BETWEEN
THE EMPLOYMENT STANDARDS ADMINISTRATION (ESA) AND
THE EMPLOYMENT AND TRAINING ADMINISTRATION (ETA)

Recognizing the need for clarifying a number of policy issues relating to the Department of Labor's (DOL's) role in enforcing fair labor standards, protective and crewleader registration legislation affecting seasonal and migrant farmworkers, the Assistant Secretary for Employment Standards and the Assistant Secretary for Employment and Training adopt the following policies and procedures:

I. Policies

A. There will be the fullest possible coordination and cooperation between ESA and ETA at all levels in developing and carrying out an effective enforcement program with respect to fair labor standards and other protective legislation for farmworkers. It is particularly important that, in each region, the Regional Administrators for ESA and ETA work together to develop procedures to implement these policies.

B. ESA will maintain its present policy with respect to its enforcement of minimum wage and child labor standards and crewleader registration laws; i.e., ESA will continue to respond on a priority basis to employee complaints and undertake a compliance program, the scope and timing of which will reflect the characteristics and needs of each region. This includes prompt servicing of employee complaints referred by the ETA. Suggested procedures for this are described in Part II below.

C. The ETA will insure that the State Employment Service Agencies (SESA's) continue to refuse services to employers and crewleaders who are in violation of minimum wage and child labor standards and, pursuant to section 4(d) of the Farm Labor Contractor Registration Act, crewleader registration laws.

D. ETA and its affiliated SESA's will refer alleged or apparent violations of such laws to ESA in accord with the procedures outlined in Part II below. ETA will utilize to the maximum possible extent the full resources of the DOL monitor/advocate system in expediting such referrals.

E. ESA and ETA support the need for an ongoing program to enhance the compliance posture of employers who use ETA's farmworker placement services as well as employers who do not use those services.

F. ESA and ETA agree to exchange pertinent information relating to complaints, inspections, and all other information necessary to insure a coordinated Department of Labor program.

NOT FOR PUBLIC DISTRIBUTION

G. In instances where ESA compliance officers are aware that migrants are stranded, or are about to be stranded, as a result of ESA enforcement actions, ESA shall notify ETA in accord with the procedures outlined in Part II-B below. ETA will take appropriate action to assist the affected migrants in alleviating their situation.

II. Procedures

A. These procedures describe in general terms how the new ESA/ETA inspection referral system should operate. It is up to the Regional Administrators for ESA and ETA in each region, however, to mutually develop procedures reflecting any special needs or circumstances which may exist.

1. On the basis of information provided by an employer on a job order and/or the possession of a crewleader's license, the SESA will determine whether an employer or crewleader meets the Department's requirements. If the SESA determines that the employer or crewleader is deficient in meeting such requirements, the SESA will require the employer or crewleader to correct the deficiencies prior to providing services.

2. Should the SESA become aware of an alleged or apparent violation through an employee complaint or through other means, SESA, utilizing the monitor/advocate system when feasible, will refer the situation to ESA. When elevated to the ETA regional office or received directly by the ETA from complainant, the referral will proceed as follows:

   a. Immediately, the Regional Administrator for ETA (or designated representative) should contact the Regional Administrator for ESA (or designated representative) to advise him or her of the situation, location of the employer or crewleader, and other pertinent information. This should be followed up in writing where appropriate. If the SESA referred workers to the employer or crewleader, a copy of the job order should be forwarded to ESA at this time.

   b. In turn, the RAdm for ESA should contact the appropriate ESA Area Director in order to schedule a complaint investigation.

   c. Upon completion of the investigation, the RAdm for ESA should notify the RAdm for ETA of the results of the investigation by the most expeditious means.

B. These procedures describe in general terms how the ESA/ETA referral system for hardship or displacement cases should operate.

NOT FOR PUBLIC DISTRIBUTION

Should ESA enforcement actions result in the probable or actual stranding or displacement of migrants, or should any hardship cases come to the attention of ESA's representative, ESA shall refer the situation to ETA as follows:

1. Immediately, the ESA compliance officer or Area Director shall notify the RAdm-ESA (or designated representative) to advise him or her of the situation, location of the migrants, and other pertinent information. In turn, the RAdm-ESA should immediately relay this information to the RAdm for ETA (or designated representative).

2. The RAdm for ETA shall contact the appropriate CETA section 303 grantee in order to alert them to the situation. The grantee shall take appropriate action to avert and/or alleviate the situation through enlistment of community resources or the direct provision of emergency aid.

3. Should no section 303 grantee exist in the affected area or the grantee be unable to provide needed assistance to the stranded migrants, the RAdm for ETA shall notify the National Office Division of Migrant Worker Services.

NOT FOR PUBLIC DISTRIBUTION

Bernard E. DeLury
Assistant Secretary for
Employment Standards

3/21/75
Date

Ben Burdetsky For
Assistant Secretary for Employment
and Training

3/10/75
Date

U. S. DEPARTMENT OF LABOR Employment Standards Administration Wage and Hour Division	USES COMPLAINT REFERRAL REPORT

This will advise the USES of the results of action taken by the Wage and Hour Division on your complaint referral of _____.
(Date)

Name of Complainant	Name of Firm	SIC CODE			
Street Address	City	County	State	ZIP Code	

No Violations Disclosed ☐	Reasons:

Violation Findings

	Total Employees		MW		OT		Total $	
	Due	Paid	Due	Paid	Due	Paid	Due	Paid
FLSA								
EPA								
ADEA								
Government Contracts (Specify)								
Minors Illegally Employed								
Civil Penalties Imposed	$							

ADEA Practices (Describe briefly)

FLCRA (Describe briefly)

Garnishment (Describe briefly)

Remarks:

Area Director	Date (Mo., day, year)

Form WH-39
June 1975

NOT FOR PUBLIC DISTRIBUTION

50f16 **Memorandum of understanding between DOL and NRC.**

(a) The MOU which follows became effective when signed by the Administrator on 10/25/1982. It sets forth the agreement reached on matters of jurisdiction, responsibility, and areas of cooperation between DOL and NRC with respect to the administration of section 210 of the Energy Reorganization Act of 1974 (ERA). It appeared in the Federal Register at 47 FR 54585, 12/03/1982.

(b) FOH 52x contains the procedures for handling whistleblower complaints. Special handling instructions for section 210 investigations are delineated in FOH 52x02(c).

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTION

NUCLEAR REGULATORY COMMISSION

DEPARTMENT OF LABOR

Wage and Hour Division

Memorandum of Understanding Between NRC and Department of Labor; Employee Protection

I. Purpose

The U.S. Nuclear Regulatory Commission (NRC) and the Department of Labor (DOL) enter into this agreement to facilitate coordination and cooperation concerning the employee protection provisions of Section 210 of the Energy Reorganization Act of 1974 (Reorganization Act), as amended, 42 U.S.C. 5851.

2. Background

Section 210 of the Reorganization Act prohibits any employer, including a Nuclear Regulatory Commission licensee, applicant or a contractor or subcontractor of a Commission licensee or applicant, from discriminating against any employee with respect to his or her compensation, terms, conditions or privileges of employment because the employee assisted or participated, or is about to assist or participate, in any manner in any action to carry out the purposes of either the Reorganization Act or the Atomic Energy Act of 1954 (Atomic Energy Act), as amended, 42 U.S.C. 2011 *et seq.*

The NRC and DOL have complementary responsibilities in the area of employee protection. DOL has the responsibility under section 210 of the Reorganization Act to investigate employee complaints of discrimination and may, after an investigation and hearing, order a violator to take affirmative action to abate the violation, reinstate the complainant to his or her former position with backpay, and award compensatory damages, including attorney fees. NRC, though without direct authority to provide a remedy to an employee, has independent authority under the Atomic Energy Act to take appropriate enforcement action against Commission licensees that violate the Atomic Energy Act, the Reorganization Act, or Commission requirements. Enforcement action may include license denial, suspension or revocation or the imposition of civil penalties.

Although each agency will carry out its statutory responsibilities independently, the agencies agree that administrative efficiency and sound enforcement policies will be maximized by cooperation and the timely exchange of information in areas of mutual interest.

3. Areas of Cooperation

a. DOL agrees to promptly notify NRC of any complaint filed with DOL alleging discrimination within the meaning of Section 210 of the Energy Reorganization Act. DOL will promptly provide NRC a copy of the complaint, decisions and orders associated with the investigation and any hearing on the complaint.

DOL will also keep NRC currently informed on the status of any judicial proceedings seeking review of an order of the Secretary of Labor issued pursuant to Section 210 of the Reorganization Act.

b. NRC and DOL agree to cooperate with each other to the fullest extent possible in every case of alleged discrimination involving employees of Commission licensees, applicants, or contractors or subcontractors of Commission licensees or applicants. NRC will take all reasonable steps to assist DOL in obtaining access to licensed facilities and any necessary security clearances. Each agency agrees to share and promote access to all information it obtains concerning a particular allegation and, to the extent permitted by law, will protect the confidentiality of information identified as sensitive that has been supplied to it by the other agency.

4. Implementation

The NRC official responsible for implementation of this agreement is the Executive Director for Operations; the DOL official responsible for implementation of this agreement is the Administrator, Wage and Hour Division. Working level point of contacts shall be established and identified within 10 days after the effective date of this agreement for both headquarters and field operations.

5. Amendment and Termination

This Agreement may be amended or modified upon written agreement by both parties to the Agreement. The Agreement may be terminated upon ninety (90) days written notice by either party.

6. Effective Date

This agreement is effective when signed by both parties.

Dated: July 29, 1982.

William J. Dircks,

Executive Director for Operations, Nuclear Regulatory Commission.

Dated: October 25, 1982.

William M. Otter,

Administrator, Wage and Hour Division, Department of Labor.

[FR Doc. 82-32971 Filed 12-2-82; 8:45 am]

BILLING CODE 7590-01-M

50f17 **Memorandum of understanding between the FBI and the WHD regarding violations of federal statutes relating to involuntary servitude and slavery.**

The memorandum which follows was signed in December 1982. It outlines the way in which the two agencies will cooperate in exchanging information. Of course, since the memorandum was signed, the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) has been signed into law (on 01/14/1983) to become effective 90 days after signing. After it becomes effective, substitute "MSPA" for "FLCRA" wherever it appears.

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTION

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE FEDERAL BUREAU OF INVESTIGATION
AND
THE DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
REGARDING
VIOLATIONS OF FEDERAL STATUTES RELATING TO
INVOLUNTARY SERVITUDE AND SLAVERY

The purpose of this memorandum is to develop a close working relationship between the Federal Bureau of Investigation (FBI) and the U. S. Department of Labor, Employment Standards Administration, Wage and Hour Division (WHD) with respect to the enforcement of Federal laws which involve Involuntary Servitude and Slavery (ISS).

POLICY

It shall be the policy of both the FBI and the WHD to exchange information relative to violations disclosed or alleged during the course of their investigative activity. The Federal statutes primarily involved in this agreement are Involuntary Servitude and Slavery (FBI), the Farm Labor Contractor Registration Act (WHD), and the Fair Labor Standards Act (WHD).

PROCEDURE

FBI

When the FBI receives information during the course of investigative activity indicating a possible violation of the Farm Labor Contractor Registration Act or the Fair Labor Standards Act, the WHD Office covering the area in which the alleged violation occurred will be notified in a timely fashion. This initial contact will be followed with a written summary of the allegation(s) set forth in an FBI letterhead memorandum. This memorandum will be furnished to the WHD Office which was provided the initial information by the FBI. A copy of the memorandum will be forwarded to FBI Headquarters for transmittal to the WHD National Office ATTENTION: Office of the Administrator.

WHD

When the WHD receives information, during the course of investigative activity, indicating a possible violation of the Involuntary Servitude and Slavery Statutes, the FBI Office covering the area in which the alleged violation occurred will be notified in a timely fashion. This initial contact will be followed with a written summary of the allegation(s) set forth in a WHD memorandum. This memorandum will be furnished to the Special Agent in Charge of the FBI Field Office which was provided the initial information by the WHD. A copy of the memorandum will be forwarded to the Regional WHD Office and thereafter to the WHD National Office for transmittal to FBI Headquarters; ATTENTION: Civil Rights Unit, Criminal Investigative Division.

INTER-AGENCY FEEDBACK

The Civil Rights Unit, FBI Headquarters, and the Office of the Administrator, WHD National Office will maintain liaison concerning matters of mutual interest relating to policy matters as set forth in this memorandum. A portion of this liaison will involve the dissemination of information concerning the final action(s) taken in each case developed and investigated under the terms of this memorandum.

12-2-82
DATE

WILLIAM H. WEBSTER
Director
Federal Bureau of Investigation

12-27-82
DATE

ROBERT B. COLLYER
Deputy Under Secretary for
Employment Standards
U. S. Department of Labor

NOT FOR PUBLIC DISTRIBUTION

50f18 **<u>Immediate referral to the FBI is required upon receipt of allegations of slavery (involuntary servitude) and peonage.</u>**

(a) Whenever allegations of slavery or peonage are received *they must be immediately referred by telephone to the Federal Bureau of Investigation (FBI)* in accordance with FOH 50f17. This immediate referral to the FBI is mandatory. A memorandum confirming the referral should be sent promptly. If subsequent information is received (updated locations of persons involved, names of additional witnesses, etc.) the FBI shall be notified by telephone and copies of any statements or other information should be immediately transmitted by memorandum to the FBI. No circumstances shall justify delaying transmittal to the FBI. Investigation findings, including information from "open" files, may be exchanged with the FBI and other law enforcement agencies where appropriate. Questions involving matters discussed in this section should be resolved by phoning the AA for the OP.

(b) Allegations of slavery or peonage referred to in FOH 50f18(a) above are typically received by telephone, in person, or in writing from sources such as:

- (b) (7)(E) [redacted]
- [redacted]

(c) Involuntary servitude or slavery and peonage are addressed by the U.S. Constitution, 13th Amendment and by Title 18 USC 241 -242 and 1581 -1588.

(1) *13th Amendment to the U.S. Constitution*

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation."

(2) *Summaries of the principal statutes involved*

Elements of sections of the principal statutes are summarized below for your information. Whenever these elements are observed or alleged, immediate referral must be made to the FBI.

a. <u>18 USC 1581: Peonage</u>

Arresting, holding, or returning any person to a condition of peonage, *i.e.*

1. Compulsory service not provided by law

2. Because of a debt, either real or pretended

3. Against the victim's will

NOT FOR PUBLIC DISTRIBUTION

b. 18 USC 1583: Enticement into slavery

Kidnapping or carrying away any person or enticing any person with the intent that such person be sold into involuntary servitude or slavery against the victim's will

c. 18 USC 1584: Sale into involuntary servitude

Knowingly and willfully holding or selling a person against that person's will to involuntary servitude or bringing into the U.S. any person so held

d. 18 USC 241: Conspiring against the rights of citizens

Two or more persons conspiring to deprive any citizen of constitutional rights, specifically the right to be free from slavery

e. 18 USC 242: Deprivation of rights under color of law

Acting under color of law to deprive any citizen of constitutional rights, specifically the right to be free from slavery

50f19 Referral of whistleblower complaints under the Surface Transportation Assistance Act of 1982 (section 405 of the Highway Improvement Act) to OSHA.

OSHA is responsible for administering the employee protection (*i.e.*, whistleblower) provisions of this law. Any employee alleging discrimination in reprisal for protected safety or health related activities under this statute shall be referred to the nearest OSHA office. Examples of protected activities include: filing a complaint or testifying in a proceeding relating to commercial motor vehicle safety rules, regulations, standards, or orders. For more expeditious handling, complainants shall be referred to the OSHA Regional Supervisory Investigator at one of the following locations:

- Waltham, MA
- New York, NY
- Philadelphia, PA
- Atlanta, GA
- Cleveland, OH
- Chicago, IL
- Dallas, TX
- Kansas City, MO
- Denver, CO
- San Francisco, CA
- Seattle, WA

Note: the state-to-region makeup of OSHA is the same as the WHD.

50f20 (Reserved.)

NOT FOR PUBLIC DISTRIBUTION

50f21 **Agreement between OSHA and ESA for coordination of inspections of fireworks manufacturers and contractors engaged in excavation or trenching operations.**

(a) The agreement which follows is intended to minimize multiple federal investigations by providing for joint WHD and OSHA compliance actions of fireworks manufacturers *where appropriate*. The joint cooperative effort with regard to excavation operations, however, is limited to interagency training and information exchange.

(b) No special planning or reporting is required. DDs will, however, report any unusual case or event through established channels.

(c) Questions regarding the agreement should be referred to the DEPP.

(d) **Fireworks manufacturing areas**

OSHA investigation procedures for fireworks manufacturers require the use of special equipment and protective clothing for entrance into areas where fireworks are manufactured. This protective equipment and clothing is *not* required for entrance into offices or other nonmanufacturing areas.

(b) (7)(E) [redacted]

(e) **Investigations**

(b) (7)(E) [redacted] These establishments should also be referred to OSHA for investigation of the physical plant in conjunction with the investigation. In these situations OSHA will continue to provide the WHD with information and assistance in accordance with the October 1985 agreement.

AGREEMENT BETWEEN THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION AND THE EMPLOYMENT STANDARDS ADMINISTRATION TO ENSURE COORDINATION OF INSPECTION AND OTHER ACTIVITIES FOR MANUFACTURERS OF FIREWORKS AND FOR CONTRACTORS ENGAGED IN EXCAVATION OR TRENCHING OPERATIONS

I. Purpose

The Occupational Safety and Health Administration (OSHA) and the Employment Standards Administration (ESA) enter into this agreement concerning manufacturers of fireworks and contractors engaged in excavation or trenching operations to ensure that:

* Employees are provided with safe and healthful working conditions and that subject employers are in compliance with safety and health standards and other regulations promulgated pursuant to the Occupational Safety and Health Act of 1970 (OSH Act); and that

* The health and well-being of employed youth are protected and that subject employers are in compliance with the child labor regulations promulgated pursuant to the Fair Labor Standards Act.

II. Policies

NOT FOR PUBLIC DISTRIBUTION

General

* There will be the fullest possible cooperation and coordination between ESA and OSHA, at all organizational levels, in developing and carrying out compliance programs with respect to employers engaged in the manufacture of fireworks and to contractors engaged in excavation or trenching operations.

Enforcement

* For enforcement purposes, OSHA and ESA shall arrange for joint inspections or investigations whenever appropriate. Such coordination of activities is necessary to avoid duplicative Federal inspections or investigations.

* ESA shall respond to referrals from OSHA, and OSHA shall respond to referrals from ESA, concerning potential violations of the other agency's requirements, when appropriate, by conducting inspections or investigations in a timely manner.

Witnesses at Hearings

* ESA and OSHA shall provide witnesses, as needed, at any administrative hearings or court actions which may result from joint inspections or investigations conducted under the terms of this agreement.

Training and Information Sharing

* ESA and OSHA will cooperate in developing and conducting training programs on agencies' regulations and requirements to assist in ensuring that valid referrals are made.

* ESA and OSHA shall exchange information relating to complaints, inspections or investigations, violations discovered, imposition of civil monetary penalties or other legal actions taken to enforce pertinent laws and regulations, and all other information necessary to ensure coordinated enforcement and to avoid duplicative inspection or investigation activities.

State Programs

* OSHA and ESA Regional Administrators will work together to facilitate referrals of violations to ESA from the relevant State agencies in those States which operate their own occupational safety and health programs under a plan approved by OSHA under section 18 of the OSH Act (Plan States).

* In those Plan States with child labor laws that contain prohibitions against employment in the manufacture of fireworks or in excavation or trenching operations, the Plan State agency may elect to refer apparent violations of child labor laws to the appropriate state office responsible for enforcement of child labor regulations in addition to carrying out its responsibilities under the OSH Act.

* OSHA will encourage Plan States to respond to referrals from ESA concerning potential violations of the States' occupational safety and health standards or regulations by conducting investigations in a timely manner.

* OSHA will encourage Plan States to participate in all training and information-sharing activities established under this agreement. OSHA and ESA Regional Administrators will coordinate Plan State participation in such activities.

Implementation

* Each agency shall publish this agreement for implementation by its field personnel.

* The Regional Administrators for ESA and OSHA shall develop procedures designed to implement the policies specified in this agreement within their respective regions. These procedures shall take into consideration the appropriate lines of communication between ESA and OSHA Plan States.

Termination

* This agreement shall remain in effect for three years from the date of the last signature unless extended by mutual consent of both parties or unless terminated with thirty days notice by either party.

Deputy Under Secretary for
Employment Standards
Administration

Date: October 17, 1985

Acting Assistant Secretary for
Occupational Safety and
Health

Date: October 15, 1985

NOT FOR PUBLIC DISTRIBUTION

50f22 **Memorandum of understanding between the DOL Office of the Inspector General (OIG) and the Wage and Hour Division of ESA.**

The MOU which follows became effective when signed on 04/16/1987. The memorandum's purpose is to foster a close working relationship and improved exchange of information between the WHD and the OIG. The objective is to increase the ability of each office to fulfill its responsibilities regarding enforcement of federal statutes administered by DOL, particularly criminal sanctions in the government contract program.

Questions regarding the memorandum should be referred to the Deputy Administrator of Program Operations.

NOT FOR PUBLIC DISTRIBUTION

MEMORANDUM OF UNDERSTANDING
U.S. DEPARTMENT OF LABOR
OFFICE OF THE INSPECTOR GENERAL
AND
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

The purpose of this memorandum is to develop a close working relationship and to improve the exchange of information between the Wage and Hour Division (WH) and the Office of Inspector General (OIG) in order to enhance the ability of each office to fulfull its responsibilities with respect to the enforcement of Federal statutes administered by the Department of Labor (DOL).

POLICY

It shall be the policy of both OIG and WH to exchange information relative to criminal matters of mutual interest. The Federal statutes primarily involved are the Fair Labor Standards Act (FLSA), Migrant and Seasonal Agricultural Workers Protection Act (MSPA), Davis-Bacon and Related Acts (DBRA), Contract Work Hours and Safety Standards Act (CWHSSA), Service Contract Act (SCA), Walsh-Healey Public Contracts Act (PCA), the Copeland "Anti-Kickback" Act, the Immigration Reform and Control Act of 1986, and the Anti-Kickback Enforcement Act of 1986.

NOT FOR PUBLIC DISTRIBUTION

This memorandum acknowledges the traditional role of WH in investigating both civil and criminal allegations under these statutes uncovered during the course of their investigations. With the passage of the Inspector General Act it acknowledges that the Office of Investigations (OI), within OIG, is now responsible for the investigation of criminal allegations with respect to the management of programs administered or financed by DOL. It also acknowledges that the Office of Labor Racketeering (OLR), within OIG, is responsible for the investigation of organized crime incursion into employee benefit plans, labor-management relations, and internal union operations.

OIG and WH will coordinate their investigative efforts when allegations of criminal conduct exist under the above statutes. Coordination will include consultation at the regional level and as appropriate, by the respective national offices of WH and OIG to insure that the most effective approach to an investigation will be maintained, including conducting joint investigations. The spirit of this memorandum is to eliminate, to the extent possible, duplication of criminal investigative efforts so as to use most efficiently the limited resources which are available to the Department.

NOT FOR PUBLIC DISTRIBUTION

PROCEDURE

WAGE AND HOUR

WH will refer to OIG those criminal allegations defined in DLMS 8 Chapter 700. WH will also notify OIG of criminal investigations performed under statutes enforced by WH. Such referrals and notifications shall be in accordance with DLMS 8 Chapter 700, Paragraph 721. WH will inform OIG when the FBI or the Immigration and Naturalization Service is notified of potential criminal violations pursuant to WH's Memorandum of Understanding with those respective agencies. Such referrals and notifications shall be in accordance with DLMS 8, Chapter 700, Paragraph 721.

Following is a list of areas of mutual concern illustrative of the types of criminal allegations which should, as appropriate, be referred by WH to OIG:

1. The submission of an application for a certificate of registration as a Farm Labor Contractor (FLC), or other information required under the provisions of the MSPA where WH has reason to believe that such application or information is false or fraudulent. Additionally, those instances where WH has fined a FLC for employment of illegal aliens shall be referred.

NOT FOR PUBLIC DISTRIBUTION

2. The submission of documentation to WH, and/or any other Federal agency, certifying wages, overtime, back wage receipts, and/or other contract labor standards, where WH has reason to believe that such documentation contains false or fraudulent information and the alleged violation meets the applicable minimum criteria for prosecution set by the cognizant Office of the U.S. Attorney.

3. Information indicating that employees are required illegally to give up any part of the compensation to which they are entitled under the terms of an employment contract.

4. Those instances where WH has reason to believe that an organized crime situation may exist. Examples of these situations would include: (1) Allegations of "payoffs" to union officials by a contractor; (2) Embezzlement of union funds in an organized crime controlled union; (3) Failure to enforce a collective bargaining agreement by a union; and/or (4) Where an employee is required to kickback a portion of his/her compensation to a union official. In addition, upon request, WH will provide OIG access to MIS reports (WHMIS).

5. Any other significant information indicating that an individual or entity has willfully engaged in any fraudulent or other criminal activity. Examples include:

NOT FOR PUBLIC DISTRIBUTION

a. Illegal acts by Governemnt contractors beyond WH jurisdiction;

b. Food stamp fraud;

c. Failure to forward deductions such as income tax, social security, employee benefits, etc. to the appropriate entity;

d. Fraudulent use of a Social Security Number.

<u>OFFICE OF INSPECTOR GENERAL</u>

1. OIG will also notify WH promptly of the initiation of any criminal investigation with respect to WH programs. This will be in the form of an "Advice of Scheduled Investigation" (ASI-OIG-Form 1048).

2. OIG will provide WH with an Investigative Memorandum (IM) upon completion of investigations conducted under the above paragraph. WH may use the information contained in the IM as WH deems appropriate in accordance with DLMS 8, Chapter 700, Paragraph 722 and 723.

NOT FOR PUBLIC DISTRIBUTION

3. OIG will also refer to WH any information or allegation coming to its attention including potential civil matters and administrative debarments which requires the resources or expertise of WH.

4. OIG will return as soon as possible to WH those referrals not accepted for investigation for any action WH deems appropriate.

5. OIG will provide instruction and/or training to WH's personnel to enable WH to better understand the mission and function of OIG. This training will be informal and at the appropriate field, regional, and national levels.

J. Brian Wyland 4/16/87
J. BRIAN WYLAND Date
Inspector General

Paula V. Smith 4/15/87
PAULA V. SMITH Date
Administrator
Wage and Hour Division

NOT FOR PUBLIC DISTRIBUTION

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE U.S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
AND
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I. Purpose:

The purpose of this agreement is to set forth the working relationship between the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) and the Wage and Hour Division of the Employment Standards Administration (ESA) to protect the health and well-being of the Nation's workforce, and to establish a complaint/referral system between the two Agencies which will provide for a coordinated enforcement effort, thereby securing the highest level of compliance with the Occupational Safety and Health Act and the various Federal Wage and Hour laws, including the Fair Labor Standards Act; the McNamara-O'Hara Service Contract Act; the Walsh-Healey Public Contracts Act; the Contract Work Hours and Safety Standards Act; the Davis-Bacon and related Acts; the temporary alien agricultural (H-2A) worker provisions of the Immigration and Nationality Act; and the Migrant and Seasonal Agricultural Worker Protection Act.

II. Background:

The Occupational Safety and Health Act of 1970 (OSH Act) was enacted to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. It also established the Occupational Safety and Health Administration and authorizes the Secretary of Labor to set mandatory occupational safety and health standards and to provide an effective enforcement program; to conduct investigations and inspections; to determine the status of compliance with safety and health standards and regulations; and to issue citations for non-compliance with safety and health standards and regulations. The OSH Act requires employers to furnish employment free from recognized hazards that are causing or are likely to cause death or serious physical harm, and to comply with occupational safety and health standards issued under the OSH Act.

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards for the Nation's workforce. The Wage and Hour Division (Wage and Hour) administers and enforces FLSA with respect to private sector and State and local government employment. In addition, it

NOT FOR PUBLIC DISTRIBUTION

administers FLSA provisions concerning child labor and Federal statutes governing migrant and seasonal farmworker employment. FLSA authorizes the Secretary of Labor to conduct investigations and gather data on wages, hours, and other employment conditions or practices, in order to determine compliance with the Act.

The Act's child labor provisions are designed to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions detrimental to their health or well-being. The standards have minimum age requirements for minors employed in non-agricultural and agricultural occupations.

The Wage and Hour Division is also responsible for Federal statutes that provide labor standards protection to migrant, seasonal, and temporary alien (H-2A) agricultural workers and employees who work on Federal and Federally-assisted contracts with the Federal Government. The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) protects migrant and seasonal workers in their dealings with farm labor contractors, agricultural employers, agricultural associations and providers of migrant housing. The temporary alien agricultural worker provisions of the Immigration and Nationality Act (INA) also provide protection to H-2A workers and U.S. workers in corresponding employment and also contain safety and health requirements for housing such workers. The McNamara-O'Hara Service Contract Act (SCA) applies to workers on Federal service contracts, and the Walsh-Healey Public Contracts Act (PCA) applies to workers on Federal supply contracts. The Davis-Bacon and Related Acts (DBRA) cover workers on Federal construction contracts and on construction contracts with State and local governments that are Federally-assisted. The Contract Work Hours Safety Standards Act (CWHSSA) sets overtime pay requirements on Federal contracts.

Occasionally, compliance officers from OSHA conducting investigations are presented with information concerning non-compliance with Federal wage and hour, migrant and seasonal, or temporary alien (H-2A) farmworker, and child labor standards. Conversely, Wage and Hour compliance officers are occasionally presented with information concerning health and safety conditions which may be in non-compliance with the OSH Act. It is the intention of this MOU to establish policy and procedures concerning an effective and efficient system for the exchange of this type of information between the two agencies.

NOT FOR PUBLIC DISTRIBUTION

III. Policies:

There will be the fullest possible cooperation and coordination between ESA and OSHA, at all organizational levels, in developing and carrying out compliance programs to ensure the health and well-being of the Nation's workforce.

For enforcement purposes, OSHA and ESA shall arrange for referrals, whenever appropriate. Such coordination of activities is necessary to ensure maximum enforcement of labor laws.

ESA shall respond to referrals from OSHA, and OSHA shall respond to referrals from ESA, concerning potential violations of the other Agency's requirements, when appropriate, by conducting investigations in a timely manner.

ESA and OSHA will cooperate in developing and conducting training programs on the agencies' regulations and requirements. Such training is necessary to ensure that valid referrals are made when potential violations are found.

ESA and OSHA shall exchange information relating to complaints, inspections or investigations, violations discovered, imposition of civil monetary penalties or other legal actions taken to enforce pertinent laws and regulations, and all other information necessary to ensure coordinated enforcement.

State Programs

OSHA and Wage and Hour Regional Administrators will work together to facilitate referrals of violations to ESA from the relevant State agencies in those States which operate their own occupational safety and health programs under a plan approved by OSHA under Section 18 of the OSH Act (Plan States).

In those Plan States with child labor laws that contain prohibitions against employment in hazardous occupations or other restrictions, the Plan State agency may refer apparent violations of child labor laws to the appropriate State official responsible for enforcement of child labor regulations, in addition to referring them to Federal Wage and Hour.

OSHA will encourage Plan States to respond to referrals from ESA and State agencies concerning potential violations of the States' occupational safety and health standards or regulations by conducting investigations in a timely manner.

NOT FOR PUBLIC DISTRIBUTION

OSHA will encourage Plan States to participate in all training and information-sharing activities established under this MOU. OSHA and Wage and Hour Regional Administrators will coordinate Plan State participation in such activities.

IV. Implementation:

Under the terms of this agreement, each agency will:

A. Ensure that all field personnel are provided with a copy of this MOU.

B. Develop and distribute to all field personnel a directive outlining the policy concerning the implementation of this MOU, taking into consideration the appropriate lines of communication between Wage and Hour and OSHA Plan States.

C. Ensure that all field personnel are provided with information and training concerning the types of issues that will be referred, including the requirements of the OSH Act and the FLSA, MSPA, SCA, PCA, INA, CWHSSA, DBRA and implementing regulations.

D. Submit all referrals generated by compliance officers to the District/Area Director, who will then forward the referral to the other agency.

E. Evaluate referrals on a priority basis and take appropriate action.

F. Transmit to the other agency the results of any inspection conducted in response to a referral from that agency.

G. Establish a system to monitor the progress of actions taken on referrals.

H. Conduct periodic regional meetings, as necessary, to report on the progress of actions taken on the other agency's referrals and evaluate the system.

V. Period of Agreement:

This MOU shall continue in effect unless modified in writing by mutual consent of both parties or terminated by either party upon 30 days advance written notice to the other.

This MOU does not preclude entering into separate agreements setting forth procedures for other special programs which can be addressed more efficiently and expeditiously by special agreement.

NOT FOR PUBLIC DISTRIBUTION

Nothing in this agreement is intended to diminish or otherwise affect the authority of either agency to implement its respective statutory functions.

This MOU will become effective on the date of the last signature.

Assistant Secretary for Occupational Safety and Health

Date: April 5, 1990

Assistant Secretary for Employment Standards

Date: April 5, 1990

NOT FOR PUBLIC DISTRIBUTION

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

SEP 16 1992

Dear Colleague:

The Departments of Education and Labor have collaborated to promote opportunities for educational placements in the community for students with disabilities while assuring that applicable labor standards protections are strictly observed.

Pursuant to the Individuals with Disabilities Education Act (IDEA), individualized education programs are developed to provide students with disabilities an opportunity to learn about work in realistic settings and thereby help such students in the transition from school to life in the community. Since the affirmation of students' rights to an appropriate free public education in 1975, many students with disabilities have benefitted from participation in vocational education programs in their public schools. Students with more severe disabilities, however, have experienced fewer benefits from participation in such programs. Alternative, community-based, and individualized education and training programs have emerged to meet their needs.

Our Departments share an interest in promoting educational experiences that can enhance success in school-to-work transition and the prospects that these students become effective, productive workforce participants and contributors to their community. At the same time, these students must be afforded the full protection of the nation's labor laws and not be subject to potential abuse as they start this transition through community-based educational experiences.

Existing Department of Labor guidelines which define "employees" for purposes of applying the requirements of the Fair Labor Standards Act (FLSA) do not specifically address community-based education programs for students with disabilities. To assist program administrators in developing programs or making placements that do not create questions about the establishment of an employment relationship between the students and partici-pating businesses in the community, the Employment Standards Administration (Department of Labor), and the Offices of Vocational and Adult Education, and Special Education and Rehabilitative Services (Department of Education) have developed the following guidance.

STATEMENT OF PRINCIPLE

The U.S. Departments of Labor and Education are committed to the continued development and implementation of individual education programs, in accordance with the Individuals with Disabilities Education Act (IDEA), that will facilitate the transition of students with disabilities from school to employment within their communities. This transition must take place under conditions that will not jeopardize the protections afforded by the Fair Labor Standards Act to program participants, employees, employers, or programs providing rehabilitation services to individuals with disabilities.

NOT FOR PUBLIC DISTRIBUTION

400 MARYLAND AVE SW WASHINGTON DC 20202

GUIDELINES

Where ALL of the following criteria are met, the U.S. Department of Labor will NOT assert an employment relationship for purposes of the Fair Labor Standards Act.

- *Participants will be youth with physical and/or mental disabilities for whom competitive employment at or above the minimum wage level is not immediately obtainable and who, because of their disability, will need intensive on-going support to perform in a work setting.*

- *Participation will be for vocational exploration, assessment, or training in a community-based placement work site under the general supervision of public school personnel.*

- *Community-based placements will be clearly defined components of individual education programs developed and designed for the benefit of each student. The statement of needed transition services established for the exploration, assessment, training, or cooperative vocational education components will be included in the students' Individualized Education Program (IEP).*

- *Information contained in a student's IEP will not have to be made available; however, documentation as to the student's enrollment in the community-based placement program will be made available to the Departments of Labor and Education. The student and the parent or guardian of each student must be fully informed of the IEP and the community-based placement component and have indicated voluntary participation with the understanding that participation in such a component does not entitle the student-participant to wages.*

- *The activities of the students at the community-based placement site do not result in an immediate advantage to the business. The Department of Labor will look at several factors.*

  1) *There has been no displacement of employees, vacant positions have not been filled, employees have not been relieved of assigned duties, and the students are not performing services that, although not ordinarily performed by employees, clearly are of benefit to the business.*

  2) *The students are under continued and direct supervision by either representatives of the school or by employees of the business.*

  3) *Such placements are made according to the requirements of the student's IEP and not to meet the labor needs of the business.*

  4) *The periods of time spent by the students at any one site or in any clearly distinguishable job classification are specifically limited by the IEP.*

NOT FOR PUBLIC DISTRIBUTION

- *While the existence of an employment relationship will not be determined exclusively on the basis of the number of hours, as a general rule, each component will not exceed the following limitation during any one school year:*

Vocational exploration	*5 hours per job experienced*
Vocational assessment	*90 hours per job experienced*
Vocational training	*120 hours per job experienced*

- *Students are not entitled to employment at the business at the conclusion of their IEP. However, once a student has become an employee, the student cannot be considered a trainee at that particular community-based placement unless in a clearly distinguishable occupation.*

It is important to understand that an employment relationship will exist unless all of the criteria described in this policy guidance are met. Should an employment relationship be determined to exist, participating businesses can be held responsible for full compliance with FLSA, including the child labor provisions.

Businesses and school systems may at any time consider participants to be employees and may structure the program so that the participants are compensated in accordance with the requirements of the Fair Labor Standards Act. Whenever an employment relationship is established, the business may make use of the special minimum wage provisions provided pursuant to section 14(c) of the Act.

We hope that this guidance will help you achieve success in the development of individualized education programs.

ROBERT R. DAVILA
Assistant Secretary
Office of Special Education
and Rehabilitative Services
U.S. Department of Education

CARI M. DOMINGUEZ
Assistant Secretary
Employment Standards
Administration
U.S. Department of Labor

BETSY BRAND
Assistant Secretary
Office of Vocational and
Adult Education
U.S. Department of Education

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

JAN 19 1993

STATEMENT OF PRINCIPLE

The U.S. Department of Labor and community-based rehabilitation organizations are committed to the continued development and implementation of individual vocational rehabilitation programs that will facilitate the transition of persons with disabilities into employment within their communities. This transition must take place under conditions that will not jeopardize the protections afforded by the Fair Labor Standards Act to program participants, employees, employers or other programs providing rehabilitation services to individuals with disabilities.

GUIDELINES

Where ALL of the following criteria are met, the U.S. Department of Labor will NOT assert an employment relationship for purposes of the Fair Labor Standards Act.

- Participants will be individuals with physical and/or mental disabilities for whom competitive employment at or above the minimum wage level is not immediately obtainable and who, because of their disability, will need intensive ongoing support to perform in a work setting.

- Participation will be for vocational exploration, assessment or training in a community-based placement work site under the general supervision of rehabilitation organization personnel.

- Community-based placements will be clearly defined components of individual rehabilitation programs developed and designed for the benefit of each individual. The statement of needed transition services established for the exploration, assessment or training components will be included in the person's Individualized Written Rehabilitation Plan (IWRP).

- Information contained in the IWRP will not have to be made available, however, documentation as to the individual's enrollment in the community-based placement program will be made available to the Department of Labor. The individual and, when appropriate, the parent or guardian of each individual must be fully informed of the IWRP and the community-based placement component and have indicated voluntary participation with the understanding that participation in such a component does not entitle the participant to wages.

- The activities of the individuals at the community-based placement site do not result in an immediate advantage to the business. The Department of Labor will look at several factors.

NOT FOR PUBLIC DISTRIBUTION

1) There has been no displacement of employees, vacant positions have not been filled, employees have not been relieved of assigned duties, and the individuals are not performing services that, although not ordinarily performed by employees, clearly are of benefit to the business.

2) The individuals are under continued and direct supervision by either representatives of the rehabilitation facility or by employees of the business.

3) Such placements are made according to the requirements of the individual's IWRP and not to meet the labor needs of the business.

4) The periods of time spent by the individuals at any one site or in any clearly distinguishable job classification are specifically limited by the IWRP.

- While the existence of an employment relationship will not be determined exclusively on the basis of the number of hours, as a general rule, each component will not exceed the following limitations:

Vocational explorations	5	hours per job experienced
Vocational assessment	90	hours per job experienced
Vocational training	120	hours per job experienced

- Individuals are not entitled to employment at the business at the conclusion of their IWRP, however, once an individual becomes an employee, the person cannot be considered a trainee at that particular community-based placement unless in a clearly distinguishable occupation.

An employment relationship will exist unless all of the criteria described in the policy is met. If an employment relationship is found to exist, the business will be held responsible for full compliance with the applicable sections of the Fair Labor Standards Act, including those relating to child labor.

Businesses and rehabilitation organizations may, at any time, consider participants to be employees and may structure the program so that the participants are compensated in accordance with the requirements of the Fair Labor Standards Act. Whenever an employment relationship is established, the business may make use of the special minimum wage provisions provided pursuant to section 14(c) of the Act.

Donald J. Hinkel, Chair
National Rehabilitation Facilities
Coalitition

Karen R. Keesling, Acting Administrator
Wage and Hour Division
U.S. Department of Labor

NOT FOR PUBLIC DISTRIBUTION

MEMORANDUM OF UNDERSTANDING
BETWEEN
Colorado Department of Labor and Employment,
AND
U.S. Department of Labor

NOT FOR PUBLIC DISTRIBUTION

I. Introduction

The State of Colorado, Department of Labor and Employment, Division of Labor, is in need of a case management system to track wage disputes and compliance with employment statutes. The United States Department of Labor, Wage and Hour Division, has developed a system called the Wage Hour Investigative Support and Reporting Database (WHISARD) that will meet these functional needs.

II. Overview

WHISARD is an on-line transactional system for real-time data entry and case management. This system encompasses the public information, labor standards enforcement, case management, and back wage collection and distribution responsibilities of the Wage and Hour Division. The system is client-server based; it was developed using Delphi as the client and Informix as the database server. The Delphi client runs on Windows 95 workstations and uses TCP/IP to communicate with an Informix database server running on a UNIX machine.

III. Scope

The U.S. Department of Labor, Wage and Hour Division, will provide the Colorado Department of Labor and Employment (CDLE) with the source code and documentation of WHISARD. The State will then be able to develop a data-entry, storage, and retrieval system in support of its operational and enforcement functions. Once CDLE receives possession of the USDOL WHISARD system and modifies it to meet CDLE requirements, the CDLE WHISARD system will then be fully operated and maintained by CDLE with a non-exclusive, perpetual license to use and adapt the WHISARD system within the State of Colorado. The State of Colorado is not authorized to re-license or provide the WHISARD system or any of its components or code for use or development by any other entity.

The CDLE WHISARD system will be a separate stand-alone system.

It will be the responsibility of the Colorado Department of Labor and Employment to obtain all necessary licenses required for all of the third-party software and components referenced in the WHISARD source code.

The U.S. Department of Labor, Wage and Hour Division, will supply the source code to CDLE to enable them to maintain, develop, and enhance the system as needed to meet the CDLE functional requirements.

The U.S. Department of Labor, Wage and Hour Division, will assist CDLE as needed in their effort to convert the WHISARD system at no cost whenever possible. If contract help is required, normal procurement procedures for contract agreements or purchase orders at the GSA Schedule rate will be utilized.

IV. Delivery

Within ten (10) working days of the signature date of this Memorandum of Understanding , the US Department of Labor, Wage and Hour Division will provide the Colorado Department of Labor and Employment with the following at no cost:

- SQL scripts to create a schema on an Informix database
- Any applicable source code with references to third-party software and components
- Data dictionary
- A list of all third-party software used to develop the WHISARD application

The above will be delivered via E-mail or CD-ROM to:

CDLE
(b) (6) [redacted]
1515 Arapahoe Street, Tower 3, Suite 550
Denver, CO. 80202

E-mail:
(b) (6) [redacted]

V. Authority

USDOL: **29 U.S.C. 211**

Colorado: **C.R.S. Title 8, Articles 1,2,3,4,5,6,8,9 and 12**
Title 26, Article 2

NOT FOR PUBLIC DISTRIBUTION

VI. Representatives

For the purpose of this agreement, the individuals identified below are hereby designated as representatives of the respective parties. Either party may, from time to time, designate in writing new or substitute representatives:

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division:

Thomas M. Markey
Deputy Administrator for Operations
RM S3502
200 Constitution Avenue, NW
Washington, DC 20210
(202) 693-0626

Nancy Flynn
Director, Office of Planning and Analysis
RM S3028
200 Constitution Avenue, NW
Washington, DC 20210
(202) 693-0551

Colorado Department of Labor and Employment:

(b) (6) [redacted]
Executive Deputy Director
1515 Arapahoe Street
Tower 2, Suite 400
Denver, CO 80202
(303) 620-4718 Ext. 304

(b) (6) [redacted]
Director, Division of Labor
1515 Arapahoe Street
Tower 2, Suite 400
Denver, CO 80202
(303) 620-4718 Ext. 315

(b) (6) [redacted]
Controller
1515 Arapahoe Street
Tower 2, Suite 700
Denver, CO 80202
(303) 620-4453

VII. Termination

This MOU may be terminated by any of the parties hereto upon written notice delivered to the other parties prior to the intended date of delivery as stated in this agreement.

VIII. Assignment of Rights

This MOU constitutes the entire agreement between the parties. All amendments and/or changes shall be by written instrument executed by the parties hereto. The parties hereto have caused this MOU to be executed as of the date set forth herein by their duly authorized representatives. The rights and responsibilities of the parties under this contract shall not be assigned without the prior written approval of CDLE and the U.S. Department of Labor.

NOT FOR PUBLIC DISTRIBUTION

IX. Intellectual Property Rights

The US Department of Labor, Wage and Hour Division declares that it has the right to grant this non-exclusive license to the State of Colorado to use and adapt the WHISARD system.

X. Effect of Agreement

This memorandum of understanding is an inter-Government agreement and is not intended to confer any right upon any private person.

This agreement does not authorize the expenditure or reimbursement of any funds. Nothing in this memorandum of understanding shall obligate the State of Colorado or DOL to expend appropriations or enter into any contract or other obligations.

Nothing in this memorandum of understanding shall be interpreted as limiting, superseding, or otherwise affecting either party's normal operations or decisions in carrying out its statutory or regulatory duties. This memorandum of understanding does not limit or restrict the State of Colorado or DOL from participating in similar activities or arrangements with other entities.

NOT FOR PUBLIC DISTRIBUTION

Signature Document

U.S. DEPARTMENT of LABOR
Office of the Assistant Secretary for Administration and Management
Procurement Services Center

By: _____ 11/27/00
Daniel P. Murphy **Date**
Director

Employment Standards Administration
Wage and Hour Division

By: _____ 11/28/00
Thomas M. Markey **Date**
Deputy Administrator for Operations

STATE of COLORADO
Bill Owens, Governor

Colorado Department of Labor and Employment

(b) (7)(E)
[redacted]

By: _____ 12/7/00
Executive Director **Date**

(b) (7)(E)
[redacted]

By: _____ 12/8/00
Controller **Date**

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTION

50g RECORDING, TRANSCRIBING, AND MONITORING OF CONVERSATIONS AND STATEMENTS

50g00 Indiscriminate use of recording, transcribing, and monitoring devices prohibited.

(a) Guarantee of integrity

The WHD must make every effort to guarantee the integrity of personal conversations or statements, and to guard against the invasion of privacy. The indiscriminate use of mechanical and electronic devices for the purpose of recording, transcribing, and monitoring of conversations or statements, without the knowledge and consent of the persons involved, could result in serious abuses and invasions of privacy. It is the policy of the WHD that all internal and external business be transacted in an atmosphere of complete candor by all parties and that, insofar as the WHD is concerned, statements or conversations made in person or over the telephone must not be surreptitiously recorded, transcribed, or monitored (listened-in-on). Therefore, the following instructions apply:

(1) The use of electronic or mechanical recording and monitoring devices in conjunction with two-way telephone conversations is prohibited. Telephone recording devices may not be purchased, rented, leased, borrowed, or otherwise utilized *except* for purposes of receiving messages on automatic answering equipment, remote one-way dictating, and the communication of non-live data.

(2) Manual verbatim transcriptions and the use of electronic or mechanical recording devices in conjunction with meetings, teleconferences, interviews, and conversations are prohibited *unless* advance notification has been given to all participants in each instance that such recording or transcription will take place.

(3) Monitoring (listening-in-on) by secretaries or other personnel of telephone conversations for the purpose of confirming appointments, making arrangements, assisting with commitments, and assuring adequate follow-ups will be permitted *only* after advance notification to callers in each instance that such monitoring is taking place.

(b) Responsibility for notification

The person responsible for authorizing the recording, transcribing, or monitoring of conversations or statements is responsible for prior notification of all parties concerned and for certifying that such notification was given. Certification may be in the form of a signed and dated notation on the file copy of the transcription or recording.

(c) Stenographic, electronic, or mechanical recording of conference with employers when requested by employers

(1) Occasionally an employer will ask that he or she be permitted to record a conference held with the WHI or DD. There is no legal basis for objecting to such a request and the WHD has no policy against permitting such conferences to be recorded. Accordingly, any such request should be agreed to. At the same time, however, the WHI or DD should ask the employer to furnish him or her with a transcript (if the

NOT FOR PUBLIC DISTRIBUTION

conference is stenographically recorded) or a duplicate disc, card, or tape (if the conference is electronically or mechanically recorded), pointing out, if necessary, that it is for the employer's protection as well as the WHI's or DD's for each of them to have a copy.

(2) The fact that a conference was recorded shall be noted by an appropriate entry in the Case Diary. If the employer declines to furnish a transcript or duplicate tape upon request, the WHI or DD should proceed with the conference, permitting it to be recorded without further comment.

NOT FOR PUBLIC DISTRIBUTION

50h INVESTIGATOR AUTHORITY

50h00 GS-5 through GS-11 WHIs.

WHIs below the General Schedule (GS)-12 grade level are subject to certain limitations in exercising their authority in performance of their duties. For GS-12 and non-supervisory GS-13 WHI limitations, *see* FOH 50h01. The DD and/or ADD may, with the concurrence of the RA, further limit this authority for individual WHIs. GS-5 through GS-11 WHIs must obtain DD and/or ADD approval *prior* to:

(a) Holding a final conference on cases in which back wages are more than:

(1) $100,000 (GS-11)

(2) $50,000 (GS-9)

(3) $25,000 (GS-7)

(4) $2,500 (GS-5)

At the discretion of the DD and/or ADD and with the concurrence of the RA these limits may be reduced (*e.g*, for WHIs newly hired at the GS-9 level).

(b) Negotiating back wage installment payments which extend for more than:

(1) One year (GS-9 and GS-11)

(2) GS-5 and GS-7 must have DD and/or ADD approval on all installment agreements

See FOH 53c15 for further limitations on installment agreements.

(c) Expanding an investigation to include branch establishments other than those initially assigned by management.

(d) Limiting the scope of an investigation to specific acts, departments, periods of time, etc.

(e) Conducting an office audit or self audit, or conducting a conciliation for more than one employee, in a matter involving evidence of repeated complaints against the same employer (at the same establishment or other establishments) or in any matter other than a final paycheck including complaints related to last paychecks for multiple employees. *See* FOH 51a02.

(f) Participating in public information and media contact activities.

DD and/or ADD approval must be documented in the case file or diary sheet.

NOT FOR PUBLIC DISTRIBUTION

50h01 GS-12 and non-supervisory GS-13 investigators.

(a) Final conferences may be held in all cases, except those meeting potential litigation criteria and those meeting the administrative settlement review criteria, and subject to the limitations set by joint review committee (JRC), if applicable.

(b) Installment agreements are limited to a maximum of 2 years without prior DD approval. *See* FOH 53c15 for further limitations on installment agreements.

(c) Investigations of multi-unit enterprises may only be expanded to include other establishments at the direction of the main office-district office (MODO) manager in collaboration with the WHI's supervisor. Note that when an enterprise is based on WHI's home DO's jurisdiction, the DD and/or ADD is the MODO manager.

(d) Participation in public information and media contact activities requires DD and/or ADD approval.

(e) Conducting a conciliation involving evidence of systemic violations or repeated complaints against the same employer (at the same establishment or other establishment) requires DD and/or ADD approval.

The DD and/or ADD may, with the concurrence of the RA, further limit the authority of individual WHIs. DD and/or ADD approvals noted above must be documented in the case file or diary sheet.

NOT FOR PUBLIC DISTRIBUTION

50i EMPLOYEE DISCHARGE: COURSES OF ACTION

50i00 Prohibition against discharge and discrimination.

(a) Federal protection

WHD personnel may be contacted by employees who believe they have been discharged unfairly, but are not aware whether they have any recourse, and cannot point to a particular law which protects them against such termination. The following is an outline of laws which, under a specific set of circumstances, may provide an avenue for redress of such grievances. Under FOH 50i00(a)(1) -(7) below, where the appropriate protection involves laws outside of WHD jurisdiction, adherence to FOH 50c01 is required. FOH 50i00(a)(8) -(17) should be handled under normal FOH procedures.

(1) *National Labor Relations Act (NLRA)*

This law is administered by the NLRB. Section 8(a)(3) of the NLRA prohibits discrimination in regard to the hiring or tenure of employment or any term or condition of employment which would discourage membership in any labor organization. Section 8(a)(4) of the NLRA makes it unlawful to discharge or otherwise discriminate against employees because they have given testimony under the act. *See* FOH 50f12.

(2) *Age Discrimination in Employment Act (ADEA)*

This law is administered by the EEOC. It protects individuals between 40 and 70 years old from age discrimination in all phases of employment, including hiring, discharge, promotion, etc. *See* FOH 50f02.

(3) *Title VII of the Civil Rights Act (CRA)*

This law is administered by the EEOC (*see* FOH 50f02). It protects individuals from discrimination on the basis of race, color, religion, sex, or national origin in all phases of employment, including hiring, discharge, promotion, etc.

(4) *Occupational Safety and Health Act (OSH Act)*

This law is administered by the OSHA of DOL. Section 11(c) of the act provides that no person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to OSHA or has testified or is about to testify in any such proceeding or because of the exercise by such employee, individually or on behalf of others, of any right afforded by OSHA.

(5) *Surface Transportation Assistance Act (STAA)*

This law is administered by the OSHA of DOL. Section 405 of the Highway Improvement Act (which amended the STAA) prohibits an employer from discharging or discriminating against any employee in reprisal for protected safety or health related activities. This includes, among other activities, filing a complaint or

NOT FOR PUBLIC DISTRIBUTION

testifying in a proceeding involving commercial motor safety rules, regulations, standards, or orders. *See* FOH 50f19.

(6) *Federal Mine Safety and Health Act (FMSHA)*

This law is administered by the Mine Safety and Health Administration (MSHA) of DOL. Section 105(c) of FMSHA makes it illegal for a miner to be fired, transferred to a lower paying job, not hired, harassed, or to otherwise lose job benefits for filing or making a complaint under FMSHA of an alleged danger or safety or health violation; for instituting, testifying, or assisting in any proceeding under FMSHA; for being a subject of medical evaluations leading to a possible transfer to another job location; and for being withdrawn from the mine for not having the mandatory safety and health training.

(7) *Black Lung Benefits Act (BLBA)*

The discrimination provisions of this law are administered by the MSHA. Section 428 of BLBA provides that no operator shall discharge or in any way discriminate against any miner employed by the operator by reason of the fact that such miner is suffering from pneumoconiosis (black lung disease). No person shall cause or attempt to cause an operator to violate this section.

(8) *Fair Labor Standards Act (FLSA)*

Administered by the WHD. Section 15(a)(3) contains employee protection provisions. *See* FOH 65f00.

(9) *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*

Administered by the WHD. Section 505 provides that no person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause filed any complaint or instituted, or caused to be instituted, any proceeding under or related to MSPA, or has testified or is about to testify in any such proceedings, or because of the exercise, with just cause, by such worker, individually or on behalf of others, of any right or protection afforded by MSPA. *See* 29 CFR 500.9.

(10) *Title III of the Consumer Credit Protection Act (CCPA)*

Administered by the WHD. *See* section 304 of CCPA and FOH 16c.

(11) *Clean Air Act (CAA)*

The WHD is responsible for conducting compliance actions. *See* 29 CFR 24.

(12) *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*

The WHD is responsible for conducting compliance actions. *See* 29 CFR 24.

NOT FOR PUBLIC DISTRIBUTION

(13) *Energy Reorganization Act of 1974 (ERA)*

The WHD is responsible for conducting compliance actions. *See* 29 CFR 24 and FOH 50f16.

(14) *Federal Water Pollution Control Act (FWPCA)*

The WHD is responsible for conducting compliance actions. *See* 29 CFR 24.

(15) *Safe Drinking Water Act (SDWA)*

The WHD is responsible for conducting compliance actions. *See* 29 CFR 24.

(16) *Solid Waste Disposal Act (SWDA) (Also may be cited as the Resource Conservation and Recovery Act)*

The WHD is responsible for conducting compliance actions. *See* 29 CFR 24.

(17) *Toxic Substances Control Act (TSCA)*

The WHD is responsible for conducting compliance actions. *See* 29 CFR 24.

(b) Recourse through private legal counsel

If the discharge or discrimination does not appear to fall within any of the above statutory protections, complainants may be advised of the possibility of seeking private legal counsel.

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTION

50j WAGE AND HOUR DIVISION MEDIA POLICY

50j00 Purpose.

(a) Under the appropriate circumstances, news releases and other media-related activities can multiply the effectiveness of WHD compliance and enforcement efforts. Publicity, particularly in this time of diminishing resources and increased responsibilities, is an effective tool to reach vast numbers of employers to deter violations. Moreover, through an aggressive media effort the agency can inform employees of their rights under the many laws we enforce.

(b) The WHD must be *proactive* rather than simply responsive to media inquiries. We need to enlist the media's interest in publicizing agency activities and results so as to achieve a higher level of compliance with the laws we enforce. Also, establishing and maintaining good media relations has the added benefit of increasing the quality of the services provided to our customers as well as increasing overall operational effectiveness.

(c) In order to use the media effectively, some general guidelines are set forth below.

50j01 Coordination with OPA.

(a) Pursuant to departmental policy, the Office Public Affairs (OPA) coordinates the release of all information to the media. Requiring coordination is not the same as handing all responsibility for media efforts to OPA. The relationship between OPA and the WHD should be one of coordination and collaboration. OPA should be viewed as an agency that supports our work, in much the same way SOL and its litigation efforts strengthen our enforcement activities. For example, OPA staff have relationships with media personnel, are skilled in handling persistent reporters and can suggest media strategies to position a story in a more advantageous manner. OPA can also act as a buffer to deflect certain media inquiries.

(b) OPA, however, can only be of assistance when it is informed in a timely fashion of current and upcoming events. This means that early and active involvement by OPA on WHD matters must be encouraged. In that regard, it may be useful for RAs to schedule regular meetings with the regional OPA offices or establish some other regular form of communication. By doing so, both offices can keep each other apprised of upcoming events or alert each other to potential problems. Both the WHD and OPA need to be flexible and responsive. Guidelines for coordinating and handling specific types of issues are set forth below.

50j02 Coordination with the National Office (NO).

(a) Advise the Office of the Administrator immediately upon receipt of all inquiries by national media (*i.e.*, major television networks including CNN and C-Span; major radio networks such as National Public Radio and CBS; major newspapers such as the New York Times, Washington Post, and Los Angeles Times; and major news magazines such as Time and Newsweek). Make simultaneous notification of such inquiries to regional OPAs, the WHD NO (in coordination with ESA's Office of Public Affairs) and the national office of OPA will determine the appropriate further action for responding to such inquiries. The Office of the Administrator, after consultation with the National OPA, will notify the RO as to how to handle the inquiry.

NOT FOR PUBLIC DISTRIBUTION

(b) Inform the Office of the Administrator promptly of any potentially significant compliance or enforcement activity that could have a national focus, *e.g.*, matters involving national or regional chains, major employers, state and local governments, significant back wages, substantial civil money penalties (CMPs), or the resolution of litigation. A useful rule could be back wages in excess of $250,000, penalties in excess of $50,000, or total number of employees in excess of 500. Use discretion in deciding when the NO needs to informed; however, the NO does not intend to substitute its judgment for that of the RO. It simply wants to stay informed.

(c) Refer requests for background information or positions on broad policy, legislative, or regulatory proposals to the Office of the Administrator.

50j03 **Responding to inquiries from the media.**

(a) As noted above, when an inquiry is received from the media, inform OPA as soon as practicable. What the response should be, and whether the response to the inquiry should be made by OPA or WHD personnel, depends upon the type of questions asked and who is asking. Below are some guidelines:

(b) **Technical questions**

Media inquiries involving technical questions about compliance with, or which seek specific information about, the laws and regulations we enforce, should be responded to by WHD personnel receiving the inquiry.

(c) **Open investigations**

Refer specific media inquiries concerning open investigations to the ADD (or the next higher level of management if the ADD is not available or is uncomfortable responding to the inquiry) for response. While it is appropriate to acknowledge the existence of an ongoing investigation, details of an open investigation should not be disclosed. The media should be made aware that WHD investigations are intended to determine if violations have occurred: the existence of an investigation does not mean that complaints have been filed or that violations of law have indeed occurred.

(d) **Closed investigations**

Handle media inquiries concerning closed investigations in accordance with the FOIA guidelines and procedures. In that regard, exercise some judgment concerning whether strict and literal adherence to the FOIA guidelines may create negative reactions on the part of the inquirer. Seek guidance from OPA whenever media FOIA requests are received. FOIA requests, however, should not be solicited.

(e) **At the site of an investigation**

If a WHI is approached by the media at the site of an investigation, the WHI should advise the media of the agency's policy that no comments may be made. If continuing the investigation becomes difficult due to the presence of the media, the WHI should contact the DO for further instruction, or if this is not possible, leave the site immediately.

NOT FOR PUBLIC DISTRIBUTION

(f) Appearances on radio or television

Where the show's purpose is to discuss laws or regulations administered by the agency, WHD personnel may accept invitations to appear on radio or television programs, provided that the employee's supervisor has approved such participation. Such appearances further the agency's education and outreach efforts, particularly if the intent of the program is to provide information about the mission of the agency as compared to focusing on specific cases. Participation in any media program concerning specific cases requires coordination with OPA in order to prepare for the possibly sensitive nature of the media inquiry.

(g) Request to accompany a WHI

Any media request to accompany a WHI on an investigation should be promptly and politely declined to ensure due process and safeguard confidentiality.

50j04 <u>Developing a proactive media strategy.</u>

(a) Again, pursuant to departmental policy, OPA will coordinate the release of information to the media. Involve OPA prior to initiating contact with the media. In considering whether to recommend to OPA to publicize a particular event or enforcement activity, we should consider the timeliness of the event, assessing the newsworthiness of the particular event or activity. We will coordinate with OPA in initiating contacts with the media and assisting in the development of a media strategy. While we will be given the opportunity to clear information released to the media, OPA has final authority with respect to language, style, and format issues that do not impact upon or alter the substantive facts set forth in the release.

(b) Contact OPA prior to any discussions with an employer regarding publicity. If it is anticipated that a press release will be issued and the employer may seek to influence the contents of the release and/or the employer may be seeking publicity on its own, OPA must be actively involved at the earliest opportunity. Every effort should be made to avoid having publicity or press releases the subject of negotiations with employers. Please note that "no publicity clauses" shall not be included or implied in any kind of administrative or legal settlement. If it is believed that in a particular case a compelling reason exists for inclusion of such a clause, approval must be explicitly sought from the Assistant Secretary for Public Affairs in consultation with the Office of the Administrator.

Other guidelines are set forth below:

(c) Compliance assistance and/or outreach activities

Prepare releases on special compliance assistance and/or outreach activities. Publicize activities including coordinated efforts with local and state agencies or participation in meetings of employers or employees sponsored by community and other organizations.

(d) Strike force and/or task force activities

Prepare releases on announced or unannounced strike force and/or task force activities; these may include general information such as the geographic area (city, state, etc.) and the types of employment and/or industries targeted.

NOT FOR PUBLIC DISTRIBUTION

(e) Settlements and judgments and debarment actions

Publicize matters including significant judgments or settlements (whether the case was referred to the SOL's office or not), and debarment actions resulting from WHD investigations. Useful guides for determining the newsworthiness of a particular matter include back wage recovery in excess of $15,000, penalties in excess of $10,000 or employees in excess of 50, or some combination thereof (recognizing that in particular geographic locations, what may be a small case in an urban area would be a significant newsworthy event in a more suburban or rural area). The WHD RA and the regional OPA director will determine on a case-by-case basis whether to issue a release on a particular case utilizing the foregoing guides and will determine the media strategy. For example, in certain cases a news release would be appropriate only in the location of the affected employer; in other cases, regional publicity may be more appropriate (Note, however, the RA is encouraged to seek publicity on successful enforcement efforts).

Coordinate releases associated with litigation matters jointly with OPA, the RSOL, and the RA.

(f) Unresolved and contested matters

As a routine matter, releases will not be issued at the time a civil complaint is filed in federal court. The appropriateness of a release, however, should be considered when an indictment is issued or a criminal complaint filed if the case involves serious allegations of wrongdoing. The RA should consult with the RSOL, Regional OPA, and the Office of the U.S. Attorneys in a criminal case.

(g) CMP cases

Prepare releases on significant CMP cases as determined by the RA. A useful rule would be when penalties are assessed in excess of $10,000. The release should identify the employer, describe the basis for the assessment and be issued after it is known that the employer has received the CMP assessment letter.

NOT FOR PUBLIC DISTRIBUTION

Chapter 51

INITIATION OF INVESTIGATIONS

Source: FOH Modernization revision 700, published 11/03/2016. Substantive revisions made *after* 11/03/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 11/03/2016 can be found here: http://esa.esa.dol.gov/whd/FOH/revisionchart.htm.

NOT FOR PUBLIC DISTRIBUTION

Table of Contents

51a ENFORCEMENT ACTIONS AND PRIORITIES

51a00 Enforcement policy.
51a01 Complaint policy.
51a02 Conciliation policy.
51a03 Compliance actions defined.
51a04 DO jurisdiction.
51a05 Extent of investigation.
51a06 Change of ownership.
51a07 Effect of employee FLSA section 16(b) suit.
51a08 Information to federal and state agencies.
51a09 NO notification of criminal investigations.
51a10 NO notification of significant legal cases.
51a11 Hot goods inquiries and notification.
51a12 Establishment for investigation and investigation reporting purposes.
51a12a Investigations of establishments with leased departments.
51a13 Investigation visit.
51a14 Special child labor investigation (except child labor in agriculture).
51a15 Child labor investigation: agriculture.
51a16 -17 (Reserved.)
51a18 PCA investigations are based on contracts.
51a19 (Reserved.)
51a20 Contracts classified for security purposes.
51a21 Canceled, concluded, or indefinite contracts.
51a22 Primary contractor investigation.
51a23 Notice of Award received.
51a24 No or minor violations chargeable.
51a25 Serious violations chargeable.
51a26 Notice of Award not received.
51a27 Pre-award determinations of PCA eligibility of contractor or bidder.
51a28 Inventors, engineering firms, or other patent holders.
51a29 Eligibility issues arising during investigation.
51a30 Secondary contractor investigation.
51a31 PCA serious violations defined.

51a ENFORCEMENT ACTIONS AND PRIORITIES

51a00 <u>Enforcement policy.</u>

(a) Wage and Hour Division (WHD) policy is to obtain compliance through a vigorous enforcement and information program based on the most efficient use of available resources. District directors (DDs) and/or assistant district directors (ADDs) are required to make judgments in scheduling investigations where there are close coverage or exemption questions, and the correct application of the law is a marginal issue. The potential benefit in scheduling such cases for investigation must be weighed against the potential benefit in scheduling other investigations.

(b) All compliance actions must involve only covered, (b) (7)(E) [redacted] and only issues and matters within the WHD's jurisdiction. *See* FOH 52a00(g).

(c) The WHD is required to maintain a vigorous, uniform, and balanced enforcement program for all the laws within the WHD's jurisdiction, consistent with annual operational plans. (b) (7)(E) [redacted] to achieve the overall goal of a balanced enforcement program that will secure increased compliance with all laws enforced by the WHD. While the prompt servicing of all legitimate complaints remains a top WHD priority, directed investigations often must be scheduled to maintain such a balanced program. Experience has shown that because relatively few complaints are received, directed investigations are needed for effective enforcement for vulnerable worker populations (including garment workers, agricultural workers, and workers with disabilities), and the enforcement of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and child labor as well as government contract labor standards statutes. DDs, ADDs, and Wage and Hour Investigators (WHIs) must be alert in identifying areas in which serious violations may be widespread, despite a lack of complaints.

(d) DDs and/or ADDs are normally responsible for assigning cases to WHIs and, except as explained below, for deciding how cases will be handled. The RA or deputy regional administrator (DRA) may determine that special circumstances exist which require assignment of particular compliance actions to WHIs. (b) (7)(E) [redacted]

- [redacted] (b) (7)(E) [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

51a01 **Complaint policy.**

It is essential to the WHD mission that the WHD effectively and efficiently handle contacts made by persons seeking assistance from the agency.

The effective and efficient handling of contacts made by persons seeking assistance from the WHD requires proper and timely action, including the initial assessment and intake of information provided by the person in order to determine whether it meets the requirements for acceptance as a complaint and if the information meets the requirements for acceptance as a complaint, the proper and timely performance of management review, prioritization, and assignment for investigation consistent with the WHD's compliance priorities and resources. If the information provided by persons seeking assistance from the WHD does not meet the requirements for acceptance as a complaint or is otherwise declined after management review, effective and efficient handling of the contact requires the provision of proper and timely notice of that determination including the reasons for the determination (*see* Written Determination Notice letters on the WHD Intranet), and the making of appropriate referrals to other entities who have agreed or may be able to provide assistance to the person.

(a) Assessment of suitability for management review and initial determination of complaint status

Complaint status is determined based on a management review by a DD and/or ADD. In order to qualify for management review, an initial assessment must be made as to whether the information submitted to the WHD qualifies as a complaint. In order to qualify as a complaint, the information submitted must:

(1) be provided directly to the WHD by a person outside of the WHD;

(2) be provided by a person who is familiar with the employment practices of the employer or has substantial reason to believe a violation has occurred;

Scenario 1:

NOT FOR PUBLIC DISTRIBUTION

A recently laid-off employee reports that a poultry processing firm does not pay for donning and doffing required clothing and equipment.

Scenario 2:

A person who lives next to a blueberry farm has observed very young children picking berries.

Scenario 3:

A union official or representative from a fair contracting association submits pay stubs, worker statements, and/or documents indicating that workers are not being paid the applicable Davis-Bacon Act (DBA) prevailing wage rates.

(3) support a conclusion that there is a reasonable probability of a violation of one or more of the laws enforced by the WHD which affects one or more employees;

Scenario:

A reasonable probability would exist if an employee of a telemarketing firm reports that the sales representatives who call customers throughout the United States (U.S.) are paid only straight-time, no overtime, for hours worked over 40 in a workweek.

(4) support a conclusion that there is a reasonable probability of coverage;

(5) identify the employer and/or the place of employment; and

Scenario 1:

The person reports that the employer is a farm labor contractor who hires farm workers from a known gathering place where workers are recruited. This is sufficient information to identify the employer and/or the place of employment.

Scenario 2:

The person heard that some day laborers were not being paid at the end of the day but did not know where or for whom they were working. This is not sufficient information to identify the employer and/or the place of employment.

(6) support a conclusion that the statute of limitations has not run.

(7) Generally, information provided by a person who wants to maintain the confidentiality of his or her complaint will be submitted for management review if it meets the requirements set out above (*see* FOH 51a01(a)(1) -(6)). However, for the Family and Medical Leave Act (FMLA), FLSA break time for nursing mothers, and complaints appropriate for conciliation, the person, if seeking assistance on his or her own behalf, must provide permission to use his or her name by the WHD in the conciliation or investigation of his or her complaint.

(b) (7)(E)

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

[redacted]

- [redacted]
  - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

[redacted]

[redacted]

- [redacted]
  - [redacted]
    - [redacted]
      - [redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

In many instances, hot goods actions are appropriate in the case of a missed payroll. *See* FOH 84.

(b) (7)(E)

(b) (7)(E)

[redacted]

[redacted]

- [redacted]
  - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]

      [redacted]

      [redacted]
    - [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]

[redacted]

- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]

NOT FOR DISTRIBUTION

(b) (7)(E) [redacted]

[redacted]

- [redacted]

[redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

[redacted]

- [redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(f) Prioritizing and assigning complaints for investigation

The WHD's goal is to investigate complaints strategically to maximize compliance with the laws under the WHD's jurisdiction given its compliance priorities and resources. Accordingly, accepted complaints will not be prioritized for investigation in the order in which they are received, but will be assigned for investigation in a manner that is consistent

with the WHD's performance goals as established in its operating plan, that is balanced and integrated with the WHD's directed investigations, and that is consistent with the WHD's priority goal of ensuring that compliance actions promote long-term sustainable compliance with the laws the WHD is responsible for enforcing.

(b) (7)(E) [redacted]

- [redacted]

  [redacted]

  [redacted]

  [redacted]

- [redacted]

  [redacted]

  - [redacted]
  - [redacted]
  - [redacted]

  [redacted]

  [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

DDs and ADDs may determine that some complaints affecting vulnerable workers employed by smaller independent employers may be more appropriately addressed through limited investigative action if there is little opportunity to use the complaint to promote systemic changes in the industry.

[redacted] 7E [redacted]

[redacted]

[redacted]

b. Complaints alleging violations that do not fall within the priorities set out in (b) (7)(E) [redacted] should be viewed as an important part of WHD's customer service goals and the most appropriate customer service may be a timely closure of the complaint and, if appropriate, referral to other entities that may be able to or have agreed to provide assistance.

c. (b) (7)(E) [redacted] The RA and/or DRA may decide to reassign (b) (7) complaints from another DO in lieu of allowing a DO to work its (b) (7) complaints. (b) (7)(E) [redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
  - [redacted]
  - [redacted]

51a02 **Conciliation policy.**

A "conciliation" is a compliance action limited to the correction of minor violations involving last paychecks or a single issue affecting one or a few employees, in which WHD staff seek resolution between the employer and the complainant with a minimal expenditure of enforcement time. (b) (7)(E) [redacted]

[redacted]

[redacted]

(c) When warranted, an action that begins as a conciliation may be expanded to be completed as an investigation.

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

NOT FOR PUBLIC RELEASE

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
- [redacted]

NOT FOR DISTRIBUTION

(b) (7)(E) [redacted]

- [redacted]
- [redacted]

- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

- [redacted]
- [redacted]

51a03 **Compliance actions defined.**

(b) (7)(E) [redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

NOT FOR DISTRIBUTION

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

- [redacted]
- [redacted]

  [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

51a04 **DO jurisdiction.**

In the ordinary case, investigations and conciliation actions shall be confined to establishments located within the jurisdiction of the DO. Complaints that indicate violation of acts enforced by the WHD received on establishments located outside the jurisdiction of a DO shall be referred by the most expedient means to the DO having jurisdiction. This

includes situations suitable for attempted conciliation by telephone which should be handled by telephone communication between the DOs.

51a05 **Extent of investigation.**

(a) Investigations of establishments not previously investigated shall normally extend back 2 years.

(b) Investigations of establishments previously investigated shall normally extend back 2 years or to the beginning of the period not covered by the previous investigation, whichever is the shorter period. However, where substantial violations of acts administered by the WHD are disclosed which were overlooked or not recognized as violations by a previous investigation, the investigation shall be extended back with respect to such violations for the full 2-year period. This proviso shall not be used to run down trivial violations or to re-open questions on a speculative basis. If the WHI has any doubt as to the proper action, the DD and/or ADD shall be consulted. Where an investigation has been extended under this procedure, the narrative shall contain a concise explanation.

(c) Where the previous investigation ended in litigation, the current investigation shall extend back to the date of filing the court's order, if such is within the 2-year period. However, where the current investigation meets the criteria for potential litigation, and violations extend back beyond the date of the court's order, the regional solicitor of Labor (RSOL) shall be consulted regarding the period to be included in the investigation.

(d) If a WHI discovers that serious violations were successfully concealed from a previous WHI, the WHI shall extend the current investigation back as far as necessary to establish the violations which were concealed and the facts of the concealment (*see* FOH 80a05).

(e) If the investigation is to be criminally litigated, the WHI shall extend the investigation back as far as necessary to establish the facts concerning the violations which are to be prosecuted. The employer may not be prosecuted for violations which occurred more than 5 years before court proceedings are begun on the violations.

(f) Section 6(a) of the Portal-to-Portal Act of 1947 (PA) provides a general 2-year statute of limitations with respect to a cause of action for unpaid minimum wages, overtime compensation, or liquidated damages. This section was revised by the 1966 Amendments by the additional language: "...except that a cause of action arising out of a willful violation may be commenced within 3 years after the cause of action accrued."

WHIs will not in any case extend an investigation back beyond the normal 2-year period to include the additional 1-year period provided by this amendment except where specifically instructed to do so in a particular case by the DD after consultation as appropriate with the RA and the RSOL. It is contemplated that only those cases which meet the potential litigation criteria (*see* FOH 80a03(d)) will be considered for such extension and then only where the extension is requested or approved by the RSOL. However, for statistical reporting purposes on WH-51-MIS: Compliance Action Report (WH-51-MIS), back wage computations will be made for only the normal 2-year period, notwithstanding that the RSOL may request an extension of the investigation period to more than 2 years. Similarly, where the RSOL brings suit under section 16(c), or under a combination of sections 16(c) and 17 for both back wages and liquidated damages, only the back wages shall be recorded on WH-51-MIS. In the event back wages are requested and/or paid for more than 2 years (and/or

NOT FOR PUBLIC DISTRIBUTION

liquidated damages collected), as for example, as a result of litigation, the additional back wages (and/or liquidated damages) shall be reported as an "update" or "after statistical closing" on WH-51-MIS. *See* FOH 54: WH-51-MIS-21A-F ("Agreed to Pay. Amount of underpaid compensation agreed to.")

(g) Child labor and/or CMP *collection* actions are subject to a 5-year statute of limitations. However, the normal 2- or 3-year period provided by section 6 of the PA still applies for investigative purposes.

51a06 **Change of ownership.**

(a) Where an establishment has definitely changed ownership, the investigation shall be confined to the new owner's period of management and control unless:

(1) the new owner assumed the liabilities of the previous owner, or

(2) there was continuing personal liability from the previous ownership against any of the parties of the new ownership.

(b) If either (1) or (2) above is present, or if there has been merely a change in name with a continuation of the same management, responsibility, and control, the investigation shall cover the usual period as set forth in FOH 51a05.

51a07 **Effect of employee FLSA section 16(b) suit.**

(a) As soon as it is determined that an employee has engaged an attorney to bring suit under section 16(b) all investigation activity (both FLSA and PCA) shall cease with respect to the particular employee or employees involved in the suit or suits. The WHI shall notify his or her DD and/or ADD immediately of the names of the parties involved. The employer shall be informed that no further investigation activity will be undertaken with respect to these employees and no determination will be made concerning the conditions of their employment. A suit under section 16(b) is a matter between the parties, and investigation activity by the WHD could affect the outcome of such a suit.

(b) Any information regarding such employees which has been obtained or which later comes to the WHI's attention shall be reported in the narrative to the extent appropriate. No discussion shall be had with the employer on any phase of the employment of such employees including future compliance.

(c) No investigation shall be made of any employer solely to obtain information for use by an employee in a section 16(b) suit. When the WHD is involved in an intervention or an appearance as *amicus curiae*, any investigative assistance requested by the RSOL shall be furnished.

51a08 **Information to federal and state agencies.**

It is the policy of the WHD to exchange information on a cooperative basis with any federal or state governmental agency, subject to proper safeguards. This shall be done as authorized by the RA.

51a09 **NO notification of criminal investigations.**

NOT FOR PUBLIC DISTRIBUTION

(a) The NO must be advised immediately of any WHD involvement in criminal investigations. This notification requirement includes all investigations arising under laws the WHD enforces (*e.g.*, FLSA, MSPA, Copeland "Anti-Kickback" Act, etc.), which are being developed for criminal prosecution, as well as situations in which the WHD is asked by a federal agency (*e.g.*, the FBI, IRS, INS, OIG of any agency, etc.), state, or local law enforcement agency to participate in or supplement a potential or ongoing criminal investigation.

(b) In all cases described above, the RA will send the NOPA a brief memorandum describing the investigation, including the following information:

(1) Name, address, and type of business being investigated

(2) Principals of the business

(3) Laws involved

(4) Investigation background (*i.e.*, complaint, directed, referral by another agency, or participation in other agency's investigation), DO involved, WHD personnel involved

(5) RSOL contact (where applicable)

(6) Law enforcement individuals and agencies involved (where applicable)

(c) The RA will provide periodic updates of information on case development and/or resolution, by memorandum to the NOPA.

51a10 **<u>NO notification of significant legal cases.</u>**

(a) RAs shall advise the Administrator or the Deputy Administrator prior to the filing of any litigation which could be controversial and/or generate media interest under the laws for which we have enforcement responsibility. The purpose of this notification is to provide early warning of sensitive and/or controversial issues before media inquiries are received in the NO. RAs should determine which cases they deem to involve sensitive and/or controversial issues and request their RSOL to provide notice of their intention to institute legal actions so that the NO can be fully informed of the issues involved in such actions *before* suit is filed.

(b) Notification of significant legal cases should provide the following information:

(1) Name of the employer

(2) Laws involved

(3) The type of violations or issues involved

(4) A summary of the findings

51a11 **<u>Hot goods inquiries and notification.</u>**

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

(a) Response to inquiries

(1) If an inquiry is received concerning a specific establishment, the inquirer may be informed that an investigation is being or has been made. The ramifications of shipment of the goods from the establishment if violations are found should also be explained. *See* FOH 84a00. If the inquirer is a party for which notification is appropriate (*see* FOH 51a11(b) below), the inquirer should be informed that he or she will be notified of the results of the investigation. (b) (7)(E) [redacted]

(2) When inquiries concerning hot goods are received, the inquiring party should be provided information about both section 15(a)(1) and the hot goods provision for child labor in section 12(a).

(3) It should be noted that if an inquiry is received regarding "hot goods" from an "ultimate consumer" within the meaning of section 3(i), or a purchaser which has qualified for the good faith defense (*see* FOH 84a03), there can be no violation with respect to the inquirer.

(b) Notification

(1) Contact with third parties which have not committed violations of the FLSA with respect to their own employees is sometimes essential to prevent violations of section 15(a)(1).

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

  [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

51a12 **Establishment for investigation and investigation reporting purposes.**

(b) (7)(E)

51a12a **Investigations of establishments with leased departments.**

(a) Except in rare instances, a leased department of a retail store will not constitute a separate establishment (*see* 29 CFR 779.225 and .306). (b) (7)(E)

(b) In some instances it may be found that the pertinent records of a leased department are not locally available. (b) (7)(E) [redacted]

[redacted]

[redacted]

(e) This procedure does not preclude selective scheduling of a leased department or departments in accordance with MO Part 3029.1.

(f) In any case involving leased department violations in which an agreement to comply is not obtained, or which otherwise meets the criteria for potential litigation, the advice of the RSOL shall be sought as to further development, including any development relative to joint employment.

51a13 **Investigation visit.**

(a) **Defined**

An investigation visit is an assignment in which the WHI determines that the establishment:

(1) cannot be located,

(2) is out of business (*see* FOH 52a06),

(3) is liquidating or bankrupt (*see* FOH 52a06), or

(4) has no employees.

(b) **Reporting**

In the ordinary case, an investigation visit shall be reported by a brief entry in Item 27 of ESA-33.

51a14 **Special child labor investigation (except child labor in agriculture).**

(a) A special child labor investigation is an investigation which is limited to a determination of compliance with section 12 and related recordkeeping requirements. The DD may schedule a special child labor investigation if in his or her judgment a full investigation is not necessary. For example, the DD may schedule such an investigation if it is known that all employees are exempt from the minimum wage and overtime provisions by section 13(a), or if available information indicates an establishment is in compliance in all respects except that minors may be oppressively employed.

(b) In special child labor investigations, the employer shall be definitely and fully informed that the investigation is limited to child labor only, and does not involve a determination of compliance with the minimum wage and overtime provisions of the FLSA or PCA, so there will be no possibility of misunderstanding. Findings in such cases shall be reported on ESA-33.

(c) If during the course of the special child labor investigation the WHI learns that the establishment is in violation of the monetary provisions of the FLSA, he or she shall communicate this information to his or her DD immediately so that authorization for a complete investigation may be obtained while the WHI is at the establishment.

51a15 **Child labor investigation: agriculture.**

NOT FOR PUBLIC DISTRIBUTION

(a) A child labor investigation in agriculture is an investigation confined to the child labor provisions of the FLSA in which the WHI actually goes on the farm and performs such investigative procedures, including a conference with management, as are required to determine the status of compliance with respect to the child labor provisions of the FLSA. Such investigations shall be reported on ESA-33.

[redacted] (b) (7)(E) [redacted]

(c) In child labor in agriculture investigations limited to child labor, the employer shall be definitely and fully informed that the investigation is limited to child labor only and does not involve a determination of the application of or compliance with minimum wage provisions of the FLSA (or FLCRA). Of course, such investigations should be expanded to include minimum wage (or FLCRA) where appropriate and the employer so advised.

Note: FOH 51a15 has been brought up-to-date; the last sentence of paragraph (b) represents an initial FOH statement of NO policy.

51a16 -17 **(Reserved.)**

[01/05/2017]

51a18 **PCA investigations are based on contracts.**

(a) Investigations under the PCA are based on contracts subject to the act. One or more contracts must be identified and tied in with the period covered by the investigation.

(b) Where an examination of a contract (completed or not) reveals the omission of the PCA stipulations or references thereto and the contract should have contained the stipulations, the WHI shall obtain the necessary identifying data (similar to Notice of Award data) and report the omission immediately through channels to the RA for transmittal to the Assistant Administrator (AA) for the Office of Government Contracts so that the awarding agency may be advised.

51a19 **(Reserved.)**

51a20 **Contracts classified for security purposes.**

(a) WHIs who have not been cleared for security purposes may not have access to classified data or to restricted areas where secret or confidential work is being performed.

(b) If the WHI finds that the establishment is engaged in classified work, he or she shall attempt to complete the investigation without access to classified data or areas. He or she may interview employees away from restricted areas.

NOT FOR PUBLIC DISTRIBUTION

(c) If the employer objects to the investigation for security reasons, the WHI should explain that he or she will not undertake to gain information about work of a classified nature, nor enter particular parts of the establishment where classified work is in progress. If the employer still objects and indicates this is due to instructions from the awarding agency or from the Department of Defense cognizant security office responsible for security of classified activities for the facility, the employer shall be requested to telephone the local or nearest representative of the agency or office from which he received such instructions so that arrangements may be made to complete the investigation without involving security matters. If the objection is not overcome, the WHI shall stop the investigation and transmit the investigation file to his or her DD with an explanatory memorandum.

51a21 **Canceled, concluded, or indefinite contracts.**

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]

51a22 **Primary contractor investigation.**

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

51a23 **Notice of Award received.**

(b) (7)(E)

51a24 **No or minor violations chargeable.**

(b) (7)(E)

51a25 **Serious violations chargeable.**

When serious violations, as defined in FOH 51a31, could be charged if coverage were established, the contract shall be examined by the WHI to determine whether the stipulations, or the reference, have been inserted, before he or she proceeds to investigate under the PCA. If the insertion has been made, he or she shall investigate under the PCA. However, if the contract does not include the required insertion, the WHI shall report the circumstances in detail through channels to the RO. This report is to contain the pertinent information for identification purposes which appears on the Notices of Award and a statement as to whether the contract has been completed. If the contract has not been completed, the estimated percentage of completion and the completion date shall be reported. This report shall also contain the identification information on any previous contract which contained the stipulations and called for goods of the same character as in the contract in question. The report shall be expedited, especially in those instances where performance on the contract in question has not commenced or has not been completed.

51a26 **Notice of Award not received.**

When an investigation initiated under the FLSA, or because of a complaint, or for some other reason, reveals that an establishment has been awarded a contract, the nature of which indicates coverage under the PCA, but for which a Notice of Award is not available, the WHI shall examine the contract for the PCA stipulations or the reference thereto, indicating the

contract is subject to the PCA. He or she shall investigate under the PCA if either has been inserted. All required information appearing on a Notice of Award can be obtained from the contract, and this shall be entered in the investigation report, in the same manner as when a Notice of Award is available.

51a27 **Pre-award determinations of PCA eligibility of contractor or bidder.**

(a) Investigations to determine the qualifications of a bidder prior to award shall not be scheduled unless directed by the NO.

(b) If a contracting agency should request that determination be made prior to award, the RA will explain to the contracting officer his or her responsibility under 41 CFR 50-201.101 and R&I No. 3, part II. This does not, of course, preclude the RO from assisting the contracting officer in carrying out his or her responsibility under the regulations. The initial decision as to qualification must, however, be made in connection with the award and is the responsibility of the contracting officer. If inquiries as to qualification prior to award are received from individuals other than the contracting officers, the inquirer shall be advised of the responsibility of the contracting agency to make the initial determination. Request for review of the contracting agency's determination once made shall be referred to the NO.

51a28 **Inventors, engineering firms or, other patent holders.**

There are rare cases where the government can purchase needed equipment only by dealing with inventors, engineering firms, or other patent holders who actually do not manufacture in the strict sense of the word, and do not carry a stock from which sales to the public are made. The question of eligibility shall not be raised, and such contractors shall be regarded, for investigation purposes, as manufacturers, and the PCA shall be applied to any of the contractors' employees, such as draftsmen who perform on the contract. Any secondary establishment performing the actual manufacturing or assembly work shall be considered to be a substitute manufacturer.

51a29 **Eligibility issues arising during investigation.**

(a) PCA investigations will be conducted on the general assumption that in making the award the agency has properly applied the criteria set forth in 41 CFR 50-201.101 and R&I No. 3, part II. In the ordinary situation, the nature of the contractor's business operations will be sufficient to confirm this without further inquiry. However, should the WHI believe that an award has been made to an ineligible contractor, the facts shall be developed and included in the investigation report. The WHI shall not indicate to a contractor that he or she is not eligible. Any question of eligibility shall not delay or affect established PCA investigation and reporting procedures as to other issues raised by the investigation.

(b) In transmitting an investigation report involving questionable eligibility, the DD will enter "PCA eligibility question" on WH-136: Investigation Transmittal Form (WH-136).

51a30 **Secondary contractor investigation.**

[redacted] (b) (7)(E) [redacted]

[redacted] [redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
- [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

51a31 PCA serious violations defined.

- (b) (7)(E)
  -
  -
  -
  -
  -
-

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

AUG 3 2005

WAGE AND HOUR MEMORANDUM NO. 2005-2

MEMORANDUM FOR REGIONAL ADMINISTRATORS

FROM: ALFRED B. ROBINSON, JR.
Deputy Administrator

SUBJECT: Assessment of Civil Money Penalties

The Wage and Hour Division (WHD) has the authority to assess civil money penalties (CMPs) under ten different enforcement programs. In order to bring clarity, consistency, and greater effectiveness to the assessment process, a CMP Task Force composed of Regional and National Office personnel was convened. I want to thank that team, chaired by Jack McKeon and Bruce Sullivan, for its fine work.

We discussed the recommendations of the CMP Task Force at our Senior Management Training Conference in Boston last May. A central theme of the recommendations is that while WHD Investigators perform the important tasks of conducting fact finding, documenting violations, and entering investigation findings into WHISARD, only WHD managers may compute and assess CMPs. Any WHISARD computations performed prior to management review are not to be considered as CMP computations. Effective immediately, all CMP assessments will be made under the following general guidelines:

1. The authority to assess or not assess, the amount of the penalty, and the collection of CMPs are all important tools the WHD can use to reach the goals of increasing compliance and deterring violations.
2. The WHD will not assess CMPs for conciliations.
3. District Directors (DDs) and Assistant District Directors (ADDs) have the discretion to assess or not assess CMPs.
4. DDs and ADDs do not have discretion to exceed the statutory limits when determining the amount of CMPs to assess.
5. CMP assessment authority may not be delegated to Investigators.
6. DDs and ADDs are responsible for insuring that each CMP assessment is justified by the investigation findings, departmental regulations, and applicable statutes, and is able to withstand judicial review.

NOT FOR PUBLIC DISTRIBUTION

7. The amount of each assessment must be reasonable, be in proportion to the violations, and not be excessive when viewed in light of all the facts and circumstances.
8. DDs and ADDs will consider the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) when assessing CMPs.
9. The pursuit of other enforcement remedies – such as hot goods, injunctive relief, certificate actions, and debarment – should also be considered as appropriate when assessing CMPs.
10. Any CMP assessment under $500 should be given special scrutiny to insure the desired impact of the assessment is achieved consistent with the appropriate use of agency resources.
11. DDs and ADDs shall insure that the appropriate parties are assessed the CMPs and that the assessment letters are sent to the correct parties.
12. DDs and ADDs shall consider appropriate notifications upon making CMP assessments such as weekly reports and press releases.

Until a new FOH chapter incorporating the above principles is disseminated, please ensure that CMP assessments adhere to the guidance provided in the *Wage and Hour Division CMP Guidance Chart* (copy attached). In addition, remember to follow applicable procedures in the June 27, 2005 settlement agreement memorandum, including those related to the potential assessment of CMPs in self-audits performed pursuant to such agreements.

Please do not hesitate to contact Michael Ginley, Director of the Office of Enforcement Policy, should you have any questions.

Attachment

CC: All WHD Managers
SOL

NOT FOR PUBLIC DISTRIBUTION

Wage and Hour Division CMP Guidance Chart

July 13, 2005

Act/ Regs	Max Penalty Per Violation	Special Rules	Computation Worksheet	Pre-assessment Adjustment[1]	Assessments Requiring RO Approval/NO Notification	Post Assessment Adjustments	No. of Days to File Exception
FLSA 578,580	$1,100	No assessment on self audits, except when deemed appropriate on self audits conducted pursuant to settlement agreements. No relationship between CMPs and BWs. Joint employment 52f16(c)(3).	WH-467 578.4	+/- 25% by DD/ADD. Serious/ pervasive violations increase CMP as per 52f16(c)(4)	$50,000	50% limitation for DD/ADD. RA approval for anything more than 50%.	15 580.6 580.8
CL 579,580	$11,000	Relatives 52g13(d)(4)b.2. Joint employment.	WH-266 579.5	+/- 25% by DD/ADD except assessments involving serious injury or death which require RA approval.	$50,000	50% limitation for DD/ADD. RA approval for anything more than 50% (no reductions for serious injury or death permitted without RA approval).	15 580.6 580.8
MSPA 500	$1,000	Joint employment/ responsibility. BWs 57a19e. Housing abatement 54f03d	WH-518 500.143	+/- 25% by DD/ADD	$50,000	50% limitation for DD/ADD. RA approval for anything more than 50%.	30+5 for mailing 500.212 500.220
OSHA	$70,000		WH-560	54:WH-560-12 - Any deviation from base amount requires RO approval and reporting to NO	$50,000	54:WH 560-16 – No post assessment adjustments without NO approval.	15 working days
EPPA 801	$10,000		WH 525 801.42	68f06 DD/ADD RA concurrence.	$50,000	50% limitation for DD/ADD. RA approval for anything more than 50%.	30
H2A 501	$1,000	Concurrent MSPA/H2A – cite violations under both but assess only under one Act.	WH-588 501.19	+/- 25% by DD/ADD	$50,000	50% limitation for DD/ADD. RA approval for anything more than 50%.	30+5 58f05(d)
H1B 20 CFR 655	$35,000	Current FOH piece (Chapter 71) is obsolete and users are operating under special instructions form the NO	WH-592 20 CFR 655.810(b)		Any assessment or non-assessment determination	Automatically go to SOL when exception filed.	15 507.815c3
H/M WKR 530	$500		530.302		$50,000	50% limitation for DD/ADD. RA approval for anything more than 50%.	30 530.403(a)
CREW 20 CFR 655	$5,000		WH 592		$50,000	50% limitation for DD/ADD. RA approval for anything more than 50%.	15
FMLA 825	$100		825.402	No pre-assessment adjustment increase in the penalty.	$50,000	50% limitation for DD/ADD. RA approval for anything more than 50%.	15 825.403

[1] RAs may increase or decrease CMPs within statutory or regulatory limits.

NOT FOR PUBLIC DISTRIBUTION

Chapter 52

COMPLIANCE STATUS

Source: FOH Modernization revision 704, published 11/03/2016. Substantive revisions made *after* 11/03/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 11/03/2016 can be found here: http://esa.esa.dol.gov/whd/FOH/revisionchart.htm.

Table of Contents

52a DETERMINING COMPLIANCE STATUS

52a00 General considerations.

PREPARATION FOR INVESTIGATION

52a01 Assignment of compliance actions.

ENTRY INTO ESTABLISHMENT

52a02 Time of investigation.
52a03 Credentials.
52a04 Employer absent.
52a05 Interference with conduct of investigation.
52a06 Bankrupt or out of business employers.
52a07 (Reserved.)
52a08 Release for entry.
52a09 Initial conference.
52a10 Tour of establishment.
52a11 Violations observed of other laws.
52a12 Complaints concerning domestic employees.

52b RECORDS: TRANSCRIPTIONS

52b00 Examination of records.
52b01 Removal of employer's records from establishment.
52b02 Examination of records: child labor compliance.
52b03 -05 (Reserved.)
52b06 No monetary violations found.
52b07 Monetary violations not meeting the potential litigation criteria.
52b08 Monetary violations meeting the potential litigation criteria.

52c EMPLOYEE INTERVIEWS

52c00 Employee interview objectives.
52c01 Interview place.
52c02 Privacy of interview.
52c03 Recording employee interview statements.
52c04 Complainant interview.

NOT FOR PUBLIC DISTRIBUTION

52c05 Discrepancies between interview statement and final disposition.
52c06 Mail interviews.

52d DISCLOSURES BY WHI: SECTION 16(b) AND 16(c) REQUESTS

52d00 Complaint not to be disclosed.
52d01 Disclosure of information by a WHI to employees.
52d02 Discussion of FLSA sections 16(b) and (c).
52d03 FLSA section 16(c) action.

52e COVERAGE FINDING

52e00 WHD coverage determination.
52e01 (Reserved.)
52e02 PCA coverage determination.
52e03 Public sector activities may not be included for purposes of section 3(s) coverage.
52e04 FLSA section 3(s) (grandfather clause).

52f MINIMUM WAGE AND OVERTIME FINDINGS

52f00 -06 (Reserved.)
52f07 Special exceptions to violation findings.
52f08 Good faith defense under the PA.
52f09 Corrected monetary violations.
52f10 Bookkeeping errors.
52f11 Back wage amounts under $20.00; liquidated damages under the CWHSSA.
52f12 Monetary violations involving corporate officials and close relatives.
52f13 Use of employee's name in negotiations.
52f14 Minimum wage and overtime civil money penalties.
52f15 Investigator action: CMP recommendation.
52f16 DD action: CMP assessment.
52f17 RA action: CMP assessment.
52f18 Collection of CMPs.

52g CHILD LABOR

52g00 -15 (Reserved.)

52h SALES ANALYSES, ESTABLISHMENT EXEMPTION, AND FLSA ENTERPRISE COVERAGE PROCEDURES

52h00 Purpose and use of sales analysis procedures.
52h01 Sales accounting records.
52h02 Records of excludable excise taxes.

52i -j (RESERVED)

52k SPECIAL PROCEDURES: RETAIL OR SERVICE ESTABLISHMENT EXEMPTIONS

NOT FOR PUBLIC DISTRIBUTION

52k00 Catalogue order offices and catalogue order desks.
52k01 Truck stops.
52k02 Availability to general public: in-plant cafeterias.

52l (RESERVED)

52m SPECIAL PROCEDURES: COVERAGE AND EMPLOYMENT RELATIONSHIP

52m00 Application of individual and enterprise coverage to employees of taxicab companies.
52m01 (Reserved.)
52m02 Section 13(b)(1) exemption: mail haulers.

52n SPECIAL PROCEDURES: TIP CREDIT

52n00 Tips and tipped employees.
52n01 Determination of voluntary and uncoerced.

52o SPECIAL PROCEDURES: HOURS WORKED

52o00 Shift changes.

52p SPECIAL PROCEDURES: OVERTIME

52p00 Questionable 7(f) plans.
52p01 Procedural instructions: invalid contracts.
52p02 Negotiated Christmas bonuses: UAW collective bargaining agreements.
52p03 Fluctuating workweek where salary does not equal minimum wage.
52p04 -05 (Reserved.)
52p06 Computation of back wages regarding partial overtime exemptions.
52p07 Ambulance and hearse transportation: enforcement.

52q (RESERVED)

52r SPECIAL PROCEDURES: APARTMENT HOUSE AND BUILDING SERVICE EMPLOYEES

52r00 -01 (Reserved.)
52r02 Regular rate: apartment house employees.

52s -t (RESERVED)

52u TEMPORARY HELP EMPLOYEES: INTERPRETATIONS

52u00 General.

52v PROCEDURES: TITLE III, CONSUMER CREDIT PROTECTION ACT

52v00 General.
52v01 Exempt states.
52v02 State garnishment laws.
52v03 Garnishment of federal employee's wages.

NOT FOR PUBLIC DISTRIBUTION

52v04 Native American Indian tribal courts.
52v05 Application of the garnishment restrictions of section 303 of the CCPA to back wage payments.
52v06 Excess garnishment withholdings are not wages.
52v07 Effect of employee suit under the CCPA.
52v08 Scheduling.
52v09 Fact-finding: objectives.
52v10 Opening conference with employer.
52v11 Records review.
52v12 Employee interviews.
52v13 Final conference and disposition.

52w -x (RESERVED)

52y PROCEDURES FOR INVESTIGATION OF OWCP CLAIMANTS

52y00 General and purpose.
52y01 Initiating assignment.
52y02 Privacy Act.
52y03 Investigation procedures.
52y04 Unreported income.
52y05 Reporting.
52y06 Further action by OWCP.

52a DETERMINING COMPLIANCE STATUS

52a00 <u>General considerations.</u>

(a) The mission of the Wage and Hour Division (WHD) is to promote and achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce. In order to meet the WHD's important mission, it is imperative that WHD staff make effective use of enforcement time. FOH procedures cannot cover every potential situation; they are guides based on experience. Determining compliance typically means making good decisions in each investigation. The authority to make judgments as to what is essential to a sound compliance action and the acceptance of responsibility for the judgments made are key. The following are factors basic to effective enforcement by investigation:

(1) Which establishments will be investigated?

(2) What investigative steps are needed to determine status of compliance in each case?

(3) If violations are found, what actions must be taken to secure compliance and payment of back wages, and to prevent future violations?

(b) (b) (7)(E) [redacted] The Wage and Hour investigator (WHI) must develop skills to determine the status of compliance in various types of establishments. In addition to the complaints and directed investigations assigned in support of the WHD's strategic goals, the WHI may be assigned to develop leads with respect to types of establishments most likely to be found in non-compliance.

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

[redacted]

(d) The extent to which WHIs below the GS-12 level are permitted to apply flexible procedures described in FOH 52a00(c) above depends on the progress of that WHI, as determined by the DD and/or ADD. The DD and/or ADD may further limit GS-12 WHI authority in particular circumstances. *See* FOH 50h01.

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

PREPARATION FOR INVESTIGATION

52a01 **Assignment of compliance actions.**

(b) (7)(E) [redacted]

[redacted]

[redacted]

(d) Template appointment letters are referenced in FOH 86a and provided on the WHD Intranet.

ENTRY INTO ESTABLISHMENT

52a02 **Time of investigation.**

(b) (7)(E) [redacted]

52a03 **Credentials.**

(b) (7)(E)

[redacted]

52a04 **Employer absent.**

(b) (7)(E)

[redacted]

52a05 **Interference with conduct of investigation.**

[redacted] (b) (7)(E)

[redacted]

(b) Forcible interference with conduct of investigation activities

(1) 18 USC 1114 makes it a federal criminal offense to kill "any officer or employee …of the Department of Labor assigned to perform investigative, inspection or law enforcement functions while engaged in the performance of his official duties, or on account of the performance of his official duties…" The inclusion of such Department of Labor (DOL) officials or employees under section 1114 automatically makes it a federal criminal offense under section 111 of Title 18 for anyone forcibly to assault, resist, oppose, impede, intimidate, or interfere with anyone designated in section 1114 of that Title "…while engaged in or on account of the performance of his official duties…" Fines of not more than $5,000.00 or imprisonment for not more than 3 years, or both, are provided for the commission of any such acts. Section 111 also provides that "whoever in the commission of any such acts uses a deadly or dangerous weapon shall be fined not more than $10,000.00 or imprisoned not more than 10 years, or both."

[redacted] (b) (7)(E)

[redacted]

[redacted]

(b) (7)(E)

(4) The following illustrate actions, which standing alone, are not considered "forcible" within the meaning of Title 18:

a. For *anyone* to refuse to give information to the official

b. For the *employer* to deny the official access to the establishment or to the firm's records

c. For the *employer* to refuse to allow his or her employees to be interviewed at the establishment or on company time

52a06 **<u>Bankrupt or out of business employers.</u>**

(b) (7)(E)

(b) (7)(E) [redacted]

[redacted]

(d) Successor liability

An enterprise that goes out of business may be taken over or replaced by a new business entity. Such a new entity may be a successor if it has assumed the assets and liabilities of the old enterprise. In such situations, a successor may be held liable for the violations committed by the old enterprise, particularly if the successor employer met the definition of an employer under section 3(d) of the FLSA with respect to the previous enterprise. For example, a manager under the old enterprise purchases the business and becomes the owner of the new enterprise; such a person would be an employer with respect to both the old and new enterprises. The new entity is also such a successor when it retains common aspects of the prior business and the management of the new entity knew of the violations at the time of the purchase of the old enterprise. (b) (7)(E) [redacted] Factors to consider when determining whether the new entity retains common aspects of the old enterprise include:

(1) common management and/or supervision;

(2) common business purpose;

(3) common premises and/or equipment;

(4) common customers;

(5) common employees; and

(6) common method of operation, the same product manufactured, or sold, or the same services rendered.

(e) Documentation of successorship

(b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

(b) (7)(E)

(g) Effect of bankruptcy proceedings on open investigations in general

The fact that a bankruptcy petition is filed or discovered during an open investigation is not justification to close or conclude the investigation, particularly when the filing occurs or is discovered late in the investigative process. However, anytime a WHI is advised of such a filing after the beginning of the investigation, (b) (7)(E)

(b) (7)(E)

[redacted]

(h) Bankruptcy and joint employment

Where there are two or more employers who are liable for statutory violations and only one party has filed a bankruptcy petition, the WHD is generally not precluded from proceeding against the non-filing employer. (b) (7)(E)

[redacted]

(l) Filing of bankruptcy petition and ongoing violations

An employer's filing of a bankruptcy petition does not permit the employer to continue violating the law. By its terms, the automatic stay does not apply to an action against a

debtor for post-bankruptcy petition violations. (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(o) FLSA back wage computations in bankruptcy cases

The amount of FLSA back wages and the time period when they were earned with respect to the filing date of the bankruptcy petition, or the date the bankrupt debtor ceased business, affect the probability of recovering such wages. Under the priority distribution scheme prescribed by the bankruptcy code (11 USC 507), wages and salaries (up to $10,000.00 per individual) earned within 180 days prior to filing the petition, or prior to the bankrupt debtor's cessation of business, are given fourth priority status among general unsecured creditors. Wages and salaries earned earlier than the 180-day time period, on the other hand, compete with all other non-priority unsecured creditors. Wages and salaries earned *after* the filing of the bankruptcy petition are to be treated as administrative expenses and as such are included in the top priority claim group. (b) (7)(E) [redacted]

11 USC 507

(p) Filing proof of claim in FLSA cases

(b) (7)(E) [redacted]

(b) (7)(E) [redacted] Whether the proceeding is under chapter 7 or 11, attention must be given to filing deadlines, as an untimely proof of claim will not be accepted for filing. The filing of a proof of claim does not affect (*i.e.*, toll) the statute of limitations prescribed by the Portal-to-Portal Act of 1947 (PA) or other applicable statute.

[redacted] (b) (7)(E) [redacted]

(r) Recovering back wages on government contracts

Where the investigation is pursuant to one of the contract standards statutes and where the underlying government contract(s) is still being performed, various remedies exist which, if invoked in a timely fashion, can affect substantial or even complete back wage recovery. Particularly in SCA situations, through prompt action, all back wages due can be recovered where the contractor has evidenced an intent or desire to assume (*i.e.*, continue) the contract. If an assumption is made and approved by the bankruptcy court, one of the considerations for the defaulting debtor-contractor agreeing to the assumption is a prompt cure (*i.e.*, payment) of all existing back wage liabilities (whether pre-petition or post-petition) along with an assurance of future contract performance. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(s) Withholding of funds in government contract cases

Where the contract is ongoing, the potential exists for having the contracting agency withhold from contract payment funds to secure back wage amounts. Keep in mind that withholding action is executed against the prime contractor and not directly against its subcontractors. Consequently, it is the bankruptcy filing by a prime contractor that triggers this special handling regarding the withholding of funds and not the filing of bankruptcy by a subcontractor. (b) (7)(E) [redacted]

(t) Effects of the automatic stay on government contract cases

The automatic stay provision of the bankruptcy code does not prohibit the WHD administrative proceedings (including administrative law judge (ALJ), Administrative Review Board (ARB), and other court actions) against a prime or subcontractor to obtain a judgment establishing the amount of back wage liability and, if appropriate, debarment. However, the stay may prohibit the WHD from disbursing the back wage monies or delay such disbursement. If such disbursement occurs, and the bankruptcy court later adjudges these monies part of the debtor-contractor's estate, the WHD could be ordered to repay the monies by the bankruptcy court. (b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

[redacted] [redacted]

(b) (7)(E)

[redacted]

(w) Debarment

DOL is not precluded from initiating and prosecuting debarment actions against a prime or subcontractor who has filed for bankruptcy.

NOT FOR PUBLIC DISTRIBUTION

Insert #1855
File: Immediately after Ch 52a06-6
October 12, 2007

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

OCT 12 2007

WAGE AND HOUR MEMORANDUM NO. 2007-2

MEMORANDUM FOR ALL WHD ENFORCEMENT STAFF

FROM: PAUL DECAMP
Administrator

SUBJECT: Internal Guidance on Collecting Social Security Numbers during Compliance Actions

The Office of Management and Budget (OMB) has formalized recommendations issued by the President's Identity Theft Task Force that include requirements for agencies to review, among other items, the use of Social Security Numbers (SSNs) in agency systems and programs, to identify instances where collection or use of the SSN is superfluous, and to eliminate the unnecessary collection of SSNs.

In keeping with this OMB mandate and a Departmental initiative, the Wage and Hour Division (WHD) is examining our use of SSNs for enforcement and other purposes. While we cannot presently eliminate all collections of SSNs, there are instances where we may not need to collect the information.

(b) (7)(E)

[redacted]

This information will appear in a future FOH update; however, in the interim, FOH holders should file this memorandum behind FOH § 52a06-6. Questions regarding this policy should be channeled via normal regional and district office protocols to the Deputy Administrator for Enforcement.

cc: Russell G. Harris, Deputy Administrator for Operations

Please Note: Insert #1854 was cancelled prior to issuance. So indicate on your WH-99.

52a07 **(Reserved.)**

NOT FOR PUBLIC DISTRIBUTION

FOH Insert #1849
File: In Front of Page 52a08- 52a09
March 15, 2002

U.S. Department of Labor

Employment Standards Administration
Wage end Hour Division
Washington, D.C. 20210

FEB 27 2002

MEMORANDUM FOR ALL WAGE AND HOUR EMPLOYEES

FROM: TAMMY D. McCUTCHEN
Administrator

SUBJECT: Addition to WHISARD

The next release of WHISARD, scheduled for March 18, will allow investigators and technicians to record whether or not an investigation involves complainants or employees covered by a Collective Bargaining Agreement (CBA). This information is frequently obtained in initial conferences with employers and in employee interviews, but has not previously been entered in the database. This data will improve our ability to identify those industries and occupations that are potentially in violation of the laws administered by WHD. (b) (7)(E) [redacted]
(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

Complainants
(b) (7)(E) [redacted]

Employees With Violations
(b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

WHISARD Summary Entries

(b) (7)(E)

[redacted]

NOT FOR PUBLIC DISTRIBUTION

52a08 **Release for entry.**

(a) A WHI shall not sign any form of release without first obtaining specific authority from the DD and/or ADD. If, after the WHI has pointed out the Administrator of the WHD (Administrator)'s authority under FLSA section 11(a) or other acts, the employer still insists that the WHI shall execute a release before entering the establishment, the WHI shall suspend the investigation and report the matter promptly to the DD and/or ADD.

(b) A WHI may sign a visitor's register, plant pass, or any other book or form used by the establishment to control the entry and movement of persons upon its premises, so long as such signature does not constitute any form of a release.

52a09 **Initial conference.**

(a) At the initial conference with the employer or the employer's designated representative, the WHI shall:

(1) inform the employer that the purpose of the visit is to make an investigation to determine compliance with the FLSA (and/or other acts);

(2) outline in general terms the scope of the investigation, including examination of pertinent records, employee interviews, and final conference with the employer or his or her designated representative to discuss the investigation findings;

(3) give the employer a copy of the Handy Reference Guide, and/or any other publications suitable to the type of establishment being investigated. Other materials shall be furnished at this time if requested;

(4) explore with the employer whether he or she believes the business to be subject to the FLSA or other acts, and his or her general approach to compliance. The content and depth of such a discussion is a matter of judgment; and

(5) ask the employer whether the enterprise is currently the subject of any private litigation involving laws enforced by the WHD, and then obtain the details of such litigation.

(b) At the initial conference with the employer or the employer's representative, or at an appropriate time during the course of the investigation, the WHI shall:

(1) obtain the exact legal name of the establishment and any trade names, the full address of the establishment, the full names of the owners or officers and their titles, the employer's federal tax identification number (FIN) or social security number (SSN), the number of persons employed by the establishment, etc.;

(2) if the employer is a MUER, obtain the legal name and address of the employer's main office, and the person to contact at the main office. This information is a critical part of the MODO process (*see* FOH 61a00(d));

(3) make every effort to obtain the employer's TIN. A TIN is a taxpayer identification number. It is a unique identifier assigned by the Internal Revenue Service (IRS) to all individuals and businesses that file tax returns in the U.S. TINs for individuals are

NOT FOR PUBLIC DISTRIBUTION

SSNs; TINs for businesses are employer identification numbers (EINs). The TIN is a key component of the CMP tracking system as well as the back wage financial system (BWFS), to ensure that these systems comply with accepted financial management and accounting practices. This number must be entered in WHISARD;

(4) advise the employer to obtain and keep on file for his or her own protection, before permitting any person of youthful appearance to begin work, an age or employment certificate showing the minor to be of legal age for the occupation in which he or she is to be employed (*see* FOH 52g04 for information as to where the certificates may be obtained);

(5) obtain the names and occupations of those employees or groups of employees whom the employer claims to be exempt; and

(6) obtain information in accordance with FOH 52g07 regarding injuries to minors under 18.

52a10 **Tour of establishment.**

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

(b) The WHI should follow the accepted safety standards and use the appropriate protective equipment. The RA and/or DD may purchase hard hats from the General Services Administration or another source for use in investigations in the construction, logging, mining, or similar hazardous industries. *See* FOH 57a10(c) for further guidance concerning re-entry by WHD personnel into areas that have been treated by pesticides or other chemical agents.

52a11 **Violations observed of other laws.**

Note conditions that appear to be possible violations of state or other federal laws or regulations. Where these matters are not within the WHI's authority but are the sole responsibility of other agencies, the WHI shall confine the investigative activities to such obvious conditions as may be observed or are brought to attention. This is essential in order to avoid any impression that the WHD is stepping beyond the investigative authority conferred under the acts. Under no circumstances shall the WHI interpret any law other than those administered by the WHD. Such possible violations of other laws or regulations noted by the WHI shall be reported to the DD and/or ADD.

52a12 **Complaints concerning domestic employees.**

(b) (7)(E)

52b RECORDS: TRANSCRIPTIONS

52b00 Examination of records.

(b) (7)(E)

52b01 Removal of employer's records from establishment.

(b) (7)(E)

(b) (7)(E) [redacted]

[redacted]

52b02 **Examination of records: child labor compliance.**

(b) (7)(E) [redacted]

52b03 -05 **(Reserved.)**

52b06 **No monetary violations found.**

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

52b07 **Monetary violations not meeting the potential litigation criteria.**

(b) (7)(E) [redacted]

52b08 **Monetary violations meeting the potential litigation criteria.**

(b) (7)(E) [redacted]

52c **EMPLOYEE INTERVIEWS**

52c00 **Employee interview objectives.**

(a) The primary objectives of employee interviews are to:

(1) test the adequacy and accuracy of the records;

(2) aid in substantiating or disproving alleged violations, and to give the employees an opportunity to point out other violations (including those at some other place of employment); and

(3) examine the validity of claimed exemptions.

(b) The objectives of an employee interview will be attained only if the WHI prepares for and conducts the interview in such a manner that the pertinent facts will be elicited. The information derived from the interview will depend in part on the attitude of the employee being interviewed, which may be influenced by the way he or she is received. WHI shall inform the employees that the information given is confidential.

(c) Top executive and management officials of a firm shall not be interviewed relative to their exemption under 29 CFR 541. Otherwise, there are no hard-and-fast rules as to which employees are to be interviewed, the number of such interviews, or the details to be covered. These are matters (*see* FOH 52a00(a) and FOH 52a00(c)) that must be determined by the circumstances of a particular case. Interviews are conducted for a definite investigative purpose and require careful planning and skill in selection. (b) (7)(E) [redacted] The key is to reach an early decision as to the cut-off point and to act on it.

(d) Until such time as the DD is satisfied that a trainee WHI has gained sufficient investigation experience, he or she may be required to make more extensive use of employee interviews. (b) (7)(E) [redacted]

52c01 **<u>Interview place.</u>**

[redacted] (b) (7)(E) [redacted]

(b) Interviews away from the establishment may be held in the employee's home, at the office of the WHD, or may be arranged at any other suitable place in the community, such as a post

office building, provided conditions of privacy can be maintained. State employment security agency offices shall not be used.

(c) WHIs shall not call on employees at home at very early or late hours; calls on holidays, Sundays, or other days of religious observance shall be avoided. Good judgment is the keynote to when home interviews are to be conducted.

(d) WH-41: Mail Request for Employee to Appear or Telephone for Interview (WH-41) shall be used to request employees to appear for interview. *See* FOH 54: WH-41.

52c02 **Privacy of interview.**

Employees must be given the opportunity to be interviewed under conditions that assure privacy. However, this rule does not preclude an interview in the presence of another employee of the WHD or the interview of a minor in the presence of a parent or guardian, or where the presence of an immediate member of the employee's family is desired or unavoidable. An interpreter may be used if strict precautions are taken to ensure that the arrangement will not be injurious to the interests of the employee, the employer, or the WHD.

52c03 **Recording employee interview statements.**

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

52c04 **Complainant interview.**

(b) (7)(E)

[redacted]

[redacted]

52c05 **Discrepancies between interview statement and final disposition.**

(b) (7)(E)

[redacted]

52c06 **Mail interviews.**

(b) (7)(E)

[redacted]

52d **DISCLOSURES BY WHI: SECTION 16(b) AND 16(c) REQUESTS**

52d00 **Complaint not to be disclosed.**

The WHI shall take no action that would reveal the existence of a complaint or disclose the identity of a complainant. As a matter of policy, the WHD does not disclose reasons for making an investigation. Where inquiry is made concerning the reasons for an investigation,

the inquirer shall be told that investigations are made for a variety of reasons, all having to do with proper enforcement of the law, and regardless of the specific reasons for making an investigation, all investigations are for the purpose of assuring compliance with the law.

52d01 **Disclosure of information by a WHI to employees.**

(a) During an investigation, the WHI may receive oral inquiries from employees as to the provisions of the laws enforced by the WHD, compliance with these provisions by the establishment, and whether the employees will receive back wages as a result of the investigation.

(b) An employee has a right to be informed of the provisions of these laws, including his or her rights under FLSA sections 16(b) and 16(c). As may be appropriate, the employee shall be given informational materials or an explanation. If the amount of back wages is known and the employer has agreed to pay, the WHI may, in response to a specific request, advise an employee of the amount due.

(c) An employee shall be given no information obtained from an examination of the employer's records.

(d) When the WHI has completed the investigation and the allegations in an employee or ex-employee complaint were not substantiated, the WHI shall, if practical, notify the complainant. If back wages were paid to the complainant or are to be paid in the immediate future, it is not necessary to contact the complainant. If practical, the WHI should also notify the complainant if back wages are to be paid in installments. The WHI shall note in the case diary whether or not the complainant was notified as set out above. The DD shall notify all complainants not previously notified by the WHI except where the notification responsibility rests with the RA. *See* FOH 53c19 and FOH 53g02. In transmitting complaint files to the RO, the DD shall indicate on WH-136: Investigation Transmittal Form (WH-136) whether any complaint notification is required.

52d02 **Discussion of FLSA sections 16(b) and (c).**

The WHI should avoid any action that may be interpreted as suggesting to employees that resort be had to the courts under section 16(b) or (c).

52d03 **FLSA section 16(c) action.**

Section 16(c), as revised by the 1974 Amendments, empowers the Secretary of Labor (Secretary) to bring suit to recover back wages and an equal amount of liquidated damages without requiring a written request from an employee. Additionally, such suits may be brought even though they may involve issues of law that have not been finally settled by the courts. The National Office (NO) is working out procedures with the Office of the Solicitor (SOL) for handling litigation cases under this new authority, and it is expected that guidelines will be issued in the near future. Pending further instructions, potential litigation cases will continue to be handled in the present manner including any JRC contacts and the like. However, employers who refuse to pay back wages shall be advised of the provisions of new section 16(c).

52e **COVERAGE FINDING**

NOT FOR PUBLIC DISTRIBUTION

52e00 **WHD coverage determination.**

It is important that an accurate determination be made as to the employees who are covered by the FLSA and those for whom an exemption may properly be taken, and it should not be forgotten that if the WHD erroneously exempts an employee from the coverage of the FLSA, the PA may bar the employee from recovering any back wages, which may rightfully be due him or her under the FLSA. *See* FOH 10, FOH 11, and FOH 12.

52e01 **(Reserved.)**

52e02 **PCA coverage determination.**

(a) 41 CFR 50-201.501, *Record of Employment* provides that where no separate records for employees engaged on government contracts are maintained, it shall be presumed, until affirmative proof is presented to the contrary, that all employees in the plant, from the date of award of any such contract until the date of delivery, were engaged on the contract.

(b) The WHI's responsibility is to show after analysis of all the facts available, whether and to what extent minors have been employed in violation. The WHI must make every effort to ascertain segregation of the government work, if it existed, so that the WHD will have all the facts and will not be taken by surprise if the employer later shows records or other proof of segregation.

52e03 **Public sector activities may not be included for purposes of section 3(s) coverage.**

Notwithstanding the fact that the combined ADV of an enterprise (within the meaning of section 3(r)), consisting of activities of a private employer and public sector activities under section 3(r), meets the ADV requirements of section 3(s)(1), the WHD, as an enforcement policy only, will not assert enterprise coverage with respect to private sector activities whose ADV must be combined with that of public sector activities in order to meet the enterprise ADV test. For example, the ADV of a leased, privately operated restaurant with less than $500,000.00 ADV would not be combined with that of a city-operated year-round golf course to cover the restaurant, even if they constitute a single establishment.

52e04 **FLSA section 3(s) (grandfather clause).**

(a) The 1977 Amendments added a new section 3(s)(2), which raised the ADV for retail or service enterprises in stages over several years from $250,000.00 to $362,500.00 (exclusive of excise taxes at the retail level that are separately stated). The $362,500.00 ADV test became effective on 01/01/1982. *See* FOH 12d00 -02.

(b) Notwithstanding the ADV changes discussed in FOH 52e04(a), the last unnumbered paragraph in section 3(s) contains a grandfather clause applicable to retail or service enterprises uncovered as a result of the increases in ADV, provided certain conditions are met. Where applicable, the grandfather clause requires that non-exempt employees continue to receive the minimum wage in effect on the day prior to the effective date of the ADV change that uncovered the enterprise. Such enterprises are also required to continue to comply with the FLSA's overtime and child labor provisions. The grandfather clause applies only to retail or service enterprises that:

(1) were in operation on 06/30/1978,

NOT FOR PUBLIC DISTRIBUTION

(2) were operating at an ADV of at least $250,000.00 on 06/30/1978, and

(3) continued to operate at an ADV of at least $250,000.00 in *each* succeeding year.

(c) Enterprises initially grandfathered, whose ADVs later dropped below $250,000.00 in *any* year since 06/30/1978, are no longer grandfathered, and only will become subject to the FLSA again when their ADV reaches the current dollar test ($362,500.00 since 01/01/1982).

[redacted] (b) (7)(E) [redacted]

[redacted]

(f) Questions related to the proper application of section 3(s) should be referred to the NO, Attention: Assistant Administrator (AA) for the Office of Policy (OP).

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

NOV 20 2003

MEMORANDUM FOR ALL FOH HOLDERS

FROM: TAMMY D. McCUTCHEN
Administrator

SUBJECT: CMP Pre-assessment Procedure

Based upon a recent review of WHISARD data, it appears that an increasing amount of CMPs computed and recommended by Investigators is being arbitrarily adjusted by managers (or on their behalf) in the system's CMP Management screen before the assessment is presented to the employer. In most instances, the recommended assessment is reduced and a lesser amount is entered as the actual assessment. This difference between the two amounts remains in WHISARD as a progressively increasing balance that is currently over $6,000,000. This is a problem since an "adjusted" balance of this magnitude in the WHISARD database is a liability for which we are accountable to oversight agencies.

The purpose of this memorandum is to remind District Office managers of the procedures concerning recommended CMP assessments upon submission of an investigation for management review in WHISARD.

If the reviewer is not satisfied that the recommended CMP assessment has been accurately computed or substantially documented, the case shall be returned to the Investigator for appropriate correction in WHISARD and then re-submitted for management review. (This does not apply to H-1B CMP assessments, which will continue to be determined on an individual case basis until further notice.)
Please contact the WHISARD HelpDesk at WHD-Thewiz@dol.gov for further assistance if necessary.

This memorandum shall be filed immediately preceding FOH 52F.

NOT FOR PUBLIC DISTRIBUTION

52f MINIMUM WAGE AND OVERTIME FINDINGS

52f00 -06 **(Reserved.)**

52f07 **Special exceptions to violation findings.**

(a) There are certain conditions that normally would result in violations, but, because of special circumstances, are not always so considered. These special circumstances and special instructions follow:

(1) *No position or changed position cases*

a. Where the WHD has announced in instructions to a region, or the employer can establish that he or she or his or her representative, which may be a trade association, counsel, or other advisory service, was informed in writing by a responsible official of the WHD that the WHD was not prepared to take a position on the question involved, violations shall be shown and back wages shall be computed from the date on which the WHD gave adequate notice of its definite position, or for 2 years, whichever period is shorter.

b. Where the employer can establish that he or she or his or her representative, which may be a trade association, counsel, or other advisory service, was informed in writing by a responsible official of the WHD regarding its position on a particular question, and the WHD later reversed the decision, violations shall be shown and back wages computed from the date on which adequate notice of the reversal was given, or from the effective date specified in such notice, or for 2 years, whichever period is shortest. Publication in the Federal Register is considered adequate notice. (b) (7)(E) [redacted]

c. This policy does not include situations where a new or changed position has no effect with respect to violations and back wages due.

52f08 **Good faith defense under the PA.**

The good faith defense provisions of the PA, which are currently in effect, are printed at the back of the FOH copy of the FLSA. Instances of such claims are rare. However, if a WHI encounters a situation where the employer claims a good faith defense under the PA, he or she shall obtain the facts on which the claim is based, in accordance with the provisions of the PA, and refer the matter to his or her DD for advice.

52f09 **Corrected monetary violations.**

Monetary violations, which have been discontinued and corrected by the full payment of back wages prior to the first contact with the employer in the investigation, are not to be treated as violations.

52f10 **Bookkeeping errors.**

NOT FOR PUBLIC DISTRIBUTION

Minor underpayments resulting solely from bookkeeping or payroll errors shall not be treated as violations. The employer shall be advised to make the necessary corrections, and no further action shall be taken.

52f11 **<u>Back wage amounts under $20.00; liquidated damages under the CWHSSA.</u>**

(a)

(1) To avoid the expenditure of WHI time disproportionate to employee benefits involved, except as provided in FOH 52f11(a)(2) below, where it is obvious that a computation of back wages (under any act or combination of acts enforced by the WHD) would disclose less than $20.00 due a particular employee, no computation shall be made. If a computation is made to resolve uncertainty as to the amount, and the total amount computed is less than $20.00, the amount will be disregarded in the preparation of WH-56 and WH-51-MIS: Compliance Action Report (WH-51-MIS). However, the employer should be instructed to add amounts less than $20.00 to the next paycheck of *current* employees. No request for payment to *former* employees shall be made. Where the employer is making the computations (or preparing WH-56), he or she shall be advised as to payment. WH-58: Receipt for Payment of Back Wages, Liquidated Damages, Employment Benefits, or Other Compensation (WH-58) shall *not* be furnished for back wage amounts under $20.00.

(2) *However*, in cases involving monetary violations with respect to workers with disabilities paid subminimum wages under a certificate issued under section 14(c) of the FLSA, WHIs shall compute and request payment of back wages of any amount. These back wage findings and amounts agreed to be paid shall be recorded on WH-56 and WH-51-MIS.

(3) In the situations described in FOH 52f11(a)(1) -(2) above, the employee shall *not* be counted in the calculation of minimum wage and/or overtime CMPs (*see* FOH 54: WH-467).

(b) **Back wages due of $20.00 or more involving less than $20.00 under one or more provisions**

(1) When an employee has been found to have been underpaid a total of $20.00 or more under both the minimum wage and overtime provisions of the FLSA, but the underpayment under one provision or under each of the provisions is less than $20.00, the violations and the amount due under each provision shall be included in the violations and back wages reported on WH-51-MIS unless the amount due under one of the provisions is less than $1.00. If the amount due under one of the provisions is less than $1.00, no violation shall be reported for the provision. Instead, the entire underpayment shall be reported to be due under the provision under which the larger amount is due, and the violation shall be reported for that provision. Apply the same principle if other acts are involved.

(2) For example, if a total of $20.00 was found to be due to an employee, $1.00 of which was due under the minimum wage provisions and $19.00 of which was due under the overtime provisions, violations of both the minimum wage and overtime provisions would be reported on WH-51-MIS. The $1.00 would be included in the amount reported to be due for minimum wage violations, and the $19.00 would be included

NOT FOR PUBLIC DISTRIBUTION!

in the amount reported to be due for overtime violations. However, if the amount due under the minimum wage provisions was only $0.99, and the amount due under the overtime provisions was $19.00, a violation only of the overtime provisions would be reported on WH-51-MIS, and the entire $20.00 would be included in the amount reported to be due for overtime violations.

(c) Liquidated damages shall not be computed under the CWHSSA with regard to any employee where it is obvious that a computation of back wages would disclose less than $20.00 due to the employee under the CWHSSA standing alone, notwithstanding that the total amount due the employee (including amounts due under other acts) may be more than $20.00.

52f12 **Monetary violations involving corporate officials and close relatives.**

(a) For the purpose of this section only, a corporate officer shall be considered as an owner when he or she is the directing head of the establishment and is:

(1) a majority stockholder;

(2) a principal stockholder with voting control; or

(3) in voting control through stock ownership by his or her spouse or family, or through his or her own stock ownership in combination with the stock ownership of his or her spouse or family.

(b) When it is found that back wages are due an officer of a corporation who is an owner within the above definition, or has such a financial interest in the corporation and actively participates in the management of the corporation to such an extent that he or she has a real proprietary interest in the corporation, which overshadows his or her interest as an employee of the corporation, the violations shall not be shown on ESA-33 nor shall payment of back wages or future compliance be requested.

(c) When an employee to whom back wages are due is a spouse, child, or parent of the owner or partner of an establishment under investigation, back wages and future compliance shall not be requested; no entries shall be made on ESA-33 with respect to such violations or the amounts due. ”Child” includes any person living in the employer’s home and standing in the same position as a child. The employer shall be advised of his or her obligation under the acts and of his or her liability under FLSA section 16. Where the employer elects to pay back wages under WHD supervision to any such employee, the normal investigation and reporting procedures shall apply.

(d) Relatives of the owner or a partner who are not “close relatives,” as described in FOH 52f12(c) above, will be considered in the same light as other employees in the establishment. However, if the employer raises family relationship as a reason for not paying back wages to an employee, he or she shall be advised that the amount is legally due and of his or her liability under FLSA section 16, but the WHI will not press the issue. Violations and amounts due shall be recorded on ESA-33.

(e) If a spouse, child, parent, or any other relative of the employer is a complainant or has otherwise stated a desire for payment of any back wages due, the instructions in FOH 52f12(c) -(d) above will not apply. Negotiations for payment of back wages to such employees will follow regular procedure.

NOT FOR PUBLIC DISTRIBUTION

52f13 **Use of employee's name in negotiations.**

(a) In rare instances, an employee (or, with respect to Age Discrimination in Employment Act (ADEA), a prospective employee) may allege violations under circumstances where the employee's statement is the only substantive evidence to support the WHI's conclusion that violations *actually exist*. If it is essential to use the name of such an employee in negotiations (or the information he or she has supplied would be readily identified as to its source), written permission must be obtained from him or her before doing so. Except, as provided in FOH 52f13(b) below, such permission shall not be sought until *after* all reasonable investigative steps have been taken to obtain proof of the violations from sources other than the employee's own statement. Such permission shall not be sought on a routine basis and shall not be incorporated in the body of the employee's written statement (*see* FOH 52f13(d) below).

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

52f14 **Minimum wage and overtime civil money penalties.**

(a)

(1) 29 CFR 578 contains the Secretary's regulations concerning CMPs for minimum wage and overtime violations, pursuant to FLSA section 16(e). The section sets a maximum CMP of $1,000.00 for each violation that is deemed to be repeated or willful, in accordance with 29 CFR 578.3. It also provides that, in determining the amount and appropriateness of such penalty, consideration will be given to the seriousness of the violations and the size of the employer's business.

(2) Where appropriate, other relevant factors may also be considered in assessing the penalty, as provided in 29 CFR 578.4.

(3) While it is important that CMPs be reasonable, do not confuse the amount of CMPs with the amount of back wages. Back wages are the amounts of wages the employer has illegally withheld from employees. CMPs are intended to discourage employers from future non-compliance. There is no inherent relationship between the two.

(4) CMPs will ordinarily be assessed based on violations occurring within the normal 2-year investigation period. *See* FOH 52f14(b)(2) below. For purposes of minimum wage and overtime CMP *collection actions only*, a 5-year statute of limitations applies, instead of the normal 2 or 3 years under section 6(a) of the PA.

(5) *Sheltered workshops*

CMPs may be assessed against employers who repeatedly or willfully fail to comply with FLSA section 14(c) requirements, where less than section 6(a) minimum wages are paid. Section 14(c), by its terms, imposes no minimum wage requirements on employers, but grants authority to the Secretary to provide for subminimum wage employment, by certificate, of people with disabilities. Thus, in a strict sense, an employer who fails to comply with the requirements of regulations issued under section 14(c) does not violate that section, but fails to qualify its employees for the exemption provided by section 13(a)(7). The latter provides:

"The provisions of section 6. . .and 7 shall not apply with respect to - (7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under Sec 14."

It follows that where an employer fails to obtain, or to comply with, a section 14 certificate, affected employees are not exempted by such a certificate or by the Secretary's regulations. Section 6 thus applies, and is violated by failure to pay the full minimum wage, which it prescribes. This is strictly analogous to failure to qualify for other exemptions, such as section 13(a)(1). When, for example, improper deductions are made from the salary of an otherwise exempt employee, the employer has not violated section 13(a)(1), but has failed to qualify for the exemption, thereby violating section 7 in workweeks when overtime is worked.

(b) Consider CMPs in accordance with the following criteria in *all* investigations in which minimum wage and/or overtime violations have been established. CMPs shall *not* be assessed in any conciliation nor as a result of a self-audit by the employer. Self-audit does not include cases in which the employer is instructed to make back wage computations after an investigation has been completed by the WHD.

NOT FOR PUBLIC DISTRIBUTION

(1) CMPs shall be assessed for a repeated violation *only* where it can be *proven* that the employer had previously violated section 6 or 7 of the FLSA (*see* 29 CFR 578.3(b)). Keep in mind that in order to sustain assessment of penalties, the WHD must be able to prove that violations of section 6 or 7 occurred in a previous investigation. *See* 29 CFR 580.7(b). (b) (7)(E) [redacted] However, if a national or multiunit enterprise is involved, the earlier violation(s) need not have occurred in the same establishment as the current one(s). Violations are not repeated where, in the same investigation, employer practice(s) resulting in a violation of section 6 also result(s) in a violation of section 7. It is not necessary that violations of section 6 or 7 in a subsequent investigation be identical to those in a previous investigation in order to be repeated. A violation of section 6 in the first investigation can result in a violation of section 7 in a subsequent investigation being repeated, or vice versa.

Note: a conciliation (*see* FOH 51a02(a)(1)) *shall not* be the basis for a repeated violation and the assessment of CMPs in a subsequent investigation. A self-audit *may* be the basis for a repeated violation and CMP assessment in a subsequent investigation, provided there is adequate proof of prior minimum wage and/overtime violations in the file for the WHD to sustain CMP assessment.

(2) CMPs shall be assessed for a willful violation only where it can be shown that the employer knew that its conduct was prohibited by the FLSA or showed reckless disregard for the requirements of the FLSA (*see* 29 CFR 578.3(c)). In any case in which consideration is given to assessing CMPs for willful violations, consultation with the JRC is required. The purpose of this consultation is to obtain RSOL's concurrence with our willful determination (*i.e.*, does the case meet the criteria for a willful violation). The purpose is *not* to determine whether the RSOL will accept the case for litigation or collection. RSOL does not have the authority to override the DD's decision to assess CMPs. If authorized by the JRC, CMPs may include violations occurring in the 3rd year. If the RSOL disagrees with the DD regarding the determination of willful violations, and the DD strongly disagrees, the DD shall consult with the RA for consideration of submitting the CMP file to the RA for discussion with the RSOL.

a. The definition of a "willful" violation is based on the decision in *McLaughlin v. Richland Shoe*, 486 U.S. 128 (1988), in which the Supreme Court defined a "willful" violation of the FLSA for purposes of the 3-year statute of limitations for recovery of back wages contained in section 6 of the PA. The Court rejected the "in the picture" standard for a willful violation in favor of a standard of employer knowledge of whether its conduct was prohibited by the act or a showing of reckless disregard regarding whether its conduct was prohibited by the statute.

b. An employer's conduct is deemed "knowing" if the employer was previously advised by a responsible official of the WHD that the employer's conduct in question was not lawful. Similarly, an employer's conduct is deemed to be in reckless disregard of the act's requirements if the employer should have

NOT FOR PUBLIC DISTRIBUTION

inquired further into whether its conduct was in compliance with the act and the employer failed to make adequate further inquiry.

c. The conduct of employers holding a certificate issued pursuant to section 14(c) could be deemed "knowing" because of the application and certification process, as well as other contacts the certificate holder may have had with responsible WHD officials, including the section 14 specialist in the RO. Willful violations will not, however, be assessed on this basis alone.

52f15 **Investigator action: CMP recommendation.**

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

(e) Follow normal procedures in conducting negotiations for payment of back wages and achieving future compliance with regard to the violations. At the final conference, give the employer a copy of WH-56, if appropriate, and, in *every* case, advise that determination of the appropriateness and amounts of CMPs is made at the supervisory level and that the employer will be notified in writing when a determination regarding CMPs has been reached. Give the employer copies of 29 CFR 578 and 29 CFR 580 at this time, and note this in the narrative report. In investigations of national or multiunit enterprises, follow the procedures outlined in FOH 61.

52f16 **DD action: CMP assessment.**

(b) (7)(E)

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

(e) Assessment

(1) In any cases in which assessment is appropriate, if a Confirmation Letter (Correspondex Letter F2-39) has already been sent, send the employer the Notice of Penalty (Correspondex Letter F2-40) by certified mail, enclosing copies of 29 CFR 578 and 29 CFR 580, if not previously provided. Otherwise, send Correspondex Letter F2-49 (combined Confirmation and Notice of Penalty letter). (b) (7)(E)

(2) For national or multiunit enterprises, send the Notice of Penalty (or combined Confirmation and Notice of Penalty letter, if used) to both the main office and the branch, and send copies of the letter and WH-467 to the MODO. When negotiations and the final conference are conducted at the main office, send the Notice of Penalty to the main office with a copy to the branch. When negotiations and the final conference are conducted with the branch, send the Notice of Penalty to the branch with a copy to the main office.

(3) Where there are joint employers and *both and/or all* employers meet the criteria for assessment of CMPs, at the DDs discretion, penalties may be assessed against *both and/or all* employers in the full amount. For example, where a temporary help agency regularly provides employees to work 6 days a week for another employer and does not pay proper overtime pay, the DD may wish to assess CMPs against both employers in the full amount. On the other hand, where such an agency provides employees to work 2 days a week at three unrelated businesses and does not combine the employees' hours for overtime pay purposes, CMP assessment would ordinarily be made only against the temporary help agency because the other employers had no knowledge of the potential overtime violation. If assessments are made against each of the employers, separate original letters must be sent to each employer. Before CMPs can be assessed against both employers in the full amount, the DD must consult with the RA.

(b) (7)(E) [redacted]

(f) After assessment

(1) *Exceptions*

a. Although 29 CFR 580.6 provides for exceptions to the Notice of Penalty to be addressed and mailed to the Administrator, employers are to be instructed (in the Notice of Penalty) to send the exception to the DO assessing the penalty. Letters of exception will be acknowledged by the DO. *See* Correspondex Letters F2-42 and F2-43.

b. The DO will review cases in which an exception has been filed to determine whether or not the exception is timely. In order to determine timeliness, the 15-day filing period will be counted from the day following the date the Notice of Penalty was received by the employer, as shown on the return receipt, until the postmark date on the envelope in which the exception letter was mailed. Where service by certified mail was not accepted by the party, notice shall be deemed received on the date of attempted delivery. When the 15th day is on a Saturday, Sunday, or holiday, the next day following, which is not one of these will be counted as the 15th day. Exceptions filed within 16 days will be accepted in order to allow for delays from the time the letter is deposited in the mail box to the time the USPS collects it for postmarking.

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

(4) *Untimely or no exception*

(b) (7)(E)

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

52f17 **RA action: CMP assessment.**

(a) Review of case file

The RA has full authority to assess, modify, or not assess minimum wage and/or overtime CMPs with respect to *any* case, with no limits as to the amount a CMP may be increased or reduced. *See* FOH 52f16(c)(1) and FOH 52f16(c)(3). This authority *shall not* be delegated. The only limitation in this regard is that CMPs *must not* be assessed in an amount related to the amount of back wages. We do not want to leave an impression that CMPs are anything like liquidated damages. The RA can assess CMPs without making a computation on WR-467 (*i.e.*, he or she can assess any amount deemed to be appropriate in a given case). The RA shall inform the Deputy Administrator of any case that may be sensitive (*e.g.*, congressional interest), or cases that may generate significant media attention or publicity. Consultation with DDs on cases involving a penalty exceeding $100,000.00 (*see* FOH 52f17(b)(3) below and FOH 52f16(c)(5)) should be by telephone, except in unusual or extraordinary cases. The RA may request the case file where appropriate.

(b) Prior to assessment

(1) *Possible civil and/or criminal action*

If the JRC indicates that the RSOL may consider civil and/or criminal action on the basis of the minimum wage and/or overtime violations, confer with the RSOL for guidance on the appropriateness of assessing CMPs.

(2) *Close questions of law or fact*

If the investigation reveals a situation which poses a close question of law that has not previously been resolved, refer the file to the RSOL for resolution. If the file contains a close question of fact, resolve it, discuss the question with the NO, OP, Division of Enforcement Policy and Procedures (DEPP), Attention: FLSA/Child Labor Branch, or submit it to that office for guidance.

(3) *Computed penalty in excess of $100,000.00*

Confer with the DD, discussing the documentation of the violations and the recommendations regarding the appropriateness of the penalty in light of the criteria set out in 29 CFR 578.3 -.4 and the data on WH-467. On the basis of such discussions, consider the monetary penalty recommended to be assessed or whether any assessment should be made. If there is agreement that the computed penalty should be assessed, authorize the DD to assess the penalty. If it is decided that the recommended CMP is inappropriate, determine the penalty to be assessed and authorize the DD to assess the revised CMP. As appropriate, the RA may wish to discuss the penalty with the NO, OP before authorizing the DD to assess. The DD must include in the file an explanation of the rationale on which any modification is made and the RA's authorization to assess.

(c) Assessment

After a final determination has been made as to the penalty to be assessed, return the case file to the DD who will assess the penalty in accordance with FOH instructions.

52f18 <u>Collection of CMPs.</u>

(a) When certified checks or money orders are received by the DO as payment for penalties assessed, they shall be forwarded by a transmittal memo to the RO. DL 1-303: Cash Transfer Receipt (DL 1-303) should accompany all checks and/or money orders. After completing the DL 1-303, retain the blue copy and submit the white and pink copies with the checks and/or money orders.

52g CHILD LABOR

52g00 -15 <u>(Reserved.)</u>

[01/05/2017]

52h SALES ANALYSES, ESTABLISHMENT EXEMPTION, AND FLSA ENTERPRISE COVERAGE PROCEDURES

52h00 <u>Purpose and use of sales analysis procedures.</u>

(a) These procedures are guides for use where it is necessary for purposes of enterprise coverage or certain exemptions to make determinations regarding the type of sales made by an establishment, or the volume of sales made by an establishment or enterprise. Also, included are guides for making sales analyses.

(b) There are certain situations where consideration must be given for purposes of coverage and exemption to the possibility of several sales analyses. For example, whether a sales analysis for purposes of section 13(a)(2) need be considered may turn upon whether the establishment is in a covered enterprise. The latter determination may likewise require a sales analysis. Because of such relationships between coverage and exemption, no hard and fast sequence of investigative steps will be followed in every case. Instead, WHIs shall make the necessary determinations (using sales analyses where necessary) in the order, which will result in the most effective utilization of time consistent with accepted investigation standards.

NOT FOR PUBLIC DISTRIBUTION

52h01 **Sales accounting records.**

(a) The sales made or business done data necessary for purposes of establishing enterprise coverage or the applicability of certain exemptions will in many cases be found in summary form on such records as the monthly, quarterly, or annual operating and profit and loss statements, sales tax returns, and state and federal income tax returns. In addition, copies of periodic reports that branch establishments make to the main office of the enterprise will ordinarily contain the necessary data. From such records, the WHI will normally be able to secure sufficient sales information upon which to base a determination as to the coverage and exemption status of the establishment or enterprise.

(b) Where more detailed information is required, data may be obtained from the sales account in the general ledger. Each month there is usually posted to the right-hand side of the sales account a summary total showing all sales made that month. Where cash sales and charge sales are accounted for separately, two accounts may appear in the general ledger, and they will have to be added to obtain the total sales. Sales data may often also be obtained from the monthly summaries in the cash journal totaling the receipt from sales. Sometimes, all sales, whether cash or charge, are recorded in a sales journal where every shipping invoice or delivery ticket is listed consecutively. The accounts receivable account in the general ledger also shows the total charge sales.

52h02 **Records of excludable excise taxes.**

(a) Sections 3(s)(1), 7(b)(3), and 13(a)(2) exclude certain excise taxes from the annual gross volume (AGV) tests. In most cases, the AGV of the enterprise will be sufficient to eliminate the need for a precise determination of the amount excludable as excise taxes. However, where it is necessary to determine this amount, the WHI shall be guided by normal business accounting practices. Such amounts are often shown as an item in the accounts payable ledger or deposited in special bank accounts. In most cases, the employer is required to submit official scheduled reports of such collections and payments to the taxing agency. Copies of these reports are usually kept on file by the employer. Any type of record or report that serves as a reliable source may be accepted in determining the amount of excludable excise taxes.

(b) Whether certain excise taxes are properly excludable from the AGV of sales may in some cases be determinative of coverage or exemption. If it is not possible to resolve the status of such taxes by reference to current CFR or FOH interpretations or instructions, all the facts shall be obtained and the question submitted through channels to the RSOL for an opinion.

52i -j **(RESERVED)**

52k **SPECIAL PROCEDURES: RETAIL OR SERVICE ESTABLISHMENT EXEMPTIONS**

52k00 **Catalogue order offices and catalogue order desks.**

(a) Several large consumer merchandising organizations, such as Sears-Roebuck and Montgomery Ward, operate separate establishments described as catalogue order offices or catalogue stores. Some of these establishments are operated by franchisees. The operations and number of employees vary. Many of the stores have only a few display items and a counter with catalogues from which the customer can select items to be ordered through the

NOT FOR PUBLIC DISTRIBUTION

establishment from some central warehouse. Others also keep small stocks of goods for immediate sale, such as tires, batteries, television sets, and the like. In other cases, a regular retail type store may have a counter, with one or two employees, which is usually designated as a catalogue order desk.

(b) It has been the position of the WHD that the section 13(a)(2) exemption did not apply to employees engaged in the operation of a catalogue order office, catalogue store, or catalogue order desk. (b) (7)(E) [redacted]

52k01 **Truck stops.**

Establishments, such as those described in FOH 21ct03, are not within the retail concept, and no sales analysis is necessary. However, situations may be encountered where an establishment does not fall precisely within that definition, and a question would be raised as to whether such an establishment would be considered a truck stop, as for example, in the case of a gasoline service establishment that performs some of the functions of a truck stop. If the WHI has any doubt as to whether the establishment is a truck stop and compliance turns on this point, a sales analysis shall be made. A sales analysis shall also be made for any case prepared for litigation. *See* 29 CFR 779.371(c)(6).

52k02 **Availability to general public: in-plant cafeterias.**

(a) 29 CFR 779.318 -.319 provide that an establishment must be ordinarily available to the general consuming public in order to be considered a retail or service establishment for purposes of sections 13(a)(2), 13(b)(18), etc. Situations may be encountered where an in-plant cafeteria, because of its location or other factors, is not accessible to the general public, or is accessible to only a limited part of the general public. In such cases, pending further clarification by the courts, the WHD will not deny that such an establishment is a retail or service establishment *solely* on the basis that it is not accessible to the general consuming public where all the other tests are met.

(b) The policy in FOH 52k02(a) above is limited to in-plant cafeterias and does not apply to other establishments, such as private clubs with a select or restricted membership that precludes patronage by the general consuming public.

52l **(RESERVED)**

52m **SPECIAL PROCEDURES: COVERAGE AND EMPLOYMENT RELATIONSHIP**

52m00 **Application of individual and enterprise coverage to employees of taxicab companies.**

(a) Prior to 02/01/1967, employees of an employer engaged in the business of operating taxicabs were exempt from the minimum wage and overtime provisions of the FLSA. However, the amendments repealed this exemption and amended the enterprise coverage provisions of the act to bring, under its general coverage, employees employed in any enterprise having an

ADV of sales or business done of $500,000.00 or more ($250,000.00 or more beginning 02/01/1969), and having some employees engaged in interstate or foreign commerce, or in the production of goods for such commerce, including employees handling, selling, or otherwise working on goods that have been moved in, or have been produced for commerce by any person. Taxicab enterprises with an ADV of such amounts ordinarily have such employees.

(b) Accordingly, except as hereafter noted, all provisions of the act as amended are applicable generally to employees employed in any enterprise with an ADV of the statutory amount or more, which engages in the activity of operating taxicabs. Taxicab drivers employed by an employer engaged in this business are exempt from the overtime requirements under section 13(b)(17). Such drivers may also be tipped employees as defined in the act, for whom a tip credit may be taken toward the minimum wage as provided in section 3(m). There is no coverage on an enterprise basis of employees employed in the taxicab activities of enterprises having an ADV less than the statutory amount. (b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

52m01 **(Reserved.)**

52m02 **Section 13(b)(1) exemption: mail haulers.**

29 CFR 782.8(b) provides that the WHD will no longer assert that employees of contract mail haulers are not within the section 13(b)(1) exemption for overtime work performed after 06/14/1972, pending authoritative court decisions to the contrary. This position is adopted without prejudice to the 16(b) rights of employees. This position will also be applied for periods prior to 06/14/1972.

52n SPECIAL PROCEDURES: TIP CREDIT

52n00 **Tips and tipped employees.**

(a) **General**

In all cases where an employee has been paid less than the section 6(a)(1) minimum wage in cash and the employer claims a wage credit for tips, it is first necessary to determine whether the employee is a "tipped employee," as defined in section 3(t) of the FLSA, and, if so, to determine the period or periods of employment in which the employee so qualifies. *See* FOH 30d. A tip credit may be claimed only for periods during which the employee qualifies as a tipped employee and only for hours during which a tipped employee works in a tipped occupation.

[redacted] (b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

(f) Invalid tip pool

Although mandatory contributions to invalid tip pools unquestionably violate the principle articulated in section 3(m) that tips are the property of the employee, the Secretary's ability to enforce section 3(m) is limited to instances where violations result in minimum wage or overtime violations. *See* 29 USC 216(c), which authorizes actions by the Secretary to enforce the act's minimum wage and overtime provisions, and 29 USC 217, which authorizes DOL injunctive proceedings to restrain violations of the act's minimum wage, overtime, recordkeeping, and child labor provisions. A contribution to a tip pool that is used for any purpose other than as an appropriate method for distributing tips among tipped employees (*e.g.*, tips retained by the employer or used to supplement wages paid to non-tipped employees) is considered an improper deduction by the employer from the tipped employees who contribute to the pool.

If ineligible employees are included in a mandatory tip pool or the employer retains tips from the pool, the tip pool is invalid for the period during which the ineligible employee was included in the tip pool. An employer may not utilize a 3(m) tip credit for an employee who contributes tips to an invalid mandatory tip pool. The employer must pay such an employee the full minimum wage and must reimburse those who contributed to the pool in the amount of tips turned over to the ineligible employees.

In certain cases, the employer may have records that would be helpful in determining back wages due, such as which employee contributed to the tip pool, amounts received from the tip pool, and the length of time the ineligible employee was part of the tip pool. Other sources of information, such as employee interviews and records kept by employees, may also assist in such a determination. The tips returned to the tipped employees do not lose its character as tips, and the employer may exclude those amounts from the regular rate of pay.

The WHD will not invalidate the tip credit taken by the employer for a tipped employee who contributes nothing to the tip pool yet receives tips from the invalid tip pool, provided all other requirements for taking a tip credit are met for that tipped employee.

When an employee who is ineligible to share in tip pooling arrangements receives funds from a mandatory tip pool, those monies lose their character as tips and become wages, and the employer must pay them free and clear. The wage requirements of the FLSA will not be met where the employee kicks-back his or her wages directly or indirectly to the employer or to another person for the employer's benefit. Accordingly, an employer may not recover the wages a non-tipped employee receives from an invalid mandatory tip pool, whether to restore a tipped employee's tips or for any other purpose, if such payments would bring the non-tipped employee's pay below the required minimum wage or overtime compensation levels. *See* 29 CFR 531.35.

(g) Scenarios: remedying an invalid tip pool when an employer takes the tip credit

NOT FOR PUBLIC DISTRIBUTION

Scenario 1:

A restaurant employs four servers, a dishwasher, and a cook. The employer claims a FLSA 3(m) tip credit for the servers. In a given week, the restaurant requires each server to contribute $50.00 of their tips to a pool, totaling $200.00, and distributes the tips equally between the dishwasher ($100.00) and the cook ($100.00).

The tip pool is invalid because tips are being diverted to non-tipped employees (*i.e.*, the dishwasher and cook). Because the servers contributed to an invalid tip pool, the FLSA 3(m) tip credit is invalidated and the employer must pay them the full minimum wage. In addition, because the diversion of tips to non-tipped employees is an improper deduction from the servers' wages, the employer must reimburse each server $50.00, which is equal to the amount of tips each contributed to the invalid tip pool. The tip pool funds received by the dishwasher and cook lose their character as tips and become wages; the employer may not recover these wages if such payments would bring the dishwasher's or cook's pay below the required minimum wage or overtime compensation levels.

Scenario 2:

A restaurant employs four servers, a busser, and a cook. The employer claims an FLSA 3(m) tip credit for the servers and busser. In a given week, the restaurant requires each server to contribute $50.00 of their tips to a tip pool, totaling $200.00 and distributes the tips equally between the busser ($100.00) and the cook ($100.00).

The tip pool is invalid because tips are being diverted to a non-tipped employee (*i.e.*, the cook). Because the servers contributed to an invalid tip pool, the employer cannot utilize the tip credit for these workers and must pay them the full minimum wage. In addition, because the diversion of tips to non-tipped employees is an improper deduction from the servers' wages, the employer must reimburse each server $25.00, which equals the amount of each server's tips that the employer diverted to the cook. The employer is not required to reimburse the servers for the tips it distributed to the busser, because bussers are eligible to receive tips from a mandatory tip pool. In addition, because the busser did not contribute to the invalid tip pool, the tip credit is not invalidated for the busser. The tip pool funds received by the cook lose their character as tips and become wages; the employer may not recover these wages if such payments would bring the cook's pay below the required minimum wage or overtime compensation levels.

(h) Tip credit in an overtime workweek

An employer may not take a higher FLSA 3(m) tip credit during overtime hours than is taken during non-overtime hours. Under section 3(m), the amount of the FLSA 3(m) tip credit is the difference between the direct wage paid, which cannot be less than $2.13 per hour, and the section 6(a)(1) minimum wage.

In an overtime workweek where a tipped employee's regular rate is determined based on a state minimum wage that exceeds the section 6(a)(1) minimum wage, and the state permits a higher tip credit than the FLSA 3(m) tip credit, the employer may claim an additional overtime tip credit, equal to the difference between the FLSA 3(m) tip credit and the state tip credit, toward satisfying its overtime compensation obligation under the FLSA. In such situations, the total tip credit that will be counted toward satisfying the employer's overtime

NOT FOR PUBLIC DISTRIBUTION

compensation obligation will consist of the FLSA 3(m) tip credit and the additional overtime tip credit (the sum of these will equal and will not exceed the state tip credit).

An employer may not claim a total tip credit that exceeds the amount of tips the employee receives and retains after any contributions to a valid tip pool. If the amount of tips retained by the employee is less than the FLSA 3(m) tip credit and the employer does not make up the difference during the pay period, the tip credit will be denied and full minimum wage is due. If the employee retains sufficient tips to cover the FLSA 3(m) tip credit but not enough tips to cover all or part of the additional overtime tip credit, the employer will only be able to claim an additional overtime tip credit up to the amount of tips retained.

(i) Scenarios: back pay calculations for overtime pay violations

For purposes of these scenarios, assume that the section 6(a)(1) minimum wage rate is $7.25 per hour, the employee works 45 hours per week, all hours worked are in the tipped occupation, the employee meets the section 3(t) definition of a tipped employee, the employer complied with the requirements in 29 CFR 531.59(b) to inform employees about the tip credit, and the payroll records are accurate. In scenarios where the state minimum wage exceeds the section 6(a)(1) minimum wage, the same calculation principles would apply if the higher minimum wage is the result of a local ordinance, rather than a state minimum wage. In instances involving possible state law violations, investigators should refer to FOH 52a11 and FOH 53g03 concerning referrals to state agencies.

<u>Scenario 1- state minimum wage and tip credit are the same as under the FLSA:</u>

The employer pays a cash wage of $2.13 for all hours worked. The FLSA 3(m) tip credit is $5.12 ($7.25 (FLSA minimum wage) - $2.13 (cash wage) = $5.12). The violation is that the employer failed to pay the overtime premium for hours worked over 40 in a workweek.

45 hours (straight time hours) × $7.25 (regular rate) = $326.25 (straight time wages due)

5 hours (overtime hours) × .5 × $7.25 (regular rate) = $18.13 (overtime wages due)

$326.25 (straight time wages due) + $18.13 (overtime wages due) = $344.38 (total wages due)

45 hours (total hours worked) × $5.12 (FLSA 3(m) tip credit) = $230.40 (total FLSA 3(m) tip credit)

$344.38 (total wages due) - $230.40 (total FLSA 3(m) tip credit) = $113.98 (total cash wage due)

$2.13 (cash wage) × 45 hours (total hours worked) = $95.85 (cash wage paid)

$113.98 (total cash wage due) - $95.85 (cash wage paid) = $18.13 (overtime back wages due)

<u>Scenario 2 – higher state minimum wage and lower state tip credit:</u>

The state minimum wage is $8.25, state cash wage for tipped employees is $4.95, and state tip credit is $3.30. The employer pays a cash wage of $3.00 per hour for all hours worked. The FLSA 3(m) tip credit is $4.25 ($7.25 (FLSA minimum wage) - $3.00 (cash wage) =

NOT FOR PUBLIC DISTRIBUTION

$4.25). The violation is that the employer failed to pay the overtime premium for hours worked over 40 in a workweek.

45 hours (total hours worked) × $8.25 (regular rate) = $371.25 (straight time wages due)

5 hours (overtime hours) × .5 × $8.25 (regular rate) = $20.63 (overtime wages due)

$371.25 (straight time wages due) + $20.63 (overtime wages due) = $391.88 (total wages due)

45 hours (total hours worked) × $4.25 (FLSA 3(m) tip credit) = $191.25 (total FLSA 3(m) tip credit)

$391.88 (total wages due) - $191.25 (total FLSA 3(m) tip credit) = $200.63 (total cash wage due)

$3.00 (cash wage) × 45 hours (total hours worked) = $135.00 (cash wage paid)

$200.63 (total cash wage due) - $135.00 (cash wage paid) = $65.63 (overtime back wages due)

Note: the regular rate is the state minimum wage of $8.25. Although the state minimum wage exceeds the FLSA minimum wage, an additional overtime tip credit is only available when the state tip credit exceeds the FLSA 3(m) tip credit. Here, because the FLSA 3(m) tip credit of $4.25 ($7.25 (FLSA minimum wage) - $3.00 (cash wage) = $4.25) exceeds the maximum state tip credit of $3.30, the employer cannot claim an additional overtime tip credit.

Scenario 3 – higher state minimum wage and higher state tip credit:

The state minimum wage is $10.00, state cash wage for tipped employees is $5.00, and maximum state tip credit is $5.00. The employer pays a cash wage of $4.00 per hour for all hours worked. The FLSA 3(m) tip credit is $3.25 ($7.25 (FLSA minimum wage) - $4.00 (cash wage) = $3.25). The violation is failure to pay the overtime premium for hours worked over 40 in a workweek.

45 hours (total hours worked) × $10.00 (regular rate) = $450.00 (straight time wages due)

5 hours (overtime hours) × .5 × $10.00 (state minimum wage) = $25.00 (overtime wages due)

$450.00 (straight time wages due) + $25.00 (overtime wages due) = $475.00 (total wages due)

45 hours (total hours worked) × $3.25 (FLSA 3(m) tip credit) = $146.25 (total FLSA 3(m) tip credit)

$5.00 (state tip credit) - $3.25 (FLSA 3(m) tip credit) = $1.75 (additional overtime tip credit)

45 hours (total hours worked) × $1.75 (additional overtime tip credit) = $78.75 (total additional overtime tip credit)

NOT FOR PUBLIC DISTRIBUTION

$475.00 (total wages due) - $146.25 (total FLSA 3(m) tip credit) - $78.75 (total additional overtime tip credit) = $250.00 (total cash wage due)

$4.00 (cash wage) × 45 hours (total hours worked) = $180.00 (total cash wage paid)

$250.00 (total cash wage due) - $180.00 (cash wage paid) = $70.00 (overtime back wages due)

Scenario 4 – higher state minimum wage and higher state tip credit:

The state minimum wage is $8.25, state cash wage for tipped employees is $4.95, and state tip credit is $3.30. The employer pays a cash wage of $4.95 per hour for straight time hours and $7.43 per hour (1.5 × $4.95 (cash wage) = $7.43) for overtime hours. The FLSA 3(m) tip credit is $2.30 ($7.25 (FLSA minimum wage) - $4.95 (cash wage) = $2.30). The violation is failure to pay overtime based on time-and-one-half the regular rate.

45 hours (total hours worked) × $8.25 (regular rate) = $371.25 (straight time wages due)

5 hours (overtime hours) × .5 × $8.25 (regular rate) = $20.63 (overtime wages due)

$371.25 (straight time wages due) + $20.63 (overtime wages due) = $391.88 (total wages due)

45 hours (total hours worked) × $2.30 (FLSA 3(m) tip credit) = $103.50 (total FLSA 3(m) tip credit)

$3.30 (state tip credit) - $2.30 (FLSA 3(m) tip credit) = $1.00 (additional overtime tip credit)

45 hours (total hours worked) × $1.00 (additional overtime tip credit) = $45.00 (total additional overtime tip credit)

$391.88 (total wages due) - $103.50 (total FLSA 3(m) tip credit) - $45.00 (total additional overtime tip credit) = $243.38 (total cash wage due)

$4.95 (cash wage paid per straight time hour) × 40 hours (straight time hours worked) = $198.00 (cash wage paid for straight time hours)

$7.43 (cash wage paid per overtime hour) × 5 hours (overtime hours) = $37.15 (cash wage paid for overtime hours)

$198.00 (cash wage paid for straight time hours) + $37.15 (cash wage paid for overtime hours) = $235.15 (total cash wage paid)

$243.38 (total cash wage due) - $235.15 (total cash wage paid) = $8.23 (overtime back wages due)

Note: the regular rate is the state minimum wage of $8.25. Because the state minimum wage is higher than the FLSA minimum wage and state permits a higher tip credit than section 3(m), the employer may claim an additional overtime tip credit of $1.00 ($3.30 (state tip credit) - $2.30 (FLSA 3(m) tip credit) = $1.00) toward satisfaction of the FLSA overtime compensation requirement.

NOT FOR PUBLIC DISTRIBUTION

(j) Insufficient tips received to cover tip credit

The WHD will not permit a total tip credit that exceeds the amount of tips received and retained by the employee. Where the amount of tips received and retained is less than the FLSA 3(m) tip credit claimed, the 3(m) tip credit will be denied. *See* FOH 30d01(b). Where the amount of tips received and retained exceeds the FLSA 3(m) tip credit but does not cover the full additional overtime tip credit, the additional overtime tip credit is limited to the tips received and retained. Allowing an additional overtime tip credit that exceeds the amount of tips received and retained would undermine the overtime payment obligations of the FLSA.

Scenario:

An employer is in a state with a $10.00 minimum wage that requires a $5.00 cash wage and permits a $5.00 tip credit. The employer pays a cash wage of $5.00 per hour. The employee works 45 hours in a tipped occupation during the week and receives $180.00 in tips and retains all tips (*i.e.*, there is no tip pool). The employer can take an FLSA 3(m) tip credit of $2.25 per hour ($7.25 (FLSA minimum wage) - $5.00 (cash wage) = $2.25), or $101.25 (45 hours (total hours worked) × $2.25 (FLSA 3(m) tip credit) = $101.25) for the workweek. The additional overtime tip credit would normally be $2.75 per hour ($5.00 (state tip credit) - $2.25 (FLSA 3(m) tip credit) = $2.75) per hour, or $123.75 for the workweek; however, this would result in a total tip credit that exceeds the $180.00 in tips received ($101.25 (FLSA 3(m) tip credit) + $123.75 (additional overtime tip credit) = $225.00 (total tip credit)). The employer is therefore limited to an additional overtime tip credit of $78.75 for the workweek ($180.00 (tips received) - $101.25 (FLSA 3(m) tip credit) = $78.75), or $1.75 per hour ($78.75 (additional overtime tip credit) ÷ 45 hours (total hours worked) = $1.75). The remaining $45.00 ($225.00 (total tip credit) - $180.00 (tips received) = $45.00) must be paid by the employer to the employee in cash.

[12/15/2016]

52n01 Determination of voluntary and uncoerced.

The WHI must determine whether facilities furnished are accepted by employees voluntarily and without coercion *except* for meals that are provided by the employer. *See* FOH 30c09 and 29 CFR 531.30.

52o SPECIAL PROCEDURES: HOURS WORKED

52o00 Shift changes.

(a) Where employees, such as guards or other personnel, are required to report for work before shift changes in order to receive necessary instructions and assignments, or to change into uniform, the time so spent is hours worked.

(b) 29 CFR 785.47 describes circumstances under which insubstantial or insignificant periods of time, beyond the scheduled working hours, may be disregarded in recording and counting hours worked. One of the practical industrial realities contemplated by this reference is the situation where an employee on an outgoing shift may spend a few minutes each day passing on information or instructions to an employee on the incoming shift. This arises under a variety of circumstances, and it is often difficult to separate that part of the time spent in connection with company business from time spent in personal discussions. (b) (7)(E)

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

52p SPECIAL PROCEDURES: OVERTIME

52p00 Questionable 7(f) plans.

There may be some situations where the WHI is unable to make a determination with respect to the validity of a section 7(f) plan, as, for example, where there is doubt as to *bona fides* of the contract, or where there is a close question as to whether the employee's weekly hours are in fact irregular. In such situations, it will be necessary to obtain all the pertinent facts and submit the question through channels to the RSOL.

52p01 Procedural instructions: invalid contracts.

(a) If the employer does not contest a determination that a section 7(f) contract is invalid, the investigation shall be handled as any other violation case. If the employer contests a decision that a contract is invalid, sufficient details shall be obtained to support the WHD's position before the file is submitted as a refusal-to-comply case. The extent of development will depend on the problems involved. In addition to employee statements bearing on the issues, it will generally be necessary to include the following:

(1) A copy of the contract if it is in writing, the facts showing the substance of the contract if it is not in writing, the date the current contract became effective

(2) With respect to the *bona fides* of the contract, any available information as to the facts and circumstances leading up to use of the contract; the date first used, whether all employees involved had duties that would appear to necessitate irregular hours; the manner in which the contract was placed in effect (*see* FOH 32g01(b)); and the pay arrangements (*i.e.*, salary, hourly rate, etc.) prior to the agreement

(3) The number of employees currently covered by the contract, their job titles and duties

(4) If the weekly hours are not in fact irregular, adequate exhibits to demonstrate this, keyed as appropriate to the factors set out in FOH 32g02(b)(1) -(4), and shown either by charts or transcriptions, or by specific reference to hours used in computations.

(b) The WHI should not hesitate to use the informal JRC procedure (*see* FOH 80b01) to secure advice and guidance in developing the type of proof required to show that a section 7(f) contract is not valid.

52p02 Negotiated Christmas bonuses: UAW collective bargaining agreements.

The 1964 CBAs between the United Automobile Workers (UAW) and the major automobile manufacturers provide for a Christmas bonus to be paid from SUB funds after the fund has

NOT FOR PUBLIC DISTRIBUTION

reached maximum size. The plan contemplates a minimum payment of $25.00 and a maximum payment of $100.00 with each employee subject to the arrangement receiving the same amount. If there is not sufficient money to pay $25.00, payment will be deferred until the following year. Amounts in excess of $100.00 will be carried over until the following year. Payments to employees under this provision of the CBA are excludable from the regular rate under section 7(g)(3) and 29 CFR 548, and will not be questioned. Arrangements of this type with other employers will be referred to the RA (for consultation with the RSOL, as appropriate) if there is any question as to whether the amounts paid are similarly excludable.

52p03 **Fluctuating workweek where salary does not equal minimum wage.**

(a) 29 CFR 778.114(c) states in part that the fluctuating workweek method of overtime compensation may not be used unless the salary is sufficient to assure that no workweek will be worked in which the employee's hourly earnings from the salary fall below the applicable minimum wage rate. This presents practical problems of future compliance and how back wages are to be computed in cases where the operation of the fluctuating workweek plan results in a particular workweeks in the penetration of the minimum wage because of the number of hours worked. For administrative settlement purposes only, back wages shall be computed in such a workweek by multiplying all the hours worked by the applicable minimum wage, and the overtime hours above the applicable overtime standards by half-time. The difference between this figure and the gross amount actually paid for the workweek, including any overtime compensation paid at a subminimum rate, is the back wage amount due. If the employer has already paid make-up pay in accordance with this principle, as will usually be the case, then no violation will be asserted or recorded.

(b) The employer should be advised that in the future to ensure that his or her fluctuating workweek plan will be valid, he or she must reach a new understanding with the employee, either to work no hours above that number that will provide at least the applicable minimum wage at all times, or to compute on the fluctuating workweek principle only up to the point where the minimum wage would be penetrated if more hours were worked, and then compute the overtime compensation for hours above this number at full time and one-half the applicable minimum wage rate.

52p04 -05 **(Reserved.)**

52p06 **Computation of back wages regarding partial overtime exemptions.**

(a) FOH 32a01 sets forth the WHD's policy regarding the application of partial overtime exemptions. However, it is intended that all of the circumstances involved in any failure to pay proper overtime under these exemptions will be taken into consideration in deciding what action will be taken. For example, where all other requirements of the exemption are met, and the employer has made a *bona fide* attempt to comply with the exemption, we will not revert to section 7(a) merely because of some misunderstanding as to what constitutes hours worked, or failure to include certain extra payments in the regular rate of pay. In such cases, any back wages due would be computed on the basis of the standards specified in the respective exemptions. Simple bookkeeping errors will not of course affect the application of the exemptions.

52p07 **Ambulance and hearse transportation: enforcement.**

NOT FOR PUBLIC DISTRIBUTION

(a) The WHD does not consider ambulance and hearse drivers to be subject to FLSA section 13(b)(1). *See* FOH 24c08. This would include the states of the Sixth Circuit (Michigan, Ohio, Kentucky, and Tennessee), where in an appropriate case the SOL is prepared to argue that *Benson v. Universal Ambulance Service, Inc.*, 675 F.2d 783 (6th Cir. 1982) is not correct.

As an enforcement policy, the WHD will not make any determination regarding the exempt status of any employee affected by the change in position in FOH 24c08 for the period prior to 08/15/1994. Employers should be so advised, and complainants should be advised of their private action rights under FLSA section 16(b). Normal procedures will apply as of 08/15/1994.

(b) Any cases that present unusual circumstances not apparently covered in FOH 24c08 should be discussed with the NO, AA for the OP.

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

AUG 15 1994

Mr. David Nevins
Executive Director
American Ambulance Association
3800 Auburn Boulevard, Suite C
Sacramento, California 95821

Dear Mr. Nevins:

This is to provide you and your members with our position on the application of the Fair Labor Standards Act (FLSA) to employees whose duties involve various aspects of ambulance operations. Since the Department of Labor last articulated a public position on this question the courts have issued some clarifying decisions.

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage (currently $4.25 an hour) for all hours worked and overtime pay of not less than one and one-half times the regular rate of pay for all hours worked over 40 in a workweek.

Section 13(b)(1) of the FLSA provides an overtime pay exemption for any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to section 204 of the Motor Carrier Act (MCA) of 1935 (now codified at 49 U.S.C. 3102). This exemption applies to any driver, driver's helper, loader, or mechanic employed by a carrier, and whose duties affect the safety of operation of motor vehicles on the public highways in interstate or foreign commerce. The application of the exemption is discussed in 29 CFR Part 782.

In the cases of Spires v. Ben Hill County, 980 F.2d 683 (11th Cir. 1993) and Jones v. Giles, 741 F.2d 245 (9th Cir. 1984), two courts of appeals have held that ambulance drivers are not subject to the FLSA's section 13(b)(1) motor carrier exemption. Both holdings are unconditional, without regard to the frequency of interstate operations, and in both cases the courts noted that the Interstate Commerce Commission (ICC) (predecessor of the Department of Transportation (DOT)) had determined that the unique operation of ambulances compared to other forms of motor transportation put them outside the ICC's jurisdiction. In

NOT FOR UNLIMITED DISTRIBUTION

Lonnie W. Dennis, Common Carrier Application, 63 M.C.C. 66 (1954), the ICC held that the Motor Carrier Act did not confer jurisdiction over ambulance services upon the Commission. The DOT adopted the reasoning of the Commission in Dennis when it published notice that ambulance services were not subject to the requirements of the Federal Motor Carrier Safety Regulations. (42 Fed. Reg. 60078, 60080 (November 23, 1977).)

On the basis of Spires and Jones, the Department does not consider the section 13(b)(1) exemption applicable to ambulance service employees. We are advising our investigative personnel that henceforth overtime for ambulance service employees is to be computed without regard to that exemption. We recognize that the case of Benson v. Universal Ambulance Service, 675 F.2d 783 (6th Cir. 1982), has a contrary result, but that decision did not deal with the ICC's interpretation of its own jurisdiction, which the ICC had explained in Dennis, and both the Ninth and Eleventh Circuits specifically declined to follow Benson.

We trust that this clarifies our position on this matter. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

Maria Echaveste
Administrator

NOT FOR PUBLIC DISTRIBUTION

52q **(RESERVED)**

52r **SPECIAL PROCEDURES: APARTMENT HOUSE AND BUILDING SERVICE EMPLOYEES**

52r00 -01 **(Reserved.)**

52r02 **Regular rate: apartment house employees.**

(a) 29 CFR 778.116 provides that where payments are made to employees in the form of facilities that are regarded as part of wages, the reasonable cost to the employer of furnishing such facilities must be included in the regular rate. Questions have been raised regarding the computation of overtime compensation for apartment house employees who are furnished an apartment by the employer. In such cases, it is necessary to determine first whether the employment agreement provides that 1) the employee is to pay for the apartment, and the amount to be deducted from his or her earnings, or 2) the employee is paid a salary and the apartment is in addition to it. This is a factual determination.

(b) If the employee is to pay for the apartment, and the amount to be deducted from his or her earnings, his or her regular rate is determined by dividing the weekly salary by the hours for which the salary is intended as compensation.

Scenario:

An employee is paid a salary of $175.00 per week with the understanding that he or she is to pay for the apartment. $30.00 per week is deducted from his or her earnings as rental for the apartment. His or her regular rate is determined by dividing $175.00 by the number of hours for which the salary is intended to compensate.

(c) If the employee is paid a salary and the apartment is in addition to it, the reasonable cost of the apartment must be added to the employee's salary to determine the regular rate.

Scenario:

An employee is paid a salary of $150.00 per week with the understanding that he or she will be furnished an apartment in addition to the salary. The reasonable cost of the apartment is $30.00 per week. His or her regular rate is determined by dividing $180.00 by the number of hours for which the salary is intended to compensate.

52s -t **(RESERVED)**

52u **TEMPORARY HELP EMPLOYEES: INTERPRETATIONS**

52u00 **General.**

(a) Because of the general increase in this type of business, numerous questions have arisen regarding the application of the FLSA to temporary help employees. The following are interpretations of the FLSA with regard to such employees. These interpretations supplement and shall be used in conjunction with the interpretations elsewhere in the FOH:

(1) *Responsibilities of joint employers*

NOT FOR PUBLIC DISTRIBUTION

a. Employees of a temporary help company working on assignments in various business establishments are considered to be jointly employed by the temporary help company and the employer whose work they do in the business establishment in which they are employed. In cases where two or more employers are joint employers of an employee, each is responsible for compliance with the requirements imposed on an employer under the statute with respect to any workweek when the employee is so employed. However, the employer, who actually pays the employee the sums intended as compensation for hours of employment, is considered primarily responsible for the keeping of the records required by 29 CFR 516, and is treated as the one who has the primary duty of compliance as to such hours of employment. Where each employer makes direct payment to the employee, each employer is required to keep the records specified in the recordkeeping regulations. In any event, a temporary help supplier that acts in the interest of one or more employers in any workweek, in relation to any employee whose service it provides, should keep the prescribed records with respect to that employee.

b. The following example illustrates the principles in FOH 52u00(a)(1)a. above: a temporary help company sends an employee to work Monday and Tuesday for a total of 20 hours in the week at F Company; on Wednesday, he or she is sent to work at G Company for 12 hours; on Thursday and Friday, he or she works a total of 20 hours at H Company. The employee thus worked 52 hours in the workweek. In such a case, each individual company is jointly responsible with the temporary help company for compliance with the minimum wage requirements of the law during the time the employee worked there. The temporary help company would be primarily responsible for the payment of proper overtime compensation in this case since it is through its act that the employee received the assignment that caused overtime to be worked, and it has the most direct knowledge of the total number of hours the employee worked in the workweek. If he or she worked more than 40 hours in any week for any of the employers to whom he or she was assigned by the temporary help company, that employer would be jointly responsible for the payment of proper overtime compensation for such work, as well as the applicable minimum wage.

(2) *Exemptions*

a. In any workweek in which the temporary help employee works exclusively as an employee of an establishment subject to an exemption and performs work that is within such exemption, the employee will be exempt. For example, if such an employee works an entire week in a retail or service establishment that qualifies for exemption under section 13(a)(2), and performs work that is within the exemption, both the temporary help company and the establishment could claim the exemption for the employee. Similarly, where a temporary help employee works an entire week in "agriculture" within the meaning of section 3(f), he or she may qualify for the section 13(a)(6) exemption if the tests are met.

b. In some situations, employees of a temporary help company may be exclusively engaged during a workweek in performing two or more types of

NOT FOR PUBLIC DISTRIBUTION

work in two or more establishments to which different exemptions apply. For example, during the same workweek, an employee may perform work in an establishment to which the section 13(a)(2) exemption applies and other work in another establishment (*e.g.*, a hotel) to which only the section 13(b)(8) exemption applies. In such a case, the exemption applicable to the employee will be equivalent to that provided by whichever exemption provision is more limited in scope. *See* 29 CFR 779.343.

(3) *Applicable minimum wage rate*

a. In order to determine the minimum wage rate applicable to such employees, where not otherwise exempt, it is necessary to look at the status under the act of both employers and the work performed by the employee.

b. Employees of a temporary help company, which is not itself a covered enterprise within the meaning of the act, are subject to the minimum wage rate applicable to work performed for the establishment by which they are employed. For example, assume that the employee works only for a particular type of establishment during the workweek: if the establishment is a newly covered hospital or hotel, he or she would be subject to the minimum wage rate provided by section 6(b); if the establishment is a factory producing goods for interstate commerce, he or she would be subject to the minimum wage rate of section 6(a)(1); if the establishment is a farm and the section 13(a)(6) exemption does not apply, he or she would be subject to the minimum wage rate of section 6(a)(5). If the employment is not covered by the act, no minimum wage rate applies.

c. Employees of a temporary help company, which is itself a newly covered enterprise, are subject to the minimum wage rate provided by section 6(b), unless subject to another rate such as section 6(a)(1) by virtue of their work performed for an establishment to which this rate applies (*e.g.*, a factory that produces goods for interstate commerce) or section 6(a)(5) by virtue of their work on a farm where the 500 man-day test is met.

d. Employees of a temporary help company, which is itself an enterprise covered under the 1961 Amendments, are subject to the minimum wage rate provided by section 6(a)(1), unless subject to another rate, such as section 6(b) by virtue of their work performed in a workweek in newly covered employment (*e.g.*, newly covered laundry) or section 6(a)(5) by virtue of their work on a farm where the 500 man-day test is met.

e. The principles stated in FOH 30b02 (multiple FLSA wage standards) apply to an employee of a temporary help company working on assignments in various business establishments during the same workweek, provided the employer clearly identifies the time spent in each type of work in his or her records as required in 29 CFR 516.29.

(4) *Hours worked* (*see* FOH 31c09)

52v PROCEDURES: TITLE III, CONSUMER CREDIT PROTECTION ACT

NOT FOR PUBLIC DISTRIBUTION

52v00 **General.**

(a) The purpose of FOH 52v is to provide procedural instructions for the administration and enforcement of the Consumer Credit Protection Act (CCPA)'s Title III restrictions on garnishment and discharge from employment because of any one debt resulting in wage garnishment. Significant procedural questions should be referred to the NO, OP, DEPP, Family and Medical Leave Act and Other Labor Standards (FMLA-OLS) Branch.

(b) The statute provides that the Secretary, acting through the WHD, shall enforce Title III of the CCPA. The WHD has no responsibilities under other provisions of the CCPA.

(c) FOH 16 supplements 29 CFR 870, which contains regulations and interpretative material.

52v01 **Exempt states.**

(a) If a complaint is received by the WHD concerning the restrictions on garnishment in an exempt state, and the complaint concerns a garnishment within the exemption, the complainant shall be advised of the exemption and referred to the appropriate official listed in FOH 52v01(b) below.

(b) List of exempt states:

State	Title	Address
Virginia	Commissioner	Department of Labor and Industry Commonwealth of Virginia Powers-Taylor Building South 13th Street Richmond, Virginia 23219

(c) Requests for opinions on whether proposed changes in state garnishment laws will enable a state to qualify for exemption shall be transmitted to the NO, OP, DEPP, FMLA-OLS Branch.

52v02 **State garnishment laws.**

Section 303(c) of the act provides "…no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section." Thus, state law is considered preempted if it results in a larger garnishment amount than permitted under section 303. On the other hand, state laws imposing stricter standards resulting in a smaller garnishment amount are not annulled, altered, or affected by section 307. In such cases, both state law *and* the CCPA apply concurrently. However, the WHD will continue to enforce *only* the CCPA. WHIs will not attempt to interpret state garnishment laws. *See* FOH 16a01, FOH 16a06, and FOH 52a11.

52v03 **Garnishment of federal employee's wages.**

NOT FOR PUBLIC DISTRIBUTION

There are only very minor distinctions between federal and non-federal employees with respect to the reasons for or the amounts subject to garnishment. *See* FOH 16b01. The Hatch Act Reform Amendments of 1993 allow the wages of federal employees to be garnished for the same purposes as other individuals. The garnishment of a federal employee's wages is subject to the provisions of section 303 of the CCPA, in the same manner and to the same extent as if the agency were a private person. A federal employee covered under Title 5 of the U.S. Code (*see* FOH 16a08 and 5 USC 2105) whose wages are subjected to excessive garnishment will be referred to his or her agency's personnel office, and informed that 5 CFR 582.305(a)(3) instructs agencies not to withhold more than the CCPA allows. If the agency declines to correct the amount withheld, the employee should contact the Office of Personnel Management, Office of the General Counsel, Claims Adjudication Unit in Washington, D.C. In addition, where the employee indicates the garnishment order was in excess of the CCPA's limits, the WHD can act as well. The WHD will review excessive garnishment complaints for non-Title 5 federal employees on the same basis as any other complainant. The compliance action should be handled in accordance with 52v13(a). *See* FOH 16a08.

52v04 **Native American Indian tribal courts.**

The protections of the CCPA may or may not apply to garnishment orders issued by courts established by a Native American Indian tribe. The role of the federal government relating to Native American Indian tribes is a developing area of law. When a compliance action involves a garnishment issued by a Native American Indian tribal court, the NO, OP, DEPP, FMLA-OLS Branch will be contacted for guidance prior to disposition of the case.

52v05 **Application of the garnishment restrictions of section 303 of the CCPA to back wage payments.**

(a) Where back wages found due an individual under acts enforced by the WHD are subject to a garnishment order, the back wage payments comprise part of the earnings (pursuant to section 302(a)) of the pay period in which actual back wage payment is made. To determine the amount of back wages to withhold to satisfy the garnishment, the restrictions of section 303 apply to the back wage payment, plus any other earnings for *that* pay period in accordance with the multiple limitations prescribed for the pay period in the statute and 29 CFR 870.10. (b) (7)(E) [redacted]

(b) Garnishment orders will not affect monies already in the hands of the WHD or the U.S. Department of the Treasury for disbursement to back wage recipients.

52v06 **Excess garnishment withholdings are not wages.**

29 CFR 531.39(b) states, "[w]hen the payment to a third person of monies withheld pursuant to a court order under which the withholdings exceeds that permitted by the CCPA, the excess will not be considered equivalent to payment of wages to the employee for the purposes of the Fair Labor Standards Act." Therefore, amounts withheld by the employer from an employee's earnings under a garnishment order in excess of the withholdings allowed by section 303 of the CCPA are not wages pursuant to section 3(m) of the FLSA. Accordingly, where such excess withholdings decrease wages below the compensation due under the FLSA, a violation of that act exists. This is not altered by the fact that such excess

withholdings are for the benefit of the employee, paid to a third person, and the employer derives no profit or benefit from the transaction.

52v07 **Effect of employee suit under the CCPA.**

(b) (7)(E)

[01/03/2017]

52v08 **Scheduling.**

(b) (7)(E)

52v09 **Fact-finding: objectives.**

(a) (b) (7)(E)

(b) (7)(E)

[redacted]

(c) Restriction on discharge

The fact-finding objectives in a compliance action of the restriction on discharge because of any one garnishment are to determine:

(1) whether a garnishment order was served on the employer; and

(2) whether the employee was discharged "by reason of the fact his earnings have been subjected to garnishment for any one indebtedness."

52v10 <u>Opening conference with employer.</u>

The objectives of the opening conference with the employer or designated representative are the same as under other statutes enforced by the WHD. Generally, this conference will be used to:

(a) inform the employer that the purpose of the compliance action is to determine compliance with the CCPA;

(b) outline in general terms the scope of the compliance action, including examination of pertinent records, employee interviews, and final conference with the employer to discuss the findings; and

[01/03/2017]

(c) furnish reference materials and advise the employer of the provisions of the CCPA.

52v11 <u>Records review.</u>

Records shall be reviewed to determine the employer's compliance status under the CCPA. The types of records to be examined and the extent of their examination are matters of judgment. Transcriptions and/or copies of records needed to support appropriate future action should be placed in the file.

(a) Restriction on garnishment

Compliance with this section involves comparing the amount actually garnished with the amount that may be subjected to garnishment. As appropriate, the WHI will examine current or outstanding garnishment orders and other records necessary to determine disposable earnings. *See* FOH 16b01.

(b) Restriction on discharge

Specific information should be obtained from records as to the number of garnishments, the dates, the agency and agency representative or court and judge or magistrate involved, the names of the creditors, and any recorded reasons for discharge.

52v12 <u>Employee interviews.</u>

NOT FOR PUBLIC DISTRIBUTION

Complainants may be interviewed concerning the CCPA in the same general manner as under other acts enforced by the WHD. *See* 52c04. Other individuals will be interviewed, as appropriate, to determine the employer's compliance status under the CCPA.

52v13 **Final conference and disposition.**

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

52w -x **(RESERVED)**

52y **PROCEDURES FOR INVESTIGATION OF OWCP CLAIMANTS**

52y00 **General and purpose.**

The WHD and the Office of Workers' Compensation Programs (OWCP) have entered into an agreement whereby WHIs will investigate claimants under the Federal Employees' Compensation Act (FECA) to confirm their continued eligibility for benefits. Generally, an employee will continue to be eligible for benefits provided that he or she 1) is not presently employed, and 2) is not physically able to be gainfully employed. Thus, investigations under this program by WHIs will be focused on these two factors.

52y01 **Initiating assignment.**

(b) (7)(E)

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

52y02 **Privacy Act.**

Under the Privacy Act, a FECA claimant may examine the contents of his or her case file at any time. Consequently, extraneous material has no place in the case file. The file should consist of facts obtained and observations made by the WHI as opposed to opinions and recommendations. In no case shall the WHI express in writing in the case file an opinion about the physical condition of the claimant nor shall any medical recommendations be made. The role of the WHI is that of fact-gatherer and impartial observer. This will take skill to ensure that the file contains only observations and direct evidence conveyed in such a manner that there is no implication of guilt or innocence.

52y03 **Investigation procedures.**

(a) In addition to specific techniques discussed in this part, the normal WHD investigation policies and procedures (*i.e.*, use of credentials, appointments as appropriate, etc.) apply to the conduct of FECA investigations.

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(c)

(1) *Background data*

It may be helpful at the inception of the assignment to gather background information concerning the claimant which may be useful during the observation and interview phases of the assignment. This activity *may* include:

a. A visit to the employing agency to obtain data from the individual's personnel file such as physical description (photo, if available), weight, height, or other distinguishing features. It would also be helpful to obtain data relating to work history, educational background, hobbies, association memberships, and general information about the claimant.

b. A visit to the registry of motor vehicles to obtain motor vehicle data on the claimant. This could also be a good source from which to obtain a photo of the claimant.

c. A visit to other sources such as the city directory, the postman, the police department, credit bureau, bank, town or city clerk's office.

(2) *Observation of the claimant*

This step initially entails observation of the claimant at his or her place of residence. Observe and note any outdoor activity on the part of the claimant. In addition, if he or she leaves the residence the claimant should be followed to determine the potential daily activity (*i.e.*, work, vigorous exercise, and other hobbies) over a minimum of a 2 week period and also at different times during the day to determine if there is a pattern to the claimant's behavior. The use of sophisticated mechanical devices in this activity is not recommended. However, this would not preclude the use of a still camera on a case-by-case basis. The use of two WHIs in the observation phase may be considered. During this phase of the investigation, maintain an observation log. This log will contain not only a brief description of the activity of the claimant, but also the date and exact time of day the activity was observed.

(3) *Personal interview with claimant*

This step is one of the most important aspects of the investigation process and should be handled with objectivity and sensitivity towards the claimant and conducted in an unhurried manner. Remember that the interview, regardless of its specific purpose, form, or content, is essentially another form of collecting information. For this reason it is essential that at the point of contact with the claimant, the WHI should possess a good working knowledge of the person to be interviewed.

The interview will focus on, but not be limited to, the preparation of Form CA-1032. Elicit from the claimant any other data which may be pertinent to the claim.

In addition to items covered by Form CA-1032, discuss the following topics in detail:

a. Any attempt by the claimant to obtain employment

b. Any source of income not previously reported such as, but not limited to: social security, military, government, and private pensions; Veterans Affairs (VA) benefits; welfare; private insurance benefits

c. Date of last physical examination including name and address of attending physician. Ascertain whether the claimant has any other disabilities unrelated to the current accepted OWCP injury.

NOT FOR PUBLIC DISTRIBUTION

d. Educational activities including:

1. School level attained

2. Special training (armed services, vocational, etc.)

3. Any special knowledge or skill

4. Any desires and/or capabilities toward, specific types of future employment

e. Any activities including volunteer work, household chores, hobbies, etc. If the claimant indicates that he or she is not presently working, it may be wise to have the claimant outline in chronological order a typical day.

f. Claimant's views regarding the disability:

1. Describe his or her outlook.

2. Does he or she want to return to work?

3. Has he or she considered another occupation?

4. If applicable, what is spouse's attitude?

5. Is rehabilitation possible?

A.

i. Has this been discussed with the doctor?

ii. Has contact been made with the state rehabilitation agency?

g. The claimant's assessment, in his or her own words, concerning the nature of the injury duration debilitating effects including what activities cause the pain to reoccur.

h. Finally, during the interview note the physical movements of the claimant, surrounding living conditions, evidence of physical activity (*i.e.*, the presence of sporting equipment, work tools, pleasure vehicles, etc.).

(4) *Other interviews*

This will include the interviews of the employers, neighbors, physicians, relatives, and others on a case-by-case basis. Situations where this may be appropriate include:

a. A visit to private employers where it has been ascertained that the claimant has worked since the date of injury. Form CA-1027 can be used as a guide for this purpose.

NOT FOR PUBLIC DISTRIBUTION

b. A visit to a neighbor where it is apparent that the claimant is away from his or her residence each day.

c. A visit to the attending physician where there is a conflict between what the claimant says he or she can do and what the medical reports indicate.

d. A visit to relatives and others where they have been the source of initiating the investigation.

52y04 **Unreported income.**

(b) (7)(E) [redacted]

52y05 **Reporting.**

(b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

52y06 **Further action by OWCP.**

(b) (7)(E)

[redacted]

[redacted]

WORKSHEET FOR COMPLIANCE OFFICER
to be prepared by OWCP

1. CLAIMANT'S NAME _____

2. ADDRESS/TELEPHONE _____

3. DATE OF INJURY _____

4. TYPE OF INJURY _____

_____

5. OCCUPATION WHEN INJURED _____

6. FEDERAL EMPLOYER _____

7. PRIOR EMPLOYMENT _____

8. PRIOR EDUCATION _____

9. _____ _____
NAME AND TELEPHONE # OF RESPONSIBLE CE DATE

10. AMOUNT OF COMPENSATION PRESENTLY EARNING _____

NOT FOR PUBLIC DISTRIBUTION

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION

Office of Workers' Compensation Programs

File No:
Employee:
Date of Injury:
SSN:

NOT FOR PUBLIC DISTRIBUTION

The above-named employee has submitted a claim in connection with his/her former employment with the Government. We understand that he/she is now, or has been, employed by you. In order that we may verify entitlement to compensation, please furnish the information requested below:

1. Job title and brief description of duties performed:

2. Number of hours worked per week:

3. Inclusive dates of employment:

4. Weekly rate of pay exclusive of overtime. This includes the value of any board, lodging, or other advantages received in addition to or in lieu of wages. Show all changes in rate of pay and the approximate date of each change.

5. If no longer employed by you, why?

Sincerely,

Supervisory Claims Examiner

BY: _____

RETURN TO:

TITLE: _____

U.S. Department of Labor, ESA
Office of Workers' Compensation Programs

DATE: _____

Include your address, ZIP code, and file number on all correspondence

Ltr. CA-1027
Rev. Aug. 1974

U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs

File No.
Date of Injury:
SSAN:

NOT FOR PUBLIC DISTRIBUTION

The information requested is required in connection with your claim for benefits under the Federal Employees' Compensation Act. All questions must be answered completely and fully.

The completed form must be returned within 30 days, otherwise your compensation benefits may be suspended.

If your address has changed from that shown above, show your new address in Part D on the reverse of this form.

INSTRUCTIONS ON REPORTING EMPLOYMENT AND PAY/EARNINGS

1. You must report any and all employment and pay/earnings during the past 12 months (or since your last employment and pay/earnings was reported to this office).

2. You must account for the entire time, to include all periods of full or part time employment (including self-employment) and unemployment.

3. You must report as your weekly "rate of pay" your gross pay before deductions. You must report commissions or piecework. You must also report separately your employer's value of housing, meals, food allowance, clothing and any other advantages received. Do not include overtime pay.

4. If you did not work for others but were self-employed (such as farming, operating a store or business, etc.), you must report such employment and show as "rate of pay" what it would have cost you to have hired someone else to do the same work. You must also report the number of hours worked each week and describe the work performed.

Sincerely,

NOTICE: A false or evasive answer to any question may be grounds for suspending your compensation benefits; or, if fraudulent, may be punishable by a fine of not more than $10,000, or imprisonment of not more than five years, or both (under appropriate U.S. Criminal Codes). All statements are subject to investigation for verification.

PART A. EMPLOYMENT: Report all employment (including self-employment) and pay/earnings and account for all periods of unemployment. Attach an additional sheet if more space is needed.

Names and Addresses of Employers	Dates Employed	Rate of Pay	Kind of Work

PART B. DEPENDENTS: If you have one or more dependents, place an "X" on the line opposite the statements below to identify each dependent.

1. Wife or Husband __who is a member of your household.
   __who is not a member of your household but who is receiving regular contributions from you toward support.
   __to whom you have been ordered by a Court to contribute support.
2. Unmarried Child __who is living with you and is under the age of 18.
   __who is living with you but is over age 18 and is incapable of self-support by reason of mental or physical disability.
   __who is not living with you but receives regular contributions from you toward support and who is under 18 years of age.
   __between age 18 and 23 who is pursuing a full-time course of study at a school, college, university, or training institution. The child's name and date of birth are _____
   _____.
3. Parent __who is wholly dependent upon and supported by you.
4. No Dependents __I no longer claim additional compensation on account of dependents. Date dependency ceased was _____.
   Reason dependency ceased was _____.

PART C. Are you a veteran with service in the Armed Forces of the United States?
☐ YES ☐ NO

If yes, are you now receiving or do you have a claim pending for benefits from the Veterans Administration on account of such service? ☐ YES ☐ NO If yes, furnish your VA claim number, the address of the VA office handling your claim, and describe the nature of the disability for which the claim or award was made.

PART D. CERTIFICATION: I certify that all the statements made in response to questions on this form are true, complete, and correct to the best of my knowledge and belief. Any information left blank on the form has been done intentionally and indicates an answer by me that I have no information to provide which is required by the question.

Signature in ink _____ Address _____ Date _____

City _____ State _____ ZIP _____

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 30, 1996

WAGE AND HOUR MEMORANDUM NO. 96-08

MEMORANDUM FOR WAGE AND HOUR REGIONAL ADMINISTRATORS

FROM: MARIA ECHAVESTE
Administrator

SUBJECT: Reporting Civil Money Penalty Assessments

This memorandum is to provide guidance for reporting Civil Money Penalty (CMP) assessments for all Acts with CMP provisions administered by the Wage and Hour Division. This guidance is retroactive to October 1, 1995, so all reports of CMP assessments that were not prepared according to this guidance should be corrected as soon as possible and no later than July 31, 1996.

A recent audit by the Office of the Inspector General (OIG) of Fiscal Year 1995 Performance Measures found that Wage and Hour District Offices do not always report CMP assessments consistently, and that CMP assessments may be under reported.

Effective immediately, the amount that we should report for CMP assessments under all Acts with CMP provisions is the amount initially assessed in the assessment letter. We recognize that often the assessment may be legitimately reduced following a timely request for exception and further discussions with the employer, but the assessment reported should **not** be reduced and should match the amount in the assessment letter.

These instructions will be incorporated into the FOH in the near future. Meanwhile please provide a copy of this memorandum to all District Directors and correct any reports not prepared according to these guidelines back to October 1, 1995.

NOT FOR PUBLIC DISTRIBUTION

Chapter 53

DISPOSITION OF FINDINGS

Source: FOH Modernization revision 699, published 11/28/2016. Substantive revisions made *after* 11/28/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 11/28/2016 can be found here: http://esa.esa.dol.gov/whd/FOH/revisionchart.htm.

NOT FOR PUBLIC DISTRIBUTION

Table of Contents

53a AUTHORITY TO DISPOSE OF FINDINGS

53a00 Potential litigation cases.
53a01 Non-compliance due to WHD and/or SOL advice or omission.
53a02 Adverse decisions by U.S. courts of appeals and U.S. district courts.

53b NEGOTIATIONS WITH EMPLOYER BY WHI

53b00 General.
53b01 Final conference.

53c BACK WAGES

53c00 WHD authority on back wages and liquidated damages.
53c01 Computation of back wages.
53c02 Back wage period.
53c03 Payment of back wages to third party.
53c04 (Reserved.)
53c05 Compromise of back wages due.
53c06 Offsetting of back wage payments.
53c07 Personal debts, garnishments, and supper money.
53c08 Tax deductions.
53c09 Use of receipt forms.
53c10 Handling of back wage monies.
53c11 Kickbacks.
53c12 Refusal to accept back wages under FLSA.
53c13 Refusal to accept back wages under PCA, SCA, DBRA, or CWHSSA.
53c14 Financial inability to pay back wages.
53c15 Installment payments.
53c16 Waiver of statute of limitations.
53c17 Employer refuses to pay.
53c18 (Reserved.)
53c19 Notifying employees of their FLSA section 16(b) rights.
53c20 (Reserved.)
53c21 Covering FLSA back wages into the U.S. Treasury and distribution of back wages.
53c22 DO assistance in locating employees due back wages.

53d SUPERVISORY ACTION ON INVESTIGATIONS

53d00 Review.
53d01 Refusals to comply or to pay back wages.
53d02 Closing action.
53d03 Back wage follow-up and debt collection.
53d04 Test re-investigations.

53e RO AND/OR NO ACTION ON INVESTIGATIONS

53e00 Regional office.
53e01 -05 (Reserved.)
53e06 Review of cases with findings of $250,000.00 or more.
53e07 NO review of cases.

53f COLLECTION OF PCA OR SCA BACK WAGES

53f00 Collection letters: PCA or SCA.
53f01 Collection letters in potential litigation or hearing action cases.

53g DISCLOSURE OF INVESTIGATION INFORMATION BY DD AND/OR RA

53g00 Disclosure: general.
53g01 Disclosure of amount of back wages due an employee.
53g02 Notification of complainants.
53g03 Notification to other agencies of possible violations of their laws; reciprocal arrangements.
53g04 Proof of authority of employer representatives to appear before the WHD.

53a AUTHORITY TO DISPOSE OF FINDINGS

53a00 Potential litigation cases.

Back wages shall not be requested in a Fair Labor Standards Act (FLSA) potential litigation investigation (*see* criteria, FOH 80a) until the question of suitability for litigation has been resolved. If the investigation is found to be unsuitable for litigation, the Wage and Hour Division (WHD) shall request payment of all back wages found due.

53a01 Non-compliance due to WHD and/or SOL advice or omission.

(a) An employer's non-compliance with the laws enforced by the WHD may be the result of:

(1) adherence to advice or an opinion from an employee of the WHD or Office of the Solicitor (SOL); or

(2) a failure by the Wage Hour Investigator (WHI), during a prior investigation, to recognize or to bring to the employer's attention violative pay practices which involved the *same* circumstances present in the current investigation. (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

(d) Violations which result from circumstances *not* present in the previous investigation or from a determination of compliance made on an individual employee basis (such as the application of 29 CFR 541.1 to an employee) are not within the scope of these procedures.

53a02 **Adverse decisions by U.S. courts of appeals and U.S. district courts.**

(a) There have been cases where a United States (U.S.) court of appeals for a particular circuit has rendered a decision contrary to the official WHD position on a given issue. Where this occurs, the WHD will not seek to enforce the statute involved in a manner contrary to that decision in any area within the jurisdiction of that circuit. *See* FOH 59a01.

(1) Negotiations for future compliance and payment of back wages shall not be conducted with respect to the pay practices or issues as to which there is a conflict between the official WHD position and a decision by the court of appeals, nor shall the number of employees or back wage amounts be shown on WH-51-MIS. The employer shall be advised of the official WHD position, of the adverse decision of the court of appeals, and, if an FLSA case, of potential liability under section 16(b) should the decision be reversed. As appropriate, complainants shall be advised of the circumstances. The narrative report shall contain a concise statement of the facts.

(2) Regular investigation procedures shall be followed with respect to violations not affected by such an adverse decision. This will include negotiations for compliance and the payment of back wages, including the use of WH-58: Receipt for Payment of Back Wages, Liquidated Damages, Employment Benefits, or Other Compensation (WH-58), with respect to violations not affected by the adverse decision.

(b) There have been cases where U.S. district courts have rendered decisions contrary to the official WHD position on a given issue. Where an adverse decision is raised by the employer in connection with the investigation of an establishment located within the jurisdiction of such a district court, the matter shall be referred to the district director (DD) for consultation with the RSOL regarding appropriate handling. In referring such files, the court case in question and the issue or issues involved shall be clearly identified.

NOT FOR PUBLIC DISTRIBUTION

53b NEGOTIATIONS WITH EMPLOYER BY WHI

53b00 General.

In light of the complexity of the statutes administered by the WHD, it is not possible to specify all the steps to be taken in the WHI's negotiations with an employer. (b) (7)(E) [redacted]

53b01 Final conference.

(a) The following is a basic outline of the final conference which shall be held with the employer (or a designated representative) upon completion of the fact-finding phase of an investigation.

(1) Inform the employer of the investigative findings.

(2) If violations are found, the WHI shall thoroughly explain methods of achieving future compliance and provide the employer with pertinent publications or WHD forms. As appropriate, the WHI shall explain the laws or regulations involved; this should be done without disturbing practices which are not violative, such as payment of overtime to employees who may be exempt.

Note: if current child labor violations are disclosed, the employer should be advised promptly without waiting for the final conference so that corrective steps can be taken immediately, such as transfer of the minor to permissible work.

(3) Determine if the employer has any reasons for the violations which were disclosed by the investigation. This information should be summarized in the disposition section of the narrative report. *See* FOH 54b01(f)(1)c.

(4) Obtain employer's agreement to comply in the future.

(5) When the employer agrees to future compliance, and if the circumstances are within the authority of the WHI, payment of back wages should be requested except where special procedures apply. *See* FOH 53a02, FOH 50h00, and FOH 80a.

(b) Where there will be a delay in completing an FLSA investigation, the employer should be so advised and, when necessary, the WHI should also advise the complainant(s) of the delay and of the provisions of FLSA section 16(b). The employer should be informed to the extent possible how to correct any known violations and of the reasons for the delay. The WHI shall note such action in the narrative report or, if necessary, on the case diary sheet, WH-53-MIS: Case Registration/WHI Assignment Form (WH-53-MIS). *See* FOH 54: WH-53-MIS-11 and FOH 53c16.

53c BACK WAGES

53c00 WHD authority on back wages and liquidated damages.

(a) Fair Labor Standards Act (FLSA)

NOT FOR PUBLIC DISTRIBUTION

(1) Section 16(c) of the FLSA confers responsibility upon the Secretary of Labor (Secretary) to resolve cases by recovering unpaid wages and liquidated damages. Section 16(e)(2) of the FLSA authorizes the Secretary to seek civil money penalties (CMPs) for repeat or willful violations of sections 6 and 7. The WHD typically acts administratively on behalf of the Secretary to exercise this authority, or in concert with SOL by pursuing legal action on behalf of the Secretary. Generally, cases are resolved in the following ways:

a. The WHD administratively supervises the payment of back wages, and if applicable, CMPs due under the FLSA.

b. The Department of Labor (DOL), acting through the SOL, institutes legal action to obtain the back wages due an employee and an equal amount as liquidated damages (and CMPs, if applicable, or other remedies including injunctive relief).

c. The WHD may, acting upon the advice and counsel of SOL, seek both back wages and liquidated damages (and CMPs, if applicable) in a settlement that is agreed to in lieu of litigation.

For further discussion on back wages under the FLSA, *see* FOH 53c.

For CMPs under the FLSA, *see* FOH 52f14(a)(1).

(2) Where the employer has demonstrated that it has met the legal requirements for the good faith defense to liquidated damages under section 11 of the Portal-to-Portal Act of 1947 (PA), 29 USC 260, the WHD, in consultation with SOL, may decide not to seek liquidated damages. The statutory good faith defense requires that the employer demonstrate both 1) a subjective belief that it was acting in good faith (*e.g.*, it had consulted an attorney and acted upon that advice); and 2) that its actions were objectively reasonable (*i.e.*, it was an understandable mistake given the facts and the legal factors).

(3) An employee's section 16(b) rights terminate upon:

a. acceptance of full payment of back wages, paid under supervision of the WHD;

b. the Secretary filing suit under section 16(c) where the individual is named; or

c. the Secretary filing suit under section 17 that includes a request for back wages due the employee.

(b) Family and Medical Leave Act (FMLA)

Section 107 of the FMLA confers responsibility upon the Secretary to resolve cases by recovering unpaid wages and liquidated damages. The WHD typically acts administratively on behalf of the Secretary to exercise this authority, or in concert with SOL by pursuing legal action on behalf of the Secretary. Generally, cases are resolved in the following ways:

NOT FOR PUBLIC DISTRIBUTION

(1) The WHD may assess damages for wages, employment benefits, other compensation, other incidental monetary loss, and any other actual monetary losses, plus interest.

(2) The WHD may assess an additional amount as liquidated damages equal to the sum of the amount of damages assessed, plus interest.

(3) The WHD may obtain such equitable relief as may be appropriate, including reinstatement and promotion.

For enforcement under the FMLA, *see* FOH 52w15.

(c) Government contracts

(1) Section 3(b) of the McNamara-O'Hara Service Contract Act (SCA) confers responsibility upon the Secretary to resolve cases by recovering unpaid wages. Generally, the WHD resolves cases by administratively supervising the payment of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. Liquidated damages may be applied to contracts that are also subject to the Contract Work Hours and Safety Standards Act (CWHSSA); however, the SCA does not provide for the recovery of liquidated damages.

For back wage payments under the SCA, *see* FOH 67c.

(2) For contracts to which it applies, section 102(b)(2) of the CWHSSA confers responsibility upon the Secretary to collect any unpaid wages and assess liquidated damages for violations of section 102(b)(1) of the CWHSSA. 41 USC 6503 confers responsibility upon the Secretary to resolve cases under the Walsh-Healey Public Contracts Act (PCA) by recovering unpaid wages and liquidated damages. The WHD typically acts administratively on behalf of the Secretary to exercise this authority. 41 CFR 50-201.3(e) gives the Secretary the specific authority to assess liquidated damages to contractors who are found to be in violation of the wage provisions of the PCA.

For liquidated damages under the CWHSSA, *see* FOH 15k10, FOH 67d30, and FOH 67d33.

(3) The Reorganization Plan of 1950 confers authority to the Secretary to assess back wages under the Davis-Bacon Act (DBA) as well as the ability to litigate when necessary. Liquidated damages may be applied to contracts that are also subject to the CWHSSA; however, the DBA does not provide for the recovery of liquidated damages.

For determination of Davis-Bacon and Related Acts (DBRA) compliance, *see* FOH 67d13.

(d) Consumer Credit Protection Act (CCPA)

Section 306 of Title III of the CCPA confers responsibility upon the Secretary to enforce the wage garnishment provisions of the CCPA.

NOT FOR PUBLIC DISTRIBUTION

For application of the garnishment restrictions of section 303 to back wage payments under the CCPA, *see* FOH 52v05.

(e) Agriculture and immigration

(1) *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*

Agricultural employers and farm labor contractors must pay "wages when due," as required by sections 202(a) and 302(a) of the MSPA. The MSPA also requires employers to meet the terms of their employment contracts. The statute provides authority to seek equitable relief in district court to remedy statutory violations. Accordingly, the WHD may seek back wages and other remedies administratively or, with the assistance of SOL, through litigation. The WHD may also assess a CMP of not more than $1,000.00 for each violation pursuant to section 503 of the MSPA.

For back wages under the MSPA, *see* FOH 57a19.

(2) *H-2A*

Section 218(g) of the Immigration and Nationality Act (INA) authorizes the Secretary to take such actions against violators of the H-2A program, including imposing appropriate (civil money) penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section. The WHD may seek back wages, CMPs, and other remedies administratively or, with the assistance of SOL, through litigation.

For enforcement of work contracts and regulatory standards under H-2A, *see* FOH 58e.

(3) *H-1B*

Section 212(n)(2) of the INA authorizes the Secretary to require back pay for wage violations of the H-1B program. For certain violations, the Secretary may be required to assess CMPs and inform the Secretary of Homeland Security of findings by the Secretary that will cause the Department of Homeland Security to debar the employer from the H-1B program and other programs under the INA.

For violations and remedies under H-1B, *see* FOH 71e.

(4) *H-2B*

Section 214(c)(14)(b) of the INA authorizes the assessment of back wages and CMPs in an amount not to exceed $10,000.00 per violation for willful violations under the H-2B program. Debarment may also be assessed for certain willful violations.

(5) *Occupational Safety and Health Act of 1970 (OSH Act)*

The Secretary's Delegation of Authority 5-96 of the OSH Act, 29 USC 651, provides authority to issue citations, assess and collect penalties, and enforce other remedies

NOT FOR PUBLIC DISTRIBUTION

available under the statute in connection with field sanitation (29 CFR 1928.110) and temporary labor camps (29 CFR 1920.142).

For investigation principles under the OSH Act, *see* FOH 56b.

29 CFR 1928.110(c) requires that field sanitation facilities be provided at no cost to the employee. Employers who charge for the use of such facilities are subject to citation and penalties under the OSH Act. In addition, charging for the use of required facilities may be a FLSA minimum wage violation if it constitutes an illegal deduction under section 3(m). This may also be a violation under the MSPA for failure to pay wages when due since illegal deductions may not be taken. The WHD may seek remedies of back wages as appropriate under the FLSA, MSPA, or H-2A for violating 20 CFR 655.135(e), failing to comply with another applicable law. Under H-2B, such a violation would need to be a final agency action under the OSH Act in order to be actionable as a willful violation under DOL H-2B regulations.

53c01 **Computation of back wages.**

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]

NOT FOR DISTRIBUTION

(b) (7)(E) [redacted]

(d) In potential litigation cases, the WHI shall obtain authority from the DD (and regional administrator (RA), RSOL when necessary) to make back wage estimates in lieu of specific computations.

(e) In full investigations, computations shall be included in the case file. In other types of compliance actions, either the computations or a clear explanation of how back wages were computed for each employee shall be included in the case file.

53c02 **Back wage period.**

(a) Except as otherwise provided by specific instructions, payment of back wages due under the FLSA or PCA shall be requested for the period extending back 2 years from the date payment is first requested (*see* FOH 51a05). With respect to the SCA, *see* FOH 52i03; with respect to the DBRA and/or CWHSSA, *see* FOH 52t07.

(b) If a specific policy provides that enforcement action in a certain case be taken for a shorter period, back wages shall be requested for the shorter period.

[redacted] (b) (7)(E) [redacted]

(d) The procedures contained in this section do not preclude a DD from instructing a WHI to conduct additional fact-finding in an investigation (*i.e.*, "update") and to recalculate the back wages accordingly.

53c03 **Payment of back wages to third party.**

(a) Although it is preferable that back wages be paid directly to the employee, instances occur where this is not practicable or possible (*e.g.*, the employee is overseas, ill, or deceased). In such instances, the WHI may approve payment by the employer to a responsible third party, as the employer or the employer's representative may determine, on behalf of the employee.

(b) The receipt shall bear the names of both the employee and the third party to whom payment is made (*e.g.*, John Jones (employee) by Mary Jones (third party receiving payment), or John Jones (deceased) by Mary Jones (executrix)) as may be appropriate. The employer shall be advised that it is primarily the responsibility of the employer to make proper payment of back wages due any employee.

(c) Circumstances may vary in government contracts cases and the WHI should consult with the DD before agreeing to the payment to a third party of monies other than wages (*e.g.*, fringe benefits).

NOT FOR PUBLIC DISTRIBUTION

53c04 **(Reserved.)**

[01/13/2017]

53c05 **Compromise of back wages due.**

Payment of less than the full amount of back wages legally due the employee (*e.g.*, face-of-record violations) shall not be approved nor shall the employer be given receipt forms to be signed by an employee for less than the full amount of such back wages found due. However, it is recognized that precise calculations cannot be made in certain cases and that back wages can only be estimated. Such estimates may be revised based on submission of additional evidence by the employer.

53c06 **Offsetting of back wage payments.**

Back wage payments made under one act may be offset against back wages due the same employees for the same workweek because of violations of other acts. However, back wage payments made to correct DBRA violations cannot be offset against FLSA violations that may have occurred in the same workweek for different hours of work. Only where violations under both laws occurred for the same hours of work can DBRA back wages offset FLSA back wages. For example, where employees are due the minimum wage under the FLSA and the prevailing wage rate under the DBRA in a workweek where no wages were paid, the FLSA minimum wage would be offset by the DBRA prevailing wage.

53c07 **Personal debts, garnishments, and supper money.**

(a) Personal debt owed by an employee is not the concern of the WHD. An employer shall not be permitted to offset the amount of such a debt against back wages due the employee unless the WHI is satisfied that the debt is genuine, and then only with the employee's written permission.

(b) "Garnishment" is defined in Title III of the CCPA to mean "any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of any debt." The back wages due an individual may be subject to garnishment. FOH 16 sets forth interpretations and guidance for administration of the CCPA. *See* FOH 52v05.

(c) Amounts paid as supper money by an employer to employees who work overtime may not be deducted from back wages.

53c08 **Tax deductions.**

Back wages that are paid directly by the employer to the employee are subject to social security and tax deductions. There are some exceptions (*e.g.*, prohibited deductions from pay checks for uniforms): monies on which the employee has already paid taxes. With respect to former employees, the employer may be advised to make income tax deductions on the basis of the number of dependents shown on the most recent Form W-4 on file or at the rate of 20 percent of the back wages involved for federal taxes and one percent of the back wages involved for state taxes. If specific questions are asked by employees or employers as to how to treat back wages for the purpose of reporting income taxes (for example, whether in the year paid or in the years covered by the violations which gave rise to the back wages), they

NOT FOR PUBLIC DISTRIBUTION

shall be referred to the nearest office of the Internal Revenue Service (IRS) or the state tax office, if necessary.

53c09 **Use of receipt forms.**

(a) 29 CFR 516.2(b) authorizes the use of a receipt form provided or authorized by the WHD to record retroactive payment of unpaid FLSA minimum wage or overtime compensation under the supervision of the WHD. The WHD provides WH-58 to accomplish such supervision.

(b) Section 16(c) of the FLSA indicates that the agreement by the employee to accept payment of unpaid minimum wages or overtime supervised by the WHD "constitute(s) a waiver by such employee of any right he may have under section (b) of this subsection to such unpaid minimum wages or unpaid overtime compensation and an equal amount in liquidated damages." The effect of this statutory language is to waive an employee's individual right to file a private action under section 16(b). It is premised on the understanding that the WHD has supervised the payment of unpaid minimum wages or overtime for the full 2-year (or when appropriate, 3-year) investigation period. Consequently, WH-58 may be used in FLSA back wage cases only to record back wage payments resulting from full investigations, with the exception described in FOH 53c09(c) below.

(c) WH-58 may be used in circumstances not authorized above only with the specific approval of the regional office (RO) and the concurrence of the RSOL.

(d) For circumstances in which the use WH-58 or an approved substitution per FOH 53c09(c) above is not authorized, the WHD shall request an employer that agrees to pay the back wages due to furnish evidence that the payment was made by the employer *and* received by the employee. Such proof from the employer is not necessary if the WHD distributed the check or the WHD contacted the employee by phone. Proof of these activities should be included in the file.

To prove *payment was made*, such employers should provide the WHD with a check run, a list of the employees paid, a payroll register or other electronic bank records which indicate the amounts paid and the date of the payment.

To prove the *employee's receipt of payment*, final pay evidence (FPE) should be included in the file. FPE is evidence that an employee has received all the money the employer agreed or was ordered to pay them. Therefore, a piece of evidence can only be considered to be FPE after the final installment has been received by the employee. As a result, FPE may come in throughout the back wage follow-up process for individual employee. Items that can constitute final pay evidence are:

- WH-58
- WH-59: Back Wage Receipt Verification (WH-59)
- Cancelled check (to include images of the front and back of the check)
- Bank statement
- WHD distributed check

NOT FOR PUBLIC DISTRIBUTION

- WHD contacted employee by phone

- Other electronic verification (including proof of direct deposit)

The WHD cannot approve the wording of any substitute receipt form that the employer may desire to use (however, *see* FOH 53c09(c) above).

(e) For cases where the total of back wages due all employees is less than $500.00 and there is no doubt as to the good faith of the employer, the WHI may advise the employer to submit a letter or other qualifying preliminary evidence on an agreed upon date which lists the employees paid. Receipt forms shall be furnished if requested by the employer in such cases, if authorized above (*see* FOH 52f11 regarding amounts due under $20.00).

(f) An otherwise complete WH-58 submitted by an employer without the employer certification may be accepted absent reason to doubt the payment was actually made.

53c10 **Handling of back wage monies.**

(a) All violation cases resulting in agreements to pay back wages are subject to the procedures for back wage payment follow-up described in FOH 53d03.

(b) Except under unusual circumstances, if the employer agrees to pay back wages and the WHI has no reason to doubt that a *bona fide* offer of back wages will be made and followed by actual payment to the employees involved, regular receipt procedures shall be followed. However, if there are circumstances present which raise a serious doubt about whether *bona fide* offers will be made or whether full and prompt payment will be made (*e.g.*, possible bankruptcy or kickbacks), the employer shall be requested to submit checks to the WHI at the time of the investigation or to the district office (DO) by a specific date. These cases should occur infrequently, and the reason for requesting checks should be stated in the disposition section of the narrative report.

As a rule, employers should bear the cost and other expenditure of resources to make restitution to employees. This should not be the responsibility of the WHD except in unusual circumstances. Checks shall not be requested for employees due less than $20.00. *See* FOH 52f11. The employer shall be instructed to prepare individual checks payable to the employees due back wages or "Wage and Hour Division – Labor" in net amounts after legal deductions have been made. The employer shall also be requested to put the employee's social security number (SSN) on the check. If the employer does not agree to do this, the WHI shall enter the SSN on the face of the computation sheet after the employee's name (*e.g.*, John Smith, SSN 447-03-6065). The use of this procedure should be limited to those situations clearly requiring DO distribution of checks. *See* FOH 53c21(b)(3).

(c) Checks for employees who cannot be located or who refuse payment shall be covered into the U.S. Department of the Treasury (Treasury) after 3 years per FOH 53c21 (*i.e.*, cases involving undelivered FLSA back wages totaling $500.00 or more with no limit on the amount due individual employees). ("Undelivered" back wages are those remaining unpaid after the employer has made a reasonable attempt to make payment and the employees were either unlocated or refused to accept payment). In cases involving PCA, SCA, DBRA, and/or CWHSSA back wages, *see* FOH 52i09(d), FOH 52t27(a)(3), and FOH 53c13.

NOT FOR PUBLIC DISTRIBUTION

(d) The following special procedures have been established for the distribution of back wages to Mexican nationals who have left the U.S. (these procedures require DD contact with the Mexican Consulate).

(1) The employer will be requested to provide the DO with checks payable to the individual employees.

(2) Checks delivered to the consulate (by certified mail or by hand delivery) will be accompanied by a transmittal letter and WH-56 listing the names and possible addresses in Mexico (if known) of the individuals as well as the amount of each check. The Spanish version of WH-58 will be used as necessary. An appropriate official will sign off at the bottom of the transmittal letter and WH-56, and return them to the DO. Copies of these documents will be placed in the investigation file.

(3) The consulate will then send a memorandum, with any completed WH-58s, to the DD that indicates (1) the names of the employees who received checks, (2) the names of those employees who could not be located, and (3) the amount of each check. This process should be completed within 180 days. Returned checks will either be forwarded to the employer or handled in accordance with FOH 53c21.

(4) The DO will keep a log for each file where the DD or ADD will record the gross amount for each employee and the date that the check is received from the employer; sent to the consulate; returned to the DO by the consulate, if applicable; and returned to the employer or deposited in the lockbox, if applicable.

(5) A copy of the completed log will be placed in the case file.

(6) A tickler file shall be maintained for each transmittal of checks to the consulate, and follow-up contact will be made after 180 days.

(7) The employer may be requested to provide the RO with a single cashier's or certified check in the net amount, made payable to "Wage and Hour Division – Labor," for the total amount due all unpaid employees. The employer should be instructed to send the single check directly to the lockbox.

(8) The offices of the Mexican Consulate may be utilized to assist in locating employees who have returned to Mexico prior to the issuance of the individual back wage checks.

(e) In all instances where back wages of $50.00 or more are due an employee (current or former), whose back wage check is returned as undeliverable, every reasonable effort will be made by WHD personnel at the RO or DO to locate such employee. This applies to checks being distributed by either the employer or the WHD. It is expected that, at the very least, telephone and city directories, and internet locator applications, will be utilized in attempting to locate such employees. State motor vehicle departments and the IRS locator service are also potential sources of such information provided that no significant costs to the WHD are involved. Also, in certain areas, utility companies may be willing to provide such information. These procedures may be followed with respect to employees due less than $50.00, as appropriate. *See* also FOH 53c22.

NOT FOR PUBLIC DISTRIBUTION

(f) Interview statements should be reviewed in order to obtain information that may be useful in the effort to locate employees who have moved.

53c11 **Kickbacks.**

(a) Wages cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally. The requirements will not be met where employees kick back any part of their wages, in cash or otherwise, directly or indirectly to the employer or to any person for the employer's benefit.

[redacted] (b) (7)(E) [redacted]

53c12 **Refusal to accept back wages under FLSA.**

(a) When an employee refuses to accept FLSA back wages due, the employer shall be informed that the WHD will scrutinize very carefully the employee's refusal of, or insistence on returning, the back wages due. The employer shall also be informed that if the back wages are not actually paid and accepted, the back wage liability under section 16(b) continues until the statute of limitations expires.

(b) Where it is alleged that an employee has refused to accept payment of back wages, the employee shall be contacted by the most appropriate means. The employee shall be informed that the WHD has been advised that the employee refused to accept payment of back wages from the employer (indicate amount due). It is the responsibility of the WHD to confirm that the employee voluntarily refused to accept the back wages. This confirmation should include an assurance that the employee is aware that it is improper for the employer, either directly or indirectly, to seek a refusal to accept payment. The WHI should explain that, in the event of a genuine refusal to accept back wages, the WHD will take no further action in the matter on the employee's behalf. The employee will be given a Handy Reference Guide. If the employee does not dispute the allegation of refusal to accept, the matter will be pursued no further unless the criteria for covering back wages into the Treasury are met. *See* FOH 53c21.

(c) There may be circumstances where an employer reports refusals to accept payment of back wages under circumstances where it is obvious that *bona fide* offers of payment were not made or that pressure was brought on employees to say they would not accept payment. In such cases, the procedures in FOH 53c10 will be followed and the employer will be asked to prepare checks for distribution by the WHD.

53c13 **Refusal to accept back wages under PCA, SCA, DBRA, or CWHSSA.**

Back wages that are due unlocated employees or that are due employees who refuse payment under the PCA, SCA, DBRA, or CWHSSA are not refunded to the employer, but are transferred to the Treasury. In a case that involves either or both of these circumstances, the employer shall be requested to submit a certified check, cashier's check, or money order payable to "Wage and Hour Division – Labor" for the gross amount due all such employees. *See* FOH 52i09(d) and FOH 52t27(a)(3)d.

53c14 **Financial inability to pay back wages.**

NOT FOR PUBLIC DISTRIBUTION

No attempt shall be made by the WHI to resolve the issue of inability to pay back wages even though it is raised by the employer. A monetary violation case in which the employer alleges inability to pay shall be treated as a refusal-to-pay case (*see* FOH 53c17) and WHIs should consult with their ADD and/or DD before requesting a financial statement or other financial data from the employer. If financial information is tendered by the employer, it should be accepted and included in the file. The WHI shall include in the narrative report an evaluation of the employer's financial ability to pay.

53c15 **Installment payments.**

(a) In the event of an employer's inability to make full payment at once, the WHD will supervise installment payments of back wages due under the FLSA pursuant to a reasonable, signed agreement with the employer. The employer shall be advised that the installment agreement does not affect the employees' rights under section 16(b) of the FLSA, and that the back wage liability continues until the final payments are made. The employer shall also be advised that the installment payments are subject to the payment of interest, which will be paid to the employees during the life of the installment agreement. *See* FOH 53c15(m) below. In all installment cases, except those of short duration (*e.g.*, 30 - 90 days), it will be necessary to require a waiver of the statute of limitations. *See* FOH 53c16.

(b) Installment payment plans under the PCA, SCA, DBRA, and/or CWHSSA should be used only where withholding action does not provide a satisfactory solution.

(c) Normally, an employer who has defaulted on an installment plan will not be given a new installment plan with respect to the same back wages.

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(g) The back wage installment payment schedule must be fully described and incorporated in a signed document. Offices should use Non-WH form: Back Wage Compliance and Payment Agreement. *See* FOH 53c21(c)(2).

(h) The employer shall be instructed to submit a statement after every installment payment in order to track back wage disbursements. As appropriate, Correspondex letters may be used to notify affected employees of the payment schedule.

(i) The DD shall place any case that involves installment agreements in WHISARD "Active Follow-up". Such cases may not be concluded until the payment of all back wages.

(j) The employer shall be instructed to submit signed and certified WH-58s to the DO after the final installment payments have been made to the individual employees.

(b) (7)(E)

(m) The formula for computing interest on back wages to be paid under an installment agreement:

$$PMT = \frac{p \times i \times (1+i)^n}{(1+i)^n - 1}$$

PMT = payment
p = principal
n = number of payments
i = interest rate

The interest rate is the Current Value of Funds (CVF) rate determined by the Secretary of the Treasury each calendar quarter pursuant to 31 USC 3717(g)(1) and 29 CFR 20.58. The capability to compute interest in accordance with this formula is built into WHISARD which contains the current CVF rate. The CVF rate can also be obtained on the Internet at http://www.fms.treas.gov/prompt/cvfr-history.html, or by telephoning the U.S. Treasury Financial Management Service (FMS) interest rate line at (202) 874-6995. Where back wages are recovered in litigation, the interest rate for the underpayment of taxes determined pursuant to 26 USC 6621(a)(2) should be used.

53c16 **<u>Waiver of statute of limitations.</u>**

(a) Whenever an FLSA/DBA/PCA investigation discloses that back wages are due but will not be paid immediately for whatever reason, it is necessary to provide protection against the operation of the 2-year PA statute of limitations that applies to back wage recovery through a waiver of the statute. Note: the PA statute of limitations does not apply to the DBRA or to the SCA. Examples of circumstances under which a waiver of the statute of limitations may be requested are:

(b) (7)(E)

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

(b) All waivers of the statute of limitations must be reduced to writing.

(c) In most cases, the agreement will not have a definite expiration date. The expiration of the waiver should be related to an event rather than a date (*i.e.*, at such time that all back wages have been paid to the employees in full or paid over to the WHD for deposit into the Treasury). (b) (7)(E) [redacted]

- [redacted]

(e) A responsible official of the employing entity, whether an individual, partnership, or a corporation, should be requested to execute the waiver of the statute of limitations. Those considered responsible are the "principals," as defined in FOH 81d01, namely, the owners, officers, and managing officials who have direct responsibility for any violations committed.

- (b) (7)(E) [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTION

FLSA WAIVER OF THE STATUTE OF LIMITATIONS

In consideration of the agreement by the U.S. Department of Labor to withhold commencement of a civil action in United States District Court to resolve the question of alleged violations of the Fair Labor Standards Act (29 U.S.C. 201, et. seq.), I, the undersigned **(enter name of individual)**, do on my own behalf and on behalf of **(enter legal name and address of employer: individual, partnership, or corporation)**, of which I am the **(enter the title of individual or relationship to employer)**, hereby waive all rights and defenses which may be available by virtue of the statute of limitations, including but not limited to section 6 of the Portal-to-Portal Act (29 U.S.C. 255) in connection with such alleged violations.

This waiver may be cancelled at any time on or after thirty days' written notice delivered to the U.S. Department of Labor. (Optional further sentence: Unless so cancelled, this waiver shall remain in effect until **(month, day, year)**.)

This waiver may be introduced as evidence in any action under section 16(b), 16(c), or 17 of the Fair Labor Standards Act of 1938, as amended.

(Signature) (Date)	(Name of District Director) (Date)
(Title/Office held)	District Director, Wage and Hour Division
For	For U.S. Department of Labor
(Name of Firm)	

53c17 **Employer refuses to pay.**

- (b) (7)(E) [redacted]
- [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]

53c18 **(Reserved.)**

53c19 **Notifying employees of their FLSA section 16(b) rights.**

(a) It is the general WHD policy to notify employees of their private rights when the employer does not agree to pay back wages due under the FLSA. The WHISARD correspondence feature contains both an English and a Spanish version of the section 16(b) notification letter. (b) (7)(E) [redacted] The letter advises the employee that the WHD made an investigation and the employee may be due back wages that the employer has not agreed to pay. (b) (7)(E) [redacted]

- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

(d) Some state and local governments have various types of wage collection laws or procedures. Some of these laws provide for administrative handling and others provide for handling by small claims courts, usually with statutory limitations of one kind or another. (b) (7)(E)

53c20 **(Reserved.)**

53c21 **Covering FLSA back wages into the U.S. Treasury and distribution of back wages.**

(a) **Background**

Section 16(c) authorizes the Administrator of the WHD (Administrator) to supervise FLSA back wage payments. Section 16(c) also provides, in part: "Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts." (b) (7)(E)

NOT FOR PUBLIC RELEASE

(b) (7)(E)

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

- [redacted]

  [redacted]

- [redacted]

  [redacted]

- [redacted]

  [redacted]

- [redacted]

  [redacted]

- [redacted]

  - [redacted]

NOT FOR PUBLICATION

(b) (7)(E)

NOT FOR PUBLIC DISTRIBUTION

UNITED STATES DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

- -

IN THE MATTER OF:

- -

BACK WAGE COMPLIANCE AND PAYMENT AGREEMENT

This agreement is entered into by and between [Name of Sec. Of Labor], Secretary of Labor, United States Department of Labor, (hereinafter referred to as "the Secretary"), and [Legal Name of the Business] dba [Trade Name of the business] hereinafter referred to as "the employer").

The Secretary, through Investigator ********** of the Wage and Hour Division, United States Department of Labor, conducted an investigation of the employer's business under the (ACT). The main office of the employer is located at [Main Office Address]. The investigation covered the employer's operations from [Period of Investigation].

As a result of that investigation monetary violations were found resulting in [Number of EE's due] employee(s) due back wages in the amount of $[BW's Due].

In order to resolve this matter, the parties to this Agreement stipulate and agree to the following:

1. The employer represents that it is presently in full compliance with all applicable provisions of the [Insert Act violated], and will continue to comply therewith in the future.

2. The employer agrees to pay the back wages due the employees in question in the amounts shown for the periods indicated on the Summary of Unpaid Wages and the Listing of Payments by Employee both of which are attached hereto and made a part hereof.

3. [ER Legal Name] agrees to pay directly to the employees the amounts due (less legal payroll deductions) on or before each payment date set forth in the Schedule of Payments below and to deliver to the Secretary's representative by the [Day]th of each month evidence of payment including any signed WH-58 receipt forms that the employer has received at that time.

Amounts and payment due dates under the Installment Agreement are set forth in the Schedule of Payments below:

Initial Payment: $

Payment:

Payment:

Payment:

4. The employer has the right to prepay the installment agreement in part or in full at any time without penalty. The employer also has the right to make additional payments towards the principal on any installment due date, but if the employer exercises this privilege, it will not excuse payments due in subsequent months.

NOT FOR PUBLIC DISTRIBUTION

5. Should the employer fail to make any agreed payment as scheduled, the entire unpaid balance will immediately become due and payable, together with such additional collection and court costs as may be incurred by the U.S. Department of Labor in pursuing collection.

6. The employer agrees to provide the Secretary's representative with a listing of all unlocated employees, their last known address, social security number (if possible), and their gross and net amounts due as soon as the employer determines that they are unable to locate an employee due back wages, but no later than 30 days from the employer's initial attempt to pay that employee. The District Office will notify the employer when a person has been located to issue a check. The employer should indicate what means were used to attempt to locate the employee.

7. In the event that any employees cannot be located, or refuse to accept the Back wages, the employer agrees to deliver to the Secretary's representative a cashier's or certified check, payable to "Wage and Hour Division - Labor" to cover the total net due all such employees on or before [Date 90 days from last installment date]. After 3 years, any monies that have not been distributed because of inability to locate the proper persons or because of their refusal to accept payment shall be covered into the Treasury of the United States as miscellaneous receipts.

8. The employer agrees to provide the Secretary's representative no later than [Date 90 days from the last installment date] any remaining signed WH-58 receipt forms not yet provided to Wage and Hour or a cancelled check (or some reasonable facsimile) for every person the employer has paid per this agreement.

9. The employer hereby waives all rights and defenses, which may be available by virtue of the statute of limitations, including but not limited to section 6 of the Portal-to-Portal Act (29 U.S.C. 255).

10. This debt is subject to the assessment of interest, administrative cost charges and penalties in accordance with the Debt Collection Improvement Act of 1996 and Departmental policies. Interest will be assessed at the Treasury Tax and Loan Account Rate on any principle that becomes delinquent. This rate is currently [Current regular interest date]. Administrative cost charges will be assessed to defray the Government's cost. A penalty at the rate of [Penalty interest rate] will be assessed on any portion of the debt remaining delinquent for more than 90 days.

11. In the event of default, the Department intends to pursue additional collection action that may include, but is not limited to, administrative offset, referral of the account to credit reporting agencies, private collection agencies, and/or the Department of Treasury.

12. Any rights to challenge or contest the validity of this Agreement are hereby waived.

NOT FOR PUBLIC DISTRIBUTION

Approved by the following parties:

UNITED STATES DEPARTMENT OF LABOR
BY ITS OFFICER WAGE AND HOUR DIVISION

_____	_____
Title_____	District Director
Dated:_____	Dated:_____

NOT FOR PUBLIC DISTRIBUTION

53c22 **DO assistance in locating employees due back wages.**

Upon receipt of a list of unlocated employees due back wages transmitted from the RO pursuant to FOH 53c21(c)(7), the DO will review the list and, where possible, attempt to locate such employees. The amount of time spent by DO staff in attempting to find these employees should be minimal. Any information obtained regarding their location should be transmitted to the RO for further action.

53d **SUPERVISORY ACTION ON INVESTIGATIONS**

53d00 **Review.**

The DD shall review the WHD investigation reports to determine the accuracy and adequacy of the factual development in each case, and to ensure conformity with the WHD regulatory, interpretive, and enforcement policies and procedures. The DD may direct that further action be taken where necessary before final acceptance of investigation reports.

53d01 **Refusals to comply or to pay back wages.**

(b) (7)(E) [redacted]

53d02 **Closing action.**

(a) The DD should conclude all cases in which no further action is required. However, no case that has been referred to the CMP System or the BCDS should be concluded until the accounts receivable balance is $0.00. The CMP System and BCDS cases should be placed in "Inactive Follow-up" until the DO is notified that the case has a $0.00 balance. A case that has been referred to the BCDS for "unlocateable" action may be concluded as soon as the DO is notified the case has been registered in the BCDS unless there is also a pending collection for CMP System.

[redacted] (b) (7)(E) [redacted]

(c) The amount of back wages ordered by a court or administrative law judge (ALJ) to be paid as a result of litigation and/or hearing may be recorded when the legal judgment has been rendered and the time for filing an appeal has expired, *unless, clearly, there is no possibility that the back wages will actually be paid*. (b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

53d03 **Back wage follow-up and debt collection.**

(a) The back wage follow-up and debt collection procedures in this section apply to any case, which results in an agreement to pay back wages. This system is to be used to track all cases awaiting back wage receipts or other evidence of payment from employers, cases where an installment plan is in effect, and cases awaiting back wage receipts where the checks have been distributed by the DO. DDs, with the approval of the RA, may modify the use of the log sheet and back wage financial system (BWFS) "tickle" system discussed in FOH 53d03(b) - (f) below to conform with alternative, established DO procedures. However, where the DO practice varies from these instructions, all the required information must be maintained in a readily available and understandable manner.

(b) **Installment cases**

All files involving installment plans should be placed in back wage follow-up until payment is completed. The file should be pulled approximately 7 days after the due date for each installment. If evidence of payment has been received, payments should be noted on the installment plan and summary sheets, and letters and/or receipts should be placed in the file. The file should remain in the BWFS until all payments are complete. *See* 53d03(j) for instructions on how to proceed in the event that the terms of the installment plan are not followed.

(c) All case files within the scope of these procedures are to be filed in a designated, locked file drawer. A listing of the back wage follow-up cases is to be maintained either in WHISARD, some other electronic record, or manually. The office should also maintain a record of what date a file has been placed under in the back wage follow-up "tickler". This will identify the names of the firms and the back wage follow-up "tickle" dates.

(d) Each case file in back wage follow-up will contain a log sheet to record payment actions and dates until payments are complete. Each log entry will be initialed by the person making the entry. This file may be maintained in an electronic format, but a hard copy should be printed and placed in the file prior to the file being concluded, or if the file is being transferred to the RO, NO, or SOL.

(e) The DD will pull all back wage follow-up files on a regular basis to review the log entries, decide on additional back wage follow-up actions, and remove any case file where the payment action is complete. The DD will note the date of back wage follow-up review on each log sheet.

(f) While receipts and other evidence of payment, except checks, may be dropped in the back wage files and logged in on the follow-up date it is strongly recommended that these materials be logged in on a daily basis. All checks will be logged in as they are received and should be distributed *within 24 hours*.

(g) **Cases in which the DO distributes back wage checks**

(1) All case files in which checks have been distributed by the DO should be maintained in the back wage follow-up system until this process is complete and the receipts have been returned to the DO. The following are the requirements for back wage checks, which shall be used in conjunction with those set forth in ESA Manual Part 6800.

NOT FOR PUBLIC DISTRIBUTION

a. The receipt of all checks shall be acknowledged in writing as soon as possible after receipt, usually within 24 hours.

b. The receipt and distribution of all checks shall be recorded in a logbook with numbered pages. A bound book is preferred, but not required.

c. All checks will be safeguarded and kept in a locked safe or locked metal file cabinet until distribution is made.

d. The receipt of each check shall be recorded by company name, check number, dollar amount of the check, and the date received. In the case of multiple checks from the same employer, ditto marks may be used for the company name and date received, as appropriate. The person recording the receipt of the checks shall initial the log.

e. Similarly, the distribution of each check shall be recorded by date and name to whom it is sent, and shall be initialed by the person distributing the check. It is required that two different persons receive and disburse checks and the log should so indicate.

f. Checks should be distributed promptly, usually within 24 hours.

(2) The file should be pulled for follow-up approximately 2 weeks after the checks have been mailed. Payments should be noted on the file copy of WH-56, and the receipts should be placed in the file.

a. If all the receipts have been returned at the time of the follow-up, the employer copies should be mailed to the employer with the appropriate letter and the file can be removed from the back wage follow-up.

[redacted] (b) (7)(E) [redacted]

Appropriate copies of receipts should be mailed to the employer with an accompanying letter listing the names of all employees who did not return receipts. The case file can then be removed from the back wage follow-up system.

(h) Undeliverable checks

Checks that have been mailed out by the DO and returned as undeliverable should be logged-in *upon receipt*, by a person *other* than the person who made the original disbursement. Once the check is re-logged, it should be placed in the case file and kept in the back wage follow-up system until such time as the employee is located, but no longer than 90 days (*see* FOH 53c10(e)). (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(i) Cases in which the employer distributes back wage checks.

(1) Where the employer distributes the back wages, the file should be retained in back wage follow-up until full evidence of payment is received. *See* FOH 53c09(a) for further information on what constitutes full evidence of payment.

(2) These files are to be assigned specific back wage follow-up dates. If the employer has not provided full pay evidence for all employees the DO should consider sending WH-59 to each employee for whom there is still no evidence of payment. After 2 weeks, the file should be pulled again to log-in the returned WH-59s. If any employees state they did not receive their back wages, appropriate further action should be taken. If the employer fails to provide full evidence of payment for all employees the employer claims to have paid, those employees should be considered unpaid for purposes of back wage follow-up and further action should be considered. *See* FOH 53d03(i)(3).

(j) Debt collection on agreement-to-pay cases

All agreement-to-pay cases are subject to consideration for debt collection action if the employer defaults on the agreement to pay. The DO should take the following actions to follow-up on agreement to pay cases:

(1) If preliminary pay evidence has not been received by the 7th day from the date agreed to pay, the employer should be contacted and the file suspended to the date approximately 30 days after the payment due date.

(2) If there is still no preliminary pay evidence, the employer should be sent a debt collection notification letter containing information about the debt being subject to debt collection procedures and including the fact that the debt is subject to interest, penalties, and other charges and fees.

(3) If after 60 days there is still no evidence of payment, the case should be reviewed with the RSOL via JRC procedures to determine 1) if the case should be forwarded for consideration of potential litigation, 2) if it should be sent through the BCDS for debt collection action, or 3) if employees due FLSA back wages should be notified of their rights under section 16(b) (*see* FOH 53c19).

a. If debt collection action is approved for the case, the DO should send a demand letter and forward the case to the BCDS as soon as possible. The RO BCDS staff will then proceed to send additional demand letters and take other collection action, as deemed necessary, including referring the debt to the Treasury's Debt Management Service.

b. If the case is selected for litigation and a judgment is obtained, the DO should follow the procedures for back wage follow-up based upon whether the employer, DO, or RO is handling the payment of back wages to the employees. In the event that the WHD obtains a judgment and the employer fails to meet the back wage payment parts of the judgment, another JRC should be held to determine whether the case should go back to RSOL for contempt of court action, or whether it should be referred to the BCDS for debt collection action.

NOT FOR PUBLIC DISTRIBUTION

53d04 **Test re-investigations.**

(b) (7)(E)

[redacted]

53e **RO AND/OR NO ACTION ON INVESTIGATIONS**

53e00 **Regional office.**

(a) The RO functions to plan, manage, and direct the WHD program and to provide support and necessary services; it is not expected that the RA will be involved in routine review of investigation reports. The relationship of the RA and the DD with respect to the handling and movement of investigation reports is largely a matter of detail best left to be worked out by the RA and the DD. The FOH instructions in this area will be kept to the minimum.

(b) The RA shall take the closing action on investigations not previously closed by the DD.

(c) Generally, interpretive questions which cannot be resolved on the basis of existing instructions shall be referred by the RA to the RSOL. In some instances, particularly where the intent of FOH instructions is involved, it may be appropriate to refer such questions to the AA/OPPR, Attn: DPA. Questions of policy or procedure shall also be referred to the AA/OPPR, Attn: DPA.

53e01 -05 **(Reserved.)**

53e06 **Review of cases with findings of $250,000.00 or more.**

[redacted] (b) (7)(E)

[redacted]

(b) The DD shall confirm the following before authorizing statistical closing of the case:

(1) The case file contains adequate support for the findings (*e.g.*, transcriptions, interviews, etc.).

NOT FOR PUBLIC DISTRIBUTION

(2) The case file contains accurate computations for each employee or reasonable estimates that are supported by facts in the case file, and are acceptable not only to the DD, but would be found acceptable upon examination by an outside reviewer. The back wage estimates should be sufficiently grounded in fact so that the WHD would recommend litigation for recovery of the estimated back wage amounts based upon the evidence available in the case file.

(3) There are not included in the case(s) findings for any branch establishments where a physical entry has not been made unless the violations are face-of-the-record and individual employee computations have been made.

(c) Upon completion of the review, the DD will make an entry on the case diary sheet with the date of the review. As an optional procedure, the DD may consider writing a brief memo to the file outlining the rationale for closing the case with statistical findings credit.

(d) Statistical reporting in all such cases shall be limited to a 2-year period.

[redacted] (b) (7)(E) [redacted]

53e07 **NO review of cases.**

(a) At times, it becomes necessary to review information regarding a particular case in the NO to respond to Congressional inquiries, etc. In order to avoid disruption of the normal case handling procedures, when the NO requests information regarding a case, the DD shall submit through channels, either a copy of the narrative report with copies of such documentation from the file as the DD may deem appropriate, or a comprehensive memorandum that clearly outlines the issues, facts, and determinations regarding the case.

(b) In unusual cases, the NO may require the submission of the entire case file after the initial review of the file material or memorandum submitted.

53f **COLLECTION OF PCA OR SCA BACK WAGES**

53f00 **Collection letters: PCA or SCA.**

(a) Request for payment of PCA back wages (statutory "damages") shall be made to the employer of the underpaid employees (PCA prime contractor or secondary contractor). If this oral request for payment is refused, a PCA collection letter shall be sent to this employer using the appropriate Correspondex letter.

(b) With respect to a primary contractor, if there is no response or the response is unsatisfactory, the file shall be referred to the RSOL for further action. With respect to a PCA secondary contractor, if there is no response or the response is unsatisfactory, a collection letter shall then be sent to the prime contractor with a copy to the PCA secondary contractor. However, where PCA child labor violations were found at the establishment of a secondary contractor, the letter shall not include such child labor violations unless it can be shown that the prime contractor had actual or constructive knowledge of the employment of the underage minors. If there is no response from the prime contractor or the response is unsatisfactory, the file shall be referred to the RSOL in the usual manner.

NOT FOR PUBLIC DISTRIBUTION

(c) In some cases, a response to a collection letter may present *bona fide* reasons for a reasonable delay to permit further discussions or a review of the circumstances. The RA has discretion to grant such a delay for a specific limited period.

(d) There may be situations where the withholding of funds under the SCA (*see* FOH 52i11) is not feasible. In such cases, the RA may send an SCA collection letter to the employer, if, in the RA's judgment, such action would be appropriate. The suitable Correspondex letter (modified as necessary for SCA purposes) shall be used.

(e) All PCA or SCA collection letters shall be sent over the signature of the RA. A copy of the collection letter may be sent to the contracting officer.

53f01 **Collection letters in potential litigation or hearing action cases.**

In any case when it appears that the investigation may result in litigation or in hearing action for reasons other than simple refusal-to-pay under the PCA (*i.e.*, FLSA/PCA cases that meet the potential litigation criteria and refusal-to-comply cases under the FLSA or PCA), the sending of a collection letter and the timing shall be fully coordinated with the RSOL.

53g DISCLOSURE OF INVESTIGATION INFORMATION BY DD AND/OR RA

53g00 **Disclosure: general.**

The DOL disclosure regulations under the Freedom of Information Act are contained in 29 CFR 70 and FOH 50d.

53g01 **Disclosure of amount of back wages due an employee.**

If an employee inquires as to the amount of back wages which the WHD believes to be due as a result of an investigation, the DD may inform the employee as to the amount of back wages believed to be due, the period for which the amount was computed, and the method of computation. The employee shall be informed at the same time of any effect the statute of limitations may have had on the amount due since the time of its computation.

53g02 **Notification of complainants.**

(a) WHIs should maintain regular communication with complainants during the course of investigations to keep them informed about the status of the case and to obtain additional information if necessary. In lengthy investigations, the WHI should contact the complainant at least once every 30 days. Contacts with complainants should be noted/entered on the diary sheet. The WHI should also notify the complainant in the event that RSOL files suit against the employer.

In any situation when the completion or disposition of an investigation is delayed beyond a reasonable or normal length of time, or when a significant delay in the further handling of an investigation may be expected because of litigation, home office negotiations, or other circumstances, the region in possession of the case file at the time the delay arises shall notify the employee or former employee complainants of the delay and of the possible effects on their rights under section 16(b) of the FLSA.

NOT FOR PUBLIC DISTRIBUTION

Chapter 54

COMPLIANCE ACTION AND RELATED DATA REPORTING

Source: FOH Modernization revision 719, published 11/28/2016. Substantive revisions made *after* 11/28/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 11/28/2016 can be found here: http://esa.esa.dol.gov/whd/FOH/revisionchart.htm.

Table of Contents

54a GENERAL INSTRUCTIONS

54a00 Compliance action data reporting.
54a01 Forms not to be varied without approval.
54a02 Office of Management and Budget approval.
54a03 Alterations or additions to Office of Management and Budget approved forms.
54a04 Sample copies of forms.
54a05 Preparation.
54a06 Number of copies.

54b NARRATIVE REPORTING

54b00 General.
54b01 FLSA narrative report.
54b02 Contents of compliance action files.
54b03 Separate lists of employees interviewed.
54b04 DBRA, SCA, and CWHSSA narrative report.
54b05 MSPA narrative.
54b06 OSH Act narrative.

54c COMPLAINT INTAKE AND CASE REGISTRATION

54c00 General.
54c01 Complaint intake.
54c02 Case registration and assignment.

54d TIME REPORTING

54d00 WHISARD time report.
54d01 Time categories.
54d02 “Outcome” and “Remarks.”
54d03 Submission of time reports.
54d04 Making corrections to already submitted time reports.

54e INVESTIGATIVE SUPPORT AND OUTREACH DATA REPORTING

54e00 General case information.
54e01 Employer information.
54e02 Act-specific employer information: MSPA.

NOT FOR PUBLIC DISTRIBUTION

54e03 Act-specific employer information: government contract.
54e04 Act-specific employer information: FLSA and garment.
54e05 Act-specific employer information: child labor prior investigations.
54e06 Employee information.
54e07 Case diary entries.
54e08 List of violations and other findings by act.
54e09 Other compliance action data reporting.
54e10 Outreach activity data reporting.

54f CIVIL MONEY PENALTY REPORTING

54f00 General.
54f01 FLSA wages CMP computations.
54f02 Child labor CMP computations regarding WH-266: Child Labor Civil Money Penalty Report – Nonagriculture and Agriculture.
54f03 (Reserved.)
54f04 FMLA CMP computations.
54f05 EPPA CMP computations.
54f06 H-1A CMP computations.
54f07 H-2A CMP computations.
54f08 H-1B CMP computations.
54f09 Homeworker CMP computations.
54f10 OSHA CMP computations.
54f11 H-1C CMP computations.

WH FORMS AND WHISARD FORMS AND REPORTS

WH-3* Employment Information Form
WH-4 Nonimmigrant Information Form
WH-9* Verification of Date of Birth
WH-11 Notice to Employer, Federal Certificate of Age
WH-14 Application for Federal Certificate of Age
WH-19 Federal Certificate of Age
WH-31 Employee Personal Interview Statement
WH-35 Form Letter Regarding BW's Remaining to Be Paid
WH-40 Weekly Time and Attendance Report
WH-41* Mail Request for Employee to Appear or Telephone for Interview
WH-42* Employee Mail Interview Form
WH-51 WHISARD Compliance Action Report
WH-53 WHISARD Case Registration/Investigator Assignment
WH-55 Wage Transcription and Computation Sheet
WH-56 Summary of Unpaid Wages
WH-58 Receipt for Payment of Back Wages, Employment Benefits, or Other Compensation
WH-75 Homeworker Handbook
WH-99 FOH Revision Record
WH-100 FOH Insert Record
WH-103 Notice to Employer-Employment of Minors Contrary to Federal Minimum-Age Standards
WH-124 Notice of Violations of Other Laws
WH-134 Coefficient Tables for Computing Extra Half-Time for OT

NOT FOR PUBLIC DISTRIBUTION

WH-135	Coefficient Tables for Computing Extra Half-Time for OT
WH-136	Investigation Transmittal Form
WH-137	Inter-office Transmittal – Branch Establishment, Multi-Unit Action, or Farm Labor Contractor Investigation
WH-148	Report of Federal Age Certificates Issued
WH-149	Notice to Minor, Federal Certificate of Age
WH-266	Child Labor Civil Money Penalty Report – Nonagriculture and Agriculture
WH-358	Investigation Appointment
WH-467	MW/OT Violations CMP Report
WH-500	(WHISARD) MSPA Compliance Action Report
WH-517	Potential MSPA Violations Checklist
WH-518	MSPA Civil Money Penalties Report
WH-519a	MSPA and H-2A Housing Safety and Health Checklist (ETA 654.404)
WH-519b	MSPA and H-2A Housing Safety and Health Checklist (OSHA 1910.142)
WH-520	Housing Occupancy Certificate
WH-525	EPPA CMP Report
WH-560	OSHAct Recommended CMP Computation Worksheet
WH-561	Citation and Notification of Penalty (OSHAct)
WH-562	OSHAct Field Sanitation Inspection Report
WH-563	Notice of Alleged Imminent Danger (OSHAct)
WH-564	OSHAct Abatement Certification (Optional)
WH-565	OSHAct Abatement Plan or Progress Report (Optional)
WH-589a	Migrant and Seasonal Agricultural Worker Protection Act Hearing Request Information
WH-592	IMMACT/INRA CMP Computation Worksheet
WH-601	Potential H-2A Violations Checklist
WH-1482	Receipt for Records Removed from Employer's Premises
WH-1504	MSPA and H-2A Transportation Safety Checklist

*Also available in Spanish. Where it is deemed advisable to send both English and Spanish copies to the same persons, names and address may usually be typed simultaneously by inserting a carbon between the forms.

MSPA CERTIFICATE AND DISCLOSURE FORMS LOCATED IN CHAPTER 57F

WH-501	Wage Statement (English)
WH-501b	Wage Statement (Spanish)
WH-511	FLC Certificate of Registration
WH-513	Farm Labor Contractor Employee Certificate of Registration
WH-514	Vehicle Mechanical Inspection Report for Transportation Subject to Department of Transportation requirements
WH-514a	Vehicle Mechanical Inspection Report for Transportation Subject to Department of Labor safety standards
WH-515	Doctor's Certificate
WH-516	Worker Information (English and Spanish)
WH-516a	Worker Information (English and Haitian-Creole)
WH-516b	Worker Information (English and Vietnamese)
WH-520	Housing Occupancy Certificate – MSPA
WH-521	Housing Terms and Conditions (English and Spanish)
WH-521a	Housing Terms and Conditions (English and Haitian-Creole)
WH-521b	Housing Terms and Conditions (English and Vietnamese)

NOT FOR PUBLIC DISTRIBUTION

WH-530	Application for a Farm Labor Contractor and Farm Labor Contractor Employee Certificate of Registration
FD-258	Fingerprint Card (FBI Form)

APPLICATIONS AND CERTIFICATES USED UNDER SECTION 14 PROGRAMS AND SECTION 11(D) (NOT MAINTAINED IN THE FOH)

WH-2	Application for Special Industrial Homeworker Certificate
WH-46	Application for Certificate to Employ Homeworkers
WH-48	Special Industrial Homeworker's Certificate
WH-200	Application for Authority to Employ Full-Time Students at Subminimum Wages in Retail or Service Establishments or Agriculture under 29 CFR 519 for Ten Percent and Greater Than Ten Percent Monthly Allowances
WH-201	Application for Authority for an Institution of Higher Education to Employ Full-Time Students at Subminimum Wages under 29 CFR 519
WH-202	Application for Authority to Employ Six or Fewer Full-Time Students at Subminimum Wages in Retail or Service Establishments or Agriculture under 29 CFR Part 519
WH-205	Application for Authorization to Employ a Student Learner at Subminimum Wages
WH-211A	Notice to Employees [Certificate] Authorizing employment of Six or Fewer Full-Time Students
WH-211B	Notice to Employees [Certificate] Authorizing Employment of Ten Percent
WH-211C	Notice to Employees [Certificate] Authorizing employment of Greater Than Ten Percent
WH-211D	Notice to Employees of an Institution of Higher Education that it has Authority to Employ Full-Time Students at Subminimum Wages
WH-224	Temporary Certificate Authorizing Subminimum Wages for On-the-Job Training or Vocational Rehabilitation
WH-226	Application for Authority to Employ Workers with Disabilities at Special Minimum Wages
WH-226A	Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Special Minimum Wages
WH-228	Certificate Authorizing Special Minimum Wages under Section 14c of the FLSA Wage

54a GENERAL INSTRUCTIONS

54a00 Compliance action data reporting.

All information necessary for reporting of compliance actions will be entered and maintained in the Wage Hour Investigative Support and Reporting Database (WHISARD). Paper-based forms are to be used to report data only if the corresponding data fields are not available in WHISARD.

54a01 Forms not to be varied without approval.

There shall be no variations from prescribed forms without prior approval by the Administrator of the Wage and Hour Division (WHD).

54a02 Office of Management and Budget approval.

NOT FOR PUBLIC DISTRIBUTION

With certain limited exceptions, any report form, questionnaire, or form letter that requires the collection or furnishing of information from 10 or more persons must be approved by the Office of Management and Budget (OMB), regardless of whether the form is filled out by the persons themselves or by a federal employee. Any record keeping or reporting requirement contained in a regulation is deemed to involve 10 or more persons. Note: interagency reporting requires the General Services Administration's (GSA's) approval.) No region shall use any such report form, questionnaire, or form letter without the approval of the OMB, which must be requested and obtained by the National Office (NO) (Attention: Deputy Administrator for Program Operations). No other form, questionnaire, or form letter shall be used in any region without express approval of the regional administrator (RA).

54a03 Alterations or additions to Office of Management and Budget approved forms.

Any substantive or material change to an OMB approved collection or form requires prior OMB approval. Therefore, no alteration or addition may be made to a form that bears OMB approval without NO clearance.

54a04 Sample copies of forms.

When a sample of any official form is furnished upon request to an interested person for informational purposes, the word "SAMPLE" shall be written diagonally across its face.

54a05 Preparation.

(b) (7)(E) [redacted]

54a06 Number of copies.

Only one copy of a form or report will be prepared unless otherwise indicated.

54b NARRATIVE REPORTING

54b00 General.

The general instructions for narrative reporting are contained in this section. There are, however, additional instructions elsewhere in the FOH that relate to special reporting requirements. For example, FOH 52g13 contains instructions for narrative reports on compliance actions involving child labor civil money penalties (CMPs), and FOH 57c03 contains instructions for narrative reporting of Migrant and Seasonal Agricultural Worker Protection Act (MSPA) CMPs. FOH 62 contains instructions for the narrative reports on homeworker investigations, FOH 64h02 contains special reporting requirements for subminimum wage section 14(c) and subminimum wage prevailing wage investigations, and FOH 81(d) contains special instructions for litigation files.

[01/03/2017]

54b01 FLSA narrative report.

NOT FOR PUBLIC DISTRIBUTION

(a) Narrative describes facts of the case

The purpose of a narrative report is to provide a clear, concise, and comprehensive description of the actions taken in an investigation, including in no violation cases. It is not a chronological recount of what took place, but rather a summary of the outcome of the investigation. The narrative should tie together the material facts as to violations and the actions taken with respect to these violations so that the whole report is understandable and can be reviewed and properly handled by others who have some action to take with regard to it. Therefore, the narrative must thoroughly summarize the facts of the compliance action.

All narratives should follow the appropriate standard format and use correct grammar and spelling. WHD-specific initializations, such as "ER," "EE," and "C," should not be used and the words should be written in their entirety. Do not include personal comments that are not relevant to the findings or disposition of the compliance action.

(1) *Four-part narrative format*

(b) (7)(E) [redacted]

Additional instructions for Davis-Bacon Related Acts (DBRA), McNamara-O'Hara Service Contract Act (SCA), Contract Work Hours and Safety Standards Act (CWHSSA), MSPA, and Occupational Safety and Health Act (OSH Act) narratives are provided in FOH 54b04 -06.

(b) (7)(E) [redacted]

(2) *Complaint information*

In all complaint cases, sufficient information on the complainant's allegations and the validity of the complaint shall be included in the status of compliance section of the report; information regarding the case disposition and the date of notification of the complainant shall be included in the disposition section of the report.

(3) *Narratives in WHISARD*

All narratives shall be typed and saved to WHISARD. Narratives can be prepared in WHISARD or using computer software compatible with WHISARD.

(4) *Review by the DD and/or ADD*

The DD and/or ADD are expected to pay particular attention to the adequacy, quality, and completeness of the narrative preparation in the course of their case review. As appropriate, files may be returned to the Wage and Hour Investigator (WHI) for corrections and/or further preparation (*i.e.*, elaboration, clarification, etc.).

[01/03/2017]

(b) Standard four-part narrative report

(1) *Arrangement*

The standard narrative report shall be organized and developed around the four major elements of an investigation:

a. Coverage

b. Exemptions

c. Status of compliance

d. Disposition

WHISARD contains a narrative builder, found under "View" on the "Narrative Editor" screen. This tool allows selection of section headings to be used when writing a narrative.

The narrative shall be printed on standard bond paper 8 ½ inch × 11 inch in size. Each page shall be headed with the name of the subject of the investigation and the WHISARD Case ID number. The second and each additional page shall be numbered "2," "3," "4," and so forth, at the lower right corner.

The final page of the narrative should include the narrative writer(s)' name(s) and title(s).

(2) *Additions to reports*

After the case is submitted, if additional or contradictory evidence (or material requiring clarification) is obtained, it should be explained in an addendum to the narrative report. For example, if the DD and/or ADD holds a second-level meeting with the employer about back wages or a CMP assessment, the outcome of that meeting should be memorialized in an addendum. The additional or supplementary reports shall be headed as "Addendum," dated, and initialed or signed by the appropriate person(s). Addendums shall be pasted to the end of the narrative already saved in WHISARD.

[01/03/2017]

(c) Coverage

(1) *Basis for coverage*

This section must contain a description of the nature of the business and sufficient information to demonstrate the basis for coverage and the existence of an employment relationship between the investigated employer and the worker(s) (*see* FOH 10 and FOH 59e).

NOT FOR PUBLIC DISTRIBUTION

The Fair Labor Standards Act (FLSA) coverage section must be tailored to describe the circumstances encountered by the WHI. Make appropriate references to any supporting exhibits in the file which explain and support the basis for asserting coverage.

Typically, the coverage section should contain all of the following information:

a. Legal name of the company

b. Address of the location(s) of the establishment(s) investigated in this compliance action

c. Type of company (*e.g.*, corporation, sole proprietorship)

d. Date and state of incorporation, if applicable

e. Type of work that the company performs

f. Principals and percentage of the company owned by each

g. Corporate officers

h. Number of employees at the establishment

i. Enterprise information, such as the total number of locations and the total number of employees corporate wide

j. Type of applicable coverage (*i.e.*, 3(s)(1)(A), 3(s)(1)(B), 3(s)(1)(C), individual coverage, closely related and directly essential (CRADE)) and an explanation of why such coverage is asserted

k. Period of investigation

l. Annual dollar volume (ADV) (note: this should always be for the entire enterprise, not a single establishment, for each year covered by the investigative period (*i.e.*, typically 3 years))

m. Identification of the 3(d) employer(s) and explanation of how they qualify as such

n. Mapping information that describes the company's position within the industry structure, the business model, and the nature of its relationship with other entities in the industry structure (*e.g.*, farm labor contractor (FLC) provides workers to the agricultural employer (AGER))

(2) *Subsections in coverage*

In addition to the general coverage information outlined above, subsections for main office-district office (MODO), employment relationship, and joint employment should be included in the coverage section of the narrative report when appropriate.

NOT FOR PUBLIC DISTRIBUTION

The analyses for employment relationship and joint employment are separate and distinct analyses. Although there is some overlap in the factors, under no circumstances should the analyses be muddled together in a narrative report.

a. MODO

Indicate if the firm is part of a multiunit enterprise. If not, state "No MODO record required as firm is not part of a multiunit enterprise." If it is, state the legal name and address of the employer's main office, the DO that acts as the MODO, the date the case was associated with the MODO record, any instructions the MODO may have provided, and refer to the exhibit showing case association (*see* FOH 61).

b. Employment relationship

In investigations where the existence of an employment relationship is in question, the narrative report must explain the outcome. The existence of an employment relationship will most often be in question when the investigated employer asserts that the worker is an independent contractor. In cases where the dispute is not because the investigated employer claims that the worker is an independent contractor but claims that another type of relationship exists (*e.g.*, trainee, intern, or volunteer), the narrative report should include an explanation of whether, and why or why not, an employment relationship exists.

In cases where the dispute is whether the worker is an employee or an independent contractor, the narrative report should include an analysis of the economic realities of the working relationship. Specifically, apply the economic realities test, which is a multi-factor test, to determine if the worker is economically dependent on the investigated employer, and thus its employee, or is in business for him or herself and thus an independent contractor. This analysis should be included in the narrative whenever there is a genuine issue regarding the worker's status, and it is equally important whether the outcome is that the worker is an employee or an independent contractor.

Explain why specific facts and evidence of the case weigh in favor of or against an employment relationship by exploring each factor of the economic realities test. Refer to all supporting file exhibits in the analysis and explain how each document relates to the factors of the economic realities test. No one factor is controlling. No factor should be omitted. If other information or evidence beyond the enumerated factors is considered in the employment relationship decision, that information should also be included in this section.

Other factors relevant to economic dependence may be considered. Whether to obtain information pertaining to these factors from sources other than the workers themselves, such as competitor businesses, community groups, and local government agencies (*e.g.*, licensing officials and unemployment insurance carriers) must be considered. The RSOL should be involved in cases in which such alternative sources of information are considered or pursued, and the narrative should note the RSOL's involvement.

NOT FOR PUBLIC DISTRIBUTION

After examining each of the factors, the WHI should weigh all factors together and explain in the narrative why the *total analysis* does or does not support a finding that the worker is economically dependent on the investigated employer.

Refer to FOH 10b05 and FOH 59e for a comprehensive discussion of the employment relationship and additional guidance on applying the economic realities factors and evaluating economic dependence.

c. Joint employment

In investigations where there may be a joint employment relationship, the WHI must include in the narrative report an analysis of whether there is or is not joint employment.

Explain why specific facts and evidence of the case weigh in favor of or against joint employment by explaining the relevant facts. Refer to all supporting file exhibits in the analysis and explain how each document relates to the applicable joint employment analysis.

Whether to obtain information pertaining to the analysis from sources other than the employees themselves, such as competitor businesses, community groups, customers, and local government agencies (*e.g.*, licensing officials and unemployment insurance carriers) must be considered. The RSOL should be involved in joint employment cases where such alternative sources of information are considered or pursued, and the narrative should note the RSOL's involvement.

The WHI should weigh all of the information and evidence gathered together and explain why the *total analysis* does or does not support a finding of joint employment.

Refer to FOH 10f and FOH 59f for a comprehensive discussion of joint employment and additional guidance on evaluating possible joint employment.

[01/03/2017]

(d) Exemptions

(1) An exemption section is required in all narrative reports.

a. If no exemptions are claimed by the employer and none are applicable, a short sentence to that effect will be sufficient.

b. If an exemption is claimed, the WHI must explain why it was, or was not, applicable.

c. If particular employees or groups of employees are found to be nonexempt under section 13(a)(1) of the FLSA, the WHI must concisely explain why the

NOT FOR PUBLIC DISTRIBUTION

exemption did not apply to such employees or groups of employees, with appropriate references to supporting employee statements and exhibits.

(2) The content of the exemption section of the narrative will depend on the circumstances. If an exemption was claimed and properly applied, include a sentence explaining why it applied. If an exemption was claimed but found inapplicable at any time to particular employees or groups of employees, concisely explain why with appropriate reference to supporting statements and exhibits.

(3) Explanations of violations that result from misapplied exemptions must be included under status of compliance.

(4) Exemptions are either applicable or inapplicable based on the law. They are neither granted nor denied by the WHD and such language should not be used in the narrative report.

[01/03/2017]

(e) Status of compliance

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

[redacted]

Employee Name	Week Ending	Hourly Rate	Hours Worked	Total Paid	1/2 Time Rate Owed	1/2 Time Hours Owed	Total OT Due
Perkins, Frances	09/03/2016	$10.00	44	$440.00	$5.00	4	$20.00

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

- [redacted]
  - [redacted]
    - [redacted]
    - [redacted]
  - [redacted]
    - [redacted]
- [redacted]
  - [redacted]
- [redacted]
  - [redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(f) Disposition

[redacted]

(b) (7)(E)

[redacted]

[redacted]

(b) (7)(E)

(b) (7)(E) [redacted]

[01/03/2017]

54b02 Contents of compliance action files.

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

(b) Exhibit order

For uniformity and reference purposes, material must be arranged in investigation files in the following order (only the exhibits under FOH 54b02(b)(2)(c) are to be numbered):

(1) *Left side of folder*

a. WH 53: Case Registration/Investigator Assignment

b. Case Diary

(2) *Right side of folder*

a. Letters, memoranda, documents, and other correspondence, including debt collection letters, received subsequent to submission of the file to the DD and/or ADD, and which are not referred to in the narrative, shall be arranged chronologically with the latest date on top

b. Applicable related forms in the following order, most of which can be printed from WHISARD:

1. WH-51, WH-500: MSPA Compliance Action Report, and narrative report

2. CMP report(s)

3. WH-103: Notice to Employer-Employment of Minors Contrary to Federal Minimum-Age Standards (WH-103) and WH-517: Potential MSPA Violations Checklist (WH-517)

4. WH-9: Verification of Date of Birth (WH-9), WH-520: Housing Occupancy Certificate – MSPA (WH-520), and WH-561: OSHA Citation

5. Complaint Information Form, WH-3: Employment Information Form (WH-3), Letter of Complaint, or Request for Housing Inspection; Complaint Acknowledgement letter; and any subsequent written updates

6. WH-58: Receipt for Payment of Back Wages, Employment Benefits, or Other Compensation (WH-58); WH-35: Form Letter Regarding BW's Remaining to Be Paid (WH-35); or other proof of payment (alphabetized); and Pay Evidence and POP Assistant Report (optional)

7. If there are more than 50 employees due back wages, proof of payment documentation may be placed in a separate file labeled "Proof of Payment Documentation Only"

8. WH-56: Summary of Unpaid Wages (WH-56) and Liquidated Damages Adjustments report

c. Labeled exhibits (A -F)

(c) Arrangement of labeled exhibits

(1) Other exhibits related to the original or supplemental narrative report must be identified in the 1ower right hand corner with designations such as "A-1," "A-2," etc., and numbered top to bottom. Supplemental exhibits must be related to the original exhibits by coding supplements with extended identifications such as "A-1a," "A-1b," etc. The letter designated below shall refer only to the designated subject. For example, "A" is used only for computations and transcripts; "B" is used only for employee interviews, etc.

a. A Exhibits

1. Profile pay period (labeled as "A-0")

2. WH-55 (alphabetized where practical) (*see* FOH 53c01(e))

b. B Exhibits

1. Interview summary (labeled as "B-0")

2. Employee interviews (alphabetized)

c. C Exhibits

1. Coverage exhibits

2. Government contract data, wage determinations, etc.

NOT FOR PUBLIC DISTRIBUTION

3. Temporary employment certifications, etc.

4. Mapping information

d. D Exhibits

1. MODO record information

2. Prior compliance actions of this employer (*i.e.*, WH-51s)

3. Liquidated damages supporting documentation

4. WH-519a: MSPA and H-2A Housing Safety and Health Checklist (ETA 654.404) (WH-519a) or WH-519b: MSPA and H-2A Housing Safety and Health Checklist (OSHA 1910.142) (WH-519b)

5. WH-514: Vehicle Mechanical Inspection Report for Transportation Subject to Department of Transportation requirements (WH-514) or WH-514a: Vehicle Mechanical Inspection Report for Transportation Subject to Department of Labor safety standards (WH-514a)

6. Supporting photographs captioned to their significance, with date and name of WHI taking photo

7. WH-124: Notice of Violations of Other Laws (WH-124), miscellaneous correspondence, memoranda, records (including any computations for employees due less than $20.00 in back wages in non-section 14(c) investigations), and documents not otherwise provided for

I. Electronic documents

i. If including electronic documents in the file, separate each external data storage device (*e.g.*, disc, memory card, flash drive, etc.) into individual paper-sized envelopes.

ii. Write a summary of the data contained on the outside of each envelope and label as separate exhibits (*e.g.*, D-3, D-4, etc.).

e. E Exhibits

1. List of mail interviews sent

2. Work papers, which serve a necessary purpose in the report

f. F Exhibits

1. Receipt for employer's records (*see* FOH 54b01)

NOT FOR PUBLIC DISTRIBUTION

(2) The person preparing the exhibit shall either sign or initial it and show the date(s) of preparation. If an exhibit is changed or corrected after it has been prepared for the completed investigation file, the corrections may be made by lining through the previous entries without disturbing their legibility and by making new entries that are initialed and dated by the persons making them. When an exhibit has been superseded, the new copy must be clearly identified as such, and the superseded copy must be retained in the file.

(3) Except where necessary in a litigation case, the WHI shall avoid building up a bulky file with printed matter, exhibits relating to the type of business, shipment and invoice data, notations, and work papers of various sorts. Such materials should be carefully screened at the time the investigation file is prepared and needless materials may be destroyed, which does not include official file materials, memoranda, letters, and employee statements.

(d) Document inflow beyond closing of an investigation

When the inflow of back wage receipts and other material continues beyond the closing of an investigation, this material may be filed temporarily at the top of the file contents, or on the left hand flap, to facilitate handling, checking, and final assembling. When the inflow has ceased, the material must be put in its designated place as provided in FOH 54b02(b)(2) above.

(e) Bulky file

A bulky file must be divided by separation sheets between the different kinds of material. Each separation sheet must have a tab indicating the type of material below it. A voluminous investigation file may be separated into as many sub-files as necessary for easy handling, provided they are kept together and labeled using the total number of files (*i.e.*, 1 of 3, 2 of 3 etc.).

(f) Documents obtained by the MODO

Additional documents pertaining to the BRADO establishment (*e.g.*, payroll records) that are obtained by the MODO WHI at the company main office must be placed on top of the original case file and in the order specified in FOH 54b02. The documents added by the MODO must not be integrated with the documents in the BRADO file.

[01/03/2017]

54b03 <u>Separate lists of employees interviewed.</u>

[redacted] (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Employee Interviews				
Exhibit	**Name**	**Title**	**Exempt status**	**Type of interview**
B-1	Michael Callahan	Manager	Exempt	Mail
B-2	Bill Certo	Waiter	Nonexempt	Written
B-3	William Shakespeare	Maintenance	Nonexempt	Phone

[redacted] summary sheet of mail interviews – "E Exhibit" – mailed 02/11/2016

Summary Sheet of Mail Interviews WH-42s printed: 02/11/2016				
Exhibit	Name	Address	Title	Status of return
E-1	Michael Callahan	63 Burnbrook Road East Mobile, AL 36604	Manager	Returned /undeliverable __/__/__ 2nd Request __/__/__
E-2	Bill Certo	4007 Murray Avenue Mobile, AL 36604	Waiter	Returned /undeliverable __/__/__ 2nd Request __/__/__
E-3	Evelyn Mitchell	3423 West 10th Street Mobile, AL 36604	Dietary Aide	Returned /undeliverable __/__/__ 2nd Request __/__/__

[01/03/2017]

54b04 **DBRA, SCA, and CWHSSA narrative report.**

(a) (b) (7)(E) [redacted]

(b) DBRA and CWHSSA or CWHSSA narratives are normally sent to the headquarters of the contracting agency under the procedures in FOH 67d. The reason for the separate narrative is to avoid mixing in other matters of no concern to the contracting agency. It is imperative that the narrative be neat and orderly so that it will reflect favorably on the WHI and WHD. *Do not* use abbreviations such as "BWs," "OT," "WD," "RTP," etc., as these typically are not used or understood by the contracting agency.

(c) Some employers may be performing on more than one contract with the same agency or on contracts with different agencies. In order that these mixed situations may be properly handled with contracting agencies, the information in the narrative must be segregated by headings or in separate paragraphs. (b) (7)(E) [redacted]

(d) The WHI must follow the usual style and format of the standard narrative under the following headings:

(1) *Coverage*

Describe briefly the basis of coverage under the DBRA, SCA, and/or CWHSSA. As appropriate, refer to invitations to bid, contract documents, notices of award, or to other coverage information in the file. If violations of the DBRA, SCA, and/or CWHSSA are found, list by contract in the narrative *or* by exhibit the following:

a. For DBRA investigations, the name of the federal funding statute(s)

b. Contract number and amount and brief description of contract work (*i.e.*, type of services furnished or type of construction activities performed and location)

c. Name of federal contracting agency financing the project and its local representative, and in the case of a DBRA contract, the name of the state or local contracting authority and name of its representative, as well as the name of owner and/or grantee, where appropriate

d. Date contract was advertised for bids

e. Date contract was awarded

f. Starting and completion date of contract

g. Information as to whether the contract contained the contract provisions in the regulations at 29 CFR 5.5 in a DBRA and CWHSSA investigation or the contract provisions in 29 CFR 4.6 for an SCA investigation

h. The applicable wage determination(s) and all modifications thereto

i. Legal name and address of the prime contractor, including the name and title of the responsible official, plus identifying information regarding any other ongoing contracts held by the *same prime contractor*, in order to facilitate cross-withholding of contract funds, where necessary

j. In investigations involving multiple tiers of contractors, all subcontractor information should be documented for each tier between the prime and the subject of the investigation, including name, title, and contact information of the responsible parties

In addition to the above information, the WHI must report under the subheading "Sureties" the name and address of each surety for each Walsh-Healey Public Contracts Act (PCA), DBRA, or SCA contract in the performance of which monetary violations have been found and where, in the WHI's judgment, it may later be necessary to look to the surety for payment. The information as to the sureties shall be obtained from copies of the contracts, when they are available. If they are not available, it may be obtained from the employer, one of the officers of the employer,

NOT FOR PUBLIC DISTRIBUTION

or the federal contracting officer. When the information cannot be obtained, explain why not.

(2) *Exemptions, variations, and tolerances*

This section must include a brief discussion of any exemptions, variations, or tolerances from the DBRA, SCA, and/or CWHSSA which apply. If any such exceptions were claimed but found not applicable to particular employees or groups of employees, a concise explanation must be made with appropriate reference to supporting statements and exhibits. Any necessary explanations of the violations resulting from misapplication of exemptions, variations, and tolerances must be included under the "Status of Compliance" section.

[redacted] (b) (7)(E) [redacted]

(4) *Disposition*

[redacted] (b) (7)(E) [redacted]

b. Except for revenue sharing cases, the WHD does not have sole responsibility for enforcement of the DBRA or CWHSSA. Therefore, it is necessary to keep the federal contracting and/or funding agency representative and, where appropriate, the state or local contracting authority advised of our enforcement activities with respect to their contracts. (b) (7)(E) [redacted]

(e) Transcriptions, employee interview statements, and other exhibits must be made to serve a dual purpose (*i.e.*, cover all statutes investigated) wherever practicable. File exhibits prepared to serve a dual purpose will be copied for forwarding to the contracting agency or the NO, as appropriate.

(f) Use of WH-55, WH-56, and WH-58

(1) *WH-55*

a. In some cases, back wage amounts will be due particular employees under a mix of acts (*e.g.*, the FLSA, PCA, SCA, DBRA, and CWHSSA). In such situations, if it is not too cumbersome, a separate WH-55 for each act should be used. If that is not possible and a single WH-55 is used for each employee, then a notation as to the amounts due under each separate act, identified by contracting agency and by contract, must be made on the WH-55. An estimate may be used if precise amounts cannot readily be determined. If the DBRA or CWHSSA back wages are not being paid for any reason, it is necessary to take further action with the contracting agency to obtain payment of such back wages. Thus, it is essential that the computations be made in such a manner that they can be readily understood by contracting agency representatives.

b. Amounts due as liquidated damages on individual contracts under the CWHSSA must be computed and shown separately from any back wages that are computed. A separate WH-55 should be used for this purpose. A summary of liquidated damages pertaining to each employee, separated by contracting agency and by contract, must also be prepared. A separate WH-56 may be used for this purpose if it is clearly marked "Summary of Liquidated Damages."

(2) *WH-56*

In all cases disclosing SCA, DBRA, and/or CWHSSA violations, a separate WH-56 must be prepared showing only the amounts due under the SCA, DBRA, and/or CWHSSA. In addition, a separate WH-56 must be prepared for each contract by agency or, if appropriate, entries must be separated by contract on the face of the form. Appropriate violation data should be entered in WHISARD and a WH-56 should be printed.

(3) *WH-58*

WH-58s must be used to show receipt of payment of back wages due under the DBRA and/or CWHSSA. When back wages are due under a mix of acts (*e.g.*, the FLSA, SCA, DBRA, and CWHSSA), only one WH-58 need be prepared, with the appropriate boxes being checked for all the acts under which back wages are due. The WH-58 can be printed in WHISARD.

[01/03/2017]

54b05 **MSPA narrative.**

(a) (b) (7)(E) [redacted] The general principles applicable to the standard narrative as set forth in FOH 54b01 apply to the MSPA narrative.

(1) *Coverage*

NOT FOR PUBLIC DISTRIBUTION

A brief statement must be included to show the basis of coverage (*see* FOH 54b01(c) and FOH 57a05).

(2) *Exemptions*

Discuss briefly any pertinent exemptions (*see* FOH 54b01(d) and FOH 57a06 -07).

(3) *Status of compliance*

Under this heading, describe the violations and any supporting information or exhibits which substantiate the violations (*see* FOH 54b01(e) and FOH 57e).

(4) *Disposition*

This portion of the MSPA narrative follows the format of the standard narrative (*i.e.*, a report of the date and participants in the final conference, what was discussed, what was agreed upon, and what actions remain to be taken or are recommended). (b) (7) (E) [redacted]

[redacted]

[01/03/2017]

54b06 **OSH Act narrative.**

(a) The OSH Act section 9(c) limitation for citing violations (*see* FOH 56a03) makes it absolutely imperative that narrative reports be prepared and the case files submitted for review and/or further action as soon as possible. (b) (7)(E) [redacted]

(b) **Coverage**

The OSH Act narrative report should address only those elements essential to the assertion of statutory and regulatory coverage. Information relevant to coverage under other statutes, which is not relevant to OSH Act coverage, should not be included in the coverage section of the OSH Act narrative report.

See FOH 56a01, FOH 56a04, and FOH 56e -f for information on the limits of the WHD's jurisdiction to enforce the OSH Act, the statutory coverage elements, and the regulatory coverage elements for field sanitation and temporary labor camp enforcement.

(c) **Exemptions**

(1) *Field sanitation (29 CFR 1928.110)*

An exemption section in an OSH Act field sanitation investigation narrative report is only required if 29 CFR 1928.110(c)(2)(v) applies. This partial exemption excuses an employer from the requirements that handwashing and toilet facilities be provided

on a given day if the hand-laborers are in the field less than 3 hours that day, including travel time to and from the field.

(2) *Temporary labor camps (29 CFR 1910.142)*

An exemption section is not required for OSH Act temporary labor camp investigation narrative reports. However, if the investigation was performed under the MSPA using the 29 CFR 1910.142 housing standards, an exemption section is required in the MSPA narrative report (*see* FOH 54b05).

(d) Status of compliance

(1) *No violation cases*

(b) (7)(E) [redacted]

(2) *Violation cases*

(b) (7)(E) [redacted]

(e) Disposition

(b) (7)(E) [redacted]

[01/03/2017]

54c COMPLAINT INTAKE AND CASE REGISTRATION

54c00 <u>General.</u>

All pertinent information relating to the registration of a compliance action, a complaint or directed case, or a compliance assistance activity must be entered into WHISARD.

54c01 <u>Complaint intake.</u>

(b) (7)(E)

Code	Act
FLSA	Fair Labor Standards Act
MSPA	Migrant and Seasonal Agricultural Worker Protection Act
CL	Child labor provisions of the Fair Labor Standards Act
FMLA	Family and Medical Leave Act

DBRA	Davis-Bacon and Related Acts
SCA	McNamara-O'Hara Service Contract Act
PCA	Walsh-Healey Public Contracts Act
CWHSSA	Contract Work Hours and Safety Standards Act
CA	Copeland "Anti-Kickback" Act
RFR	Right of First Refusal (obsolete)
OSHA	OSHA housing and field sanitation inspections
SMW14	FLSA section 14(c)
SMWFT	FLSA section 14(b): full-time students
SMWPW	FLSA section 14(c): patient worker
SMWSL	FLSA section14(a): student learner
HMWKR	FLSA/29 CFR 530/homeworkers
CCPA	Consumer Credit Protection Act (Garnishment)
EPPA	Employee Polygraph Protection Act
H1A	Immigration Nursing Relief Act: non-immigrant registered nurses
H1B	Specialty occupations (*i.e.*, computers and fashion models)
H2A	Temporary Alien Agricultural Worker Certification Program
CREW	Longshoremen (D-1)
H2A	Temporary Alien Agricultural Worker Certification Program
OWCP	Federal Employee Compensation Act
TVA	Tennessee Valley Authority (obsolete)

[redacted] (b) (7)(E) [redacted]

(6) *"Employer Name"*

Enter the trade name of the establishment or employer. Note: a maximum of 45 characters, including spaces, may be used. Where the investigation is of a state or local government agency, enter the highest level of the state or local government being investigated (*e.g.*, "California, State of," "Sacramento, County of," or "Roseville, City of").It is important to search for any active cases for the employer using the "Search for Active Cases for this Employer" feature in WHISARD. If there is an active case, a note should be entered in the "Complaint Notes" field in the "Complaint Intake (Detail)" screen indicating that the complaint should be associated with the active case.

(7) *"ER Contact Person"*

Enter name and title of the employer contact person.

(8) *"Employer Street Address, City, State, Zip Code, and Phone Number"*

Enter the complete address of the physical location of the establishment including number, street, city, state, and zip code. If there is no street address or the establishment is located in a rural area, enter the post office address or rural route number, and if necessary, describe in the narrative how the establishment may be found. Enter primary phone number and other phone numbers if available.

(9) *"County"*

Select the county in which the establishment investigated was located. Note: in the vast majority of cases, the county will be within the jurisdiction of the investigating DO and/or area office (AO), but there may be circumstances (*e.g.*, investigations or contacts with garment manufacturers, retailers, or suppliers) that would be located in a county outside the DO and/or AO jurisdiction.

[redacted] (b) (7)(E) [redacted]

(11) *"NAICS Code"*

The North American Industry Classification System (NAICS) is an industry classification system that groups establishments into industries based on the activities in which they are primarily engaged. NAICS was developed by Mexico's *Instituto Nacional de Estadística, Geografía e Informática (INEGI)*, Statistics Canada, and the United States (U.S.) Economic Classification Policy Committee (ECPC) to provide common industry definitions for Canada, Mexico, and the U.S. that facilitate economic analyses of the economies of the three North American countries. The NAICS facilitates the collection, tabulation, presentation, and analysis of data related to establishments and ensures that data about the U.S. economy published by U.S. statistical agencies, including the Department of Labor (DOL), is uniform and comparable among the North American countries. The WHD uses the codes in various ways, to assess compliance levels in certain industries and to plan future compliance action activities. The NAICS code is required information and has to be at least four digits long out of a possible six digits and it must be accurate. Use the "Search for NAICS Code" feature in WHISARD.

[redacted] (b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

[redacted]

(b) (7)(E)

54c02 **Case registration and assignment.**

(b) (7)(E)

(b) Directed case registration

Directed case assignments are registered either from the "Case Management" or "Investigative Support" modules of WHISARD.

(c) Case assignment

Once a case is registered in WHISARD, it is ready to be assigned to a WHI. There must be one "Lead Investigator" in a case. More than one WHI can be assigned to a case. Case assignment is done on the "Case Assignment" screen in WHISARD.

54d TIME REPORTING

54d00 **WHISARD time report.**

WHISARD time report serves as a daily record of WHI activity. It records time expended in hours by case, act, and non-case activity. It also serves as a record of leave taken. WHIs are required to enter all hours worked in the appropriate modules in WHISARD depending on the type of the activities involved. The accurate input of WHI hours is an important component of the agency's performance and budget planning strategies.

54d01 **Time categories.**

There are three time categories in WHISARD: "Case Time," "Outreach Activities," and "Other Time."

(a) **"Case Time"**

All hours spent in conducting investigations belong to the "Case Time" category in WHISARD. (b) (7)(E) [redacted]

(b) **"Outreach Activities"**

All hours spent in compliance assistance activities belong to the "Outreach Activities" category in WHISARD. (b) (7)(E) [redacted]

(c) **"Other Time"**

All other hours spent on the activities that do not belong to either the "Case Time" or "Outreach Activities" category are considered to be "Other Time" for purposes of reporting.

- [redacted] (b) (7)(E) [redacted]
- [redacted]
- [redacted]

(b) (7)(E)

[redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

[redacted]

[redacted]

54d02 **<u>"Outcome" and "Remarks."</u>**

(a) **"Outcome"**

This entry is not required. The DD and/or ADD may instruct a WHI to make this entry if the activity is associated with a national or local initiative or other aspect of the program plan.

(b) **"Remarks"**

This box is available for the time report data entry for all time categories. (b) (7)(E) [redacted]

54d03 **<u>Submission of time reports.</u>**

(a) WHIs are required to submit the time report weekly in WHISARD. The time report should normally be submitted by the end of the day on Friday or no later than Monday morning.

(b) The time reports for the future weekending dates, up to 90 days from the current date, and for the past week ending dates, up to 365 days from the current date, can be submitted.

54d04 **<u>Making corrections to submitted time reports.</u>**

(a) When making corrections to submitted time reports on either case time or outreach activities categories, the corrected data should be made on the appropriate module in WHISARD (*i.e.*, "Case Diary" screen for case time and diary screen for "Outreach Activities"). Once these entries are made, then the corrections should be posted by refreshing the time report data on the "Time Report" screen.

(b) Any changes to the "Other Time" category can be made directly on the time report.

(c) WHISARD automatically marks the time report as "Corrected" and enters the date of the most recent changes.

54e **INVESTIGATIVE SUPPORT AND OUTREACH DATA REPORTING**

54e00 **<u>General case information.</u>**

The information for the WHISARD fields marked with an asterisk is required information. In addition, information on some fields not marked with an asterisk, such as employer identification number (EIN) and NAICS code, is also required information when the case is submitted or concluded. No instructions will be given in this section for the data fields that are self-explanatory.

54e01 Employer information.

(a) Accuracy of information

It is absolutely imperative that names of businesses be entered properly in WHISARD. All efforts shall be made to obtain accurate spelling of the firm's trade names and legal names (s*ee* FOH 54e01(a) -(b)). When available, WHD staff should consult the firm's website or other public information for the spelling. In all cases, the "Standard Employer Names" feature in WHISARD should be checked to determine if the employer is already listed. Names shall be entered in the appropriate upper and lower case letters. Unless the employer's name is actually spelled in all capitals, *do not enter names in all capital letters*.

(b) Correction of erroneous information

If it any time is determined that an inaccurate name is entered, the correct name should be entered as soon as possible.

(c) Employer trade name

Enter the trade name of the establishment or employer. Note: a maximum of 45 characters, including spaces, may be used. Where the investigation is of a state or local government agency, enter the highest level of the state or local government being investigated (*e.g.*, "California, State of," "Sacramento, County of," or "Roseville, City of"). To reduce the variations of data entry of employer trade name for some of the well-known national chain employers (*e.g.*, Wal-Mart, J.C. Penney, Denny's, etc.), use the "Standard Employer Names" feature in WHISARD.

(d) Employer legal name

Enter the legal name of the establishment. In cases where litigation is a possibility, enter the exact legal name of the establishment. Do not abbreviate unless the true legal name contains abbreviations. A maximum of 45 characters, including spaces, may be used. Where the investigation is of a state or local government agency, enter the specific department, bureau, commission, board, division, etc., within the agency being investigated (*e.g.*, "Sheriff's Department," "Corrections, Board of" or "Energy Commission, California"). Use the "Standard Employer Names" feature in WHISARD for some of the well-known national chain employers for entering the correct legal name.

(e) Street address, city, state, and zip code

Enter the complete address of the physical location of the establishment, including number, street, city, state, and zip code. If there is no street address or the establishment is located in a rural area, enter the post office address or rural route number and, if necessary, describe in the narrative how the establishment may be found.

NOT FOR PUBLIC DISTRIBUTION

(f) County

Select the county in which the establishment investigated was located. Note: in the vast majority of cases, the county will be within the jurisdiction of the investigating DO and/or AO, but there may be circumstances (*e.g.*, investigations or contacts with garment manufacturers, retailers, or suppliers) when it is outside this jurisdiction.

(g) EIN

Enter nine-digit EIN.

(h) EIN reason

Select an appropriate reason from the picklist for this field if EIN is not available. EIN is not required for a conciliation or when a case is dropped. For an employer who is an individual, a social security number (SSN) for that individual is required. (b) (7)(E) [redacted]

(i) NAICS code

See FOH 54c01(c)(12).

(j) Employer with establishment outside DO jurisdiction

Appropriately indicate whether the establishment is affiliated with a multi-branch company that crosses DO boundaries.

(k) Establishment number of employees and enterprise number of employees

This information may be used in calculating CMPs.

(l) Representative type and/or CMP person assessed

In case where a CMP is assessed, enter the name and address of the person to whom the CMP assessment letter should be sent on the "Representatives" tab. The names and addresses of other representatives, such as accountants or attorneys, can also be entered on this tab. The primary telephone number for the CMP person assessed is also required when a CMP is assessed.

54e02 <u>Act-specific employer information: MSPA.</u>

(a) Employer crop codes

Select a crop code from the list:

- Apples
- Apricot
- Aquaculture/Finfish Farming
- Aquaculture/Shellfish Farming

NOT FOR PUBLIC DISTRIBUTION

- Asian Vegetables
- Asparagus
- Avocado
- Beans
- Beef Cattle Ranching/Farming
- Bees
- Beets
- Blueberries
- Broccoli
- Cabbage
- Carrots
- Cauliflower
- Celery
- Cherries
- Christmas Trees
- Citrus: except Oranges
- Citrus: Oranges
- Corn
- Corn: Detasseling
- Cotton
- Cranberries
- Cucumbers
- Dairy & Milk
- Egg Production
- Flowers
- Forest Firefighting (manual)

NOT FOR PUBLIC DISTRIBUTION

- Forest Product Gathering
- Fur Bearing Animal
- Garlic
- Grapes
- Grapes: Raisin
- Grapes: Winery
- Greenhouse (non-flower)
- Hog & Pig
- Hops
- Horse & Equine
- Lettuce
- Maple Syrup
- Misc Farm Chores
- Mushrooms
- Nursery Products
- Oilseed
- Olives
- Onions
- Other Berries
- Other Fruits
- Other Grains
- Other Livestock
- Other Melons
- Other Misc Crop
- Other Nuts
- Other Vegetables

NOT FOR PUBLIC DISTRIBUTION

- Peaches
- Peanuts
- Pears
- Pecans
- Peppers
- Potatoes
- Poultry: Catch Crews
- Poultry: Hatcheries
- Poultry: Raising
- Prunes
- Reforestation
- Rice
- Sheep, Goat
- Soybeans
- Squash
- Strawberries
- Sugar Beets
- Sugar Cane
- Sweet Potatoes
- Tobacco
- Tomatoes
- Watermelon
- Wheat

(b) Employer type

Select employer type for the subject of this investigation from the following: FLC, agricultural employer (AGER), agricultural association (AGAS), user (USER), and housing provider (HP) (*see* FOH 57a06).

NOT FOR PUBLIC DISTRIBUTION

(c) Registration number

If the subject of the investigation is a FLC, then enter the FLC registration number. If not registered, enter the contractor's SSN or a text entry "Exempt Contractor" as appropriate.

(d) Itinerary of FLC

(b) (7)(E)

[redacted]

(e) Migrant agricultural workers

(b) (7)(E)

[redacted]

For the definition of a MAW, *see* FOH 57a09.

(f) Seasonal agricultural workers

(b) (7)(E)

[redacted]

For the definition of a seasonal agricultural worker, *see* FOH 57a09.

(g) Housing and/or transportation

If applicable, enter pertinent information on either the "Housing" or "Transportation" screen.

(h) Preoccupancy housing inspection

(b) (7)(E)

[redacted]

54e03 **Act-specific employer information: government contract.**

(b) (7)(E) [redacted]

(a) Contract

(1) *"Contract ID"*

(b) (7)(E) [redacted]

(2) *"Advertised for Bids," "Award Date," and "Beginning and Ending Dates"*

Enter the date information in the fields.

(3) *"Contract Type," "Description of Work," "Wage Rates," and "Estimated number of employees in the contract"*

Appropriately enter information in the fields. For "Contract Type" enter a brief description such as "highway construction" or "janitorial services." Enter more detailed description of the work in "Description of Work." For "Wage Rates," enter the applicable wage determination for the contract. The wage determination includes the original decision and any subsequent decisions modifying, superseding, correcting, or otherwise changing the provisions of the original decision.

(4) *"Date of 5.11/5.12 Letter," "Date of Hearing Request," and "Date of Referral to RSOL"*

Enter the date information in the fields. For the "Date of 5.11/5.12 Letter," enter the date of the letter sent pursuant to 29 CFR 5.11 and/or 29 CFR 5.12.

(5) *"Status"*

(b) (7)(E) [redacted]

(b) Agency

(1) *Contracting agency*

Enter the name of the contracting agency. In WHISARD the user can either select from the list or type in an agency's name if necessary.

- Army and Air Force Exchange Service
- Defense Commissary Agency

- U.S. Department of Agriculture
- U.S. Department of Agriculture: U.S. Forest Service
- U.S. Department of Energy
- U.S. Department of Homeland Security
- U.S. Department of Housing and Urban Development
- U.S. Department of Interior
- U.S. Department of the Air Force
- U.S. Department of the Army
- U.S. Department of the Navy
- U.S. Department of Transportation
- Federal Aviation Administration
- Federal Highway Administration
- General Services Administration
- National Aeronautics and Space Administration
- U.S. Postal Service
- U.S. Army Corps of Engineers
- U.S. Department of Veterans Affairs

(2) Appropriately enter the contracting officer's name, title, address, and phone number.

(c) Withholding actions

- [redacted] (b) (7)(E) [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(d) Subcontractors or prime contractor

(b) (7)(E) [redacted]

54e04 Act-specific employer information: FLSA garment.

(a) Garment employer type

Select whether the garment employer is a contractor, manufacturer, or retailer. In general, "contractors" in the apparel industry are firms that provide manufacturing or finishing services for the shipper, the label, and owner of the goods. The shipper, label, and owner of the goods are generally referred to as the "manufacturer" even though the manufacturing is more often performed by someone, such as the contractor. The "retailer" normally refers to the "purchaser" of the goods after they have been manufactured and who intends to sell them to the general public.

(b) Labels

Enter the goods produced on the "Clothing Labels" screen. It is recommended that at the very least, the most recent two or three major shipments be entered for each contractor, manufacturer, and/or retailer.

(c) Related businesses

(b) (7)(E) [redacted]

(d) Linking

(b) (7)(E) [redacted]

(e) NAICS codes for garment employers

For a contractor or a manufacturer, use the 3152 or 3159 series. For a retailer select from 44811, 44812, 44813, 44814, 44815, 45211, 45291, or 45299.

For general information on the garment industry practices and investigation considerations, *see* FOH 62e.

54e05 Act-specific employer information: child labor prior investigations.

(b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

54e06 **Employee information.**

(a) **Employee personal information**

Enter employee first and last name, address, city, state, zip code, and SSN. The employee's last name is mandatory. Employee information is used for the WH-56.

(b) **Covered by CBA**

(b) (7)(E)

[redacted]

(c) **Rate of pay (in hourly rate)**

(b) (7)(E)

[redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]

54e07 **Case diary entries.**

(b) (7)(E) [redacted] It is recommended that the case diary entries be made daily. Any case diary entries entered will be forwarded and appear on the WHISARD weekly time report.

(a) Definition of case diary fields

(1) *"Act"*

"Act" is a mandatory field. Time spent on a case on more than one act can be reported on the same day.

(2) *"Action Code"*

Two-letter action codes shall be entered. The action codes may be typed or selected from a list of action codes check boxes. As many boxes as necessary may be checked.

- MU: multiple entries
- CN: conciliation
- RS: research
- IC: initial conference (b) (7)(E) [redacted]
- TE: tour of establishment
- RC: records check: (b) (7)(E) [redacted]
- IN: interviews (b) (7)(E) [redacted]
- BW: estimating and/or computing back wages, or checking employer's computations

- CF: case file analysis: (b) (7)(E) [redacted]
- MR: meet with employer representative
- FC: final conference: (b) (7)(E) [redacted]
- RP: report preparation: (b) (7)(E) [redacted]
- DD: submitted to management review
- PL: potential litigation: (b) (7)(E) [redacted]
- SL: second level conference
- TR: travel on official business
- SU: surveillance
- PR: policy review (b) (7)(E) [redacted]
- MG: manufacturer contacts
- RG: retail contacts
- BF: back wage follow-up
- BU: BCDS unlocated employees

(3) *"Action Description"*

This entry shall be concise. There is no set formula; the wording of each entry should fit the circumstances. Such entries as the following will usually be adequate: "Interviewed complainant, held opening employer conference with John Doe;" "Checked shipping and payroll records, interviews;" and "Conference with firm's attorney, A.B. Smith."

(4) *"Establishment Time" vs. "Non-establishment Time"*

Establishment time will include all time spent in the employer's establishment, in the establishment of the employer's representative (*e.g.*, lawyer's or accountant's office), or at job sites. Time under non-establishment includes other case time such as home interviews, travel time, court appearances, and any time spent in a WHD office computing back wages, researching the FOH, etc.

(5) *"Action Date"*

The date of the action automatically defaults to today's date. The date should be changed to reflect the actual date the action was taken. Time reported here will also be posted to the weekly time report. An incorrect action date will result in an incorrect time report.

(6) *"Place"*

Enter a description of the place where a WHI spent case time (*e.g.*, establishment, DO, etc.).

(b) Required "Case Diary" entries on child labor

(b) (7)(E) [redacted]

(c) Changes to diary entries

For any changes made to the diary entries during the week for which a time report has been submitted, (b) (7)(E) [redacted]

(d) "Case Diary Entries Report"

"Case Diary Entries Report" provides a brief chronological history of the compliance action. (b) (7)(E) [redacted]

54e08 <u>List of violations and other findings by act.</u>

(b) (7)(E) [redacted]

For database management purposes, violations are categorized in two types in WHISARD, namely employee violation ("E") and employer violation ("R"). In general, employee violations are the violations that are specifically identified with an employee and are entered on the "EE Findings" screen. Employer violations are all other violations and are entered on the "ER Findings" screen in WHISARD.

(a) FLSA: Fair Labor Standards Act

Type	Description
E	Failure to pay minimum wage
E	Failure to pay overtime
E	Back wages due in 90 days immediately preceding investigation (garment only)

E	Overtime pay due in 90 days immediately preceding investigation period (garment only)
E	FLSA liquidated damages as the result of litigation
R	No violation found for this act
R	No coverage under this act
R	Failure to keep accurate records
R	Failure to display poster
R	Hot goods in association with minimum wage and/or overtime

(b) (7)(E) [redacted] The list reflects violations of the executive, administrative, and professional exemption (*see* 29 CFR 541) that became effective 08/23/2004 and some general categories of common WHD FLSA violations. The list also contains a *single* designation for violations of the *prior* 29 CFR 541 regulations (*i.e.*, 29 CFR 541 in effect prior to 08/23/2004). Users should select the primary reason for the violation for each monetary violation, for each employee. Users should be as specific as possible in designating violations reasons related to the new 29 CFR 541 regulations. For violations unrelated to 29 CFR 541, users should select a violation reason that most closely describes the nature of the violation.

Reason for violation
Preliminary/postliminary work
Uncompensated hours not elsewhere identified
Bonus not in regular rate
Regular rate issues not elsewhere identified
Straight-time for overtime
Banked hours
Failure to combine hours
Failure to pay proper overtime not elsewhere identified
Tip credit
Piece rate
Illegal deductions

NOT FOR PUBLIC DISTRIBUTION

Improper credit under FLSA section 3(m)
Failure to pay minimum wage not elsewhere classified
Last paycheck; missed payroll
Misapplied 13(a)(6) exemption
Misapplied 13(b)(1) exemption
Misapplied 7(i)
Misapplied 7(k)
541.100(a)(1) and 541.602 does not meet salary basis test
541.100(a)(1): does not meet salary level test
541.100(a)(2): management not primary duty
541.100(a)(3): does not supervise two full-time employees
541.100(a)(4): lacks authority to hire and fire
541.200(a)(1) and 541.602/.605 not paid on salary or fee basis
541.200(a)(1): does not meet salary level test
541.200(a)(2): does not meet primary duties test
541.200(a)(3): does not exercise discretion/judgment
541.300(a)(1) and 541.602/.605: not paid on salary or fee basis
541.300(a)(1): does not meet salary level test
541.300(a)(2): primary duty not professional
541.301(b): does not exercise discretion and judgment
541.302: primary duty is not creative professional
541.303: primary duty is not teaching
541.304: fails practice of law or medicine test
541.400(b): does not meet primary duties test
541.400(b): does not meet salary, fee, or hourly rate test

NOT FOR PUBLIC DISTRIBUTION

541.500(a)(1): not primarily engaged in outside sales
541.601(a): not paid total annual compensation of $100,000
541.601(b): not paid $455 per week on salary or fee basis
541.601(a) and (b): does not meet duties test
541 regulation in effect prior to August 23, 2004

(b) MSPA: Migrant and Seasonal Agricultural Worker Protection Act

For a detailed explanation of each violation, *see* FOH 57e.

Type	Description
E	04a Breach of working arrangements with workers
E	09a Fail to pay wages when due
R	00 No violation found for this act
R	01 Fail to disclose conditions to workers
R	02 Fail to post MSPA poster at worksite
R	03 Misrepresenting conditions to workers
R	04 Breach of working arrangements with workers
R	05 Fail to make/keep employer records
R	06 Fail to provide wage statement to workers
R	07 Fail to provide records
R	08 Fail to maintain records provided by FLC
R	09 Fail to pay wages when due
R	10 Restrict workers in purchase of goods and services
R	11 Fail to post housing conditions
R	12 Fail to ensure housing safety and health
R	13 Fail to provide safe transport vehicles
R	14 Fail to ensure driver has valid license
R	15 Fail to obtain prescribed insurance coverage
R	16 Utilizes services of unregistered FLC
R	17 Discriminate against workers testifying, etc.
R	18 Interfering with DOL official during investigation
R	19 Fail to register
R	20 Fail to register employee
R	21 Fail to exhibit certificate
R	22 Knowingly made misrepresentation on application
R	23 Fail to comply with court judgment or final order
R	24 Was not the real party in interest
R	25 Transported workers without certificate of authorization
R	26 Housed workers without certificate of authorization
R	27 Fail to provided change of permanent address
R	28 Fail to apply to amend certificate
R	30 Fail to abide by agreements with AGER or AGAS

NOT FOR PUBLIC DISTRIBUTION

(c) Child labor: child labor provisions of the FLSA

For a detailed explanation of each violation, *see* FOH 54f02(b). *See* FOH 52g for child labor investigation guidance. *See* FOH 33 for child labor definitions and interpretations.

Type	Description
E	Age: occupation standards of Reg. 3 (under 14)
E	Child labor recordkeeping: per child where records were not kept: no CMP
E	Hazardous occupations order (HO): agriculture (under 12)
E	Hours: agriculture: during school hours (14 or 15)
E	Hours: agriculture: outside school hours (12 or 13)
E	Hours standards of Reg. 3 (under 14)
E	Hours standards: non-agriculture
E	HO: agriculture: 14 or 15 and not specifically exempt
E	HO: non-agriculture: 16 or 17
E	HO: agriculture: under 14 and do not qualify for parental exemption
E	HO: non-agriculture: under 16
E	Reg. 3 occupations: non-agriculture but not HO: under 16
E	Age: non-agriculture: under 14
E	Hours: agriculture: 12 or 13 during school hours
E	Age: agriculture: under 12 outside/during school hours
R	Child labor recordkeeping: failure to have date of birth
R	No coverage under this act
R	No violation found for this act
R	Child labor recordkeeping: failure to have parental written permission to work
R	Shipment of "hot goods," as defined by FLSA section 12(a)

(d) FMLA: Family and Medical Leave Act

For detailed instructions on FMLA investigations, *see* FOH 52w.

Type	Description
E	Denial of leave
E	Discrimination (*e.g.*, disciplinary action)
E	Failure to comply with 301(b) specific written notice to employee
E	Failure to maintain group health insurance
E	Failure to maintain health benefits
E	Failure to reinstate to same or equivalent position, benefits, pay, or other terms of employment
R	No violation found for this act
R	Failure to post FMLA poster
R	FMLA recordkeeping
R	Failure to comply with 301(a) general notice
R	Policy review issue: 301(a)(1) incomplete written guidance
R	Policy review issue: 301(a)(2) incomplete general written notice upon request for leave
R	Policy review issue: 301(a)(2) no general written notice provided upon request for leave
R	Policy review issue: 301(b)(1) incomplete specific notice
R	Policy review issue: 301(b)(1) no specific notice

NOT FOR PUBLIC DISTRIBUTION

R	Policy review issue: 301(b)(1)(i) leave will be counted against annual entitlement
R	Policy review issue: 301(b)(1)(ii) medical certification requirement
R	Policy review issue: 301(b)(1)(iii) substitution of paid leave (rights and requirements)
R	Policy review issue: 301(b)(1)(iv) premium payment (requirements/arrangements) made by employer
R	Policy review issue: 301(b)(1)(v) fitness for duty requirements
R	Policy review issue: 301(b)(1)(vi) key employee status
R	Policy review issue: 301(b)(1)(vii) right to restoration
R	Policy review issue: 301(b)(1)(viii) potential liability for premium payment

(e) DBRA: Davis-Bacon and Related Acts

See FOH 15 for DBRA definitions and interpretations. *See* FOH 52t for DBRA investigation guidance.

Type	Description
E	Failure to pay prevailing wage rates
E	Failure to pay for all hours worked
E	Failure to properly pay health and welfare (fringe benefits)
E	Improper classifying of an employee and paying less for the type of work actually performed
R	No violation found for this act
R	Misrepresenting or falsifying certified payroll versus actual pay practices
R	Apprentice trainee violations
R	No coverage under this act

(f) SCA: McNamara-O'Hara Service Contract Act

See FOH 14 for SCA definitions and interpretations. *See* FOH 52i for SCA investigation guidance.

Type	Description
E	Failure to pay prevailing wage rate
E	Failure to pay required health and welfare (fringe benefits)
R	No violation found for this act
R	No coverage under this act

(g) PCA: Walsh-Healey Public Contracts Act

See FOH 13 for PCA definitions and interpretations. *See* FOH 54i09 for PCA investigation guidance.

Type	Description
E	Failure to pay prevailing wage rate
E	Employment of child under 16
E	Convict labor liquidated damages
R	No violation found for this act
R	No coverage under this act

(h) CWHSSA: Contract Work Hours and Safety Standards Act

NOT FOR PUBLIC DISTRIBUTION

Where CWHSSA violations are present, the WHI must compute liquidated damages for all laborers and mechanics due more than $20.00 in CWHSSA back wages standing alone. CWHSSA liquidated damages are not optional, and must be computed in every instance where the above criteria are present; FOH 15k10 and FOH 52t20 describe the method for computing CWHSSA liquidated damages. After computing and separately summarizing liquidated damages, as required by FOH 54b04(f)(2), enter the total amount computed per "Unpaid OT compensation EE violation" entry in the field "Liquidated Damages" in WHISARD.

See FOH 15 for CWHSSA definitions and interpretations. *See* FOH 52t for CWHSSA investigation guidance.

Type	Description
E	Unpaid overtime compensation
R	No violation found for this act
R	No coverage under this act

(i) CA: Copeland "Anti-kickback" Act

See FOH 15a04 for Copeland "Anti-Kickback" Act (Copeland Act) definitions and interpretations. *See* FOH 52t24 for CA investigation guidance.

Type	Description
E	Failure to pay prevailing wage due to illegal kickbacks or deductions
R	No coverage under this act
R	No monetary findings

(j) RFR: Right of First Refusal

This EO was rescinded. No entries are to be made under this act.

(k) OSH Act: OSH Act housing and field sanitation inspections

For detailed instructions on OSH Act investigation, *see* FOH 56. Field sanitation ("FS") indicates the field sanitation standards at 29 CFR 1928.110, and migrant housing ("MH") indicates the temporary labor camp standards at 29 CFR 1910.142.

(b) (7)(E)

[redacted]

Type			Description
R	FS	10	Cost to employees for facilities

NOT FOR PUBLIC DISTRIBUTION

R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
R	FS	20b	Maintenance: handwashing facilities were not refilled with potable water as necessary to ensure an adequate supply
R	FS	20c	Maintenance: handwashing facilities were not maintained in a clean and sanitary condition

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
R	FS	21	Maintenance: facility waste disposal caused unsanitary conditions

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
R	FS	22	Reasonable use: employer failed to notify employees of the location of

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
			the facilities and water

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
R	FS	22a	Reasonable use: employer did not allow each employee reasonable opportunities during the workday to use the sanitation facilities and

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
			water

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
R	FS	23a	Employer failed to inform employees of following good hygiene practices in use of water and facilities provided for drinking,

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
			handwashing, and elimination

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
R	FS	23b	Employer failed to inform employees of following good hygiene

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
			practices in drinking water as frequently as needed

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
R	FS	23c	Employer failed to inform employees of following good hygiene

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
			practice to urinate as often as necessary

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
R	FS	23d	Employer failed to inform employees of following good hygiene

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
			practice to wash hands before and after using the toilet

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
R	FS	23e	Employer failed to inform employees of following good hygiene

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	FS	10	Cost to employees for facilities
R	FS	11	Potable drinking water not provided and readily accessible
R	FS	12	Potable drinking water: not cool
R	FS	12a	Potable drinking water: provided not in sufficient amounts
R	FS	13	Potable drinking water: not dispensed in single-use cups or fountains
R	FS	13a	Potable drinking water: the use of common drinking cups was not prohibited
R	FS	14	Toilet and handwashing facilities: not provided in proper ratio
R	FS	15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy
R	FS	16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other
R	FS	16a	Toilet and handwashing facilities: not located within ¼ mile walk of each hand laborer's place of work in the field
R	FS	17	Toilet and handwashing facilities: not located at point of closest vehicular access
R	FS	18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices
R	FS	19	Maintenance: drinking water containers not constructed of materials which maintain water quality
R	FS	19a	Maintenance: drinking water containers were not refilled daily or more often as necessary
R	FS	19b	Maintenance: drinking water containers were not kept covered
R	FS	19c	Maintenance: drinking water containers were not regularly cleaned
R	FS	20	Maintenance: toilet(s) were not operational
R	FS	20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition
			practice to wash hands before eating and smoking

NOT FOR PUBLIC DISTRIBUTION

Type			Description
R	MH	01	Inadequate drainage
R	MH	02	Inactive water (swamp, sinkhole, etc.) within 200’ of camp and untreated mosquito control
R	MH	03	Site not graded, ditched, or rendered free from depressions in which water may become a nuisance
R	MH	04	Danger to domestic or public water supply from poor drainage
R	MH	05	Subject to periodic flooding
R	MH	06	Within 500’ of livestock area
R	MH	07	Overcrowding of structures
R	MH	08	Grounds and open areas not maintained in a clean and sanitary condition; areas not free from rubbish, debris, waste paper, garbage, and other refuse
R	MH	09	When closing camp for season, failure to collect and dispose of refuse
R	MH	10	Abandoned toilet pits not filled with dirt
R	MH	11	Toilet buildings not locked when camp closed for season
R	MH	12	Shelter(s) do not provided protection against the elements
R	MH	13	Less than 50 square feet per person in sleeping rooms
R	MH	14	Ceiling not 7’ high
R	MH	15	No wall lockers for clothing and personal articles provided in sleeping rooms
R	MH	16	No beds, cots, or bunks provided for each occupant
R	MH	17	Beds, cots, or bunks less than 3’ apart, and / or less than 12” from floor
R	MH	18	Double-deckers: less than 4’ between bunks, side to side, and end to end; and less than 27” between bunks
R	MH	19	Triple bunks used
R	MH	20	Floors in structures made of other than wood, asphalt, or concrete
R	MH	21	Wooden floors not of smooth and tight construction

NOT FOR PUBLIC DISTRIBUTION

R	MH	22	Floors in disrepair
R	MH	23	Wooden floors elevated less than 1’ above ground level
R	MH	24	Windows and doors in living quarters total less than 1/10 of floor area
R	MH	25	Windows cannot be opened one-half to allow for ventilation
R	MH	26	Broken windows
R	MH	27	Openings in shelter not screened with 16 gauge mesh material
R	MH	28	Door not equipped with self-closing devices
R	MH	29	Less than 100 square feet per person in a room where workers cook, live, and sleep
R	MH	30	Sanitary facilities not provided for storing and preparing food in rooms where workers cook, live, and sleep
R	MH	31	At least 1 stove for each 10 people or 2 families not provided where cooking facilities are used in common
R	MH	32	Cooking facilities used in common not provided in an enclosed and screened shelter
R	MH	33	Heating, cooking, and water heating equipment not installed in accordance with applicable codes and regulations
R	MH	34	Adequate heating not provided in every shelter used during cold weather to maintain a comfortable temperature
R	MH	35	Water supply inadequate and / or inconvenient for drinking, cooking, bathing, and laundry
R	MH	36	Water supply less than 35 gallons per person per day
R	MH	37	Water not approved by health department for drinking, cooking, bathing, and laundry purposes
R	MH	38	Water unfit for human use
R	MH	39	Shelter more than 100’ from available water outlet when no indoor water facilities are provided
R	MH	40	Drinking fountains (at ratio of 1 fountain per 100 occupants) not provided where water under pressure is available
R	MH	41	Common drinking cups used

NOT FOR PUBLIC DISTRIBUTION

R	MH	42	Toilet room accessible only through sleeping room
R	MH	43	Toilet room not adequately ventilated and / or do not have a 6 square foot opening to the outside
R	MH	44	Privies within 100’ of any sleeping room, dining room, lunch area, or kitchen
R	MH	45	Toilet room(s) located more than 200’ away from every sleeping room
R	MH	46	Separate toilet facilities not provided for each sex
R	MH	47	Facilities for each sex not separated by solid walls or partitions extending from floor to ceiling
R	MH	48	Toilet facilities not provided in the required ratio of 1 unit for each 15 persons and urinals of at least 20’ of trough for every 25 men
R	MH	49	Construction of pit or vault does not keep out flies and rodents
R	MH	50	Water closets installed after 08/31/1971 not located in a toilet room
R	MH	51	Toilet rooms, commodes, and urinals not kept lighted all hours of the night and day
R	MH	52	Outside openings not screened
R	MH	53	Toilet paper not provided in adequate supply
R	MH	54	Toilets in unsanitary condition
R	MH	55	Toilet rooms not cleaned daily
R	MH	56	Sewer lines and drains not connected to available public sewers
R	MH	57	Laundry facilities not provided
R	MH	58	Handwashing facilities not provided
R	MH	59	Bathing facilities not provided
R	MH	60	Handwashing basins at ration of 1 per family shelter or 1 per every 6 persons in shared facility not provided
R	MH	61	At least 1 shower head for every 10 persons not provided
R	MH	62	Laundry tray or tub at ratio of 1 for every 30 persons not provided
R	MH	63	Slop sinks in building used for laundry, washing, and bating not provided

NOT FOR PUBLIC DISTRIBUTION

R	MH	64	Waterproof, smooth, non-slip floors not provided in laundry and bathing facilities
R	MH	65	No floor drains or adequate drainage
R	MH	66	Walls and partitions not of waterproof material up to splash line
R	MH	67	Inadequate supply of hot and / or cold running water for bathing and laundry purposes
R	MH	68	No hot water available
R	MH	69	No facilities available for heating, bathing, and laundry water
R	MH	70	Service building not equipped with heating facilities to maintain a temperature of 70° F during cold weather
R	MH	71	No facilities provided for drying clothes
R	MH	72	Service building not kept clean
R	MH	73	Electric service available but not supplied to each habitable room, laundry rooms, toilet rooms, kitchens, dining rooms, and storage rooms
R	MH	74	Each room not supplied with at least one ceiling-type light fixture
R	MH	75	Electrical outlets not provided in each room
R	MH	76	Lighting of an adequate level not provided in each room
R	MH	77	No refuse containers (insect and rodent-proof) provided
R	MH	78	Failed to have at least one container for each family unit
R	MH	79	Containers not kept clean
R	MH	80	Containers not on a wooden, metal, or concrete stand
R	MH	81	Containers not within 100’ of shelters
R	MH	82	Containers not emptied when full
R	MH	83	Containers emptied less than twice a week
R	MH	84	Food not free from vermin, rodents, flies, etc.
R	MH	85	Food not free from spoilage
R	MH	86	Poisonous or toxic materials stored with food or in food preparation area

NOT FOR PUBLIC DISTRIBUTION

R	MH	87	Person(s) with communicable disease working in preparation, cooking or handling of food
R	MH	88	Equipment and utensils not clean
R	MH	89	Kitchen area unclean
R	MH	90	Hot and cold running water not provided
R	MH	91	Garbage containers, leak-proof and with tight lids, not provided in kitchen area
R	MH	92	Central food facilities separate from sleeping quarters not provided
R	MH	93	Infestation by and harborage of insects and / or pests
R	MH	94	No first aid supplies or equipment available
R	MH	95	No person in camp trained to administer first aid
R	MH	96	Failure to report to local health authorities the identify of anyone in the camp suspected of having a communicable disease
R	MH	97	Failure to report immediately to local health authorities a case of food poisoning or an unusual prevalence of any illness where fever, diarrhea

(l) "SMW14": FLSA section 14(c)

For detailed instructions on a subminimum wage 14(c) investigation, *see* FOH 64.

Type	Description
E	Failure to meet terms of certificate *and* failure to pay commensurate rate
E	Failure to meet terms of certification though wage is correct
E	Failure to pay commensurate rate
E	No certificate
E	No violation subminimum wage; violation under SCA
R	No violation found for this act
R	Failure to display poster
R	No coverage under this act

(m) "SMWFT": FLSA section 14(b), full-time students

For detailed instructions on a subminimum wage full-time student investigation, *see* FOH 65.

Type	Description
E	No certificate
E	Failure to pay certified rate
E	Failure to meet terms of certification though wage is correct
R	No violation found for this act

NOT FOR PUBLIC DISTRIBUTION

R	Failure to meet terms of certificate
R	Failure to post certificate
R	No coverage under this act

(n) "SMWPW": FLSA section 14(c), patient worker

For detailed instructions on a subminimum wage patient worker investigation, *see* FOH 64c01.

Type	Description
E	No certificate
E	Failure to pay commensurate wage
E	Failure to meet terms of certificate *other* than commensurate wage
R	No monetary findings for this act
R	Section 14(c): failure to post poster
R	Section 14(c): improper calculation of commensurate wage rate
R	Recordkeeping
R	No coverage under this act

(o) "SMWSL": FLSA section 14(a), student learner

For detailed instructions on a subminimum wage student learner investigation, *see* FOH 65d.

Type	Description
E	No certificate
E	Failure to pay subminimum wage authorized by certificate
E	Failure to meet terms of certificate though wage is correct
R	No monetary findings for this act
R	No certificate
R	Recordkeeping
R	No coverage under this act

(p) "HMWKR": FLSA, 29 CFR 530, homeworkers

For detailed instructions on a homeworker investigation, *see* FOH 62.

Type	Description
E	Failure to pay minimum wage for all hours worked
E	Failure to pay time and one-half for overtime hours worked
R	No monetary findings for this act
R	No certificate
R	Failure to provide Homeworker Handbook
R	Working in women garments, a prohibited industry
R	Section 14(c): improper calculation of commensurate wage rate
R	Section 14(c): failure to post poster
R	Recordkeeping
R	No coverage under this act

(q) CCPA: Consumer Credit Protection Act (garnishment)

NOT FOR PUBLIC DISTRIBUTION

For detailed instructions on a CCPA investigation, *see* FOH 16 and FOH 52v.

Type	Description
E	Excessive garnishment
E	Fired for first garnishment
R	No monetary findings for this act
R	No coverage under this act

(r) EPPA: Employee Polygraph Protection Act

For detailed instructions on an EPPA investigation, *see* FOH 68.

Type	Description
E	Improper lie detector test
E	Adverse employment actions, discharge or denial of employment
E	Adverse employment actions, other discriminatory actions with loss of pay or benefits
E	Adverse employment actions, other discriminatory action without loss of pay or benefits
E	Adverse employment actions, threaten adverse action
E	Discriminated against employee for exercising their rights
E	Failure to meet one or more of the exemption restrictions listed in section 8 of EPPA
E	Requiring, requesting, suggesting test (801.4(a))
E	Inquiring into and / or using test results (801.4(b))
E	Improper disclosure of polygraph test information
E	Improper polygraph test, no exemption
E	Improper polygraph test, exemption conditions not satisfied, ongoing investigation, no specific incident
E	Improper polygraph test, exemption conditions not satisfied, ongoing investigation, no access
E	Improper polygraph test, exemption conditions not satisfied, ongoing investigation, no reasonable suspicion
E	Improper polygraph test, exemption conditions not satisfied, ongoing investigation, no written statement, was not properly signed
E	Improper polygraph test, exemption conditions not satisfied, ongoing investigation, no written statement, was not complete
E	Improper polygraph test, exemption conditions not satisfied, ongoing investigation, no written statement, was not timely
E	Improper polygraph test, controlled substances, prospective employee without direct access
E	Improper polygraph test, controlled substances, current employee without access or not exemption conditions not satisfied, ongoing investigation
E	Improper polygraph test, security services, primary business test not met
E	Improper polygraph test, security services, not hired to protect covered facilities or assets
E	Improper polygraph test, security services, not a prospective employee
R	No violation found for this act
R	Recurring failure to post
R	Interfering with DOL investigation
R	Recordkeeping
R	No coverage under this act

(s) H-1A: Immigration Nursing Relief Act: nonimmigrant registered nurses

NOT FOR PUBLIC DISTRIBUTION

For detailed instructions on an H-1A investigation, *see* 20 CFR 655 subparts D and E.

(t) H-1B: specialty occupations (*i.e.*, computers and fashion models (Chile and Singapore nationals only))

For detailed instructions on an H-1B investigation, *see* 20 CFR 655 subparts H and I.

(u) H-2A: Temporary Nonimmigrant Agricultural Worker Certification Program

For detailed instructions on conducting H-2A investigations, *see* FOH 58.

Type	Description
E	01 Failed to provide copy of work contract / job order
E	04 Failed to pay wages when due
E	05 Failed to pay proper rate
E	06 Failed to pay three-quarter guarantee
E	07 Illegal deductions
E	09 Illegal charges for housing
E	10 Failed to provide transportation / subsistence
E	15 Failed to abide by agreement in the case of contract impossibility
E	17 Preferential treatment given to H-2A workers
R	00 No violation found for this act
R	02 Failed to make / keep employer records
R	03 Failed to provide wage statements
R	08 Failed to ensure housing safety and health
R	11 Failed to provide safe transportation vehicles
R	12 Failed to provide meals at reasonable cost
R	13 Failed to provide necessary supplies at no charge
R	14 Failed to provide worker's compensation
R	16 Illegal dismissal of U.S. worker
R	18 Discrimination against worker testifying, etc.
R	19 Procured waiver of rights
R	20 Failed to permit investigation
R	21 Interfered with DOL investigation
R	22 Knowingly provided false information to DOL
R	23 Failed to provide records
R	24 Failed to comply with employment-related laws
R	"NC": no coverage under this act

(v) "CREW": longshoremen, D-1

For detailed instructions on a D-1 investigation, *see* 20 CFR 655 subparts F and G.

(w) F-1: foreign students working off-campus

For detailed instructions on an F-1 investigation, *see* 20 CFR 655 subparts J and K.

(x) OWCP: Federal Employee Compensation Act

For detailed instructions on an OWCP investigation, *see* FOH 52y.

NOT FOR PUBLIC DISTRIBUTION

Type	Description
R	No coverage under this act
R	No monetary findings for this act

(y) TVA: Tennessee Valley Authority

For detailed instructions on a Tennessee Valley Authority (TVA) investigation, *see* FOH 59a09.

Type	Description
R	No violations for this act
R	Non-monetary violation
R	No coverage under this act

54e09 <u>Other compliance action data reporting.</u>

(a) Period of investigation

Enter the beginning and ending dates of the longest period covered by the activity. The date format shall be MM/DD/YYYY, for example, 04/01/2004.

(b) Registration act

This information would have been entered when the case was registered and brought forward to the "Investigative Support" module. This entry can be modified.

(c) Investigation tool

This information was captured at the time of case registration. The entry can be modified to reflect the actual tool used. For example, a case may have been registered as a conciliation but circumstances may dictate that a full investigation be conducted (*see* FOH 51a01(d), FOH 51a02 -03, and FOH 51a05 for definitions of the tools). If applicable, select from the picklist containing the following: "Full Investigation," "Limited Investigation," "Office Audit," "Self Audit," "Conciliation," "Preoccupancy Housing Inspection," and "No Further Action."

(d) Reinvestigation

(b) (7)(E)

[redacted]

(e) Recurring violation

Recurring or identical violation cases are reinvestigation cases that disclosed violations that are identical in nature to the violations found in a prior investigation of the employer. This

NOT FOR PUBLIC DISTRIBUTION

definition of recurring is different from the definition of child labor violations in FOH 54f02(a)(3).

(f) Repeat violation

Repeat violation cases are reinvestigations that disclose violations and the employer had prior violations under any statute enforced by the WHD. *This definition is different from the FLSA definition of repeat violation used for the assessment of CMPs under that act and set forth in FOH 52f14(b)(1).*

(g) Compliance status and future compliance agreed

Appropriately indicate the information for these fields.

(h) Recommended actions

Check all that apply to the case. Recommended actions available are "BCDS," "CMP," "Litigation," "Civil Action," "Criminal Action," "Submit for Opinion," "RO/NO Review," "Follow Up Investigation," "Other Action," and "Certificate Action."

(i) Number of branches not physically investigated

(b) (7)(E) [redacted]

(j) Final conference and back wage payment deadline

Enter as appropriate. Either type in the dates or use the calendar icons to call up calendars. The "BW Payment Deadline" entry is mandatory in all agree-to-pay cases. It is used to establish back wage follow-up dates.

(k) Case summary notes and recommendations

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

(l) Case narrative

(b) (7)(E) [redacted]

(m) Publications

Select all publications and quantities furnished to the employer, (b) (7)(E) [redacted]

(n) Profile pay period

(1) *Profile pay period dates*

The profile pay period is defined as the last pay period preceding the notice of the investigation and is generally a 2 week period. If the employer pays weekly, then the last 2 consecutive weeks are used. If the employer pays semi-monthly, then this period can be used. If the employer pays monthly, then the first 2 weeks in the month should be used. Note: this is *not* the equivalent of the profile workweek.

(2) *Employees employed in violation or paid in violation during the profile pay period (all cases)*

In this field WHIs should enter the total unduplicated number of employees who were the subject of a monetary or non-monetary violation, including youth employed in violation of the child labor requirements, agricultural workers subject to non-monetary violations, and workers illegally terminated under the FMLA. Data for this field is limited to the act or acts investigated. Data is limited to the establishment or establishments that are the subject of the investigation. If there are no violations, then the WHI should enter "0."

(3) *Number of minors employed during the profile pay period (all cases)*

WHIs should enter the total number of youth 17 years old and under employed during the profile pay period. If no youth are employed, "0" should be entered. This applies to all child labor cases and all full and limited investigations during which child labor compliance is reviewed or time is charged to child labor. If there are no youth employed, or if the investigation does not include a check for child labor compliance, then "0" should be entered.

(4) *Number of minors employed in violation during the profile pay period (all cases)*

WHIs should enter the total unduplicated number of minors who were employed in violation of the child labor requirements. If no minors were illegally employed, "0" should be entered.

(5) *Number of employees paid on the payroll in the profile pay period (garment)*

In garment manufacturing investigations, WHIs should enter only the unduplicated number of workers who were listed *completely* on the payroll for all hours that they worked. In cases other than garment manufacturing, WHIs should enter "0."

NOT FOR PUBLIC DISTRIBUTION

(6) *Number of employees housed during the day of the site visit and the number of employees transported on the day of the site visit in compliance and in violation (agriculture)*

(b) (7)(E) [redacted] The MSPA housing counts are to include only workers housed, not non-working spouses or children. Similarly, the MSPA transportation counts are to include only workers transported on the day. In joint employment situation, the profile pay period count should only be entered for the primary employer or provider of housing or transportation. Do not duplicate the count for joint employers. The number of workers employed in compliance should be entered whether violations are found or not.

a. Housing violations are Item 12 violations: "Fail to Ensure Housing Safety and Health" (*see* MSPA section 203, 29 CFR 500.130 -135, and FOH 57e12). Transportation violations are Items 13, 14, and 15: "Fail to Provide Safe Transport Vehicles" (*see* MSPA sections 401(b)(2)(A) and (C), 29 CFR 500.45(b), 29 CFR 500.100 -105, and FOH 57e13); "Fail to Ensure Driver Had Valid License" (*see* section 401(b)(1)(B), 29 CFR 500.45(b), 29 CFR 500.100(a), and FOH 57e14); and "Fail to Obtain Prescribed Insurance Coverage" (*see* MSPA section 4019b)(1)(C), 29 CFR 500.120 -128, and FOH 57e15).

b. Where no violations are disclosed, the count for the three violation fields should be "0."

c. For non-agriculture cases, "0" should be entered in these fields.

(7) *FMLA cases*

For investigations that are limited to compliance under the FMLA, WHIs should enter the number of employees who are employed in violation of the FMLA during the profile pay period only. (b) (7)(E) [redacted]

54e10 <u>Outreach activity data reporting.</u>

All data relating to WHD compliance assistance or outreach activities must be entered in and reported by WHISARD. Any compliance assistance or outreach activity by the WHD requires prior approval from the NO before anyone actually engages in such activity. The planned activity must be registered and submitted for approval.

The procedures for the request for approval and the notification for approval decision are done in WHISARD.

(a) Outreach event registration

(1) *"Wage and Hour Office"*

This information is entered automatically.

(2) *"Event Types"*

a. "Presentation/Seminar/Speech" includes presentations and seminars to associations, employee groups, and other interested parties regardless of size of audience (can be self-initiated or invitation).

b. "Panel Discussion Participation:" as a member of a panel on a WHD topic.

c. "Media (TV/Radio/News)": *proactive* media activities only. Media activities like interviews or response to Freedom of Information Act requests should not be entered into the WHISARD approval system. Pro-active events where the WHD initiates the activity should be submitted for approval.

d. "Exhibit/Booth": this entry should be used when WHD staff set up a booth or table at an exhibit. If staff also gives a presentation, then the presentation selection should be used instead of this event.

e. "Committee/Task Force Meetings": used for regular and reoccurring meetings of a defined committee group, which includes participation of members external to the WHD.

f. "Training" on-going or one-time training for external parties that is designed to educate the audience on how to comply with labor standards statutes. This event type is more focused and less general than seminars or presentations.

g. "Mailings": used for mass mailing events to a defined group.

h. "Town Hall": used for open meetings attended by members of the general public.

i. "Face-to-Face Consultation": face-to-face consultations are approved compliance assistance initiatives. The event should be entered once with individual consultations identified on the "Audience Location" screen.

j. "Stakeholder Meeting": meetings with external organizations or groups upon WHD initiation to discuss or plan activities of common interest.

k. "Compliance Consultations": meetings held in response to an individual or employer to discuss methods for ensuring compliance. Held in response to a request from an external party.

l. "Initiative Planning": WHD staff only. Used only as interim measure for district offices planning specific compliance initiatives.

(3) *"Program Area"*

Select the most critical act applied for the activity.

(4) "*Description*"

NOT FOR PUBLIC DISTRIBUTION

Enter the name or description of the event sponsor in the event description line. Examples: Indiana Restaurant Association seminar, Society of Human Resource Professionals conference, child labor mailings to public schools, New York State DOL post-harvest meeting.

(5) *"Primary Subject"*

This field is used to identify the compliance assistance with nontraditional partners; outreach to Hispanic, Asian, and other ethnic organizations; state coordinated activities; the YouthRules! student work permit activities; and our compliance assistance in low-wage industries. While some activities may cross subject areas, users should select the primary activity. This field should be completed upon submission of an event for approval.

a. "Compliance Assistance Plan": compliance assistance activities not elsewhere captured.

b. "Non-Traditional Partnerships": activities related to broad community-based, ethnic, or faith-based partnership initiatives.

c. "Hispanic Outreach": outreach primarily directed to the Hispanic community (employers and employees).

d. "Asian Outreach": outreach primarily directed to the Asian American and Pacific Islander community (employers and employees).

e. "Other Ethnic Outreach": outreach primarily directed to some other ethnic community (employers and employees).

f. "State Cooperation": compliance assistance activities undertaken with a state agency.

g. "Student Work Permit": initiatives with schools or state department of education related to YouthRules! work permit activities.

h. "Low-Wage Industry (Garment)": industry specific compliance assistance.

i. "Low-Wage Industry (Agriculture)": industry specific compliance assistance.

j. "Low-Wage Industry (Health Care)": industry specific compliance assistance.

k. "Low-Wage Industry (Other)": industry specific compliance assistance.

"541": the event should be selected for any compliance assistance specifically undertaken to educate the public on revised regulations governing the executive, administrative, and professional exemptions under 29 CFR 541.

(6) *"Target Audience"*

NOT FOR PUBLIC DISTRIBUTION

The "Target Audience" menu captures the various groups and audiences to and for which the agency provides compliance assistance.

a. Employers

b. Employer Associations

c. Attorneys

d. Accountants

e. Human Resource Professionals

f. Employees

g. Unions

h. Advocacy Groups

i. Payroll Associations

j. Federal Government Agencies

k. State Governmental Agencies

l. Local Governmental Entities

m. Community-Based Organizations (Hispanic)

n. Community-Based Organizations (Asian)

o. Community-Based Organizations (Other)

p. Faith-Based Organizations

q. Schools (Students and Teachers)

r. Public (Media)

s. Task Groups

(7) *"Event Initiated"*

Select one from the list: "WHD Initiated," "Sponsor Invitation," "Regularly Scheduled," and "Meeting Request."

(8) *"NAICS Code"*

NAICS codes must be entered where the outreach event is targeted toward a specific industry (in particular, the low-wage industries that are the focus of the agency's compliance efforts).

NOT FOR PUBLIC DISTRIBUTION

(9) *"Crop Code"*

"Crop code" must be entered for crop specific agricultural outreach activities.

(10) Enter the date and time of the event and its duration. If the event is recurring, enter the first occurrence of the activity. Identify whether the event is directly targeted towards new businesses, small businesses, or both by checking the associated box. Enter the expected audience count. Also, identify whether media coverage is expected.

(11) If the compliance assistance activity is related to a *nationally-tracked initiative*, associate the activity through the "Associate Event with Strategic Plan" button in the lower left-hand corner. Similarly, events can be associated to a local group through "Associate Event with Local Groups" button.

(b) Details

(1) *"WH Offices"*

Enter any additional WHD offices participating in the planned activity.

(2) *"Subjects"*

If more than one subject or act is covered in the planned activity, enter all that apply.

(3) *"Presenters vs. Assigned WH Employees"*

Enter under the "Presenters" tab those WHD employees who normally do not report their time on the "Time Report." Examples include an RA or deputy regional administrator (DRA) as guest speakers for that event. A presenter cannot charge time to the event unless he or she is assigned to the event.

(c) Event location

Enter the location of the event. If the event takes place at multiple locations, enter the primary location or the location of the first occurrence of the event. Additional locations and the respective dates will be entered under the tab identified as "Audience Locations." Check the box, "Recurring Activity – Multiple Locations," if the event is a recurring activity and there are multiple locations.

Fields that are available for the contact information and directions should be completed.

(d) Publications

Select the appropriate publication(s) and enter the quantity. This field is mandatory. If no publications are being provided, the "Outreach Approval Request E-mail," "Special Instructions / Comments" section should note that information.

If non-standard presentations are being used in the event, the e-mail request should identify the presentation and a copy must be attached. If a previously approved PowerPoint presentation is being used, note in the e-mail the name of the PowerPoint presentation file and when, or for which event, it was previously approved.

NOT FOR PUBLIC DISTRIBUTION

(e) Diary entries

All outreach activity time *must* be entered on the "Diary" tab in the "Outreach" module in WHISARD. Outreach activity time should be rounded to the nearest quarter of an hour.

(1) *"WHI"*

This information is entered automatically.

(2) *"Act/Time"*

Act is a mandatory field. Identify the appropriate act and the amount of time attributable to each act.

(3) *"Action Description"*

Enter a brief text description of the work performed. The description shall be in sufficient detail to describe the work performed.

(4) "*Action Date*"

The date of the action automatically defaults to today's date. The date should be changed to reflect the actual date the action was taken. Time reported here will also be posted to the weekly "Time Report." An incorrect action date will result in an incorrect "Time Report."

(f) Sponsor

Enter the name and location of the event sponsor. Presentations or other events sponsored or requested by for-profit organizations can not be approved.

(g) Audience locations

(1) Rather than create separate records and numerous approvals for the same activity or event that take place in multiple locations, WHISARD allows for the capture of all related event locations and dates under this tab.

Visits to schools or face-to-face consultations that are part of an *approved strategic initiative* should be registered as a single event and the various locations and the specific audience names should be identified under the "Audience Locations" tab. The various locations and dates of subsequent meetings should be entered into the "Audience Locations" tab as they become known.

(2) The event will be approved, rejected, or returned for modification upon initial submission. As new locations, audience names, or dates are entered, the user should generate a follow-up e-mail alert to the "Outreach Approval E-mail" with notice of the new information. If there are concerns about subsequent activities, the event status will be changed to "Not Approved" and a return e-mail will alert the user of the change in status. The subsequent event(s) cannot take place until approval is obtained.

NOT FOR PUBLIC DISTRIBUTION

Task force or committee meetings that take place with the same sponsor and occur on a regular basis, however, should be entered individually before each meeting occurs and approved individually.

(h) Submitting for approval

(1) Compliance assistance activities should be cleared in accordance with regional clearance procedures before submitting for approval. WHI should use the "Event Check" function prior to submitting.

Once all relevant and required data is entered, click on the "Submit for Approval" button. WHISARD will automatically compose an e-mail that identifies the event and alerts regional management and OZ that the event is ready for review and approval. Complete the "Outreach Approval Request E-mail" screen. Copy any staff on the e-mail as identified by regional management. WHISARD will not permit the submission of any event in which the required data fields have not been completed.

(2) Attach any non-standard presentations, PowerPoint files, handouts, or talking points to the e-mail. State in the "Special Instructions or Comments" section of the e-mail message if no presentation or a previously approved presentation is being used. Also include any relevant information that would facilitate approval of the event. Do not order publications through the OZ system.

(i) "Approved," "Returned for Modification," and "Approval Not Required"

(1) Once approved, the event status is changed to "Approved." An e-mail is generated notifying the submitter that the event is approved.

(2) If additional information is needed or the submission is incomplete, the event status will be changed to "Returned for Modifications." The submitter will receive an email notice directing him or her to make certain modifications or provide additional data. Complete all necessary changes in WHISARD and in the appropriate event screens. *Do not reply to the e-mail message*. Once all modifications have been made, click on the "E-mail Approval Request" button and indicate that the modifications have been made. This e-mail will notify OZ that the event has been resubmitted.

(j) Cancelling events

On the "Browse Events" tab, highlight the event to be cancelled. Click on the "Cancel Event" button in the lower right corner of the screen. Confirm that the event is to be cancelled. Complete the "Outreach Approval Request E-mail" screen and indicate that the event was cancelled. Click on the "Send" button. The e-mail will notify OZ that the event has been cancelled.

Events can also be un-cancelled. From the "Browse Events" tab, filter the events list by "Event: Concluded Only." Highlight the event to be un-cancelled. Click on the "Un-cancel Event" button in the lower right corner of the screen. Follow the same steps to advise OZ that the event will now take place.

(k) Results and/or conclusion

NOT FOR PUBLIC DISTRIBUTION

(1) To conclude an event in WHISARD, enter the date of conclusion of the event in the "Date Concluded" field on the "Results" tab.

(2) Enter either the total number of people who attended the presentation, the number of mailings accomplished, or another reasonable count of the audience reached in the "Actual Audience Count" field. Include information on the number of employees impacted, if known, in the "Number of Employees Affected" field.

(3) Enter any comments on the event in the "Event Remarks" field.

54f CIVIL MONEY PENALTY COMPUTATIONS

54f00 General.

(b) (7)(E) [redacted]

54f01 FLSA wages CMP computations.

Under the Federal Civil Penalties Inflation Adjustment Act, as amended by the Debt Collection Improvement Act of 1996, the WHD is required to increase penalties as an adjustment for inflation. In December, the Final Rule for increasing FLSA sections 6 and 7 and child labor CMPs by 10 percent was issued. As of 01/07/2002, the penalty amounts have increased by 10 percent.

(a) Recommendation of CMPs

(b) (7)(E) [redacted]

(b) Penalty

(b) (7)(E) [redacted]

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

54f02 **Child labor CMP computations regarding WH-266: Child Labor Civil Money Penalty Report – Nonagriculture and Agriculture).**

It is the policy of the WHD to promote a vigorous and active child labor enforcement program, including the assessment of CMPs in appropriate amounts that are consistent with

FLSA section 16(e), and to issue assessments that will serve as an effective deterrent to violations of the FLSA child labor provisions.

(a) Recommendation of a CMP

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) Definition of violations

(1) *Illegal employment: non-agriculture*

Parental exemption: Minors who are 16 or 17 years of age may be employed by their parents or a person standing in the place of parents in occupations other than an occupation covered by a non-agricultural HO. If the minor is under 16 years of age,

they may be employed by their parents or a person standing in the place of parents in occupations other than manufacturing or mining, or an HO. The parent(s) must be the *sole employer(s)* of the minor(s). No violation should be charged and no assessment should be made where this exemption applies. *See* FOH 73h08(d)(4)b.2. for assessment procedures involving relatives other than parents.

The description of a violation as it appears in WHISARD is indicated in brackets [ ].

a. Reg. 3 hours violation [Hours Standards – Non-Agriculture]

Any 14- or 15-year-old who is employed in violation of the hours or time standards in child labor Reg. 3.

b. Reg. 3 occupations [Reg. 3 Occupations – Non-Ag but not HO – Under 16]

Any 14- or 15-year-old who is employed in any occupation prohibited by Reg. 3 other than an HO occupation.

Scenario:

A 15-year-old employed in construction operating a forklift is employed in violation of Reg. 3 (work in connection with construction), and would be counted here. In addition, the violation for the HO occupation (HO 7) would be charged under number (7) below.

(b) (7)(E) [redacted]

c. Under legal age for employment (under 14 years) [Age – Non-Agriculture – Under 14]

Any minor who is illegally employed under 14 years of age. Items 4 and 5 below are *in addition* to this violation, where either or both occur.

d. Hours standards of Reg. 3 [Hours Standards of Reg. 3 (Under 14)]

Any minor under age 14 who is employed in excess of the hours or time standards in Reg. 3.

e. Occupations standards of Reg. 3 [Age – Occupation Standards of Reg. 3 (Under 14)]

Any minor under age 14 who is employed in an occupation prohibited by Reg. 3 other than an HO violation. (b) (7)(E) [redacted]

f. HO (16 or 17 years) [Non-Agricultural HO – 16 or 17]

Any 16- or 17-year-old who is employed in violation of any HO. (b) (7) (E) [redacted]

Scenario 1:

A 17-year-old employed in a restaurant operating a pizza dough roller (HO 11) and delivering pizzas in a motor vehicle (HO 2) is employed in violation of two HOs, and two violations would be counted here for this minor.

In addition, where a minor was employed: in more than one occupation prohibited under a single HO (*e.g.*, a minor works as a driver and outside helper (HO 2)) and/or to operate more than one power-driven machine prohibited under a single HO (*e.g.*, a minor operates a circular saw and band saw (HO 14)), a separate violation will be charged for each prohibited occupation and for the operation of each prohibited machine.

Scenario 2:

Where a 17-year-old minor operates a circular saw *and* a band saw during the investigation period, *two separate* violation entries would be made in WHISARD as child labor HO violations.

g. Reg. 3 - HO (under 16 years) [Non-Agricultural HO – Under 16]

Any minor under age 16, including minors under the legal age for employment, who is employed in an occupation or activity prohibited by the HOs. (b) (7)(E) [redacted]

(2) *Illegal employment: agriculture*

Parental exemption: Minors of any age may perform any farm job at any time on a farm owned or operated by their parents or a person standing in the place of parents. *No* assessment should be made where this exemption applies.

The description of a violation as it appears in WHISARD is indicated in brackets [ ].

a. Outside and/or during school hours (under 12 years) [Age – Agriculture – Under 12 Outside/During School Hours]

A minor under 12 years of age may not be employed outside school hours for the school district where such minor is living while so employed, *unless* employed with written parental consent on a farm where the employees are exempt from the minimum wage provisions under section 13(a)(6) of the FLSA. Minors under 12 years of age may not be employed during school hours. (b) (7)(E) [redacted]

b. Outside school hours (12 or 13 years) [Hours – Agriculture – Outside School Hours (12 or 13)]

A 12- or 13-year-old minor may not be employed in agriculture outside of school hours for the school district where such minor is living while so

employed, *unless* either the written consent of a parent or person standing in place of the parent was obtained or the minor is employed on the same farm where such parent or person standing in place of the parent is employed.

c. During school hours (12 or 13 years) [Hours – Agriculture – 12 or 13 During School Hours]

Unless otherwise exempt, a 12- or 13-year-old minor may not be employed in agriculture during school hours for the school district where such minor is living while so employed.

d. During school hours (14 or 15 years) [Hours – Agriculture – During School Hours (14 or 15)]

Unless otherwise exempt, a 14- or 15-year-old minor may not be employed in agriculture during school hours for the school district where such minor is living while so employed.

e. Under legal age for employment (under 12 years) [Age – Agriculture – Under 12]

Any minor who is illegally employed under 12 years of age. Items (1), (3), (7), and (8) of this section are *in addition* to this violation, where any occur.

f. Under legal age for employment (12 or 13 years) [Age – Agriculture – (12 or 13)]

Any 12- or 13-year-old who is illegally employed. Items (1), (3), (7), and (8) of this section are *in addition* to this violation, where any occur.

g. Agricultural HO (under 12 years) [Agricultural HO (under 12)]

(b) (7)(E) [redacted]

h. Agricultural HO (12 or 13 years) [Agricultural HO – Under 14 and Do Not Qualify for Parental Exemption]

(b) (7)(E) [redacted]

i. Agricultural HO (14 or 15 years) [HO – 14 or 15 and Not Specifically Exempt]

Where any 14- or 15-year-old is employed in violation of any agricultural HO, (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(3) *Other violations*

The description of a violation as it appears in WHISARD is indicated in brackets [ ].

a. Child labor recordkeeping [Child Labor Recordkeeping – Failure to Have Date of Birth]

The employer either did not keep an accurate record of the date of birth (DOB) of an employee as required by 29 CFR 516.2(a)(3) for non-agricultural employment or 29 CFR 516.33(f)(3) for agricultural employment, or falsified such record.

b. Shipment of hot goods [Shipment of "Hot Goods" as Defined by FLSA section 12(a)]

Pursuant to section 12(a) of the FLSA, "shipment" means a shipment or delivery for shipment as described in 29 CFR 570.106. *See, generally,* definitions in 29 CFR 570.104 -.111. This definition *does not* include hot goods shipped under section 15(a)(1) of the FLSA for violations of minimum wage and overtime. *See* FOH 84a for additional information on hot goods actions.

(c) CMP adjustment factors

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

(2) *5.0× factor: similarly employed*

For CMP computations of the violations for minors who worked in the same HO or Reg. 3 prohibited occupation, or during prohibited Reg. 3 hours, that resulted in the death or serious injury of some other minor(s), a multiplier of up to 5.0 will be applied to the standard base CMP amounts of those violations. This is referred to as "bundling". *Where a minor's death or injury is found to be the result of working prohibited Reg. 3 hours, a factor up to 5.0 is applied only to the minors who worked hours prohibited by Reg. 3 on the same day the death or serious injury occurred.*

a. In order to apply a factor up to 5.0 for CMP computations in WHISARD, select the *injury level* of a child labor violation entry to "*Similarly Employed*."

Scenario:

A 15-year-old was seriously injured while operating a chain saw during prohibited Reg. 3 working hours. Ten 16-year-olds were found to have operated a chain saw during the investigation period. In this instance, a multiplier up to 5.0 will be used to the standard base CMP amount for the HO CMP computations for the ten 16-year-olds.

(3) *Child labor CMP reduction based on mitigating factors and size of business*

a. The FLSA requires the WHD to consider the gravity of the violation and the size of the business in assessing child labor CMPs. The regulatory factors in 29 CFR 579 also require the agency to consider any mitigating factors before making the assessment. Therefore, in determining the final amount of the child labor CMP, the WHD assessing official will follow the guidance of this document as well as other internal guidance, and use his or her independent judgment to evaluate whether an adjustment in the child labor CMP is appropriate, given the facts of that particular case, including:

1. whether the child labor violation is *de minimis*, and

2. the employer has given credible assurances of future compliance, and

3. whether a CMP is necessary to achieve the objectives of the FLSA; *OR*

4. whether the employer has no prior history of child labor violations, and

5. that there are credible assurances of future compliance, and

NOT FOR PUBLIC DISTRIBUTION

6. that the violations themselves involved no intentional or heedless exposure of any minor to any obvious hazard or detriment to health or well-being and were inadvertent, and

7. whether a CMP is necessary to achieve the objectives of the FLSA. *See* 29 CFR 579.5(d); small business factors in 29 CFR 579.5(b) are discussed below.

b. The WHD may reduce certain initial child labor CMP assessment amounts in consideration of the size of the employer's business. The WHD will generally find such reduction to be appropriate only when all of the criteria listed below have been met:

1. The employer's gross annual dollar volume of sales or business done, exclusive of excise taxes, does not exceed $1,000,000.00.

2. None of the employer's child labor violations were determined to be willful or repeated.

3. The employer did not conceal or falsify child labor violations.

4. None of the employer's child labor violations caused or contributed to the death of a minor employee.

5. None of the employer's child labor violations caused or contributed to a serious injury of a minor that resulted in an initial assessment amount of CLEPP Serious Injury Tier I or of Non-CLEPP Serious Injury Tier I (for more information about the CLEPP and Non-CLEPP "Tiers," *see* FOH 73h05(a)(4), (b), (c), and (d));

6. The employer has given credible assurance of future compliance.

7. If a child labor violation caused or contributed to a serious injury, there may be only one such violation and only one such injury.

c. If all the criteria above have been met, the WHD will generally reduce the initial child labor CMP assessment amount based on the following formulae:

1. The initial child labor CMP amount will be reduced by 50 percent if the employer has less than 21 employees.

2. The initial child labor CMP amount will be reduced by 30 percent if the employer has between 21 and 99 employees.

d. Reductions in the child labor CMP *generally* will not be made if the employer has a gross annual dollar volume of sales made or business done, exclusive of excise taxes, that is greater than $1,000,000.00 or if the employer employs 100 or more employees. However, consistent with the statute and the regulatory provisions at 29 CFR 579.5, the assessing official will independently consider the size of the business and the gravity of the violation when determining the appropriate child labor CMP, and will in all

NOT FOR PUBLIC DISTRIBUTION

cases consider whether the size of the penalty is necessary to achieve the objectives of the child labor provisions of the FLSA.

(d) CMP computations

(1) *Violations listed at FOH 54f02(b)(1) -(2)*

Basic CMP computations for applicable violations:

CMP = (standard base CMP) × (aggravating factor) × (reduction factor)

(2) *Violation listed at FOH 54f02(b)(3)(a): child labor recordkeeping (per investigation)*

a. Cite a child labor recordkeeping violation, but *do not assess* a CMP where the violation occurred with respect to a minor engaged in non-agricultural employment who was 18 years of age (29 CFR 516.2(a)(3) requires a record of DOB of minors under age 19) or with respect to a minor engaged in agricultural employment, as described in the definition for FOH 54f02(b)(3)(a) above, who was 16 or 17 years of age (29 CFR 516.33(f)(3) requires a record of DOB of minors under age 18 under certain conditions).

b. Cite a child labor recordkeeping violation, but *do not assess* a CMP where the employer's failure to maintain an accurate DOB for a minor resulted from the minor presenting false documents as to DOB without the employer's knowledge.

c. Assess a CMP if the investigation discloses that the employer did not keep an accurate record of the DOB of one or more employees engaged in non-agricultural employment under age 18 as provided in 29 CFR 516.2(a)(3), *or* one or more employees engaged in agricultural employment under age 16 as provided in 29 CFR 516.33(f)(3).

(3) *Violation listed at FOH 54f02(b)(3)(b): shipment of hot goods (per investigation)*

For all child labor hot goods cases, WHD will generally assess an initial CMP according to these charts: https://www.dol.gov/whd/CL/CLCMP_TableNonAG.pdf and https://www.dol.gov/whd/CL/CLCMP_TableAG.pdf. Note that if any child labor hot goods shipments occurred during the investigation period and the Aggravating Factor 2.0 was used as a multiplier for any other violations, the CMP is doubled.

(e) Maximum CMP amount

(1) For violations listed at FOH 54f02(b)(1) -(2):

a. The maximum CMP per minor where no death or serious injury occurred is the maximum non-CLEPP CMP, found here: https://www.dol.gov/whd/flsa/index.htm#cmp.

NOT FOR PUBLIC DISTRIBUTION

b. The maximum CMP per similarly employed minor is the maximum non-CLEPP CMP, found here https://www.dol.gov/whd/flsa/index.htm#cmp. *See* FOH 54f02(c)(2).

[01/05/2017]

54f03 **(Reserved.)**

54f04 **FMLA CMP computations.**

An employer that willfully violates the posting requirement may be assessed a CMP pursuant to 29 CFR 825.300(b).

(a) Recommendation of CMP

If an employer commits a willful violation of the FMLA posting requirements in 29 CFR 825.300 and the assessment of a CMP is considered appropriate, a CMP may be assessed not to exceed $100.00 for each separate offense (*see* FOH 52w06 and 29 CFR 825.300(b)).

(b) Definition of violations and base CMP amounts

The description of a violation as appears in WHISARD is indicated in a bracket [ ].

Failure to post FMLA poster [Failure to Post FMLA Poster]: *see* FOH 52w06(a) for the requirements. CMP: $100.00.

(c) CMP computations

(b) (7)(E) [redacted]

54f05 **EPPA CMP computations.**

Section 6(a) of the EPPA authorizes the Secretary of Labor (Secretary) to assess employers CMPs of up to $10,000.00 for any violation of the EPPA. In determining CMP amounts, the employer's previous EPPA compliance record and the gravity of the violation must be taken into consideration. Subpart F of 29 CFR 801 prescribes the administrative process for assessment of EPPA CMPs, including rules for requesting hearings before administrative law judges (ALJs) for appealing such CMP assessments. (b) (7)(E) [redacted]

(a) Definition of violations and CMP amounts

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(1) *Section I improper lie detector test*

A violation listed under section I occurs when any covered employer, other than one exempt from the EPPA under section 7(a) -(c) of the act, and 29 CFR 801.10 -.11 (*i.e.*, tests by federal, state, and local government employers of public sector employees, and tests by certain Federal Government employers (*e.g.*, the DOD, DOL, Central Intelligence Agency (CIA), Federal Bureau of Investigation (FBI), etc.), of employees of contractors involved in national defense and intelligence and/or counterintelligence activities) gives any type of lie detector test, *other than a polygraph* test.

The description of a violation as it appears in WHISARD is indicated in a bracket [].

a. Improper lie detector test [Improper Lie Detector Test]

(b) (7)(E) [redacted]

(2) *Section II improper polygraph test*

A violation in this section occurs when any covered employer gives a polygraph test, other than one exempt from the EPPA under section 7(a) -(f) of the act and 29 CFR 801.10 -.14 (*i.e.*, the exemptions noted in section I and FOH 54f05(a)(1) above and the exemptions for ongoing investigations, employers involved with controlled substances, and certain employers providing certain exempted security services). [redacted]

(b) (7)(E) [redacted]

The description of a violation as it appears in WHISARD is indicated in a bracket [ ].

a. No exemption: [Improper Polygraph Test, No exemption].

b. Exemption conditions not satisfied and ongoing investigation and no specific incident: [Improper Polygraph Test, Exemption Conditions not satisfied, Ongoing Investigation, no specific incident].

c. Exemption conditions not satisfied and ongoing investigation and no access: [Improper Polygraph Test, Exemption Conditions not satisfied, Ongoing Investigation, no access].

d. Exemption conditions not satisfied and ongoing investigation and no reasonable suspicion: [Improper Polygraph Test, Exemption Conditions not satisfied, Ongoing Investigation, no reasonable suspicion].

e. Exemption conditions not satisfied and ongoing investigation and no written statement and was not properly signed: [Improper Polygraph Test, Exemption Conditions not satisfied, Ongoing Investigation, no written statement, was not properly signed].

f. Exemption conditions not satisfied and ongoing investigation and no written statement and was not complete: [Improper Polygraph Test, Exemption Conditions not satisfied, Ongoing Investigation, no written statement, was not complete].

g. Exemption conditions not satisfied and ongoing investigation and no written statement and was not timely: [Improper Polygraph Test, Exemption Conditions not satisfied, Ongoing Investigation, no written statement, was not timely].

h. Exemption conditions not satisfied and controlled substances and prospective employee without direct access: [Improper Polygraph Test, Controlled Substances, prospective employee without direct access].

i. Exemption conditions not satisfied and controlled substances and current employee without access or no ongoing investigation: [Improper Polygraph Test, Controlled Substances, current employee without access or no ongoing investigation].

j. Exemption conditions not satisfied and security services and primary business test not met: [Improper Polygraph Test, Security Services, primary business test not me].

k. Exemption conditions not satisfied and security services and not hired to protect covered facilities or assets: [Improper Polygraph Test, Security Services, not hired to protect covered facilities or assets].

l. Exemption conditions not satisfied and security services and not a prospective employee: [Improper Polygraph Test, Security Services, not a prospective employee].

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

(3) *Section III adverse employment action*

The description of a violation as it appears in WHISARD is indicated in a bracket [ ].

a. Discharge or denial of employment: [Adverse employment actions, discharge or denial of employment]. (b) (7)(E) [redacted]

b. Other discriminatory action with loss of pay or benefits: [Adverse employment actions, other discriminatory actions with loss of pay or benefits]. (b) (7)(E) [redacted]

c. Other discriminatory action without loss of pay or benefits: [Adverse employment actions, other discriminatory action without loss of pay or benefits]. (b) (7)(E) [redacted]

d. Threaten adverse action: [Adverse employment actions, threaten adverse action]. (b) (7)(E) [redacted]

e. Discriminated against employee for exercising his or her rights (section 3(4) of the EPPA) [Discriminated against employee for exercising their rights]. (b) (7)(E) [redacted]

(b) (7)(E) [redacted] A violation noted in FOH 54f05(a)(3)e. above occurs when any discriminatory action is taken against an employee, or prospective employee, for filing a complaint, offering testimony in a proceeding, etc. (*see* section 3(4) of the EPPA). (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(4) *Section IV failure to meet one or more of the exemption restrictions listed in section 8 of the EPPA*

Restrictions listed in section 8 of the EPPA apply to the statutory exemptions in sections 7(d) -(f) (*see* FOH 54f05(a)(2) above). Failure to meet one or more of the section 8 restrictions results in the denial of the ongoing investigation, security services, or controlled substances exemptions. (b) (7)(E) [redacted]

The description of a violation as appears in WHISARD is indicated in a bracket [ ].

a. Failure to meet one or more of the exemption restrictions listed in section 8: [Failure to meet one or more of the exemption restrictions listed in Sect 8 of EPPA].

(b) (7)(E) [redacted]

For ease of reference, an abbreviated summary of the exemption restrictions listed in section 8 of the act, with citations from the regulations, follows:

Citations at 29 CFR	General
801.22(B)(1)	1. Denied employee's right to terminate test
801.22(B)(2) -(3)	2. Unlawful questions asked
801.22(B)(4)	3. Required test despite written evidence of medical / psychological problems
801.23(A)(1)	4. No adequate written notice of test and of right to counsel
801.23(A)(2)	5. No oral and written notification of nature of exam and instruments used
801.23(3)	6. No complete oral and written notice of rights
801.23(3)(V)	7. No written pretest review of questions to be asked

Citations at 29 CFR	Actual testing phase
801.24(A)	8. All questions asked during test were not presented for pretest review

801.24(B)	9. Test less than 90 minutes

Citations at 29 CFR	Post-test phase
801.25(A)(1)	10. Employer failed to interview examinee
801.23(A)(2)	11. After completed test before taking adverse employment action examinee not provided with written copy of examiner's opinion, test question, and charted response (entire examination charts recording examinee's physiological responses) before adverse employment action taken

Citations at 29 CFR	Examiner requirements
801.23(C)(2)	12. More than five tests given by examiner on a given day
801.26(B)(1)	13. Examiner does not hold a state license
801.26(B)(2)	14. Examiner not properly bonded insured
801.26(C)(4)	15. Examiner opinions not in writing or contain improper information
801.26(C)(5)	16. Examiner records not maintained for 3 years

(b) (7)(E) [redacted]

(5) *Section V recordkeeping*

CMPs resulting from recordkeeping violations under section V are charged per investigation. This section is used to record violations resulting from the employer's failure to record and maintain records required by the EPPA. The examiner's failure to record and maintain records is assessed against the employer as noted in FOH 54f05(a)(4) above. In the case of a multiunit enterprise, (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(6) *Section VI other violations*

The description of a violation as appears in WHISARD is indicated in a bracket [ ].

a. Recurring failure to post: (b) (7)(E) [redacted]

b. Interfering with an investigation: [Interfering with DOL Investigation]: occurs when any person resists, opposes, impedes, intimidates, or interferes with any official of the DOL assigned to perform an investigation, inspection, or law enforcement function, pursuant to the act, during the performance of such duties.

(b) (7)(E) [redacted].

c. Suggesting, requiring, requesting: (29 CFR 801.4(a)): [Requiring, Requesting, Suggesting Test (801.4(a))]: (b) (7)(E) [redacted]

d. Inquiring into and/or using test results: (29 CFR 801.4(b)): [Inquiring into and/or using test results (801.4(b))]: (b) (7)(E) [redacted]

e. Improper disclosure of polygraph test information: [Improper Disclosure of polygraph test information]: (b) (7)(E) [redacted]

(b) CMP computations

CMP computation is automated in WHISARD. However, when there are a number of violations per employee under section II and/or section III, WHIs must follow FOH 54f05(a)(2) -(3) instructions described above to compute CMPs for only *one* violation per employee per violation under section II and for *one* violation per employee for a single discriminatory action under section III.

The "EPPA CMP Computation Summary Sheet" shall be printed in WHISARD and the WHI must sign and date the original and all copies.

54f06 (Reserved.)

54f07 H-2A CMP computations.

Section 218(g)(2) of the Immigration and Nationality Act (INA) authorizes the Secretary to impose "appropriate penalties" to assure compliance with contractual obligations.

(a) Recommendations of CMP

Pursuant to 29 CFR 501.19, a CMP may be assessed for each violation of the work contract or the obligations imposed by 8 USC 1188 (the statute); 20 CFR 655, subpart B; or 29 CFR 501 (the regulations). Each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment constitutes a separate violation. A CMP for each violation will not exceed the amount listed in the following chart.

Violation	Maximum CMP
Each Violation of the Work Contract, Regulations, or Statute	$1,500.00
Each Willful Violation of the Work Contract, Regulations, or Statute	$5,000.00
Each Act of Discrimination	$5,000.00
Failure to Cooperate with a WHD Investigation	$5,000.00
Layoff or Displacement of Each U.S. Worker	$15,000.00
Improper Rejection of Each U.S. Worker Applicant	$15,000.00
Housing or Transportation Safety/Health Violation that Proximately Causes the Death or Serious Injury of Each Worker	$50,000.00
Repeat or Willful Housing or Transportation Safety/Health Violation that Proximately Causes the Death or Serious Injury of Each Worker	$100,000.00

For guidance on "willful," *see* FOH 57f07(h). For guidance on "serious injury," *see* 29 CFR 501.19(c)(3).

The assessment of H-2A CMPs is to be considered in all cases in which a violation is disclosed.

(b) List of violations, CMP base amount, and number of violations

For the purposes of CMP computation under H-2A, the CMP base amount is the regulatory maximum of $1,500.00 per violation of the work contract, regulations, or statute. As explained below (*see* FOH 54f07(c)), the number of violations for certain requirements may be calculated as a single violation of the requirement (*i.e.*, per requirement) or based on the

NOT FOR PUBLIC DISTRIBUTION

number of workers affected (*i.e.*, per worker). This determination is an important part of the WHI's appropriate CMP recommendations.

The WHI is instructed to use the chart below to determine the number of violations for use in the "H-2A Recommended CMP Computation Worksheet." The chart below lists the possible violations under H-2A, the CMP base amount, and the number of violations to be used when computing CMPs. For several of the H-2A violations listed below, the chart advises that the WHI should refer to special guidance set forth in FOH 54f07(c) in determining how to compute the number of violations. However, as a part of its responsibility to consider all of the facts and circumstances of the case, the WHD may deviate from the chart below and recommend that the number of violations for any violation be calculated on a per worker basis. Such a recommendation must be fully supported and the reasons for recommendation clearly articulated in the narrative and prepared to litigation standards.

Considering whether a CMP should be calculated in accordance with the chart below or whether the circumstances are such that the WHI recommends that the CMP be calculated on the more stringent per worker basis is the first step in determining an appropriate CMP amount that is commensurate with the type of violations and the effect the employer's conduct had on each worker. In all cases, the WHI must consider all relevant circumstances when determining an appropriate CMP recommendation (*see* FOH 54f07(c) for guidance on evaluating whether a CMP should be calculated on a per worker basis).

(b) (7)(E)

Item	U.S. worker protections	Regulation cite	Number of violations
1	H-2A workers given preferential treatment	20 CFR 655.122(a)	Number of U.S. workers
2	Unlawful rejection of U.S. workers	20 CFR 655.135(d)	Number of U.S. workers
35	Failed to contact prior U.S. worker(s)	20 CFR 655.153	Number of U.S. workers
36	Position vacant due to strike, layoff, etc.	20 CFR 655.135(b)	Number of positions
37	Layoff or displacement of U.S. workers	20 CFR 655.135(g)	Number of U.S. workers
38	Failed to accept state workforce agency (SWA) referrals	20 CFR 655.135(c)	1
39	Failed to satisfy requirements of the job order by not stating actual terms and conditions *(e.g., location, duties, period, number of workers, hours, or wages/bonuses; see FOH 54f07(f))*	20 CFR 655.121(a) (3)	Number of material facts missing

Item	Disclosure	Regulation cite	Number of violations

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

26	Failed to provide copy of work contract	20 CFR 655.122(q)	Special guidance
51	Failed to post H-2A poster	20 CFR 655.135(l)	1

Item	Wage-related violations	Regulation cite	Number of violations
6	Failed to provide housing at no cost	20 CFR 655.122(d) (1)	Special guidance
9	Unlawful charges for public housing	20 CFR 655.122(d) (4)	Special guidance
10	Unlawful deposits: bedding / other items	20 CFR 655.122(d) (3)	Special guidance
13	FTC: employer provided items requirements	20 CFR 655.122(f)	Special guidance
14	Failed to provide meals or kitchen facilities	20 CFR 655.122(g)	Special guidance
15	FTC: inbound transportation requirements	20 CFR 655.122(h) (1)	Special guidance
18	FTC: outbound transportation requirements	20 CFR 655.122(h) (2)	Special guidance
19	FTC: three-quarter guarantee	20 CFR 655.122(i)	Special guidance

Item	U.S. worker protections	Regulation cite	Number of violations
27	Failed to pay required rate(s) of pay	20 CFR 655.122(l)	Special guidance
28	Unlawful deductions	20 CFR 655.122(p)	Special guidance
29	FTC: frequency of pay requirement(s)	20 CFR 655.122(m)	1
41	Unlawful cost-shifting	20 CFR 655.135(j)	Special guidance

Item	Recordkeeping	Regulation cite	Number of violations

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

20	Failed to record why hours worked < hours offered	20 CFR 655.122(j)(3)	1
22	FTC: earnings records requirements (up to eight requirements)	20 CFR 655.122(j)(1)	Number of requirements
23	Failed to make required records available	20 CFR 655.122(j)(2)	Number of requirements
24	Failed to keep records for 3 years	20 CFR 655.122(j)(4)	1
25	FTC: pay statement requirements (up to eight requirements)	20 CFR 655.122(k)	Number of requirements

Item	Housing violations	Regulation cite	Number of violations
4	Failed to provide housing	20 CFR 655.122(d)(1)	Number of workers
5	Housing failed to meet safety and health requirements	20 CFR 655.122(d)(1)	Special guidance
5a	Housing violation resulting in *death/serious injury*	20 CFR 655.122(d)(1)	Number of workers
5b	*Repeat/willful* housing violation resulting in death/serious injury	20 CFR 655.122(d)(1)	Number of workers
7	Failed to get housing pre-occupancy inspection	20 CFR 655.122(d)(1)	Number of sites
8	Family housing required but not provided	20 CFR 655.122(d)(5)	Special guidance

Item	U.S. worker protections	Regulation cite	Number of violations
11	Failed to notify SWA of change in certified housing	20 CFR 655.122(d)(6)	1

Item	Transportation violations	Regulation cite	Number of violations
16	Failed to provide daily transportation to/from worksite	20 CFR 655.122(h)(3)	Special guidance
17	Transportation failed to meet safety requirements	20 CFR 655.122(h)(4)	Special guidance
17a	Transportation violation resulting in *death/serious injury*	20 CFR 655.122(h)(4)	Number of workers

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

17b	*Repeat/willful* transportation violation resulting in death/serious injury	20 CFR 655.122(h)(4)	Number of workers

Item	Legal requirements	Regulation cite	Number of violations
12	FTC: workers' compensation requirements	20 CFR 655.122(e)	Special guidance
32	Sought waiver of rights from workers	29 CFR 501.5	Special guidance
33	Failed to cooperate with investigation	29 CFR 501.7	1
40	Failed to follow all applicable federal, state, and local laws and regulations	20 CFR 655.135(e)	Number of laws
42	Failed to contractually forbid cost-shifting	20 CFR 655.135(k)	1
44	Discriminate, intimidate, threaten, etc.	20 CFR 655.135(h)	Special Guidance

Item	H-2ALC only violations	Regulation cite	Number of violations
48	H-2ALC provided invalid fixed-site information	20 CFR 655.132(b)(1)	1
49	H-2ALC provided invalid MSPA FLC information	20 CFR 655.132(b)(2)	1

Note on computing CMPs for wage-related violations:

Only one *wage-related violation*, as shown in the chart above, may be computed for each unduplicated worker without concurrence of the NO, Office of Policy (OP), Division of Enforcement Policy and Procedures (DEPP), Immigration/Farm Labor Branch.

If the facts and circumstances surrounding the violations warrant computing and assessing for multiple wage-related violations for the same workers, the DD and/or ADD must receive concurrence from the NO, OP, DEPP, Immigration/Farm Labor Branch. An example of this might be a combination of violations resulting from the workers receiving much lower than the required rate, having unlawful deductions taken from their pay, paying recruitment costs, receiving no reimbursement for inbound transportation, and not being provided with outbound transportation.

See additional guidance at FOH 54f07(f)(3).

(c) Special guidance for determination base number of violations

As illustrated by the chart set forth at FOH 54f07(b), special guidance is required for determining whether to calculate the violation as a single violation of the requirement ("per requirement") or on a "per worker" basis for certain violations. This guidance is set forth below.

(b) (7)(E)

[redacted]

[redacted]

[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

b. Scenario 2 - required rate of pay:

The employer pays one long-time H-2A worker $0.10 more per hour than the other H-2A workers and the U.S. workers in corresponding employment.

This potential for additional pay based on longevity with the employer was not disclosed in the job order, the advertising, or the work contract. As a result, 19 corresponding workers are due a total of $934.00 in back wages for the contract period. This represents a violation of Item 1 (H-2A workers given preferential treatment), Item 27 (failed to pay required rate of pay), as well as Item 39 (failed to satisfy the requirements of the job order).

Although all workers in corresponding employment were exposed to this violation, the adverse impact on the workers was less serious. And although the violation was within the employer's control to correct, it appears to be unintentional since the employer only paid one H-2A worker, out of 10 H-2A workers, the higher rate and claimed that this worker was paid more based on the number of years he had worked for the employer. In addition, the financial gain to the employer and the financial harm to the affected workers for this violation was not substantial. An analysis of all of these factors indicates that this requirement should be computed on a per requirement basis and that the number of violations is "1."

c. Scenario 3 - inbound transportation:

The employer failed to reimburse 92 workers for the daily subsistence cost in 2010 and 2011. The inbound trip took 1 day. In addition, the employer

failed to reimburse 14 workers for their bus ticket from the place they were recruited to the border where the employer picked them up for the rest of the journey. Based on interview statements about the cost incurred for the bus travel, as well as an analysis on the most reasonable and economical cost, it was determined that $50.00 was due to each of the 14 workers for their inbound bus travel. In total, 92 employees are due $2,015.00. This represents a violation of Item 15 (failure to comply with inbound transportation requirements).

Although all workers were exposed to a portion of this violation, the adverse impact on the workers was less serious. And although the violation was within the employer's control to correct, it appears to be unintentional since the employer did pay the majority of the costs. In addition, the financial gain to the employer and the financial harm to the affected workers for this violation was not substantial since the amount due each worker is less than the amount due to that worker in the most recent pay period. An analysis of all of these factors indicates that this requirement should be computed on a per requirement basis and that the number of violations is "1."

d. Scenario 4 - disclosure:

The employer provided a complete and accurate copy of the work contract to each worker, but it was not provided timely. In other words, the H-2A workers did not receive it before they applied for their visas and the corresponding workers did not receive it by the first day of work. The same workers have been returning to this employer for many years and, based on interview statements, they are aware of the terms and conditions of employment. No other violations resulted from the lack of timely disclosure. This represents a violation of Item 26 (failed to provide copy of work contract).

Given that the workers knew the terms and conditions of the job and that there were no violations resulting from the lack of timely disclosure, the adverse impact to the workers for this violation was less serious. Although the employer knew of this requirement, and it was within his control to provide a copy of the contract, there was little to no monetary benefit to the employer. An analysis of all of these factors indicates that this requirement should be computed on a per requirement basis and that the number of violations is "1."

In another scenario, the employer fails to acknowledge that certain U.S. workers fall within the scope of corresponding employment, and as such, neglects to provide these workers with a copy of the H-2A contract. No other violations exist from this lack of disclosure: the corresponding workers are paid the correct rate, on time, and are offered and provided all other benefits associated with the H-2A contract. In this scenario, it would be more appropriate to compute the penalty for Item 26 based on the requirement being violated and not based on each worker that was affected by the lack of disclosure.

(2) *Calculating a CMP on a per worker basis*

NOT FOR PUBLIC DISTRIBUTION

In using the factors in the preceding chart and considering particularly egregious violations, willful violations, or violations resulting in significant adverse effects on workers, such violations should be computed and assessed on a per worker basis so that, for example, a violation takes place for every worker who is not paid the required wage. There is a maximum amount of $1,500.00 per violation, and a maximum amount of $5,000.00 per willful violation.

a. Scenario 1 - required rate of pay:

The AEWR listed on the job order and work contract is $10.86. The employer pays each of the 50 H-2A and corresponding workers $8.00 per hour. Total back wage liability for the entire work contract period is over $68,000.00. This conduct violates Item 27 (failure to pay required rate(s) of pay). It is appropriate to compute and assess the number of violations of Item 27 on a per worker basis because the violation is egregious, intentional, wholly within the employer's control, affects the entire workforce, results in a significant financial gain for the employer, and has a substantial adverse financial impact on the workers.

b. Scenario 2 - unlawful cost-shifting:

In the course of a previous WHD investigation, the H-2A employer was charging workers for access to the job. He or she promptly came into compliance by reimbursing the workers for the cost they incurred. The current investigation discloses that the 25 H-2A workers were each charged $500.00 by the H-2A employer. The employer informed the workers that this $500.00 up- front payment would help them secure the job and pay for their visa and other related fees. This represents a violation of Item 41 (unlawful cost-shifting). In this scenario, it is appropriate to calculate the violation on a per worker basis because the violation created substantial financial and other hardships for the workers, were completely within the employer's control, and were committed willfully since the employer engaged in this practice in the past. In addition, a significant number of workers were affected by the violation.

(d) CMP computation formula

(b) (7)(E)

[redacted]

Step	Action
1	Base amount × number of violations of a given requirement = subtotal
2	Reduce the subtotal (from step 1) by 10 percent for each applicable mitigating factor. This results in the violation subtotal for a given requirement

3	Sum of all violation subtotals = total recommended CMP

(e) Application of mitigating factors

The proper application of mitigating factors allows the WHD to consistently determine an appropriate CMP amount by reducing the CMP amount that the WHD is authorized by law to impose in order to account for the specific situation and facts present in each case and with respect to each violation. Mitigating factors should be used to reduce the base CMP amount only under circumstances in which that particular factor clearly applies. Each factor is discussed in detail below. DDs and/or ADDs, upon reviewing WHI CMP recommendations, should closely scrutinize whether each of the mitigating factors has been considered and whether they were properly applied, and, where not, make the appropriate adjustment(s). If the circumstances warrant, DDs and/or ADDs may also use their discretion, as outlined in Wage and Hour Memorandum No. 2005-2, to adjust the CMP amount in accordance with current WHD managerial guidelines and policies.

In the event an H-2A case reaches litigation, the DD and/or ADD involved in the case will be asked to testify at a hearing concerning the formulation of the CMP assessment and the specific reasons why the DD and/or ADD reached that amount, including an explanation of why any mitigating factor was not applicable to reduce a CMP amount. Thus, capturing why a CMP assessment is warranted and how the facts support the violation and the assessment of a CMP, as well as how the CMP amount was determined, is very important in order to show that all factors were properly considered and the WHD correctly assessed the CMP.

29 CFR 501.19(b) identifies seven factors, referred to herein as mitigating factors, to consider in determining the amount of a penalty to be assessed for each violation. An eighth mitigating factor of other applicable factors may also be included in order to ensure the WHI has the opportunity to include additional information not otherwise captured by the seven factors outlined in 29 CFR 501.19(b). Once the WHI has determined the appropriate preliminary CMP based on the violations, the WHI must then determine whether any of the mitigating factors apply to the violations and factor that into the CMP computations. The potential applicability of each factor is to be tested independently against each violation. For each applicable mitigating factor, the potential CMP for the violation is to be reduced by 10 percent. The potential CMP for a given violation can be reduced by as much as *80 percent*; reductions of more than 80 percent in the CMP amount computed for a given violation are not permitted without the concurrence of the NO, OP, DEPP, Immigration/Farm Labor Branch to preclude administratively undermining of the deterrent and punitive efficacy of the CMP sanction for a given violation.

During the final conference, the WHI is to make inquiry sufficient to ascertain whether any of the mitigating factors are applicable to each violation. This is *absolutely essential* to the proper computation of a proposed CMP and to supporting the appropriateness of assessed CMPs should the CMP be contested. Just as it is important to document in the narrative which mitigating factors were found applicable, it is equally important to document why it was determined that other factors were deemed inapplicable and no reduction allowed, particularly if the case goes to litigation. Three of the mitigating factors relate to the violator's compliance history (*i.e.*, previous history of violations, efforts made in good faith to comply, and subject's explanation of the violation), and three relate to the gravity of the violation (*i.e.*, number of workers affected, gravity of the violations, and extent to which

NOT FOR PUBLIC DISTRIBUTION

subject achieved a financial gain). The mitigating factors provided for in 29 CFR 501.19(b) are listed below and are to be applied as follows:

(1) *History of violations of H-2A*

The WHI must consider whether the employer has *any* history of violations of H-2A. This mitigating factor should be applied to each violation by an employer who has not previously been investigated or who was previously investigated but not found to be in violation of any H-2A requirements. If the employer has been the subject of a previous investigation where violations were found, the WHI must then make an objective determination about whether it is appropriate to apply this factor to *any* of the current violations. Consideration should be given to the nature and severity of the previous violations, as well as the amount of time since the last violations were disclosed, taking into account evidence regarding the duration of the current violations. Previous narrative reports can provide insight on the subject's prior commitment to future compliance and their agreement, or possibly even plan, to remedy the problem.

Scenario 1:

The WHD finds that an employer failed to timely pay his or her workers, sometimes withholding pay for several weeks. During a WHISARD history search of this employer, the WHI learns that this had occurred during the last investigation of this employer 5 years ago. However, since the employer was in compliance at the time of the investigation, a violation was not cited. In addition, the employer had agreed during the last investigation to come into compliance, but evidence in interview statements in the current investigation demonstrates that the employer has continually paid his or her workers late, even in past seasons. In such a scenario where the employer's previous commitment to future compliance has not been upheld (even, as in this example, where no violation was previously cited), it would not be appropriate to apply this mitigating factor.

Scenario 2:

If the WHISARD history search indicated that the previous investigation disclosed only a housing violation that neither posed the risk of a tangible-potential harm nor resulted in harm to covered workers, and that affected a limited number of workers for a brief time and was immediately abated, then it may be appropriate to apply this factor in the current investigation. As with all mitigating factors, WHIs must consider the full picture and, for this factor in particular, whether the subject's previous non-compliance has influenced the current violations. There does not, however, need to be a correlation between past and present violations for it to be inappropriate to apply this factor.

It is important to remember that, when properly recorded, even violations for which no CMP has previously been assessed can still create a history of violations, rendering the recurrence of such violations potentially willful or knowing in nature. Under such circumstances, it may not be appropriate to apply a mitigating factor for previous history when the person has been notified of the requirements, warned of the consequences of violating the act, and fails to comply. Continually failing to post the required H-2A poster, for example, even after being notified by the WHD, could

NOT FOR PUBLIC DISTRIBUTION

constitute willful behavior for which compliance with that requirement cannot reasonably be expected.

Where this mitigating factor applies, the WHI will reduce the CMP base by 10 percent. As discussed above, if an employer has a prior history of violations that demonstrates a disregard for the H-2A requirements, this mitigating factor should not be applied and the reasoning should be clearly articulated in the narrative. As with each mitigating factor, it is important to justify why the factor does or does not apply. Note: this factor is applicable to the employer. If a business has a prior investigative history, but there is a new owner, the determination of whether this mitigating factor should be based solely on the history, if any, of the new owner and should be applied consistently with the guidance above.

(2) *Number of workers affected by the violation*

This mitigating factor applies to each violation where less than 10 percent of covered workers employed by the subject were affected. If the number of covered workers affected by the violation is and/or was 10 percent or more of the employer's total number of covered workers, this mitigating factor is not applicable. For example, if the employer has eleven covered workers and fails to make records for one worker, then this factor should be applied. Similarly, this factor would ordinarily apply where less than 10 percent of the subject's covered workers are exposed to a particular housing safety and health violation.

A worker can be affected by a violation directly or indirectly. For example, a worker who fails to receive a copy of the terms and conditions of employment is directly affected by the employer's failure to comply with the H-2A disclosure requirements. A worker can also be indirectly affected by a violation when the worker is exposed to the harm that the particular H-2A requirement was designed to protect against. For example, the requirement to provide safe housing conditions is designed to ensure worker safety. Therefore, when there is a housing safety and health violation, for example, inadequate drainage, then each worker living in that particular unit would be considered potentially affected by exposure to the violation.

Note: regardless of whether the recommended CMP is calculated on a per requirement or per worker basis, for the purpose of determining whether this particular mitigation factor is applicable to reduce the CMP, the WHI must consider the number of workers affected by the employer's act or omission, either directly or indirectly.

(3) *Gravity of the violation*

When determining whether this mitigation factor applies, the WHI should consider the impact of the violation on those particular workers affected by the violation. Where there is little impact, the gravity is low and the employer should receive this reduction. However, if the gravity is significant, the employer should ordinarily not be entitled to this factor. Application of this mitigating factor may not be appropriate for violations that directly affect wages as well as certain housing safety and health and/or transportation safety violations, including but not limited to those which have resulted in the death or serious injury of any covered worker. In addition, if the

NOT FOR PUBLIC DISTRIBUTION

violation poses an immediate threat to health or safety, this mitigating factor should not be applied.

For example, for any violation of the transportation safety standards, the following factors, among other relevant factors, should be considered in determining the gravity of the violation and its impact on worker safety: the distance traveled; the time of day; the road conditions (*e.g.*, straight or windy, flat or bumpy, highway or local road); the speed of the vehicle; the weather conditions; whether the seats were really secure; etc.

For wage violations, factors to consider in determining the gravity of the violation include the amount of the wages due to each employee as well as how long the employees did not receive the proper payment. Keep in mind that H-2A-covered workers generally are low-wage workers and that relatively small amounts could impact them.

For recordkeeping violations, consider what impact the missing requirements had on the affected workers. If, for example, the wage statement was periodically late but the workers were paid all wages due when owed, then the gravity might be low and this factor may be applicable. On the other hand, application of this factor would likely be inappropriate where workers did not receive a wage statement and the workers frequently did not receive their wages until weeks after they should have been paid.

(4) *Efforts made in good faith to comply*

Based on investigation findings, the WHI must determine whether the employer made good faith compliance efforts *prior to* the investigation process. This is different from the mitigating factor available for employers who demonstrate a commitment to *future* compliance, listed below. If the WHI determines that this mitigating factor applies, the WHI should recommend the CMP be reduced by 10 percent.

This factor is not appropriate where the subject has a history of the same violations, particularly where the employer has made previous assurances of future compliance in a prior investigation that were not upheld. Where an agent or accountant is not qualified to give legal advice (*e.g.*, does not possess a law degree), reliance on such an individual generally does not constitute a good faith effort to comply. However, application of this mitigating factor is a fact-specific determination that must be made based on all the circumstances in a given case.

Also, application of this factor may not be appropriate to reduce the CMP where the subject should have had clear knowledge of the standards, such as having a pre-occupancy housing inspection, not following up on state workforce agency referrals of potential U.S. workers, or not paying at least the wage rate that was disclosed on the job order and application.

This mitigating factor may be applied, for example, where prior to an investigation the employer has failed to post a legible poster, but can provide evidence that he ordered a new poster, but had not yet received it. Under this example, the employer recognized a potential violation, and in response made a good faith effort to correct

NOT FOR PUBLIC DISTRIBUTION

the violation and come into compliance rather than choose to ignore it. It might be appropriate to apply this factor when the employer worked the H-2A workers in a location outside the scope of the job order but paid the higher required wage rate for that undisclosed area, if it involved work in another state, and also ensured that workers were still covered by workers' compensation coverage.

(5) *Subject's explanation of the violation*

During the final conference, the WHI(s) should ask the subject for an explanation for each individual violation. The subject's explanation may differ depending on the violation, and this mitigating factor may be appropriate for some violations and not for others during the same investigation. The mere fact that an employer has provided an explanation should never serve as the basis for applying this mitigating factor. In order for this factor to apply, the subject's explanation should be *both plausible and verifiable* and no other evidence should call their good faith defense into question. It is the WHD's responsibility to attempt to verify the explanation and to obtain documentation demonstrating the veracity of the subject's claim.

For example, a sheepherder employer who applied under the special procedures claims that employees prefer to be paid at the end of the season. During the interviews, the employees tell the WHD in their signed statements that they do in fact prefer to be paid at the end of the season rather than at least monthly, for a variety of reasons but mainly because they want to take a large sum of money home. If there is no reason to question these statements, then a violation of Item 29 (failed to comply with frequency of pay requirements) should be cited, but it may be appropriate to apply this mitigating factor in determining the amount of CMPs to assess. Another plausible and verifiable defense may arise when the subject makes an occasional clerical error, such as omitting the EIN from the pay statement for several pay periods during a transition to a new accounting system or staff turnover in handling the records.

This factor may also be applied if the subject can document in writing (*e.g.*, through an email, letter, inspection report, etc.) that he or she relied on erroneous advice from an attorney or state agency. Copies of any relevant letters or email correspondence between the parties should be requested. Note: considering this factor due to an employer's reliance on advice from another party is limited to attorneys and state agencies and does *not* include agents. Where an agent is not qualified to give legal advice (*i.e.*, does not possess a law degree), reliance on such an individual generally does not constitute a plausible reason for the subject's violation. However, application of this mitigating factor is a fact-specific determination that must be made based on all the circumstances in a given case.

In another example, it may not be appropriate to apply this factor when the employer claims that he or she did not know charging the workers for housing was a violation. This explanation is not plausible given that the ETA Form 9142A, signed by the employer, clearly states the employer "will provide for or secure housing for workers who are not reasonably able to return to their permanent residence at the end of the work day…housing without charge to the worker."

The key to all of the above is that the explanation is *plausible and verifiable* and that nothing else calls this good faith defense into question. If the violations are

NOT FOR PUBLIC DISTRIBUTION

particularly egregious, such as with housing or transportation safety violations that warrant computing the CMPs on a per worker basis, then this factor should not apply even when the employer relied on advice from an attorney or state agency.

(6) *Commitment to future compliance*

Based on interactions during the investigation and at the final conference, the WHI must determine whether the employer has demonstrated a commitment to future compliance. A mere statement, absent any other supporting evidence of commitment to future compliance, may not be a sufficient demonstration of commitment. Supporting evidence includes proactive steps on how the employer plans to comply in the future. In addition, this factor should not be applied where an employer has a history of violations or the WHI has found willful or egregious violations.

During the final conference, the WHI(s) should inquire as to how the employer has come into compliance for each individual violation and what concrete steps the employer will take to ensure the violations will not recur. An employer's agreement to pay back wages or even the prompt payment of back wages is not a commitment to future compliance in certain circumstances. Paying the back wages that are owed or providing the disclosure that was never given in writing, for example, remedies the current violation but does not provide an assurance that the employer will not violate this requirement in the future. If in a similar situation, however, the employer provides the ADD and/or DD with proactive steps that indicate an assurance of compliance, then this factor may be appropriate. For example, where the employer is found to have committed recordkeeping violations and remedies the problem by buying a payroll book, investing in payroll software, or enrolling the bookkeeper in relevant training, these acts demonstrate proactive and documentable steps toward future compliance.

If, for example, housing or transportation safety violations are found and the employer agrees to abate the violations at the end of the season, he or she has likely not adequately demonstrated his or her commitment to comply in the future. Simply offering to stop using the non-compliant housing or transportation does not constitute a proactive step towards compliance. If, however, the employer abates housing and transportation safety violations within the appropriate timeframe and while the workers are still living in the housing or being transported in the vehicles, this may demonstrate a commitment to future compliance. A further example that could justify application of this mitigating factor would be the employer's decision to install a new roof on the housing or new tires on the vehicle to remedy the relevant violation and provide a measure of future compliance.

WHIs should question an employer's commitment to future compliance where violations were willful, systemic, or particularly egregious and should require additional evidence before applying the factor.

(7) *Extent to which the subject achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers*

If the violation did not result in a financial gain for the violator, or did not result in potential financial loss or potential injury for the workers, then a 10 percent reduction in the amount computed for the violation may be appropriate.

NOT FOR PUBLIC DISTRIBUTION

For example, violations relating to unpaid wages, including unlawful deductions, or benefits required by the regulations or work contract but not provided, such as free daily transportation, free housing, or failure to provide or pay for the inbound or outbound transportation, ordinarily result in a financial gain to the employer and a financial loss to the affected worker. For the purpose of determining whether the financial loss to workers is substantial such that applying this mitigation factor is not appropriate, if the amount of money due to workers is equal to or more than the amount of money due the workers in the most recent pay period, the factor may not be applicable. However, it may not be appropriate to apply this factor if the total dollar gain of the employer far exceeds the financial loss to the individual worker.

For example, if each worker incurred a loss of $10.00 but the violation affected 200 of the employer's workers, thus providing a $2,000.00 gain for the employer, this mitigating factor should not be applied. In addition, if the employer has previously been found in violation of certain housing standards but, for financial reasons, failed to remedy the violations and allowed workers to live under such conditions, it may not be appropriate to apply this mitigating factor because the employer has financially benefitted by failing to remedy the housing violations.

Just as with every mitigating factor, it is essential to justify why the factor has or has not been applied. This is particularly true when there are various wage-related violations in the same investigation, and based on the analysis of the facts, this factor is applied to some of those violations and not to others.

(8) *Other applicable factors*

The application of a mitigating factor is dependent upon the facts and evidence arising from each independent violation. The seven mitigating factors discussed above are non-exclusive and WHIs may therefore consider other relevant evidence not specifically addressed in this chapter to reduce the CMP amount when appropriate. The same justification or evidence should not be the sole basis for applying multiple mitigating factors. This factor, permitting the consideration of other applicable evidence, may only cover circumstances that are not addressed by the other seven mitigating factors.

<u>Scenario:</u>

The ADD and/or DD should think critically about each violation to determine which mitigating factors apply. If the facts in the case present compelling evidence that has not been addressed through application of a different mitigating factor, then it may be appropriate to apply this factor. For example, during the employer's pre-occupancy housing inspection, the appropriate state agency conducting the inspection advised the employer that he was in compliance with the state's housing safety and health standards. However, our investigation mid-season disclosed that the compliant housing did not have the adequate ratio of toilets to occupants: a condition that clearly existed during the pre-occupancy inspection. The facts demonstrate that the number of housing occupants does not exceed the maximum capacity, and that the employer thought he or she was in compliance with the requirement based on the state agency's inspection. In such a scenario, it may be appropriate to apply this factor.

NOT FOR PUBLIC DISTRIBUTION

Use of this factor must be included as a notation to the narrative, with a full explanation of the circumstances and why they do not fall within the other seven mitigating factors. Application of this factor must be supported by the facts of the case, and any available relevant evidence should be included as an addendum to the file.

(f) Computing and assessing CMPs when employer's conduct violates multiple H-2A requirements

(1) *Where the employer engages in a single action that violates separate H-2A requirements*

Step 1: Cite each requirement that was potentially violated.

Step 2: Consider whether any of these potential violations was caused by other factors or actions and thus should be separately considered for CMP computation.

Step 3: Determine the number of violations for each requirement, and where appropriate, analyze, based on the factors in FOH 54f07(c), whether the number of violations for each requirement should be based on the fact that the requirement was violated (*i.e.*, per requirement which equals "1") or based on the number of workers affected by the requirement being violated (*i.e.*, per worker).

Step 4: Compute and recommend the penalty for the single most egregious requirement that was violated by the single action based on the number of violations, as determined in the previous step. In other words, where the same action violates multiple H-2A standards, WHIs should cite violations for all items that are violated (and consider the mitigating factors for each violation) but, except in extraordinary circumstances, should generally only compute CMPs for one of those items.

Note: the CMP assessment letter should explain the basis for each violation cited and should account for the fact that CMPs have only been assessed for one such item. In determining whether to assess CMPs on a per requirement or per worker basis for that item, the number of discrete H-2A requirements that have been violated by the employer's single action should be taken into account. If the employer's conduct violates multiple items, it is likely that the number of violations for the most egregious of those violations should be calculated on a per worker basis (*see* FOH 54f07(c) for special guidance on determining the base number of H-2A violations).

a. <u>Scenario 1:</u>

The employer's single act would violate multiple H-2A requirements when the employer states in the job order that the worksite is in Texas and thus includes the Texas AEWR as the rate to be paid, but then took the workers to California to work for the entire work contract period. The employer has potentially violated Items 39, 26, 27, and 12, respectively, by not stating the actual location of the work in the job order, which also potentially affects the required rate that should be listed in the job order; not providing a complete and accurate work contract; not paying the required rate of pay (*i.e.*, California's AEWR is higher than Texas' AEWR); and potentially failing to

NOT FOR PUBLIC DISTRIBUTION

ensure that the workers are covered by workers' compensation coverage in California.

Absent extraordinary circumstances, the WHI should cite violations of Items 39, 26, 27, and 12 (if applicable), but should only assess CMPs for one of those items (*e.g.*, Item 27) as long as *only* this single act caused each of these violations to occur. In other words, if the disclosure violation also resulted from another factor, such as the employer not providing a copy of the contract in writing at the correct time, then a CMP recommendation for the disclosure violation should be separately considered.

In determining whether to calculate the number of violations of Item 27 on a per requirement or per worker basis, the WHI should consider that, not only were all workers adversely impacted by not being made aware in advance of the actual terms of employment, but the situation was wholly within the employer's control and appears to have been intentional since he or she stated on the Employment and Training Administration (ETA) Form 9142 application form that the work was in Texas. These factors all increase the likelihood that the employer's violation of Item 27 will be computed on a per worker basis.

b. Scenario 2:

The employer pays the H-2A workers $0.50 more per hour than the workers in corresponding employment. This higher potential wage was not advertised to potential applicants through the job order, nor was it disclosed in the work contract provided to the workers. In addition, the job order does not include language about a higher potential wage for certain levels of experience or longevity with the employer.

The employer has potentially violated Items 1, 39, 26, and 27, respectively, by exhibiting preferential treatment towards the H-2A workers, not stating the actual wage in the job order, not providing a complete and accurate work contract with the correct wage, and not paying the required rate of pay. Note: workers in corresponding employment must receive at least the same wages and benefits as the H-2A workers. If this preferential treatment of the H-2A workers is the only action that caused the other violations in this scenario, then all four items should be cited, but the CMP should only be assessed for Item 26 for failing to pay the required rate, and it is recommended that the CMP be computed based on the number of workers affected by this violation.

Note: as in the previous example, this guidance only pertains to situations in which the employer's *single* action or decision results in the violation of multiple H-2A requirements.

(2) *Where the employer engages in several different actions that violate separate H-2A requirements*

Step 1: Cite each requirement that was potentially violated.

NOT FOR PUBLIC DISTRIBUTION

Step 2: Determine the number of violations for each requirement, and where appropriate, analyze, based on the factors in FOH 54f07(c), whether the number of violations for each requirement should be based on the fact that the requirement was violated (*i.e.*, per requirement which equals "1") or based on the number of workers affected by the requirement being violated (*i.e.*, per worker).

Step 3: Compute and recommend the penalty for each requirement based on the number of violations, as determined in the previous step.

Note: the guidance for computing and assessing CMPs for violations of separate *wage-related* requirements, found in FOH 54f07(f)(3) below, is slightly different.

Scenario:

The investigation disclosed several housing safety and health violations, a failure to provide the H-2A work contract to the workers in corresponding employment, a failure to fully reimburse the inbound transportation to the H-2A workers, and a failure to pay FLSA overtime for certain work in the packing shed. In this scenario, the employer has potentially violated Items 5, 26, 15, and 40, respectively, by failing to meet the housing safety and health requirements, not providing a complete and accurate work contract, not complying with the inbound transportation requirements, and failing to follow all applicable laws. Each of these potential violations stemmed from a different action by the employer, and thus each warrants a separate penalty computation and assessment.

(3) *Where the employer engages in several different actions that violate separate wage-related H-2A requirements*

Step 1: Cite each requirement that was potentially violated.

Step 2: Analyze, based on the factors in FOH 54f07(c), whether the number of violations for each requirement should be based on the fact that the requirement was violated (*i.e.*, per requirement, which equals "1") or based on the number of workers affected by the requirement being violated (*i.e.*, per worker).

Step 3: Identify whether any *duplicated workers* (*i.e.*, any of the same workers) are affected by the requirements determined to warrant a per worker CMP computation.

Step 4: If so, consider whether there are any extraordinary circumstances or whether the violations are particularly egregious as to warrant computing and assessing multiple CMPs for duplicated workers.

If not, the CMP computation should be based on the number of unduplicated workers affected by all wage-related violations. Therefore, when two or more wage violations would normally be assessed on a per worker basis, and the violations affect the same workers, the more serious violation will be assessed on a per worker basis and the other wage-related violation(s) will be assessed on a per requirement basis. This avoids multiple per worker assessments for wage violations for all but the most egregious violations.

Scenario:

NOT FOR PUBLIC DISTRIBUTION

The employer fails to pay the daily subsistence cost for both the inbound and outbound transportation to all workers, but pays all other related inbound and outbound transportation costs; fails to pay the required rate of pay to the five corresponding workers, which is $2.00 more per hour than they receive; charges each of the ten H-2A workers $300.00 for visa and associated recruitment costs; and charges the five corresponding workers $50.00 per week each for housing for the 16-week season, even though they are all entitled to free housing in this scenario. In this example, the employer has potentially violated Items 15, 18, 27, 41, and 28, respectively, by not complying with the inbound transportation requirements, not complying with the outbound transportation requirements, failing to pay the required rate, allowing unlawful cost-shifting, and making unlawful deductions.

Given only the information here, the number of violations for failing to comply with the inbound transportation requirement would likely be determined to be one for the requirement being violated. The analysis for the outbound transportation requirement would likely produce the same outcome. Analyzing the other three requirements in this scenario would likely result in a per worker determination for each of these violations given the impact on the workers. Looking at these three violations, we note that the required rate of pay and unlawful deductions violations affect only the corresponding workers while the unlawful cost-shifting affects only the H-2A workers. Absent particularly egregious or extraordinary circumstances, the total penalties for all wage-related violations determined to warrant a per worker CMP computation should be based on the number of unduplicated workers affected.

Therefore, the resulting CMP computation would look similar to this:

Item 15 (failing to comply with inbound transportation requirements) × 1 violation (per requirement)

Item 18 (failing to comply with outbound transportation requirements) × 1 violation (per requirement)

Item 27 (failing to pay the required rate) × 5 violations (per worker, unduplicated)

Item 41 (unlawful cost-shifting) × 10 violations (per worker, unduplicated)

Item 28 (unlawful deductions) × 1 violation (per requirement since a CMP computation has already been made for these 5 workers under Item 27)

(g) Special guidance for H-2A housing and transportation safety and health CMPs

H-2A housing safety and health CMPs are computed in the "H-2A Housing CMP" module in WHISARD. Where the investigation discloses H-2A violations, the employer should be fully informed of the actions required to come into compliance. Further, it should be given a suitable period of time in which to come into compliance and should be re-contacted at the end of that period to determine their compliance status.

H-2A transportation safety CMPs are computed in the "H-2A Transportation CMP" module in WHISARD. As with housing violations, where the investigation discloses H-2A transportation safety violations, the employer should be fully informed of the actions required to come into compliance. Further, the responsible person(s) should be given a suitable period

NOT FOR PUBLIC DISTRIBUTION

of time in which to come into compliance and should be re-contacted at the end of that period to determine their compliance status.

(1) *Determining whether to compute a recommended CMP*

As stated elsewhere in the FOH, all violations must be documented and substantiated by the evidence. Where the WHI determines that violations of applicable requirements either do not pose a discernible potential harm or have not resulted in harm to covered workers, the violations are to be cited (including, if applicable, in the determination letter) and fully and specifically noted in the narrative, and the employer must be put on notice of the violations in the final conference or otherwise. The narrative should specifically reflect when and how the employer was informed of the violations, but no CMP will ordinarily be computed and/or recommended or assessed.

However, those investigations revealing housing or transportation violations that pose a discernible potential harm or that have resulted in harm to covered workers must be fully documented and considered for CMP assessment. A recommended CMP shall be computed where, based on the evidence and the circumstances pertaining to worker exposure to the hazard(s), the WHI determines the violative condition to be substantive.

For housing, depending on the applicable standards, the WH-519a or WH-519b will be used as the worksheet in determining the amount of the assessment. Refer to FOH 54: WH-519a and FOH 54: WH-519b for housing standards under the ETA and OSHA. For transportation, the WH-1504 may be used as the worksheet in determining the amount of the assessment. Refer to FOH 54: WH-1504 for transportation standards under 29 CFR 500.104 -.105.

(2) *Rating the violation*

Housing or transportation safety violations (as well as the basis upon which it is asserted that the requirement(s) are applicable) must be fully described in the narrative, and each such violation must be separately analyzed in terms of its discernible potential harm or actual harm to covered workers. The analysis should include an assessment of the actual exposure of covered workers to the violative condition, and should also consider the length of time workers were exposed to the hazard.

The WHI must clearly distinguish between those violations that pose no discernible potential harm, or that have resulted in no actual harm (*i.e.*, non-discernible harm), and those which do pose such a threat of harm (*i.e.*, discernible harm).

a. <u>Examples of violations that pose no discernible potential harm or actual harm</u>

A violation with no discernible potential harm or actual harm is generally one which has little to no risk or actual impact on the safety and health of affected persons. Such a condition is still a clear violation of the letter of the law, and should therefore be recorded in the narrative as a violation and disclosed to the employer or person responsible for the violation (even though no CMP is ordinarily recommended unless the violation is clearly

NOT FOR PUBLIC DISTRIBUTION

willful or knowing in nature, or when a violation is repetitive to the extent that future compliance cannot reasonably be expected).

1. In the context of housing violations, examples may include inadequate storage space for clothes and personal effects where overcrowding is not evident, screen doors not equipped with a self-closing device when there is no infestation, ceiling height marginally below the standard (*e.g.*, ceiling is 6'10" when the standard requires a 7' high ceiling), or the camp has been inspected and certified but the owner and/or operator neglected to post the certification. Note: this list is merely illustrative and in no way exhaustive, and a slight change in the circumstances surrounding a violation can lead to a different conclusion regarding whether a given violation presents discernible harm or not.

2. In the context of transportation violations, examples may include a broken headlight when the transportation is documented to only occur during the daytime, when visibility is good and for short distances, or when the height of the exit from the passenger compartment is marginally less than what is required but it does not affect the passenger's ability to exit. Note: this list is illustrative and there are occasions when the circumstances are such that the WHI may conclude that the violation does pose a discernible potential harm or results in an actual harm to covered workers.

b. Examples of violations that pose a discernible potential harm or that result in an actual harm

Note: when assessing the impact of violations that pose a discernible potential harm or that resulted in actual harm, keep in mind that the violations may be amplified by non-compliance with other standards. Consider all the circumstances and how the violations act together to impact worker safety and health. The lists below are for illustration purposes only and are not exhaustive.

1. Housing violations that may pose potential harm or result in actual harm include an inadequate or unsanitary supply of drinking water, poorly-maintained plumbing; construction of buildings that are not structurally sound, ineffective maintenance of those buildings, inadequate heat for the weather conditions, and lack of or unreasonable protection from insects and rodents.

2. Transportation violations that may pose potential harm or result in actual harm include improperly attached or non-functional doors; inoperable headlights, when it is confirmed that the transportation occurs before sunrise or after sundown; inadequate means of ventilation; lack of protection from the elements; unserviceable tires; passenger seating that does not equate with the vehicle capacity and the number of workers being transported; lack of seats belts, where required; and inoperable brakes.

NOT FOR PUBLIC DISTRIBUTION

(3) *CMP calculation and determining the number of violations*

As explained above in FOH 54f07(g)(2)(a), CMPs are ordinarily not recommended for violations that pose no discernible potential harm or actual harm to covered workers. However, once the WHI has determined the violations do pose a discernible potential harm or have resulted in harm to covered workers, the violations are subject to CMPs. The WHI must again weigh and balance multiple factors to determine whether to recommend a separate CMP for each sanctionable violation of a housing or transportation requirement (*i.e.*, per requirement), or to recommend a separate violation for each worker for whom there is evidence that the worker was exposed to the employer's act or omission (*i.e.*, per worker) because of the risk to health and safety warrants a greater sanction. Since some violations may be compounded by other violations, it is also important to consider how the violations act together to create a more harmful environment.

a. Factors to consider in determining the number of violations

The following chart can be used as a guide to compare the circumstances where violations may be cited and sanctioned on a per requirement basis versus those which are more egregious and can be cited and sanctioned on a per worker basis. As more items in the "Per requirement basis" column are true of a particular act or omission, the more likely it is that the WHI can soundly and defensibly recommend the CMP be calculated on a per requirement basis. In contrast, as more items in the "Per worker basis" column are true of a particular act or omission, the more likely it is that the WHI can soundly and defensibly recommend the CMP be calculated on a per worker basis. These factors should be explained in the narrative report to support the CMP recommendation and basis of calculation.

Factors to consider	Per requirement basis	Per worker basis
Consequences	Less serious	More serious
Number of people exposed	Lower	Higher
Potential danger	Lower	Higher
Intention/knowledge/willful	Unintentional	Intentional
Duration of condition	Recent	Longstanding
Occurrence	First	Repeated
Predictability of occurrence	Less	More
Degree of control	Not within control	Within control
Abatement	Agrees to correct	Refuses to correct

NOT FOR PUBLIC DISTRIBUTION

The WHI should take into account, among other things, the consequences that have resulted or could result from the act or omission (*i.e.*, nature and severity of the conduct); the number of workers affected by the act or omission; whether the violations were recurring either within the standard investigation period or in prior investigations; whether, when, and to what degree corrections were made (if any); the explanation of the person who owns or controls the housing; their history of compliance; their commitment to future compliance; and whether the conduct was intentional.

b. Assessing a CMP on a per requirement basis

Where the totality of the circumstances support a CMP recommendation on a per requirement basis, the number of violations for the purpose of CMP computations for housing safety and health or transportation violations will be "1" for each single requirement that is violated in each housing facility or vehicle. These are violations for which exposure to the hazard presents a discernible potential harm or actual harm but the risk of harm is not egregious in nature.

c. Assessing a CMP on a per worker basis

Particularly egregious violations of the housing or transportation standards should be computed and assessed on a per worker basis so that, for example, a violation takes place for every worker who is exposed to a significant housing or transportation hazard. These are violations for which exposure to the hazard can directly affect the safety and health of individual workers and pose an immediate danger.

1. Scenario:

An example of such housing violations may be where the WHI sees an extension cord running from one building to another and then notices that the cord is lying in puddles of water. Upon further investigation, the WHI sees that the cord is connected to wiring hanging loosely on nails on the outside of the building and that the wiring is old, frayed, and bare in spots and there is current running through the wires. This situation presents a clear danger to housing occupants and violations should be computed based on the number of workers affected by the hazard.

2. Scenario:

An example of particularly egregious violations of the transportation safety standards may be where a 15-passenger van with bald tires and inoperable headlights is documented to transport workers before sunrise on a narrow winding road for 50 miles (a trip which takes 2 hours). Interviews indicate that the vehicle's tires and headlights have been this way for at least 1 month. In addition, the evidence establishes that the vehicle was used to transport workers during heavy rain storms the previous day. Under these circumstances, these violations can justifiably be construed as egregious and the

NOT FOR PUBLIC DISTRIBUTION

potential CMP should be computed based on the number of vehicle occupants exposed to the hazardous conditions.

The evidence of willfulness will be considered as one of the relevant circumstances in determining whether to assess a CMP on a per requirement basis or a per worker basis. Depending on the totality of the surrounding circumstances, it may be appropriate to construe willful violations as particularly egregious violations that warrant computation on a per worker basis for the number of workers exposed to the hazard (*see* FOH 54f07(h) for further guidance on the definition of "willful" pertaining to the assessment of CMPs).

For example, willfulness is indicated if the employer did not request a pre-occupancy inspection because he or she knew that the housing facility would not pass the inspection because of prior safety and health violations. The file must contain documentation and the narrative must describe how the person had such knowledge by showing the person had been previously cited for safety and health violations. In such a situation, any violations determined to pose a discernible potential harm or actual harm disclosed in the current inspection should be treated as willful and computed at the $5,000.00 penalty level. Depending on the circumstances, the number of violations may warrant assessment on a per worker basis.

d. Housing standards checklists

See Housing Safety and Health Checklists WH-519a and WH-519b at FOH 54: WH-519a and FOH 54: WH-519b.

Note: particularly egregious violations of these standards should be computed on a per worker basis rather than per requirement (*see* FOH 54f07(g)(3)(c)). Such cases should be brought to the attention of the NO, OP, DEPP, Immigration/Farm Labor Branch through the regional enforcement coordinator: agriculture.

e. Transportation standards checklist

See Transportation Checklist WH-1504 for the form and instructions on completing the form at FOH 54: WH-1504.

Note: particularly egregious violations of these standards should be computed on a per worker basis rather than per requirement (*see* FOH 54f07(g)(3)(c)). Such cases should be brought to the attention of the NO, OP, DEPP, Immigration/Farm Labor Branch through the regional enforcement coordinator: agriculture.

(h) CMPs for willful violations

(b) (7)(E) [redacted]

NOT FOR FURTHER DISTRIBUTION

(b) (7)(E)

[redacted]

54f08 **H-1B CMP computations.**

Section 212(n) of the INA (*see* 8 USC 1182(n)) authorizes the Secretary to impose CMPs with maximums of $1,000.00, $5,000.00, or $35,000.00 depending on the violation.

(a) Recommendation of CMP

The WHD assesses CMPs using the guidelines outlined in 20 CFR 655.810(b). The statute sets the following maximum CMPs:

(1) *An amount not to exceed $1,000.00 per violation for*

a. a violation pertaining to strike and/or lockout (*see* 20 CFR 655.733) or displacement of U.S. workers (*see* 20 CFR 655.738);

b. a substantial violation pertaining to notification (*see* 20 CFR 655.734), labor condition application specificity (*see* 20 CFR 655.730), or recruitment of U.S. workers (*see* 20 CFR 655.739);

c. a misrepresentation of material fact on the labor condition application;

d. an early-termination penalty paid by the employee (*see* 20 CFR 655.731(c)(10)(i));

e. payment by the employee of the additional training and/or petition filing fee ($750.00 or $1,500.00) (*see* 20 CFR 655.731(c)(10)(ii)); or

f. a violation of the requirements in subpart H or I of the regulations or the public access provisions (*see* 20 CFR 655.760) where the violation impedes the ability of the WHD Administrator to determine whether a violation has

occurred or it impedes the ability of the public to have information needed to file a complaint.

(2) *An amount not to exceed $5,000.00 per violation for*

a. a willful failure pertaining to wages and/or working conditions (*see* 20 CFR 655.731 and .732), strike and/or lockout, notification, labor condition application specificity, displacement (including placement of an H-1B non-immigrant at a worksite where the other and/or secondary employer displaces a U.S. worker), or recruitment;

b. a willful misrepresentation of a material fact on the labor condition application; or

c. discrimination against an employee (*see* 20 CFR 655.801(a)).

(3) An amount not to exceed $35,000.00 per violation where an employer (whether or not the employer is an H-1B-dependent employer or willful violator) displaced a U.S. worker employed by the employer in the period beginning 90 days before and ending 90 days after the filing of an H-1B petition, in conjunction with any of the following violations:

a. a willful violation of any of the provisions described in 20 CFR 655.805(a)(2) -(9) pertaining to wages and/or working condition, strike and/or lockout, notification, labor condition application specificity, displacement, or recruitment; or

b. a willful misrepresentation of a material fact on the labor condition application (see 20 CFR 655.805(a)(1)).

(b) (7)(E) [redacted]

(b) Definition of violations and base CMP amounts

(b) (7)(E) [redacted]

Number	Violation
1.	Misrepresentation of a material fact
	Willful
2.	Failed to pay required wages
	Willful
3.	Failed to offer benefits, equal eligibility for benefits, or both
	Willful
4.	Failed to provide required working conditions
	Willful
5.	Filed the Labor Condition Application (LCA) during a strike or lockout

Number	Violation	(b) (7)(E)
	Willful	[redacted]
6.	Failed to provide notice of filing the LCA	[redacted]
	Substantial	[redacted]
	Willful	[redacted]
	Willful and substantial	[redacted]
7.	Failed to accurately specify the number of workers sought, occupational classification, or wage rate and conditions	[redacted]
	Substantial	[redacted]
	Willful	[redacted]
	Willful and substantial	[redacted]
8.*	Displacement of U.S. worker	[redacted]
	Willful	[redacted]
9.*	Failed to make required displacement inquiry of another employer at a worksite where H-1B workers are placed	[redacted]
	Willful	[redacted]
10.*	Failed to take good faith steps in recruitment	[redacted]
	Substantial	[redacted]
	Willful	[redacted]
	Willful and substantial	[redacted]
11.	Displaced U.S. worker in the course of committing a willful violation	[redacted]
12.	Required/accepted payment of employer's fee for filing petition	[redacted]
13.	Employer required payment of penalty for early cessation of employment	[redacted]
14.	Discriminated or retaliated for protected activity	[redacted]
15.	Failed to make LCAs and public access documents available to public (if the WHD or public was impeded)	[redacted]
16.	Failed to maintain required documentation (if the WHD was impeded)	[redacted]
17.	Failed to cooperate in investigation (if the WHD was impeded)	[redacted]
18.	Failed to otherwise comply with subpart H or I (if the WHD was impeded)	[redacted]

*Note: violations apply only to H-1B dependent employers.

(c) CMP computations

[redacted] (b) (7)(E) [redacted]

[redacted]

54f09 Homeworker CMP computations.

A system of CMPs is established to provide a remedy for any violation of the FLSA related to homework (except child labor violations, which are subject to CMPs pursuant to 29 CFR 579), or for any violation of the homeworker regulations or employers' assurances (*see* 29 CFR 530.103), which are not so serious as to warrant denial or revocation of a certificate (*see* 29 CFR 530 subpart D).

(a) Assessment of CMP

CMPs will be assessed only against employers who are operating under a certificate or who are seeking certification. No CMP will be assessed for conduct which serves as the basis of proposed denial or revocation of a certificate (*see* 29 CFR 530.301).

(b) List of violations and base CMP amounts

(1) A CMP, not to exceed $500.00 per affected homeworker for any one violation, may be assessed.

(2) (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

Item	Violation	Severity: Not serious	Severity: Serious
01	Failure to failure to pay time and one-half for overtime hours worked	$100.00	$200.00
02	Failure to pay the minimum wage for all hours worked	$100.00	$200.00
03	Failure to provide Homeworker Handbook	$100.00	$200.00
04	No certificate	$0.00	$200.00
05	Recordkeeping	$100.00	$200.00
06	Section 14(c) – failure to post poster	$100.00	$200.00
07	Section 14(c) – improper calculation of commensurate wage rate	$100.00	$200.00
08	Working in women garments, a prohibited industry	$100.00	$200.00

(c) Definition of severity or willfulness levels

(1) -(2) (Reserved pending further instructions from NO)

[redacted] (b) (7)(E) [redacted]

[redacted]

(b) (7)(E)

(d) CMP computations

(b) (7)(E)

(e) Number of violations

(b) (7)(E)

(f) Decrease factor (*i.e.*, mitigation factor)

The description of a decrease factor as it appears in WHISARD is indicated in a bracket [ ].

(1) Good faith attempts to comply with the act or regulations: [Employer made good faith attempt to comply with Act. (530.303(a)(1))]

(2) Non-culpable ignorance of the requirements of the act or regulations: [Employer had a non-culpable ignorance of the requirements of the Act or Regulations. (530.303(a)(3))]

(3) Exercise of due care: [Employer exercised due care. (530.303(a)(5))]

(b) (7)(E)

(4) Extent to which the violation is under the employer's control: [Violations were under employer's control. (530.303(a)(2))]

(5) False documents or representations: [False documents or misrepresentations. (530.303(a)(4))]

(b) (7)(E)

54f10 <u>OSHA CMP computations.</u>

Section 17 provides for the assessment of CMPs for violations of the OSH Act, or any standard, rule, order, or regulation promulgated pursuant to the act. The statute fixes different penalty limitations for different types of violations up to a maximum of $70,000.00

for each violation in cases where an employer willfully or repeatedly violates a requirement. The statutory limitations for CMPs can be found in section 17 of the act (*see* FOH 56d02).

(a) Recommendation of CMP

In order to ensure consistency in recommending CMPs, a methodology has been designed to take into consideration regulatory factors considered significant in determining the appropriateness of CMPs (*i.e.*, the gravity of the violation, the size of the business, good faith efforts on the part of the employer, and the employer's prior history of compliance).
(b) (7)(E)
[redacted]

(b) Definition of violations

(1) *Field sanitation standards (29 CFR 1928.110)*

Item	Description	Regulation
10	Cost to employees for facilities	29 CFR 1928.110(c)
11	Potable drinking water not provided and readily accessible	29 CFR 1928.110(c)(1)(i)
12	Potable drinking water: not cool	29 CFR 1928.110(c)(1)(ii)
12a	Potable drinking water: provided not in sufficient amounts	29 CFR 1928.110(c)(1)(ii)
13	Potable drinking water: not dispensed in single-use cups or fountains	29 CFR 1928.110(c)(1)(iii)
13a	Potable drinking water: the use of common drinking cups was not prohibited	29 CFR 1928.110(c)(1)(iii)
14	Toilet and handwashing facilities: not provided in proper ratio	29 CFR 1928.110(c)(2)(i)
15	Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside and not constructed to ensure privacy	29 CFR 1928.110(c)(2)(ii)
16	Toilet and handwashing facilities: not accessibly located and in close proximity to each other	29 CFR 1928.110(c)(2)(iii)

NOT FOR PUBLIC DISTRIBUTION

16a	Toilet and handwashing facilities: not located within a ¼ mile walk of each hand laborer's place of work in the field	29 CFR 1928.110(c)(2)(iii)
17	Toilet and handwashing facilities: not located at point of closest vehicular access	29 CFR 1928.110(c)(2)(iv)
18	Maintenance: potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices	29 CFR 1928.110(c)(3)
19	Maintenance: Drinking water containers not constructed of materials which maintain water quality	29 CFR 1928.110(c)(3)(i)
19a	Maintenance: drinking water containers were not refilled daily or more often as necessary	29 CFR 1928.110(c)(3)(i)
19b	Maintenance: drinking water containers were not kept covered	29 CFR 1928.110(c)(3)(i)
19c	Maintenance: drinking water containers were not regularly cleaned	29 CFR 1928.110(c)(3)(i)
20	Maintenance: toilet(s) were not operational	29 CFR 1928.110(c)(3)(ii)
20a	Maintenance: toilet(s) were not maintained in a clean and sanitary condition	29 CFR 1928.110(c)(3)(ii)
20b	Maintenance: handwashing facilities were not refilled with potable water as necessary to ensure an adequate supply	29 CFR 1928.110(c)(3)(ii)
20c	Maintenance: handwashing facilities were not maintained in a clean and sanitary condition	29 CFR 1928.110(c)(3)(ii)
21	Maintenance: facility waste disposal caused unsanitary conditions	29 CFR 1928.110(c)(3)(iv)
22	Reasonable use: employer failed to notify employees of the location of the facilities and water	29 CFR 1928.110(c)(4)
22a	Reasonable use: employer did not allow each employee reasonable opportunities during the workday to use the sanitation facilities and water	29 CFR 1928.110(c)(4)

NOT FOR PUBLIC DISTRIBUTION

23a	Employer railed to inform employees of following good hygiene practices in use of water and facilities provided for drinking, handwashing, and elimination	29 CFR 1928.110(c)(4)(i)
23b	Employer failed to inform employees of following good hygiene practices in drinking water as frequently as needed	29 CFR 1928.110(c)(4)(ii)
23c	Employer failed to inform employees of following good hygiene practice to urinate as often as necessary	29 CFR 1928.110(c)(4)(iii)
23d	Employer failed to inform employees of following good hygiene practice to wash hands before and after using the toilet	29 CFR 1928.110(c)(4)(iv)
23e	Employer failed to inform employees of following good hygiene practice to wash hands before eating and smoking	29 CFR 1928.110(c)(4)(v)

Note: toilet and handwashing facilities are not required for employees who perform field work for a period of 3 hours or less, including transportation time to and from the field, during the day (*see* 29 CFR 1928.110(c)(2)(v)).

(2) *Temporary labor camp standards (29 CFR 1910.142)*

Item	Description	Regulation
01	Inadequate drainage	29 CFR 1910.142(a)(1)
02	Inactive water (swamp, sinkhole, etc.) within 200’ of camp and untreated mosquito control	29 CFR 1910.142(a)(1)
03	Site not graded, ditched, or rendered free from depressions in which water may become a nuisance	29 CFR 1910.142(a)(1)
04	Danger to domestic or public water supply from poor drainage	29 CFR 1910.142(a)(1)
05	Subject to periodic flooding	29 CFR 1910.142(a)(1)
06	Within 500’ of livestock area	29 CFR 1910.142(a)(2)

NOT FOR PUBLIC DISTRIBUTION

07	Overcrowding of structures	29 CFR 1910.142(a)(2)
08	Grounds and open areas not maintained in a clean and sanitary condition; areas not free from rubbish, debris, waste paper, garbage, and other refuse	29 CFR 1910.142(a)(3)
09	When closing camp for season, failure to collect and dispose of refuse	29 CFR 1910.142(a)(4)
10	Abandoned toilet pits not filled with dirt	29 CFR 1910.142(a)(4)
11	Toilet buildings not locked when camp closed for season	29 CFR 1910.142(a)(4)
12	Shelter(s) do not provide protection against the elements	29 CFR 1910.142(b)(1)
13	Less than 50 square feet per person in sleeping rooms	29 CFR 1910.142(b)(2)
14	Ceiling not 7’ high	29 CFR 1910.142(b)(2)
15	No wall lockers for clothing and personal articles provided in sleeping rooms	29 CFR 1910.142(b)(3)
16	No beds, cots, or bunks provided for each occupant	29 CFR 1910.142(b)(3)
17	Beds, cots, or bunks less than 3’ apart, and/or less than 12” from floor	29 CFR 1910.142(b)(3)
18	Double-deckers: less than 4’ between bunks, side to side, and end to end; and less than 27” between bunks	29 CFR 1910.142(b)(3)
19	Triple bunks used	29 CFR 1910.142(b)(3)
20	Floors in structures made of other than wood, asphalt, or concrete	29 CFR 1910.142(b)(4)
21	Wooden floors not of smooth and tight construction	29 CFR 1910.142(b)(4)

NOT FOR PUBLIC DISTRIBUTION

22	Floors in disrepair	29 CFR 1910.142(b)(4)
23	Wooden floors elevated less than 1' above ground level	29 CFR 1910.142(b)(5)
24	Windows and doors in living quarters total less than 1/10th of floor area	29 CFR 1910.142(b)(7)
25	Windows cannot be opened one-half to allow for ventilation	29 CFR 1910.142(b)(7)
26	Broken windows	29 CFR 1910.142(b)(1)
27	Openings in shelter not screened with 16 gauge mesh material	29 CFR 1910.142(b)(8)
28	Door not equipped with self-closing devices	29 CFR 1910.142(b)(8)
29	Less than 100 square feet per person in a room where workers cook, live, and sleep	29 CFR 1910.142(b)(9)
30	Sanitary facilities not provided for storing and preparing food in rooms where workers cook, live, and sleep	29 CFR 1910.142(b)(9)
31	At least 1 stove for each 10 people or 2 families not provided where cooking facilities are used in common	29 CFR 1910.142(b)(10)
32	Cooking facilities used in common not provided in an enclosed and screened shelter	29 CFR 1910.142(b)(10)
33	Heating, cooking, and water heating equipment not installed in accordance with applicable codes and regulations	29 CFR 1910.142(b)(11)
34	Adequate heating not provided in every shelter used during cold weather to maintain a comfortable temperature	29 CFR 1910.142(b)(11)
35	Water supply inadequate and/or inconvenient for drinking, cooking, bathing, and laundry	29 CFR 1910.142(c)(1)

NOT FOR PUBLIC DISTRIBUTION

36	Water supply less than 35 gallons per person per day	29 CFR 1910.142(c)(2)
37	Water not approved by health department for drinking, cooking, bathing, and laundry purposes	29 CFR 1910.142(c)(1)
38	Water unfit for human use	29 CFR 1910.142(c)(1)
39	Shelter more than 100' from available water outlet when no indoor water facilities are provided	29 CFR 1910.142(c)(3)
40	Drinking fountains (at ratio of 1 fountain per 100 occupants) not provided where water under pressure is available	29 CFR 1910.142(c)(4)
41	Common drinking cups used	29 CFR 1910.142(c)(4)
42	Toilet room accessible only through sleeping room	29 CFR 1910.142(d)(2)
43	Toilet room not adequately ventilated and/or do not have a 6 square foot opening to the outside	29 CFR 1910.142(d)(2)
44	Privies within 100' of any sleeping room, dining room, lunch area, or kitchen	29 CFR 1910.142(d)(3)
45	Toilet room(s) located more than 200' away from every sleeping room	29 CFR 1910.142(d)(3)
46	Separate toilet facilities not provided for each sex	29 CFR 1910.142(d)(4)
47	Facilities for each sex not separated by solid walls or partitions extending from floor to ceiling	29 CFR 1910.142(d)(4)
48	Toilet facilities not provided in the required ratio of 1 unit for each 15 persons and urinals of at least 20 feet of trough for every 25 men	29 CFR 1910.142(d)(5) –(6)
49	Construction of pit or vault does not keep out flies and rodents	29 CFR 1910.142(d)(6)
50	Water closets installed after August 31, 1971 not located in a toilet room	29 CFR 1910.142(d)(7)

NOT FOR PUBLIC DISTRIBUTION

51	Toilet rooms, commodes, and urinals not kept lighted all hours of the night and day	29 CFR 1910.142(d)(8)
52	Outside openings not screened	29 CFR 1910.142(d)(2)
53	Toilet paper not provided in adequate supply	29 CFR 1910.142(d)(9)
54	Toilets in unsanitary condition	29 CFR 1910.142(d)(10)
55	Toilet rooms not cleaned daily	29 CFR 1910.142(d)(10)
56	Sewer lines and drains not connected to available public sewers	29 CFR 1910.142(e)
57	Laundry facilities not provided	29 CFR 1910.142(f)(1)
58	Handwashing facilities not provided	29 CFR 1910.142(f)(1)
59	Bathing facilities not provided	29 CFR 1910.142(f)(1)
60	Handwashing basins at ratio of 1 per family shelter or 1 per every 6 persons in shared facility not provided	29 CFR 1910.142(f)(1)(i)
61	At least 1 shower head for every 10 persons not provided	29 CFR 1910.142(f)(1)(ii)
62	Laundry tray or tub at ratio of 1 for every 30 persons not provided	29 CFR 1910.142(f)(1)(iii)
63	Slop sinks in building used for laundry, washing, and bathing not provided	29 CFR 1910.142(f)(1)(iv)
64	Waterproof, smooth, and non-slip floors not provided in laundry and bathing facilities	29 CFR 1910.142(f)(2)
65	No floor drains or adequate drainage	29 CFR 1910.142(f)(2)

NOT FOR PUBLIC DISTRIBUTION

66	Walls and partitions not of waterproof material up to splash line	29 CFR 1910.142(f)(3)
67	Inadequate supply of hot and/or cold running water for bathing and laundry purposes	29 CFR 1910.142(f)(3)
68	No hot water available	29 CFR 1910.142(f)(3)
69	No facilities available for heating, bathing, and laundry water	29 CFR 1910.142(f)(3)
70	Service building not equipped with heating facilities to maintain a temperature of 70ºF during cold weather	29 CFR 1910.142(f)(4)
71	No facilities provided for drying clothes	29 CFR 1910.142(f)(5)
72	Service building not kept clean	29 CFR 1910.142(f)(6)
73	Electric service available but not supplied to each habitable room, laundry rooms, toilet rooms, kitchens, dining rooms, and storage rooms	29 CFR 1910.142(g)
74	Each room not supplied with at least one ceiling-type light fixture	29 CFR 1910.142(g)
75	Electrical outlets not provided in each room	29 CFR 1910.142(g)
76	Lighting of an adequate level not provided in each room	29 CFR 1910.142(g)
77	No refuse containers (insect and rodent-proof) provided	29 CFR 1910.142(h)(1)
78	Failed to have at least one container for each family unit	29 CFR 1910.142(h)(1)
79	Containers not kept clean	29 CFR 1910.142(h)(2)
80	Containers not on a wooden, metal, or concrete stand	29 CFR 1910.142(h)(1)
81	Containers not within 100’ of shelters	29 CFR

NOT FOR PUBLIC DISTRIBUTION

		1910.142(h)(1)
82	Containers not emptied when full	29 CFR 1910.142(h)(3)
83	Containers emptied less than twice a week	29 CFR 1910.142(h)(3)
84	Food not free from vermin, rodents, flies, etc.	29 CFR 1910.142(i)
85	Food not free from spoilage	29 CFR 1910.142(i)
86	Poisonous or toxic materials stored with food or in food preparation area	29 CFR 1910.142(i)
87	Person(s) with communicable disease working in preparation, cooking, or handling of food	29 CFR 1910.142(i)(3)
88	Equipment and utensils not clean	29 CFR 1910.142(i)
89	Kitchen area unclean	29 CFR 1910.142(i)
90	Hot and cold running water not provided	29 CFR 1910.142(i)
91	Garbage containers, leak-proof and with tight lids, not provided in kitchen area	29 CFR 1910.142(i)
92	Central food facilities separate from sleeping quarters not provided	29 CFR 1910.142(i)(2)
93	Infestation by and harborage of insects and/or pests	29 CFR 1910.142(j)
94	No first aid supplies or equipment available	29 CFR 1910.142(k)(1)
95	No person in camp trained to administer first aid	29 CFR 1910.142(k)(2)
96	Failure to report to local health authorities the identity of anyone in the camp suspected of having a communicable disease	29 CFR 1910.142(k)(1)
97	Failure to report immediately to local health authorities a case of food poisoning or an unusual prevalence of any illness where fever, diarrhea	29 CFR 1910.142(k)(2)

(c) CMP computations

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

[redacted]

(d) Base amount

The statute fixes different penalty limitations for different types of violations up to a maximum of $70,000.00 for each violation. (b) (7)(E) [redacted]

[redacted]

Nature of violation	(b) (7)(E) [redacted]	OSH Act
Not serious: not willful or repeated		Section 17(c)
Not serious: willful* or repeated		Section 17(a)
Not serious: willful* or repeated (injury/illness)		Section 17(a)
Not serious: willful* or repeated (fatality)		Section 17(a)
Serious: not willful or repeated		Section 17(b)
Serious: not willful or repeated (injury/illness)		Section 17(b)
Serious: not willful or repeated (fatality)		Section 17(b)
Serious: willful* or repeated		Section 17(a)
Serious: willful* or repeated (injury/illness)		Section 17(a)
Serious: willful* or repeated (fatality)		Section 17(a)

*It is important to note that the OSH Act sets the minimum amount that can be assessed for willful violations at $5,000.00, regardless of the impact of the adjustment factors.

(1) *Willful violations*

a. A willful violation exists where the evidence shows either an intentional violation of the OSH Act or plain indifference to its requirements.

The employer committed an intentional and knowing violation if:

1. an employer representative was aware of an applicable standard, and was also aware of a condition or practice in violation of those requirements, and did not abate the hazard; or

2. an employer representative was not aware of the requirements of the standard, but was aware of a comparable legal requirement (*e.g.*, state or local law) and was also aware of a condition or practice in violation of that requirement, and did not abate the hazard.

The employer committed a violation with plain indifference to the law where:

3. higher management officials were aware of an OSHA requirement applicable to the company's business but made little or no effort to communicate the requirement to lower level supervisors and employees;

4. company officials were aware of a continuing compliance problem but made little or no effort to avoid violations;

5. an employer representative was not aware of any legal requirement, but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or to take the corrective action (knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, media coverage, or, in some cases, complaints of employees or their representatives); or

6. in particularly flagrant situations, willfulness can be found despite lack of knowledge of either a legal requirement or the existence of a hazard if the circumstances show that the employer would have placed no importance on such knowledge even if he or she had possessed it, or had no concern for the health or safety of employees.

b. It is not necessary that the violation be committed with a bad purpose or an evil intent to be deemed willful. If the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental, or ordinarily negligent, it is *willful*.

c. Willfulness could exist if an employer is advised by employees or employee representatives of an alleged hazardous condition and the employer makes no reasonable effort to verify and correct the condition. Additional factors to consider in determining willfulness are:

1. The nature of the employer's business and the knowledge regarding safety and health matters that could reasonably be expected in the industry

2. The precautions taken by the employer to limit the hazardous conditions

3. The employer's awareness of the OSH Act and of the responsibility to provide safe and healthful working conditions

NOT FOR PUBLIC DISTRIBUTION

(2) *Repeated violations*

A repeated violation exists if that employer has been cited previously for a substantially similar condition and the citation has become a final order.

a. Identical standard

Generally, similar conditions can be demonstrated by showing that in both situations the identical standard was violated.

b. Different standards

In some circumstances, similar conditions can be demonstrated when different standards are violated. Although there may be different standards involved, the hazardous conditions found could be substantially similar, and therefore a repeated violation would be appropriate.

c. Time limitations

Although there are no statutory limitations upon the length of time that a citation may serve as a basis for a repeated violation, the following policy shall be used in order to ensure uniformity.

A violation will be considered as repeated if:

1. the second citation is issued within 3 years of the final order of the previous citation, or

2. the second citation is issued within 3 years of the-final abatement date of that citation, whichever is later.

When a violation is found during an inspection, and a repeated citation has previously been issued for a substantially similar condition which meets the above time limitations, the violation may be classified as a second instance repeated violation with a corresponding increase in penalty.

For any further repetition, the DD shall be consulted for guidance.

d. Obtaining inspection history

For purposes of determining whether a violation is repeated, the following criteria shall apply.

1. High gravity serious violations

When a CMP for a high gravity serious violation is to be assessed, the DD shall obtain a history of citations previously issued to the employer at all of its identified establishments, nationwide (federal enforcement only), within the same two-digit NAICS code. If the violation has been previously cited within the time limitations described above, and has become a final order of the OSHRC, a repeated violation assessment is appropriate.

NOT FOR PUBLIC DISTRIBUTION

2. Violations of lesser gravity

When violations of lesser gravity than high gravity serious have been cited, WHD policy is to encourage the DD to obtain a national inspection history whenever the circumstances of the current inspection will result in a large number of serious, repeat, or willful assessments. This is particularly important if the employer is known to have establishments nationwide and if significant citations have been issued against the employer in other areas or at other mobile worksites.

3. Geographical limitations

Where a national inspection history has not been obtained, a multi-facility employer shall be assessed for a repeated violation if the violation recurred at any worksite within the same WHD DO jurisdiction.

e. Repeated vs. willful

Repeated violations differ from willful violations in that they may result from an inadvertent, accidental, or ordinarily negligent act. Where a repeated violation may also meet the criteria for willful, but not clearly so, a citation for a repeated violation shall normally be issued.

f. Repeated vs. failure to abate

A failure to abate situation exists when an item of equipment or condition previously cited has never been brought into compliance and is noted at a later inspection. If, however, the violation was not continuous (*i.e.*, if it had been corrected and then reoccurred), the subsequent occurrence is a repeated violation.

(3) *Serious violations*

The term serious has a different meaning under the OSH Act than under the MSPA, and therefore the determination as to whether a violation is serious when conducting field sanitation or temporary labor camp inspections must be made using the OSH Act criteria. Section 17(k) of the OSH Act provides that "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

(4) *Increase in base amount*

(b) (7)(E)

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

(e) Multiplication factors

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(f) OSHA section 17(d) amount: employer failed to correct cited violation(s)

This amount is not applied until such time as the finding of a violation has become a final order of the OSHRC and the abatement period has passed. Then, add an additional $7,000.00 for *each day* beyond the end of the allowed abatement period for each *serious* violation that has become a final order of the OSHRC that remains uncorrected. Add additional $3,500.00 for *each day* beyond the end of the abatement period for each violation that is uncorrected, not of a serious nature, and which has become a final order of the OSHRC.

(g) (b) (7)(E) [redacted]

[redacted]

(b) (7)(E)

[redacted]

54f11 **Crew CMP computations.**

(Reserved: *see* FOH: WH-592.)

WH-3 **Employment information form.**

(a) **Purpose**

This form shall be used to obtain or record information from a person alleging non-compliance by an employer with one or more of the acts enforced by the Wage and Hour Division (WHD).

(b) **Preparation**

If an employee, employer, or other person contacts a Wage and Hour Investigator (WHI) in the field to report non-compliance with one or more of the acts enforced by the WHD, the WHI shall take the complaint on the spot if possible; otherwise, the WHI shall give (or mail) the person a copy of the WH-3 with a business reply envelope. When the complainant comes to a WHD office or when otherwise a complaint is taken in person, full information concerning the alleged non-compliance shall be obtained and recorded on the WH-3 or entered directly into WHISARD. If it appears that false records may be involved and the person is an employee of the establishment, a signed statement shall be taken if possible.

(c) The box "Complaint Taken By" (bottom, reverse side of the form) shall be used to enter, on the top line, the name and title of the WHD representative who took the complaint in person. Other uses for the space in the box are optional.

(d) **Equivalent form in WHISARD**

WHISARD Complaint Information Form.

NOT FOR PUBLIC DISTRIBUTION

WH-4 **<u>Nonimmigrant information form.</u>**

(a) **Purpose**

Form WH-4 is used to record complaint information for H-1B cases.

(b) **Preparation**

If an employee, employer, or other person contacts a Wage and Hour Investigator (WHI) in the field to report non-compliance with H-1B provisions, the WHI shall take the complaint on the spot if possible; otherwise, the WHI shall give (or mail) the person a copy of the WH-4 with a business reply envelope. When the complainant comes to a Wage and Hour Division (WHD) office or when otherwise a complaint is taken in person, full information concerning the alleged noncompliance shall be obtained and recorded on the WH-4. All pertinent complaint data should be entered into WHISARD. If it appears that false records may be involved and the person is an employee of the establishment, a signed statement shall be taken if possible.

(c) The section "For DOL Use Only" (bottom, page 3) shall be used to enter the name of the WHD representative who took/received the complaint, date of the complaint, and source of the complaint.

(d) **Equivalent form in WHISARD**

WHISARD Complaint Information Form.

NOT FOR PUBLIC DISTRIBUTION

H-1B Nonimmigrant Information Form

U.S. Department of Labor
Employment Standards Administration

ESA Form WH-4
OMB Approval: 1205-0310
Expiration Date: 11/30/2003

This report is authorized by 8 U.S.C. 1182(n)(2)(G)(ii) of the American Competitiveness and Workforce Improvement Act (ACWIA) of 1998. The information provided on this form will assist the Department of Labor in determining whether the named employer of H-1B nonimmigrants has committed a violation of provisions of the H-1B program. Your identity will be kept confidential to the fullest extent provided by law. Please provide as much of the requested information as possible. Attach additional sheets if you need additional space to respond to a question. If you do not understand a term, or need assistance in the completion of this form, please contact the local Wage and Hour office of the U.S. Department of Labor. After you submit the form, a representative from the Department of Labor may contact you if further information is necessary to initiate an investigation.

1. **Person Submitting Information** *(please print)*

Mr., Miss, Mrs., Ms. _____
First Name Middle Initial Last Name

Current Address: _____
Number, Street, Apt, or P.O. Box No.

_____
City, State, ZIP Code

Telephone Number: *(including area code)* _____

Days/Times When You Can be Reached at that Number: _____

E-Mail Address (optional): _____

2. **Nature of Source's Relationship to Employer;** (*Please check all that apply*)

(a) ☐ H-1B Nonimmigrant Employee

☐ Former or ☐ Current Employee *(dates of employment):* _____

(b) ☐ U.S. Worker

☐ Former or ☐ Current Employee *(dates of employment):* _____

(c) ☐ Job Applicant *(date of application):* _____

(d) ☐ Competitor Business *(please specify):* _____

(e) ☐ Federal Government Agency *(please specify):* _____

(f) ☐ State or Local Government Agency *(please specify):* _____

(g) ☐ Community or Service Organization *(please specify):* _____

(h) ☐ Other *(please specify):* _____

NOT FOR PUBLIC DISTRIBUTION

3. **Information on H-1B Employer Committing Alleged Violation**

Name of Employer/Company: _____

Address: _____
Number, Street City State ZIP Code

Employer Representative to be Contacted: _____

Telephone Number *(including area code)*: _____

---

4. **Description of Alleged H-1B Violations**

Please check the appropriate box(es), (a) through (q), which best describe the violation of the H-1B provisions of the Immigration and Nationality Act which you believe have occurred. In section 8, identify each item checked and describe, in as much detail as possible, the facts and circumstances which cause you to believe that violations have occurred.

(a) ☐ Employer supplied incorrect or false information on the Labor Certification Application (LCA).

(b) ☐ Employer failed to pay H-1B worker(s) the higher of the prevailing or actual wage.

(c) ☐ Employer failed to pay H-1B worker(s) for time off due to a decision by the employer (e.g., for lack of work) or for time needed by the H-1B worker(s) to acquire a license or permit.

(d) ☐ Employer made illegal deductions from H-1B worker's wages (e.g., for H-1B petition processing; for food and housing expenses while the worker is traveling on employer's business; for tools and equipment necessary to perform employer's work).

(e) ☐ Employer failed to provide fringe benefits to H-1B worker(s) equivalent to those provided to U.S. worker(s) (e.g., cash bonuses, stock options, paid vacations and holidays, health benefits, insurance, retirement and savings plans).

(f) ☐ Employer does not afford H-1B worker(s) working conditions (hours, shifts, vacation periods) on the same basis as it does U.S. worker(s), or the employment of H-1B worker(s) adversely affects the working conditions of U.S. worker(s).

(g) ☐ Employer failed to comply with "no strike/lockout" requirement by: 1) placing or contracting out H-1B worker(s) during the validity period of the LCA to any place of employment where there is a labor dispute; 2) failing to notify the DOL, within 3 working days of the occurrence, of such a labor dispute; or 3) using an LCA for H-1B worker(s) to work at a site before the DOL has determined that a labor dispute has ended.

(h) ☐ Employer failed to provide employees or their collective bargaining representative, either by hard copy posting or electronically, notice of its intentions to hire H-1B worker(s), **or** has failed to provide H-1B worker(s) with a copy of the LCA.

(i) ☐ Employer required H-1B worker(s) to pay all or any part of $500/$1000 filing fee.

(j) ☐ Employer imposed an illegal penalty on H-1B worker(s) for ceasing employment with the employer prior to a date agreed upon by the worker and employer.

(k) ☐ Employer retaliated or discriminated against an employee, former employee, or job applicant for disclosing information, filing a complaint, or cooperating in an investigation or proceeding about a violation of the H-1B laws and regulations (i.e., whistleblower).

NOT FOR PUBLIC DISTRIBUTION

(l) ☐ Employer failed to maintain and make available for public examination the LCA and necessary documents at the employer's principal place of business or worksite.

(m) ☐ Employer laid off U.S. worker(s) and has replaced or seeks to replace U.S. worker(s) with H-1B worker(s) within 90 days before or after filing H-1B visa petitions.

(n) ☐ Employer placed H-1B worker(s) at another employer's worksite where U.S. workers have been laid off, and/or has failed to inquire of the second employer whether it has or intends to lay-off U.S. worker(s) and replace them with H-1B worker(s).

(o) ☐ Employer failed to recruit U.S. worker(s) for jobs for which H-1B worker(s) are sought.

(p) ☐ Employer failed to hire a U.S. worker who applied and was equally or better qualified for the job for which the H-1B worker was sought. Complaints regarding this violation should be filed with the U.S. Department of Justice, 10th and Constitution Ave., N.W., Washington, D.C., 20530.

(q) ☐ Other _____

_____

5. Date(s) of Alleged Violation(s): _____

6. Location of Worksite(s) where Alleged Violation(s) occurred: _____

7. Basis of Knowledge of Alleged Violation(s): _____

8. Description of facts and circumstances which support allegations in items 4 (a) through (q). Use additional sheets of paper, if necessary.

_____

FOR DOL USE ONLY

Complaint Received/Taken by: _____ Date: _____

Source of Complaint is: ☐ Aggrieved Party ☐ Credible information source

Public Burden Statement: We estimate it will take an average of 20 minutes to complete this form, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the U.S. Department of Labor, Wage and Hour Division, Room S 3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

NOT FOR PUBLIC DISTRIBUTION

WH-9 **<u>Verification of date of birth.</u>**

(a) Purpose

(1) Use this form for age verification when it will simplify obtaining proof of age, whether locally or elsewhere. The Wage and Hour Investigator (WHI) shall prepare and submit the WH-9 to the verifying agency when it has been determined that the case may result in criminal or civil action or may go to an ALJ for hearing.

(2) Send this form to the appropriate bureau of vital statistics with a request for the *least expensive* verification (*e.g.*, if there is a choice of having the WH-9 completed at no charge or a minimal charge, or obtaining a birth certificate for which there is a higher charge); WHIs shall request WH-9 verification only *unless* more formal documentation is required by the regional solicitor of Labor (RSOL). When the WH-9 is sent to a school for completion, include a request that the form be signed by the supplying official.

(3) Certified copies of birth certificates obtained by WHIs when needed shall be paid for in accordance with regional practice.

(b) Copies

(1) Prepare each WH-9 in triplicate unless two or more copies are required by the verifying agency, in which case prepare the form with the necessary additional copies. *See* WH-9, supplemental instructions, (d): Birth verification offices, for those verifying agencies requesting more than one copy of the form. Prepare separate copies of the WH-9 for each verifying agency to be contacted and list only those minors claiming to have been born in or attended school within the jurisdiction being contacted. The areas serviced by bureaus of vital statistics vary among the states; some are on a statewide basis, some are on a county basis, and certain large cities have their own bureaus.

(2) Send the original and one copy of each WH-9, or more if required, to the appropriate bureau of vital statistics or to the school for which it was prepared. Enclose a self-addressed return envelope. Retain one copy of the WH-9 in the case file or other pending file to await the return of the original from the verifying agency.

(c) Preparation

(1) Enter the name and address of the verifying agency in the address box. Type or stamp the date of mailing on the original and all copies. A case file identification may be entered on the form (*e.g.*, the Case ID Number, the WHI's name, or the initials only of the name of the establishment). The WHI shall sign under the complimentary close.

(2) The WHI shall enter the information to be provided in the first four columns (items (1) through (6)). Ask the verifying agency to complete the last column (item (7)). Submit an alphabetical listing of the minor's last name, or family name, followed by the minor's given name.

NOT FOR PUBLIC DISTRIBUTION

(3) When the original WH-9 is returned to the WHI from the verifying agency, include it in the child labor civil money penalty (CMP) case file. If no separate child labor CMP case file has been set up, retain the WH-9 in the primary case file for the establishment in which the child labor investigation was made.

(d) Birth verification offices

When it is necessary to send the WH-9 to a state or local vital statistics agency outside the DO jurisdiction, the Wage and Hour Division (WHD) district office (DO) nearest the location where the form is to be submitted should be contacted for current information regarding the address of the appropriate vital statistics agency and any special procedures or fees that exist. No DO will be expected to handle verifications for other DOs. However, each DO is expected to maintain current information on vital statistics agencies within its jurisdiction so that detailed information can be provided in response to inquiries from other offices.

(e) Equivalent form in WHISARD

School date of birth verification.

NOT FOR PUBLIC DISTRIBUTION

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I would appreciate your assistance in verifying the birth dates of the minors listed below. This information will help us determine whether these minors were employed in conformity with the Federal child labor laws.

The first four columns contain background information to assist you in checking your records. If your records show birth dates for these minors, please enter the month, day and year in the last column. If your records do not contain this information, please enter the words "not found."

For your convenience, I am enclosing a self-addressed envelope which requires no postage, and an extra copy of this letter for your records.

This report is authorized by Section 11(a) of the Fair Labor Standards Act. While you are not required to respond your co-operation is needed for the enforcement of Federal Child labor laws.

Sincerely yours,

VERIFICATION OF DATE OF BIRTH

(1) Name of Minor	(2) *Birthplace; or (3) Name of school, grade, month and year last attended	(4) Name of Father; and (5) Maiden Name of Mother	(6) Alleged Date of Birth	(7) Date of Birth on record

* County of birth is required for minors born in Texas.

(Signature of Registrar or School Official)

GPO 923-020

Form WH-8 (Rev. Dec. 1977)

WH-11 **Notice to employer, federal certificate of age.**

(a) Purpose

The Notice to Employer is sent to the employer with applicable item(s) checked to either transmit the Federal Certificate of Age or to advise the employer why a Federal Certificate of Age may not be issued.

(b) Copies

Prepare in duplicate and retain one copy as a file record of the status of the Federal Certificate of Age issuance and the return of the evidence of age.

(c) Preparation

The Age Certificate Officer (ACO) shall:

(1) Enter the ACO office address, telephone number, and date

(2) Check the applicable item(s)

(3) Attach the Federal Certificate of Age and/or the evidence of age, when appropriate

(4) Attach the incomplete application or other item which is the reason why the Federal Certificate of Age may not be issued

Note: more than one item may be checked and/or returned.

NOT FOR PUBLIC DISTRIBUTION

Notice To Employer On Federal Certificate Of Age

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

_____ A Federal Certificate of Age for _____
is transmitted herewith. The certificate is not valid until the minor signs item 14.

_____ Documentary evidence of age is returned.
Please return the documentary evidence of age to minor.

_____ A Federal Certificate of Age for _____
cannot be issued until certain requirements have been met.

The Application (WH-14) submitted on _____ is returned for further information as noted below:

_____ Intention to Employ Portion is Incomplete:

Item No. _____

Item No. _____

_____ Documentary evidence of age.

_____

_____ Was unacceptable in accordance with order of preference listed on reverse side of Form WH-14.

_____ Information on application and in evidence of age do not agree.

_____ Age

_____ Date

_____ Name of minor

_____ Documentary evidence of age appears to have been altered (erased)

_____ Minor is under the minimum age for the occupation (See enclosed Child Labor Bulletin No. 101 or 102)

_____ Employer did not sign Application (Form WH-14)

_____ Minor did not sign Application (Form WH-14)

Upon receipt of additional or corrected information, this Issuing Office will again review the application and issue a Certificate if appropriate. Please send information to the address noted on this form.

Form WH 11
Rev Jan. 1989

WH-14 **<u>Application for federal certificate of age.</u>**

(a) Purpose

(1) This form shall be used by employers or minors to apply to the Wage and Hour Division (WHD) for a Federal Certificate of Age (Certificate).

(2) The application must be completed by both the minor and the employer for minors who are under 18 years of age in non-agricultural employment and under 16 years of age in agricultural employment. It must be accompanied by acceptable documentary evidence of age, as listed on the reverse of the WH-14 in order of preference.

(3) The minor must have a specific job offer from an employer before a Certificate may be issued. A Certificate cannot be used on the assumption that the minor will get a job at some future time.

Exception: an application may be completed and a Certificate issued for minors 18 years of age or over for non-agricultural employment, or 16 or over for agricultural employment, upon completion of only the minor's portion of the application (items 1 -11, WH-14). Child labor Reg. 1 (*see* 29 CFR 570.5(c)) recommends that employers secure protection if there is reason to believe the minor may be below the applicable minimum age.

(4) A blank Form WH-14 may be distributed by the Age Certificate Officer (ACO) to requesting employers, minors, or to other inquiring parties, such as school officials.

(b) Copies

Only one copy is necessary. This copy shall be retained in the issuing office records.

(c) Preparation

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

The employer shall complete the "Intention to Employ" portion (*i.e.*, items 12 -16)

(b) (7)(E)

[redacted]

NOT FOR PUBLIC DISTRIBUTION

Application for Federal Certificate of Age

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

IMPORTANT: Complete this form carefully. Print or write plainly. No Federal Certificate of Age may be issued unless completed application form has been received and without appropriate documentary proof of age. (29 C.F.R. 570). (See instructions on reverse side.) Note: Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

OMB No. 1215-0083
Expires: 01-31-2006

1. Name (First, middle, last)

2. Sex ☐ Male ☐ Female

3. Present address, (Number, street, P.O. Box No., City or Town, County, State, Zip Code)

4. Place of birth (City, County, State)

5. Date of birth (Month, day, year)

6. Father's full name

7. Mother's full name (include maiden name, if any.)

8. Name as shown on any previous age certificate

9. Check type of proof of age ATTACHED to this application (See instructions on reverse side.)

☐ Birth Certificate ☐ Passport
☐ Baptismal Certificate ☐ Other (Identify)
☐ Life insurance Policy

10. If for any reason, other than marriage, your last name as shown on this application is not the same as that shown on the documentary proof of date of birth attached to this application, please indicate when your name was changed and where this change is recorded (i.e. court records, school records, etc.)

11. Signature of minor submitting application

INTENTION TO EMPLOY PORTION

TO BE COMPLETED BY EMPLOYER IF: Applicant is under 18 years of age and to be employed in industry, or under 16 years of age and to be employed in Agriculture.

12. Specific occupation of minor to be employed

13. Industry (Such as retail, wholesale, manufacturing, agriculture)

14. Name of employer (Company)

15. Business address of employer (Number, Street, City, State, Zip Code)

16. Daily and weekly hours minor is to be employed (If minor is under 16 years of age)

The undersigned intends to employ the above named minor immediately upon receipt of a certificate showing that such minor is above the oppressive child-labor age for the occupation specified above, as defined by the Fair Labor Standards Act of 1938, as amended, and subsequent regulations.

Signature of employer or authorized representative

Date

Form WH-14
Rev. Sept. 1999

INSTRUCTIONS

A Federal Certificate of Age cannot be issued without appropriate documentary proof of age. The proof of age that you submit will be returned to you.

1. Attach your birth certificate to this form.

   If you do not have a birth certificate you may:

   a. Obtain one from the Bureau of Vital Statistics in the State where you were born,

   b. Or (if unable to obtain a birth certificate) attach a copy of an official document which shows your full name, date (month/day/year) and place of birth, and parents' names, such as,

      - A baptismal certificate,

      - A bonafide contemporary record of births in the Family Bible,

      - A life insurance policy at least one year old,

      - A passport, or certificate of arrival in the U.S. at least one year old,

      - A school record of age with sworn parental statement and physician's certificate of physical age.

2. Return the completed form with the documentary proof of age to the address shown at the top of this form.

If the information that you give is complete, the documentary proof of age is satisfactory and the job you are to do is permissible for a person of your age, the certificate will be issued and given to the employer except for those minors who are employed in agriculture or are 18 years of age or older when the certificate may be given to the minor.

Public Burden Statement

We estimate that it will take an average of 10 minutes to complete this collection of information, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding these estimates or any other aspect of this collection of information, including suggestions for reducing this burden, to the Administrator, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210. **DO NOT SEND THE COMPLETED FORM TO THIS OFFICE**

WH-19 **<u>Federal certificate of age.</u>**

(a) Purpose

This form shall be completed by a designated Age Certificate Officer (ACO) of the Wage and Hour Division (WHD) upon acceptance of a completed application for Federal Certificate of Age (Certificate) (WH-14). This Certificate is accepted as proof of age under the Fair Labor Standards Act (FLSA) child labor provisions in any state which does not have an employment certificate program which meets the standards set forth in 29 CFR 570.1 -27 (child labor Reg. 1). *See* FOH 52g18.

(b) Copies

Complete this form in duplicate. Give or mail the original to the requesting employer for minors under 18 years of age to be employed in non-agricultural work, or under 16 years of age to be employed in agriculture. (Exception: minors 18 years of age or over requesting employment in non-agricultural work or 16 years of age requesting employment in agriculture may be given or mailed the original certificate which may be issued on the basis of completion of the minor's portion of the form only.) The duplicate copy is to be retained by the ACO in accordance with appropriate regional administrator (RA) instructions.

(c) Preparation

Following review of the application for completeness and acceptability, the ACO may issue a Certificate and should:

(1) Enter a check mark in the appropriate box at the top of the form to indicate r1acs of worker for whom the Certificate is being issued

(2) Complete all items for minors under age 18 to be employed in non-agricultural work, or under age 16 to be employed in agriculture (as noted on the form, items 9 and 10, which are asterisked, are not required to be completed for minors 18 years of age or over for non-agricultural work, or 16 years of age or older for agriculture

(3) Enter the WHD local address in item 11

(4) Sign item 13

(5) Have minor sign item 14 if minor is available in the WHD office at the time of issuance; otherwise, when the Certificate is mailed to the employer the ACO shall request that the minor's signature be obtained prior to the beginning of employment, advising that the certificate is not valid without such signature (*see* FOH 54: WH-11)

(6) Follow the procedure in FOH 54: WH-149 if the minor has sent in the application

NOT FOR PUBLIC DISTRIBUTION

Keep this Certificate on file while minor is employed. When minor leaves, return to Issuing Officer if minor is under 18 *for under 16 in agriculture*; otherwise, give Certificate to minor.

Federal Certificate of Age

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

NOTE: Do not fill out items with an asterisk (*) for minors 16 years of age or for minors 16 years of age or over employed in agriculture.	☐ For Minors 14 and 15 ☐ For Minors 16 and Over ☐ For Minors Employed in Agriculture	1. State	2. Date of Issue	3. Evidence of Age Accepted

4. Name of Minor	5. Address of Minor	6. Date of Birth	7. Age	8. Sex

*9. Occupation	*10. Industry	11. Address of Issuing Officer

12. Name of Employer and Address of Establishment

13. _____
(Signature of Issuing Officer)

14. _____
(Signature of Minor)

Form WH-19 (Rev. July 1984)

☆U.S. GOVERNMENT PRINTING OFFICE: 1984—451-000

INFORMATION FOR EMPLOYER

A Federal Certificate of Age is accepted as proof of age under the child labor provisions of the Fair Labor Standards Act and the Walsh-Healey Public Contracts Act. This Certificate protects the employer only if it shows the minor to be the legal age for the occupation in which he/she is employed.

Federal minimum ages for: Nonagricultural Employment – 18 for hazardous occupations; 16 for general employment; 14 outside school hours in some nonmanufacturing, nonhazardous occupations for limited hours and time. Agricultural Employment – 16 for hazardous occupations and during school hours; 14 outside school hours in nonhazardous occupations except 12 and 13-year old with parental consent or when parent is employed on same farm.

Child Labor Bulletins 101 and 102 provide detailed information on the child labor provisions of the Act. If the young worker you employ is 14 or 15, note particularly hours and occupational limitations as well as other conditions of nonagricultural work.

Please have minor sign the certificate on line 14.

WH-31 Employee personal interview statement.

(a) Purpose

This form is for recording employee personal interview statements. A plain sheet of paper may be used only in emergencies when the form is not available. This form shall not be used for mail interviews. Form WH-42 shall be used for mail purposes.

(b) Copies

Only one copy need be prepared for each employee interviewed.

(c) Preparation

When blank sheets of paper are used instead of this form, the identifying information required by the form's heading must be obtained. The sheets should be filed alphabetically in the "B" section.

(d) Driver's license number

This information should be requested except in those states where the driver's license number is the same as the individual's social security number.

(e) Equivalent form in WHISARD

WH-31: Employee Personal Interview Statement.

NOT FOR PUBLIC DISTRIBUTION

Employee Personal Interview Statement

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

This report is authorized by Section 11 of the Fair Labor Standards Act and other Wage Hour Laws. While you are not required to respond, your cooperation is needed for the Wage Hour Division to make a determination of compliance under the applicable Act(s). Your identity will be kept confidential to the maximum extent possible under existing law.

_____ (Date)

_____ (Place of interview)

I, Mr. / Miss / Mrs. / Ms. _____ (Name of employee), of _____ (Number, street, apt. no.),

_____ (City or town), _____ (State) _____ (Zip code).

_____ (Telephone number), _____ (Driver's license number - Do not request if number is same as Social Security number).

_____ years of age, (was/have been) employed by _____ (Establishment).

_____ (Location of establishment) for the approximate period from _____ to _____ (If still employed state "present")

as _____ (Occupation or description of duties)

Statement: _____

(If additional space is needed continue on reverse)

Form WH-31 (Rev. Jan. 1989)
B-

WH-35 **<u>Form letter regarding back wages remaining to be paid.</u>**

(a) **Purpose**

This form shall be used by the district office and/or regional office to obtain current information from an employer regarding back wage payments where there is no evidence that such payments have been completed.

(b) **Filing**

File on top of the WH-56.

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division

Reply to Attention of:

Date:

To:

Subject: Status of Agreement to Pay Back Wages

As a result of our recent investigation of your firm, you agreed to pay back wages in the amount of $ _____ to _____ employee(s). In view of this and your agreement to comply in the future, we plan to close the investigation administratively. Before doing so, however, we need to know what steps you have taken to complete payment of these back wages.

Our records show that of the total amount shown above, $ _____ due _____ employee(s) remains to be paid. Please forward to this office any receipt(s) you may have covering back wages already paid to the employee(s), or in the absence of such receipt(s) other evidence of payment.

If any employee was not paid because the mail was returned by the Post Office, please send us the employee's name, Social Security number and the returned envelope. Your cooperation is appreciated.

Form WH-35 (Rev. Oct. 1984)

WH-40 **<u>WHISARD weekly Time and Attendance Report.</u>**

(a) Purpose

Wage and Hour Division (WHD) Weekly Time and Attendance Report (formerly WH-40) serves as a record of daily Wage and Hour Investigator (WHI) activity, a record of time expenditure of hours in three different time categories: Case Time, Outreach Activities, and Other Time.

(b) Copies

WHD Weekly Time and Attendance Report can be printed in WHISARD for WHIs' own record.

(c) Preparation

All WHIs' time expenditure data are entered and reported in WHISARD. *See* FOH 54d. WHIs are required to submit time report weekly in WHISARD.

(d) WHISARD form/report

Weekly Time and Attendance Report (WH-40).

WH-41 **<u>Mail request for employee to appear or telephone for interview.</u>**

(a) Purpose

This form shall be used to request employees to appear or telephone for the purpose of being interviewed concerning the conditions of their employment when interviews at the establishment are not practicable or are considered unwise.

(b) Copies

Only one copy need be prepared and mailed to the employee.

(c) Equivalent form in WHISARD

WH-41 Mail Request for Employee to Appear or Telephone for Interview.

(WH-41 Request Contact).

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division

Firm:

We are making an investigation of this firm to determine if it is complying with requirements of the Fair Labor Standards Act or, where applicable, the Walsh-Healey Public Contracts Act, the McNamara-O'Hara Service Contract Act, the Davis-Bacon and related Acts, or Title III of the Consumer Credit Protection Act. The fact that we are asking for this information does not imply that this firm has violated any law.

In connection with this investigation, I would like to discuss with you certain aspects of your employment by this firm, such as the hours you worked and the wages you were paid. Your identity will be kept confidential to the maximum extent possible under existing law. The type of appointment sought, as well as the date, time and other conditions are shown below.

Sincerely,

Investigator

[ ] **PLEASE MEET ME FOR A PERSONAL INTERVIEW.**

Address

Date	Time

If you have any records of the hours you worked or the wages you were paid by this firm, please bring them with you. **It is important that you call me if you will be unable to keep this appointment.** I can be reached (or a message can be left for me) on

Date: Time: Tel:

[ ] **PLEASE CONTACT ME BY TELEPHONE.**

If I am not in when you call, please leave a telephone number and time when you can be reached.

Date	Time	Telephone No.

Form WH-41 (Rev. Jan 1987)

WH-42 **Employee mail interview form.**

(a) **Purpose**

This mail interview form may be used to obtain needed information in accordance with FOH 52c06.

(b) **Copies**

One copy will be prepared and mailed to the employee.

(c) **Preparation**

(b) (7)(E)

[redacted]

(d) **Filing**

See FOH 54b03.

(e) **Equivalent form in WHISARD**

WH-42 Employee Mail Interview Form.

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division

Firm:

We are making an investigation of this firm to determine if it is complying with requirements of the Fair Labor Standards Act (or, where applicable, the Walsh-Healey Public Contracts Act, the McNamara-O'Hara Service Contract Act, the Davis-Bacon and related Acts, or Title III of the Consumer Credit Protection Act). In doing so, it is customary to ask some of the present and former employees for certain information by direct correspondence. The fact that we are asking for this information does not imply that this firm has violated any law.

While you are not required to respond, we ask that you assist us by answering the questions below. Our investigation is limited to the past two years; for this reason, your answers should refer only to the period or periods during which you worked for the firm **within the past 2 years**. If some of your answers require additional comments, please explain under "Remarks" on the reverse side of this form. The enclosed material is for your information and will help you answer the questions. Return the completed form **within 3 days** after you receive it, using the enclosed self-addressed envelope which needs no postage.

Your identify will be kept confidential to the maximum extent possible under existing law. Please do not ask the employer to fill out this form for you.

Enclosure

Investigator

PLEASE ANSWER THE FOLLOWING QUESTIONS AS BEST AS YOU CAN

1. Period employed (month, year):

   From: _____

   To: _____

   (if still there, state "present")

2. Job Title:

3. Briefly explain your duties:

   _____

   _____

   _____

4. Place of work: (Office, warehouse, sales floor, machine shop, shipping room, etc.)

5. In an average week, about how many hours did you usually work each day (less time off for meals) and for the week? (Enter number of hours in boxes):	Sun	Mon	Tue	Wed	Thr	Fri	Sat	Total

Continue on other side

Form WH-42
Rev. May 1992
B-

6. In about how many weeks (within the past two years) did you work over 40 hours? (If none, so state):	7. If you did work over 40 hours (as shown in Question 6), about how many hours did you usually work in such weeks? (Example: 42, 45, 48, etc.):

8. Method of pay (Complete either a., b., or c., as appropriate):

a. Salary before deductions $ _____ (check one) per ☐ week ☐ month other (explain): _____	b. Hourly rate (amount per hour) $ _____

c. Other (Describe: commissions only; salary plus commissions; draw and commissions; piecework; and indicate amount earned on this basis in an average week):

_____

_____

9. Did you get extra pay for overtime hours? (Check one) ☐ No ☐ Yes

If yes, explain how your overtime pay was figured (For example: time and one-half after 40 hours per week or after 42, 44, or 48 hours a week; time and one-half after 8 hours a day, 40 hours per week; time and one-half after 8 hours per day only).

_____

_____

_____

10. Remarks: (Use extra sheet if needed)

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Signature	Mr. Miss Mrs. Ms.	Date	Home Telephone No. ( )

Address (number, street, apt. no., city, state, ZIP Code)

Date of Birth (if under 20) (month, day, year)	

WH-51 **WHISARD Compliance action report.**

(a) Purpose

Compliance Action Report (Form WH-51) is a report form that shows the summary of the compliance action, including the recommended actions, findings, and Wage and Hour Investigator (WHI)'s conclusions and recommendations. This report can be printed in WHISARD.

(b) Copies and filing

One copy is to be printed and placed in the investigation file according to *FOH 54b02*. The lead WHI must sign and date the report prior to the submission of the case file for a review. The assistant district director or district director reviewing the compliance action must sign and date the report.

(c) Preparation

All data relating to the compliance action activities and findings are entered and reported in WHISARD. Print this report in WHISARD and place it in the case file before submitting the case for management review in WHISARD. *See FOH 54e*.

(d) WHISARD form/report

WH-51 WHISARD Compliance Action Report.

WH-53 **WHISARD case registration/investigator assignment.**

(a) Purpose

WHISARD Case Registration/Investigator Assignment (Form WH-53) is a report form that shows the case registration and investigator assignment data of a compliance action. This report can be printed in WHISARD. The pre-WHISARD WH-53 form included a trailer form called the diary sheet. In WHISARD, the diary sheet is a separate report and is called Case Diary Entries report.

(b) Copies

One copy is to be printed and placed in the investigation file. If there are multiple complaints in a complaint case, a report for each complainant shall be printed and placed in the investigation file.

(c) Preparation

All case registration information data must first be entered and registered as a case in WHISARD. Once registered as a case, it can then be assigned to Wage and Hour Investigators(s) in WHISARD. *See FOH 54c*.

(d) WHISARD form/report

WH-53 WHISARD Case Registration/Investigator Assignment Case Diary Entries.

NOT FOR PUBLIC DISTRIBUTION

WH-55 **<u>Wage transcription and computation sheet.</u>**

(a) Purpose

This form is for use in transcribing payroll records and in computing back wages due. The form may also be used to compute liquidated damages. Plain paper or columnar sheets may be substituted for the form.

(b) Copies

One copy is required for the investigation file. The employer shall not be given copies of sample transcriptions but may be furnished copies of computations if he or she requests them and if he or she is given Form WH-56. *See* FOH 54: WH-56(b)(2) and (3). As appropriate, the employer will be furnished copies of the computations of liquidated damages.

(c) Preparation

No particular method of making transcriptions or computations is prescribed. If payroll transcriptions are required, the entries shall be made in such a manner as to reflect accurately the information obtained from the source document. In making computations, these general instructions shall be followed:

(1) Enter in the heading the date the computations were made and the name, address including ZIP code if known, social security number where appropriate, and occupation of the employee. In some cases, such as where payrolls are electronically processed, it may be appropriate to enter the employee's payroll identification number in conjunction with his or her name. Where the employer makes the computations, he or she shall be instructed to identify the firm's name and address in the heading. This is necessary for identification of the forms in the event they are transmitted to the Wage and Hour Division (WHD) by mail. However, where the Wage and Hour Investigator (WHI) prepares these forms and assembles them in the investigation file, the firm's address need not be shown. In appropriate instances, the form shall be used for more than one employee by skipping a line or two and entering the same identifying information for the next employee. The form has been pre-marked with the exhibit letter "A"; however, each sheet should be numbered after the exhibit letter.

(2) The entries shall demonstrate clearly how the computations were made. For example, the following details of the computations shall be shown: the period covered by the violations, the basis of compensation (*e.g.*, the hourly rate, piece rate, or salary), the hours worked (usually the weekly total will suffice), and the gross amount due. Shortcuts and coefficients shall be used where possible, but sufficient information shall be included to permit adequate review. The objective is to make correct and understandable computations without waste of time.

The form is intended to be flexible in use; certain column headings have been left blank so that appropriate headings may be inserted in any of the columns to suit varying compliance situations. In situations where a column is used for a particular type of entry, such as "Total Wages Paid" or "CWHSSA liquidated damages," this heading shall be entered at the top of the column so that persons subsequently reviewing the file can readily understand the entries on the form.

NOT FOR PUBLIC DISTRIBUTION

(3) Separate notation must be made in all cases of the amounts due under the McNamara-O'Hara Service Contract Act (SCA), Walsh-Healey Public Contracts Act (PCA), Davis-Bacon and Related Acts (DBRA), and Contract Work Hours and Safety Standards Act (CWHSSA) standing alone and identified by statute, contracting agency, and contract. CWHSSA liquidated damages must be computed and shown separately from any back wages. *See* FOH 54b04(f)(1)(a) and (b).

NOT FOR PUBLIC DISTRIBUTION

Wage Transcription and Computation Sheet

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Establishment/Employer ____________________ Date ____________

Employee ____________________ Social Security No. ____________

Address ____

Occupation ____________________ (ZIP Code) ____________

Year and Workweek Ending	Hours Worked								Rate of Pay					Amount Due Employee
								Total						

Investigator ____________________

Form WH-55
Rev. Aug. 1996

Year and Workweek Ending	Hours Worked							Total	Rate of Pay					Amount Due Employee

Show name, address including Zip Code if known, Social Security Number, and Occupation as appropriate of each employee for whom transcriptions or computations are made on this sheet.

*U.S. GPO: 1996-443-723/89155

WH-56 **<u>Summary of unpaid wages.</u>**

(a) Purpose

This form shall be used to provide as a summary of unpaid wages due current and/or former employees; under the Fair Labor Standards Act (FLSA), Walsh-Healey Public Contracts Act (PCA), McNamara-O'Hara Service Contract Act (SCA), Davis-Bacon and Related Acts (DBRA), Contract Work Hours and Safety Standards Act (CWHSSA), or Consumer Credit Protection Act (CCPA); instructions to the employer for making back wage payments; and a space for the employer's signature, indicating agreement to pay the back wages and the date by which proof of payments will be mailed to the district office (DO).

In all cases, back wage information must be entered into WHISARD and then print the WH-56.

(b) Copies

(1) *Agreement to pay*

Print a set of Form WH-56 from WHISARD in each case where back wages are computed. The original shall be furnished to the employer (together with Forms WH-58) and the duplicate shall be placed in the investigation file. If the employer is not being requested to submit official receipt Form WH-58 (such as under FOH 53c04(b)), he or she may be given the duplicate copy instead of the original if the instructions for use of the receipt forms on the reverse of the original could result in confusion. If the employer agrees to make the computations, he or she should be encouraged to complete and prepare the data in a format which can be easily imported into WHISARD. The Wage and Hour Investigator (WHI) will provide the necessary guidance for this purpose.

(2) *Refusal to pay*

If computations have been made in FLSA or CCPA cases, a Form WH-56 shall be printed. Because collection action may be taken under the PCA, SCA, DBRA, or CWHSSA, it is necessary to print separate Forms WH-56 to show the amount computed under the particular act involved (see 54b04(f)(2)). The original in each instance shall be given to the employer except in those rare instances where the WHI may deem the procedure unwise.

(3) *Potential civil litigation and administrative hearing cases*

In potential civil litigation cases and PCA, SCA, DBRA, or CWHSSA administrative hearing cases, the original of the form may be given to the employer *unless* the joint review committee (JRC) decides that the employer should not be provided with the form. In such cases, both copies should be placed in the investigation file.

(4) *Potential criminal litigation*

Place both copies in the investigation file. The WHI shall not leave a copy of the form with the employer in such cases, unless the WHD has clearance from the Office

NOT FOR PUBLIC DISTRIBUTION

of Inspector General (OIG) or appropriate Assistant United States Attorney (through the OIG or regional solicitor of Labor) to negotiate for collection of back wages.

(c) Manual preparation of summary of unpaid wages

In situations where manual preparation of this form is necessary, conform to the following instructions in completion this form. Any back wage information that is not entered into WHISARD, must be entered into WHISARD.

(1) *Heading*

Enter the DO address, name of the WHI, date the summary was prepared or approved, the employer's federal tax identification number, and date the back wage payments should be completed, and the original copy of the WH-58(s) mailed to the district director (DD). The WHI (or, as appropriate, the DD or assistant district director) should sign and date the form above the printed name of the WHI to certify the accuracy of the names and amounts entered on the form.

(2) *Name*

Enter the name of each employee due $20.00 or more. In the ordinary case this listing will be alphabetical; however, where appropriate, employees may be grouped on the form in accordance with categories or occupations or under any other manner that will make it easier for other persons to handle and review the file. Use additional forms if continuation sheets are required.

(3) *Address*

Enter the last known address. If no address is available, enter the word "unknown".

(4) *Periods covered*

Enter, by individual employee, the beginning and ending dates (by workweek ending dates in each case) of the period covered by the violations.

(5) *Acts*

Enter in column 4 the appropriate code number(s) as shown on the face of the WH-56: Summary of Unpaid Wages.

(6) *Gross amounts due*

Enter the gross amount due each employee and total the entries. The abbreviation "Pd" shall be entered to the right of the amount due on file copy of Form WH-56 to indicate a payment made in full.

(7) *Employer name and address of establishment*

Enter the name and address.

(d) Employer's agreement to pay

NOT FOR PUBLIC DISTRIBUTION

Where possible, the signature of the employer should be obtained on the WH-56 indicating agreement to pay the back wages and the date by which proof of payment will be mailed to the WHD. Where back wage installments are approved, the date indicated shall be the date by which the final installments are to be made.

(e) WHISARD form/report

WH-56 Back Wage Summary.

NOT FOR PUBLIC DISTRIBUTION

Summary of Unpaid Wages

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

(Office Address)	Investigator:	Date:
	Employer Fed. Tax ID Number:	

1. Name	2. Address	3. Period Covered by Workweek Ending Dates		4. Act(s) (see code below)*	5. Gross Amounts Due

I agree to pay the listed employees the back wages shown due and to mail proof of payment to the Wage and Hour District Office address shown above by _____ (date)

Signed: _____

Employer Name and Address:

TOTAL $

* Column 4-Code

FLSA	1
PCA	2
SCA	3
DBRA	4
CWHSSA	5
CCPA	6

(See Reverse Side for Instructions)

Form WH-56
Rev. July, 1988

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

The summary on the reverse side represents unpaid wages due your present or former employees under the Fair Labor Standards Act (FLSA-1), the Public Contracts Act (PCA-2), the Service Contract Act (SCA-3), the Davis-Bacon and Related Acts (DBRA-4), the Contract Work Hours and Safety Standards Act (CWHSSA-5), or the Consumer Credit Protection Act (CCPA-6), as indicated by code number(s) shown in column 4. An employee paid in full under our supervision waives any further right provided under section 16(b) of the Fair Labor Standards Act for recovery of such unpaid wages and an equal amount as liquidated damages.

INSTRUCTION FOR THE USE OF OFFICIAL RECEIPTS

(1) Official Receipts (Forms WH-58). - A receipt in triplicate is to be used for payment of each employee listed on the face of this sheet. Unless already shown on the forms, enter the employee's name, the name and address of the establishment, the period covered, the gross amount due, and mark(x) the Act or Acts involved in the boxes provided for this purpose on the receipt form. All of this information can be obtained from the Summary of Unpaid Wages. Also, compute and enter the deductions required by law, such as Social Security and taxes, and the net amount to be paid. One of the copies of the receipt is for the employee. The original and one copy are to be signed and dated by the employee at the time of payment. Keep the copy for your files. Complete the certification on the original and send it to the address shown on the reverse side of this instruction sheet. Receipts are to be forwarded as payment is made. The amount paid each employee, the period covered by the payment and the date of payment must be shown in your records.

(2) Payment to a Third Party.- Payment may be made to a third party legally entitled to receive it on the behalf of the employee. This includes heirs and administrators of the estate of a deceased person. The name of the employee and the signature of the person receiving the payment for him/her shall be entered on the receipt on the space for signature of employee.

(3) Former Employees. - Receipt forms and a check should be mailed to the last-known address of each former employee listed. It is suggested that a self-addressed envelope be enclosed, together with a request that the original and one copy be signed, dated and returned to you immediately. If a former employee fails to return the receipt forms, the cancelled check should be kept as evidence of payment. Notify the Division of the name endorsed on the check and the date of bank clearance.

(4) Unlocated Former Employees. - On or before the completion date shown, furnish a list showing the name, last-known address, Social Security number and the gross amount due each former employee who could not be located. Attach any envelope(remove contents, please) returned undelivered by the Post Office. You will be notified of any further action that may be required in the disposition of these back wage amounts.

(5) Unpaid Wages Due Under Government Contract Statutes. - Amounts Due under Government contract statutes (codes 2,3,4,5) (or concurently under the Fair Labor Standards Act) must be paid either to the employees involved or to the United States Government. Payments to employees are to be handled in the same manner as those due solely under the Fair Labor Standards Act. However, within 30 days after you submit a list of those who could not be located for payment, you will be required to furnish a certified check made payable to "Wage and Hour Division, Labor" for the amount remaining unpaid. You will be notified of the amount of the check and the names of the employees involved. Where funds payable under the contract have been withheld to meet the employer's back wage liability or where the employer pays the amount due to the United States Government pursuant to an administrative settlement under these statutes, back wages that cannot be disbursed to the employees involved will be retained in the United States Treasury and will not be returned to the employer.

If you have any questions please contact the Division at the address shown on the reverse side.

U.S. Department of Labor
Wage and Hour Division
Washington, D.C. 20210

September 21, 2010

WAGE AND HOUR MEMORANDUM No. 2010-13

MEMORANDUM FOR: REGIONAL ADMINISTRATORS AND DISTRICT DIRECTORS

FROM: NANCY J. LEPPINK
Deputy Administrator

SUBJECT: Revised Form WH-58

This memorandum provides guidance on the changes and use of the revised Form WH-58. *See* Form WH-58 (Rev. September 2010) (attached). Effective immediately, this is the only version of the Form WH-58 that is authorized for use. Please strike the previous version of the form from your copy of the FOH and insert a copy of this memorandum and the revised Form in its stead. The Memorandum and revised Form are Insert # 1856.

There are three primary changes to the revised form:

- Instead of automatically covering the entire two-year statute of limitations in a non-willful FLSA case, the back wage period is limited to the beginning and ending dates of the time period for which back wages are actually computed.

- The FLSA waiver notice has been revised and is now the only waiver notice on the form.[1] The Employee Polygraph Protection Act and Family and Medical Leave Act waiver notices have been removed from the form.

- A checkbox for the Migrant and Seasonal Agricultural Worker Protection Act has been added to the form; the checkboxes for the Walsh-Healy Public Contracts Act, the Title III-Consumer Credit Protection Act, and H-2A have been removed from the form. A checkbox for "other" laws we enforce is included.

Regulation 516.2(b) provides for the use of a receipt form provided or authorized by the WHD to record retroactive payment of unpaid FLSA minimum wage and/or overtime compensation under the supervision of the WHD. *See* FOH 53c09. The WHD provides Form WH-58 to accomplish such supervision. The Form WH-58 may also be used in non-FLSA cases when appropriate.

---

[1] Under Section 16(c) of the FLSA, an employee's acceptance of payment in full of WHD-supervised back wages "constitute(s) a waiver by such employee of any right he may have under section (b) of this subsection to such unpaid minimum wages or unpaid overtime compensation and an equal amount in liquidated damages." *See* 29 U.S.C. 16(c). None of the other statutes we enforce contain this explicit waiver language; as such, we cannot definitively say that an employee has waived his/her private right of action in cases arising under those statutes. Because an equivocal waiver is of limited value, we have decided to not include waiver language for the other statutes.

The Form WH-58 (Rev. September 2010) is only authorized for use when WHD has completed an investigation that includes sufficient fact finding to determine that the back wage amounts we have calculated are correct and are in accordance with the applicable statute(s) and regulation(s). The back wage period listed on the Form WH-58 should be limited to the period of time for which back wages were actually computed (and not just default to the period allowed by the applicable statute of limitations). Use of the Form WH-58 for any other reasons may only be done so with the approval of the Regional Office.

Effective immediately, please use the attached Form WH-58 and ensure that your staff becomes aware of these changes and has access to the form. The version of the Form WH-58 in WHISARD is no longer authorized for use. Although there may be some lag time before the revised form will be updated in WHISARD, it is now posted on the WHD intranet. An update to the FOH is forthcoming. A Form WH-58L (for use in limited investigations) will be released in the coming weeks.

If you have any questions regarding this revised Form WH-58, please contact Bonny Crosby, Acting Director, Division of Enforcement Policy and Procedures at (202) 693-0722.

Attachment

This guidance is for internal use only and is not for general distribution.

U.S. Wage and Hour Division

Receipt for Payment of Back Wages, Employment Benefits, or Other Compensation

U.S. Department of Labor Wage and Hour Division

I, _____, have received payment of wages, employment benefits,
(typed or printed name of **employee**)
or other compensation due to me from _____
(name and location of the **establishment**)
for the period beginning with the workweek ending _____ through the workweek

ending _____. The amount of the payment I received is shown below.

This payment of wages and other compensation was calculated or approved by the Wage and Hour Division and is based on the findings of a Wage and Hour Division investigation. This payment is required by the Act(s) indicated below in the marked box(es):

- ☐ Fair Labor Standards Act[1]
- ☐ Family and Medical Leave Act
- ☐ Employee Polygraph Protection Act
- ☐ Migrant and Seasonal Agricultural Worker Protection Act
- ☐ Contract Work Hours and Safety Standards Act
- ☐ Service Contract Act
- ☐ Davis-Bacon and Related Act(s)_____
- ☐ Other _____

Gross Amount Back Wages $ _____
Legal Deductions $ _____
Other Amount Paid $_____ _____
(please specify type)
Net Amount Received $ 0.00

[1]NOTICE TO EMPLOYEE UNDER THE FAIR LABOR STANDARDS ACT (FLSA) – Your acceptance of this payment of wages and other compensation due under the FLSA based on the findings of the Wage and Hour Division means that you have given up the right you have to bring suit on your own behalf for the payment of such unpaid minimum wages or unpaid overtime compensation for the period of time indicated above and an equal amount in liquidated damages, plus attorney's fees and court costs under Section 16(b) of the FLSA. Generally, a 2-year statute of limitations applies to the recovery of back wages. Do not sign this receipt unless you have actually received this payment in the amount indicated above of the wages and other compensation due you.

Signature of employee _____ Date _____

Address _____

EMPLOYER'S CERTIFICATION TO WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR:

I hereby certify that I have on this (Date) _____ paid the above-named employee in full covering lost or denied wages or other compensation as stated above.

Signature _____ Title _____
(Employer or authorized representative)

PENALTIES INCLUDING FINES OR IMPRISONMENT ARE PRESCRIBED FOR A FALSE STATEMENT OR MISREPRESENTATION UNDER U.S. CODE, TITLE 18, SEC. 1001

WH-75 **Homeworker handbook.**

(a) **Purpose**

This form or record is to be used by employers and homeworkers to record daily and weekly hours worked, piecework information, and business-related expenses incurred by homeworkers. This form is also available in Spanish, Chinese, Korean, Vietnamese, Cambodian, and Laotian.

(b) **Copies**

One copy shall be kept for each homeworker.

(c) **Preparation**

Instructions for the completion of entries in the handbook and for the employer's attestation of accuracy are printed in each handbook.

NOT FOR PUBLIC DISTRIBUTION

Homeworker Handbook

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

O.M.B. No. 1215-0013
Expires: 08/31/2006

This handbook is the property of the Wage and Hour Division, Employment Standards Administration, United States Department of Labor, and must be returned upon request. This is a Federal handbook only and does not authorize the distribution of homework by any employer or by any contractor in violation of any applicable State law or regulation.

1. A. Homeworker's name: (last name) (first name)

B. Address: (number, street, city, State, Zip code)

2. A. Firm's name:

B. Address: (number, street, city, State, ZIP code)

3. Homework distributed from: (number, street, city, State, Zip code)

4. Industry:	5. Day and time workweek begins	6. Required minimum wage

7. Date issued to homeworker (month, day, year):

8. Homeworker's certificate number (if applicable) (See Regulations 29 CFR 530.4)

Form WH-75
Rev. Nov. 1988

f

NOTICE TO EMPLOYER AND HOMEWORKER

1. Under the Fair Labor Standards Act, homeworkers are entitled to the same protections of the law as other employees. Any violations committed with respect to homeworkers are subject to the penalties set forth in the law and in Regulations, 29 CFR Parts 530 and 579.

2. Homeworkers must be paid at a rate of not less than the minimum wage provided in the Act for all hours worked unless a lower rate is permitted under a special certificate for an individual homeworker in accordance with Regulations, 29 CFR Part 525.

3. Homeworkers must be paid overtime pay at a rate of not less than one and one-half times their regular rates of pay for all hours of work after 40 in a workweek.

4. Deductions from wages for damaged goods, cost of tools or materials (yarn, thread, packing materials, etc.), cost of machines or other equipment, etc., are not permitted and workers may not themselves pay such costs without reimbursement where this reduces the wages received to less than the minimum wage or cuts into required overtime pay.

5. No one under 16 years of age is permitted to perform industrial homework as defined in Regulations, 29 CFR Part 530.

6. The work record entered in this handbook must be only for the employee named on the front page.

7. Records of hours worked and earnings of homeworkers must be kept by the employer in accordance with section 516.31 of Regulations, 29 CFR Part 516.

8. No homework may be performed on Government manufacturing or supply contracts subject to the Walsh-Healey Public Contracts Act.

INSTRUCTIONS

(Enter in ink all information required)

Each page of this handbook is a time sheet to be used by the homeworker to accurately record all the hours worked in one workweek. A workweek is a fixed period of 7 consecutive calendar days - 168 hours. The employer designates the time of the day and day of the week on which the workweek begins.

In many instances, a homeworker does not work continuously, so space has been provided for several daily entries of starting and stopping times, if needed. It is important that the homeworker accurately record **each time** he or she starts and stops working (for example, "Start" - 8:15 a.m.; "Stop" - 10:45 a.m.). This time should be recorded immediately when he or she starts and stops working, rather than at the end of the day or workweek. However, short breaks or rest periods of less than 20 minutes need not be recorded.

Activities which must be considered hours worked (and paid for each pay period) include all time spent in:

(a) setting up and putting away machines and materials,
(b) adjusting, threading, cleaning, oiling, or repairing machines,
(c) actual production of the articles,
(d) inspection of the articles,
(e) repairing or re-work,
(f) sorting and packing or unpacking materials,
(g) training to produce new designs or new items,
(h) rest periods of short duration (up to 20 minutes),
(i) traveling to and from the distribution point to pick up and/or deliver the homeworker's own work or the work of other homeworkers (where the travel includes time spent in personal activities, such as shopping or going to the post office, this personal travel time need not be included in counting the hours worked),
(j) waiting at the distribution point to pick up work or deliver completed work and have it inspected,
(k) any other activity required to produce the article, or otherwise required by the employer to be performed.

In the space indicated, the homeworker is to record the type(s) of article(s) worked on each day, the number of pieces made, and any other activities (travel, packing, etc.). The homeworker also is to record all business-related expenses incurred during the workweek, such as cost of thread and tools, postage, etc., in the space provided at the bottom of the time sheet.

Except for the time necessary for the calculation of hours worked at the end of the pay period by the employer, the handbook shall remain in the possession of the homeworker until filled in (that is, no space is left for entries) or until the homeworker's employment is terminated, at which time the handbook shall be returned to the employer as required by the regulations. The employer then signs and dates the statement on the final page and keeps and preserves the handbook for at least 2 years.

For further information or additional handbooks, contact the nearest office of the Wage and Hour Division, Employment Standards Administration, United States Department of Labor.

Workweek Ending Date:

	Start	Stop	Hours	Article (hat, glove, etc.) Style or lot number and number of pieces of each Other activities (travel, packing, etc.)
Day1				
Day2				
Day3				
Day4				
Day5				
Day6				
Day7				
			Total Hours	Expenses (description/amount)

I attest that the homeworker to whom this handbook was issued was instructed to accurately record all hours worked, piece work information, and business-related expenses. I also attest that, to the best of my knowledge and belief, the information was recorded accurately.

Date

Signature of Employer

Public Burden Statement

re not required to respond to this collection of information unless it displays a currently valid OMB control number. Completion
nse is voluntary. We estimate that it will take an average of 30 minutes to complete this collection of information, including tl
ng instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing t
of information. Send comments regarding this burden estimate or any other aspect of this collection of information, includ
ns for reducing this burden, to the U.S. Department of Labor, Administrator, Wage and Hour Division, ESA, Room S3502, 2
n Avenue, N.W., Washington, D.C. 20210 (Paperwork Reduction Project 1215-0013).

END THE COMPLETED FORM TO THIS OFFICE

WH-99 **<u>FOH revision record.</u>**

(a) **Purpose**

This form shall be used by each person to whom a Field Operations Handbook (FOH) is assigned to maintain an up-to-date record of insertions of FOH revisions.

(b) **Copies**

One copy shall be maintained in Appendix B for the control of FOH revisions.

(c) **Preparation**

(1) *Date of revision*

Enter the date of the revision as shown on the revision.

(2) *Date inserted*

Enter the date the revised sheets inserted in FOH.

NOT FOR PUBLIC DISTRIBUTION

FOH Revision Record

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Revision No.	Date of Revision	Date Inserted	Revision No.	Date of Revision	Date Inserted	Revision No.	Date of Revision	Date Inserted
	5/8/87	5/22/87	579	6/8/90	6/22/90	607	4/15/94	5/11/94 BAD 5/25/94 O.K.
552	8/28/87	9/24/87	580	6/15/90	7/23/90	608	5/9/94	5/12/94
553	10/14/87	11/5/87	581	6/22/90	7/18/90	609	5/13/94	5/25/94
554	10/23/87	11/23/87	582	6/29/90	8/15/90	610	5/18/94	5/25/94
555	12/16/87	1/15/88	583	7/6/90	8/16/90	611	7/11/94	8/2/94
556	3/10/88	4/27/88	584	7/12/90	8/17/90	612	6/19/94	6/24/94
557	3/1/88	3/18/88	585	10/25/90	11/2/90	613	7/11/94	8/11/94
558	3/18/88	6/9/88	586	11/15/90	1/10/91	614	8/15/94	8/30/94
559	4/4/88	6/9/88	587	10/3/91	1/3/92	615	8/24/94	9/8/94
560	5/25/88	6/22/88	588	11/22/91	1/17/92	616	10/14/94	10/26/94
561	7/20/88	8/22/88	589	3/19/92	4/20/92	617	11/9/94	11/30/94
562	8/8/88	1/3/89	590	7/7/92	8/28/92	618	3/23/95	4/10/95
	12/9/88	1/23/89	591	9/30/92	11/13/92	619	5/22/95	6/2/95
	9/30/88	10/28/88	592	1/14/93	2/11/93	620	7/21/95	8/30/95
565	12/20/88	1/31/89	593	2/5/93	3/4/93	621	11/13/95	11/24/95
566	11/10/88	12/20/88	594	2/19/93	3/10/93	622	3/21/96	4/4/96
567	2/10/89	5/1/89	595	9/15/93	10/7/93	623	4/22/96	4/30/96
568	5/10/89	7/27/89	596	10/20/93	11/15/93	624	6/24/96	7/16/96
569	5/12/89	6/29/89	597	10/22/93	10/28/93	625	9/19/96	10/9/96
570	5/31/89	7/27/89	598	12/10/93	1/3/94	626	12/6/96	1/28/97
571	7/27/89	9/7/89	599	12/28/93	3/3/94	627	2/21/97	3/5/97
572	8/9/89	9/7/89	600	1/3/94	3/1/94	628	7/11/97	7/31/97
573	10/6/89	10/19/89	601	1/31/94	3/1/94	629	7/18/97	9/29/97
574	10/20/89	11/16/89	602	1/18/94	3/3/94	630	8/22/97	10/21/97
575	10/27/89	11/14/89	603	2/9/94	2/10/94	631	12/31/97	2/4/98
	11/20/89	1/8/90	604	4/4/94	4/21/94	632	2/20/98	3/3/98
	2/9/90	4/6/90	605	4/11/94	4/21/94 BAD 5/23/94 O.K.	633	6/12/98	7/23/98
578	3/16/90	3/29/90	606	4/22/94	5/17/94	634	6/15/98	8/12/98

Continue on reverse side

Form WH-99
Rev. April 1983

Revision No.	Date of Revision	Date Inserted	Revision No.	Date of Revision	Date Inserted	Revision No.	Date of Revision	Date Inserted
635	6/17/98	7/23/98	662			689		
636	7/30/98	8/27/98	663			690		
637	7/31/98	8/31/98	664			691		
638	12/1/98	12/15/98	665			692		
639	2/26/99	3/9/99	666			693		
640	4/16/99	4/22/99	667			694		
641	6/30/00	7/28/00	668			695		
642	2/28/01	5/10/01	669			696		
643	12/15/00	3/12/01	670			697		
644	2/9/01	3/12/01	671			698		
645	1/31/01	3/12/01	672			699		
646	4/26/01	6/29/01	673			700		
647	3/8/02	4/5/02	674			701		
648	5/16/02	6/12/02	675			702		
649	9/18/03	10/15/03	676			703		
650			677			704		
651			678			705		
652			679			706		
653			680			707		
654			681			708		
655			682			709		
656			683			710		
657			684			711		
658			685			712		
659			686			713		
660			687			714		
661			688			715		

WH-100 <u>FOH Insert record.</u>

(a) Purpose

This form shall be used by each person to whom a Field Operations Handbook (FOH) is assigned to maintain an up-to-date record of insertions of FOH revisions.

(b) Copies

One copy shall be maintained in Appendix C.

(c) Preparation

Entries shall be made on this form whenever an FOH insert is added, revised, or deleted.

NOT FOR PUBLIC DISTRIBUTION

WH–100 Rev. 479
(Rev. 11/69)

U.S. DEPARTMENT OF LABOR
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS

REMOVE from FOH Vol III, WH–100 (6/25/81) and SUBSTITUTE WH–100 (8/14/81)

FOH INSERT RECORD

(PRINTED ENTRIES indicate all ACTIVE Inserts thru Insert 1620

Ins. No.	FOH Section	SUBJECT	Date Inserted	Ins. No.	FOH Section	SUBJECT	Date Inserted
[illegible]	[illegible]	[illegible]	[illegible]	1302	25p	House parents	1974 8/28
684	83d06	FLSA Sec 17 actions	12/13	1310	51a15	CL inv agr	11/18
801	81a03	Civil action	1965 2/11	1314	32L00	Sec 7(b) & pub agen	1975 1/6
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1020	80a00	Litigation	7/6	1373	152v	Garnishment	1976 1/15
1077	31c09	Temporary help firms	1969 8/15	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	1390	50d10	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	1391	25c01	Sec 7(b)(3)	4/26
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1115	52v12	Empl suit Title III	5/18	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1166	Vol 5 162[illegible]	Forms	7/27	[illegible]	[illegible]	[illegible]	[illegible]
1164	65[illegible]08	Full-time students	11/2	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	1462	64b00	Disc against employee	9/21
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1257	CH [illegible]	Pilot testing	12/12	[illegible]	[illegible]	[illegible]	[illegible]
1279	52g12-2	MECEP	1974 4/17	[illegible]	[illegible]	Garnishment & Fed Emp	12/1
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

NOTE: Entries or appropriate notations shall be made on this form by each individual FOH holder whenever an WH insert is added, revised, or deleted. Printed date shown in the date inserted column indicates the date inserted in Master FOH copy in NO

(Continued on reverse side)

FOH Insert Record

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Ins. No.	FOH Sec.	SUBJECT	Date	Ins. No.	FOH Sec.	SUBJECT	Date
1841	I	PART 500 - 3/12/97 - IND. CONTRACTOR JT. EMPL. MSPA	4/14/97				
1842	I	PART 9, FNL RULE - RIGHT OF FIRST REFUSAL / WORKERS OF SCA	6/18/97				
1843	I	PART 520 - AMENDED by combining 520, 521, 522 + 523 Del. 527	12/19/97				
1844	I	PART 500 - 5/16/96 - WORKER COMP. INSURANCE, ALJ	6/1/96				
1845	III	59615-TRI-CONCORP. PIZZA HUT KENTUCKY... Chile	7/27/98				
~~1846~~	~~II~~	~~33610 - High school/girls, [illegible] ... grounds~~	~~4/9/98~~				
1847	I	PART 5 - SITE OF THE WORK	1/19/01				
1848	FRONT VOL. 4	COMPLIANCE ASSISTANCE PROCEDURES	3/15/01				
1849	IN FRONT 52a 88-09	ADDITION TO WISARD	4/1/02				
1850	IN FRONT 52F	CMP PRE-ASSESSMENT PROCEDURE	12/15/03				

Form WH-100
Rev. Feb. 1996

WH-103 Notice to Employer- Employment of Minors Contrary to the Fair Labor Standards Act.

(a) Purpose

This form is the notice given to the employer regarding Fair Labor Standards Act (FLSA) child labor violations found during the investigation. The information on the form is needed for completing the Child Labor Civil Money Penalty Report in WHISARD. Use the WH-103 for listing child labor violations in both agriculture and non-agriculture. Any information regarding child labor violations must be entered into WHISARD.

(b) Copies

(1) Except as provided in WH-103 supplemental instruction: (a)(2) and (3) below, prepare the form in triplicate. Give the original to the employer and place one copy in the case file. Enclose the third copy with either the Advisory Letter (Correspondence Letter F2-12) or the Notice of Penalty (Correspondence Letter F2-13) under the civil money penalty (CMP) provisions.

(2) In those investigations in which the establishment is part of a *national or multiunit enterprise*, make additional copies for main office-district office (MODO) and/or branch or main office officials, as appropriate.

(3) If a joint employment situation is involved in the violation, give the original to the employer under investigation (or to the primary employer, as appropriate) with a copy to each of the other joint employers. Prepare additional copies where child labor in agriculture violations involve crew leaders or labor contractors. Thus, for example, if the crew leader or labor contractor is the primary employer, give him or her the original, and also make a copy and give to the farmer. In some cases it may be appropriate to give the original or a copy to a canner or packer if such firm is harvesting the crop through a crew leader or labor contractor. The Wage and Hour Investigator (WHI) will have to decide on a case-by-case basis who shall receive the original copy as the primary employer and how many additional copies are required. The important point is to make certain that all the parties receive a copy of the form. If additional copies are prepared, the names of the persons to whom they are given or mailed shall be shown in the space after "Copies to:". The original and all copies shall be signed in ink by the WHI(s).

(c) Numbering

Numbering is automatic in WHISARD. In situations where manual preparation of this form is necessary, the WHI shall number consecutively each minor found in violation. The name of the establishment or employer should be entered on each additional WH-103 sheet used. Each sheet should also be numbered consecutively (*e.g.*, 1of 3, 2 of 3, and 3of 3).

(d) Preparation

All pertinent information regarding child labor violations should be entered into WHISARD and this notice be printed in WHISARD. In situations where manual preparation of this form is necessary, conform to the following instructions in completion this form.

(1) *Control number*

NOT FOR PUBLIC DISTRIBUTION

Enter the seven-digit WHISARD Case ID Number. If more than one sheet is required for an establishment or farm, enter the control number on the case file copy. The number may be omitted, if desired, from the employer's copy.

(2) *Establishment and address*

Enter the name and address of the establishment (or farm).

"Trade Name": enter the trade name of the establishment or employer. Note: where the investigation is of a state or local government agency, enter the highest level of the state or local government being investigated (e.g., "California, State of;" Sacramento, County of;" or "Roseville, City of").

"Legal Name": enter the legal name of the establishment. If it is the same as the trade name, it may be left blank. In cases where litigation is a possibility, enter the exact legal name of the establishment. Do not abbreviate unless the true legal name contains abbreviations. Where the investigation is of a state or local government agency, enter the specific department, bureau, commission, board, division, etc., within the agency being investigated (e.g., "Sheriff's Department," "Corrections, Board of" or "Energy Commission, California").

(3) *Product or services*

Enter the principal product(s) or service(s) rendered.

(4) *NAICS code*

Use a North American Industry Classification System (NAICS) code number. When entering a NAICS code, it has to be at least four digits long out of a possible six digits.

(5) *Total employees*

Complete this item to show the number of employees of this employer in this establishment and elsewhere which should be counted for purposes of assessing child labor CMPs. Thus, if the employer exercises control (i.e., hiring, firing, and setting work standards over several establishments), enter the total employment of all such establishments. This would be true even if the establishments are engaged in unrelated activities. If the number of employees varies widely from time to time, as may be the case in agriculture and other seasonal businesses, complete this item to show the number of employees employed during a week of full operations.

(6) *From to be left at time of investigation*

In all investigations involving child labor violations, leave the form with the employer at the time of investigation, based on as much information as it is possible to obtain at the establishment. Show in the space provided the name and title of the person to whom the form is given and the date on which it is given. If additional copies are made for other persons (see WH-103: (b)(2) and (3) above), mail these if personal delivery is not convenient. Identify such other persons by name, title, designation as a branch or main office official, etc. If new evidence is subsequently

NOT FOR PUBLIC DISTRIBUTION

found, or if for other reasons it is necessary to prepare an additional WH-103, mark it "Supplemental" or "Amended," according to the situation involved, and leave it with the employer; or, if the WHI has left the vicinity, mail it along with an explanatory letter. Also send copies of such supplemental or amended forms to the other persons who received the first notice. In the latter case, the words "left with" on the form shall be changed to "mailed to."

(7) *Total number of minors illegally employed*

Enter the total number of individual minors found employed in violation. If more than one page of the WH-103 is required, enter the total number only on the first page.

(8) *Name of minor*

Give the full name of each illegally employed minor.

(9) *Local or migrant*

Check the appropriate box. "Local" refers to one who commutes daily from a permanent residence. "Migrant" refers to one who does not commute daily from a permanent residence.

(10) *Date and place of birth*

Enter the minor's date of birth, and indicate whether this date has been verified or not by marking either "Verified" or "Not Verified." Identify sources used to verify ages in the narrative report. Place of birth need not be entered unless the date has not been verified.

(11) *Father's name/mother's maiden name*

Record this information if needed to verify age. It is not otherwise required.

(12) *Child labor standard(s) violated: period(s) of illegal employment: age(s) at start of violation(s)*

Space is provided to describe the duties in which the minor was illegally employed, each hazardous occupations order (HO) and child labor Reg 3 standard violated, and the agricultural standards violated. Enter the period(s) of illegal employment only for the dates in which the minor was employed in violation, and enter the age of the manor at the beginning of that period. If the minor was employed in violation of more than one standard, enter the beginning and ending dates of such illegal employment for each standard and the age at that time. If the violations occurred intermittently throughout the period of the minor's employment, list the entire period of the employment on the WH-103; however, documentation of the specific dates of violation must be included in the file. The period(s) of illegal employment should not extend beyond the date when the minor attains the legal age for the occupation or

NOT FOR PUBLIC DISTRIBUTION

hours/time standards (*i.e.*, age 18 for HOs and age 16 for hours/time or Reg. 3 occupations or agricultural occupations).

***See* FOH 54f02(b)(1) -(14) for the list of child labor violations.**

(e) Equivalent form in WHISARD

WH-103 Notice to Employer-Employment of Minors Contrary to the Fair Labor Standards Act.

NOT FOR PUBLIC DISTRIBUTION

U.S DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

Control Number

NOTICE TO EMPLOYER
EMPLOYMENT OF MINORS CONTRARY TO THE FAIR LABOR STANDARDS ACT

Name of Establishment | Address (St./RFD No., City, County,State, ZIP Code)

Trade Name:

Legal Name:

Product or Services | NAIC Code | Total Employees

Mailed To | Title | Date (Mo.,day,yr.)

Copies To | Title

This notice is to advise you that the investigation of your establishment indicates that the minors listed below have been employed by you contrary to the minimum-age standards of the Fair Labor Standards Act (FLSA). Failure to comply with any of the child labor provisions of the Fair Labor Standards Act (FLSA), including those failures noted herein below, may result in the assessment of a civil money penalty up to $11,000 per violation and may also result in legal action. Unless verified, the dates of birth shown below should not be used for purposes of determining when the minors listed may be legally employed. This list may be incomplete because verification of the ages of all minors in your employ may disclose additional minors of oppressive child-labor age. You will receive an amended or supplemental notice if any changes are in order.

Investigator

Total number of minors illegally employed

Name of Minor | Place and Date of Birth (Mo.,day,yr.) | Father's Name

☐ Local ☐ Migrant | ☐ Verified ☐ Not Verified | Mother's Name

Child Labor Standard(s) Violated | Period(s) of Illegal Employment | Age(s) at Start of Violations

Hazardous order(s) or HO/A item(s) violated: 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 ☐ 9 ☐ 10 ☐ 11 ☐ 12 ☐ 13 ☐ 14 ☐ 15 ☐ 16 ☐ 17 ☐

Injury Sustained in illegal employment ☐ Permanent ☐ Serious ☐ Nonserious ☐ Time Lost

WH-103
(Rev. WHISARD)

Name of Minor | Place and Date of Birth (Mo.,day,yr.) | Father's Name

☐ Local ☐ Migrant ☐ Verified ☐ Not Verified | Mother's Name

Child Labor Standard(s) Violated | Period(s) of Illegal Employment | Age(s) at Start of Violations

Hazardous order(s) or HO/A item(s) violated: 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 ☐ 9 ☐ 10 ☐ 11 ☐ 12 ☐ 13 ☐ 14 ☐ 15 ☐ 16 ☐ 17 ☐

Injury Sustained in illegal employment ☐ Permanent ☐ Serious ☐ Nonserious ☐ Time Lost

Name of Minor | Place and Date of Birth (Mo.,day,yr.) | Father's Name

☐ Local ☐ Migrant ☐ Verified ☐ Not Verified | Mother's Name

Child Labor Standard(s) Violated | Period(s) of Illegal Employment | Age(s) at Start of Violations

Hazardous order(s) or HO/A item(s) violated: 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 ☐ 9 ☐ 10 ☐ 11 ☐ 12 ☐ 13 ☐ 14 ☐ 15 ☐ 16 ☐ 17 ☐

Injury Sustained in illegal employment ☐ Permanent ☐ Serious ☐ Nonserious ☐ Time Lost

Name of Minor | Place and Date of Birth (Mo.,day,yr.) | Father's Name

☐ Local ☐ Migrant ☐ Verified ☐ Not Verified | Mother's Name

Child Labor Standard(s) Violated | Period(s) of Illegal Employment | Age(s) at Start of Violations

Hazardous order(s) or HO/A item(s) violated: 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 ☐ 9 ☐ 10 ☐ 11 ☐ 12 ☐ 13 ☐ 14 ☐ 15 ☐ 16 ☐ 17 ☐

Injury Sustained in illegal employment ☐ Permanent ☐ Serious ☐ Nonserious ☐ Time Lost

WH-124 **Notice of violations of other laws.**

(a) Purpose

(1) This form is for use by the regional office (RO) in notifying state or other federal agencies of possible violations of their laws observed by Wage and Hour Investigator (WHI)(s) in accordance with FOH 53g03.

(2) The same form may also be used by other government agencies, if they so desire, instead of using their own form or other means of notification, in accordance with whatever arrangement the RO or authorized staff member (*see* FOH 51a09) may make for reciprocal notification of possible violations such agencies may observe of our statutes. If so desired by such other agencies, quantities may be furnished (estimated 6-month supply at a time). All supplies of the form so furnished should have the RO name and address inserted in the address box.

(3) The forms are blank as to agency heading and address. This is to enable ROs to imprint "U.S. Department of Labor, Wage and Hour Division" and their local address on supplies to be used by them, and also to permit the other agencies who may wish to use the form to imprint their own agency heading and address.

(b) Copies

(1) For notifying other agencies, prepare in duplicate: original for agency, copy for investigation file.

(2) If notification has been made by more expeditious means for urgent reasons, make one copy for the investigation file only, with a notation on the form indicating how the agency was notified.

(c) Preparation

(1) The form shall be prepared by the RO on the district director (DD)'s recommendation; or, in emergency situations where it is essential to avoid any delay in notifying the agency, it may be prepared by the DD.

(2) A separate form may either be prepared and sent on a single employer or the names and addresses of employers on whom identical violations were observed may be accumulated and one form prepared listing and sent to the agency periodically (*i.e.*, weekly, monthly, biweekly, or semimonthly). In the latter case, when preparing the form, make sufficient copies for each investigation file.

(3) *Items*

"Address Box": enter agency name and address.

"Date": the date the form is prepared and sent.

"Nature of possible violations": check appropriate box or braces; if "Other," specify.

NOT FOR PUBLIC DISTRIBUTION

"Remarks" may be used for any statement considered pertinent, or for additional information regarding the conditions checked that will assist the receiving agency.

NOT FOR PUBLIC DISTRIBUTION

Date:

For your information, conditions that might indicate violations of laws or regulations administered by your agency, as noted below, were observed while performing our official duties:

Employer name and address: _____

_____

_____

Nature of possible violations:

- ☐ Safety and health
- ☐ Unemployment insurance deductions
- ☐ Improper operation of vehicles regulated by DOT
- ☐ Discrimination prohibited by Executive Order 11246, As Amended (race, color, religion, sex, national origin), Section 503 of the Rehabilitation Act of 1973 (handicap), or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, As Amended, 38 U.S.C. 2012 (Vietnam era and disabled veterans).
- ☐ Minimum wage
- ☐ Overtime pay
- ☐ Child labor
- ☐ Social Security deductions
- ☐ Withholding tax deductions
- ☐ Discrimination prohibited by Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, or the Equal Pay Act.
- ☐ Other

Remarks: _____

_____

_____

_____

Very truly yours,

Form WH-124
(Rev. 1/89)

WH-134 **<u>Coefficient tables for computing extra half-time for overtime.</u>**

(a) **Purpose and use**

This form is an abbreviated version of Form WH-135. The WH-134 may be given to employers as an aid in computing the extra half-time for hours over 40 in a workweek.

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

COEFFICIENT TABLE FOR COMPUTING EXTRA HALF-TIME FOR OVERTIME

This table may be used for computing overtime on piecework, bonuses, commissions or fixed salaries for varying hours. Refer to Part 778 of Title 29 of the CFR for guidance regarding when the coefficient method is applicable.

This form has been prepared for use by employers who may find the coefficient table to be a time saver when computing the extra half time for hours worked over 40 in a workweek.

Hours	Even	1/4	1/2	3/4	1/10	2/10	3/10	4/10	6/10	7/10	8/10	9/10
40		0003	0006	[illegible]	[illegible]	0015	0017	0019	0024	0026	0028	0030
41	[illegible]	015	018	[illegible]	[illegible]	0246	[illegible]	[illegible]	[illegible]	0294	0215	0227
42	024	027	029	032	0349	[illegible]	0272	0283	0305	0316	0327	0338
43	035	036	040	043	0360	[illegible]	0381	0393	[illegible]	0423	0434	0444
44	045	048	051	053	0465	0475	0485	0495	0516	0526	0536	0546
45	056	058	060	063	[illegible]	0575	0585	0595	0614	0624	0633	0643
46	065	068	070	072	[illegible]	[illegible]	0680	0690	0708	0717	0726	0736
47	[illegible]	077	079	08	[illegible]	[illegible]	[illegible]	0781	0798	0807	0816	0825
48	083	085	088	090	0863	0871	0859	0868	0885	0893	0902	0915
49	091	094	096	098	[illegible]	[illegible]	0943	0951	0968	0976	0984	0997
50	100	102	104	[illegible]	[illegible]	[illegible]	1024	[illegible]	1047	[illegible]	1063	[illegible]
51	108	110	[illegible]	[illegible]	[illegible]	1094	[illegible]	1109	[illegible]	1132	1139	1146
52	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	1169	[illegible]	1183	1198	1205	1212	1219
53	123	124	126	128	1234	1241	1248	1255	1269	1276	1283	1289
54	130	131	133	135	[illegible]	1310	1317	1324	1337	1344	1350	1357
55	136	138	140	[illegible]	[illegible]	1377	1383	1390	1403	1409	1416	1422
56	143	144	146	148	1435	1441	1448	1454	1466	1473	1479	1485
57	149	151	152	154	1497	1503	1510	1516	1528	1534	1540	1546
58	155	157	158	160	1558	1564	1569	1575	1587	1593	1599	1604
59	161	162	164	165	1616	1622	1627	1633	1644	1650	1656	1661
60	[illegible]	168	169	[illegible]	[illegible]	1678	1683	1689	1700	1705	1711	1716
61	172	173	175	[illegible]	1727	1732	1737	1743	1753	1759	1764	1769
62	177	178	180	181	1779	1785	1790	1795	1805	1810	1815	1820
63	183	184	185	186	1830	1835	1840	1845	1855	1860	1865	1870
64	188	189	190	[illegible]	1880	1885	1890	1894	1904	1909	1914	1918
65	192	193	195	[illegible]	1928	1933	1937	[illegible]	1951	956	1960	1965
66	197	198	199	200	[illegible]	[illegible]	1983	1988	1997	2001	2006	2010
67	20	203	204	205	[illegible]	2024	2028	2033	204[illegible]	2046	2050	2054
68	20[illegible]	207	208	[illegible]	2103	2106	2112	2116	2165	2089	2093	2097
69	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	2135	2139
70	[illegible]	215	216	[illegible]	[illegible]	[illegible]	[illegible]	2155	[illegible]	[illegible]	2175	2179
71	[illegible]	219	220	221	218[illegible]	2191	2195	2199	[illegible]	221[illegible]	22[illegible]4	22[illegible]8
72	222	223	224	225	2226	2230	2234	2235	2245	2249	2253	2257
73	226	227	228	229	2264	2268	22[illegible]	[illegible]	[illegible]	2296	2290	2294
74	[illegible]	231	[illegible]	[illegible]	2357	2305	2308	[illegible]	[illegible]	2323	2326	2330
75	233	234	235	236	2337	2340	2344	2347	2354	2358	2361	2365
76	237	238	239	239	2372	2375	2379	2382	2389	2392	2396	2399
77	240	241	242	242	2406	2409	2413	2416	2423	2426	2429	2433
78	244	244	245	246	2439	2442	2446	2449	2455	2459	2462	2465
79	247	248	249	249	2472	2475	2478	2481	2487	2491	2494	2497
80	250	251	252	252	2503	2506	2509	2512	2519	2522	2525	2528
81	253	254	255	255	2534	2537	2540	2543	2549	2552	2555	2558
82	256	257	258	258	2564	2567	2570	2573	2579	2582	2585	2587
83	259	260	261	261	2593	2596	2599	2602	2608	2611	2613	2616
84	262	263	263	264	2622	2625	2628	2630	2636	2639	2642	2644
85	265	265	266	267	2650	2653	2655	2658	2664	2666	2669	2672

TO CONVERT INTO WEEKLY EQUIVALENT: Multiply SEMIMONTHLY salary by 0.4615, MONTHLY salary by 0.2308, ANNUAL salary by [illegible].

TO CONVERT INTO STRAIGHT-TIME HOURLY EQUIVALENT FOR 40 HOURS: Multiply WEEKLY salary by 0.025, SEMIMONTHLY by 0.01154, MONTHLY salary by 0.00577, ANNUAL by 0.00048.

TO CONVERT INTO TIME AND ONE-HALF HOURLY RATE BASED ON 40 HOUR WEEK: Multiply WEEKLY salary by 0.0375, SEMIMONTHLY by [illegible], MONTHLY salary by 0.00866, ANNUAL by 0.000721.

CAUTION: Be sure straight-time earnings are not below legal minimum.

(SEE INSTRUCTIONS ON REVERSE SIDE)

Form WH-134
(Rev. May 1980)

INSTRUCTIONS

General. In determining the extra half-time that is due for overtime pay after 40 hours, the method of calculation commonly used is to divide the straight-time earnings by the total number of hours worked and multiply the result by the number of overtime hours divided by two. For instance, the

Computation for 48 hours would be $\frac{\text{Earnings}}{48} \times \frac{8}{2}$; for 50 hours, $\frac{\text{Earnings}}{50} \times \frac{10}{2}$; for 47 ¾ hours,

$\frac{\text{Earnings}}{47\frac{3}{4}} \times \frac{7\frac{3}{4}}{2}$. The table on the reverse side contains the decimal equivalents of the fraction.

$$\frac{\text{O.T. Hours}}{\text{Total Hr.} \times 2.}$$

For example, the decimal for 48 hours is $\frac{8}{48 \times 2} = \frac{1}{12} = .083$; for 50 hours it is $\frac{10}{50 \times 2} = \frac{1}{10} = .1$;

and for 47 ¾ hours $\frac{7\frac{3}{4}}{47\frac{3}{4} \times 2} = \frac{7.75}{95.5} = .081$.

How to use: (a) Multiply the straight-time earnings for an overtime week by the applicable decimal and the result will be the extra half-time due. Thus, by using the decimals in the table (on the reverse side) the computations performed are, in effect, exactly the same as if the equivalent fractions were used, with the advantage of having eliminated the long division necessitated by the fractions. For example:

(1). A pieceworker earns varying wages each week. In a 43 9.10 hour week he earned $153.65 straight-time. The coefficient for 43 9 10 hours is .0444. .0444 X $153.65 = $6.82, additional half-time due. $153.65 + $6.82 = $160.47, the pieceworker's total pay for the week.

(2). Jones is paid a weekly salary of $180.25. He worked 51½ hours. The coefficient for 51½ hours is .112. .112 X $180.25 = $20.19. $180.25 + $20.19 = $200.44, Jones total pay for the week.

(b) The decimal table can also be used effectively when back wages are due because of additions to wages (such as a weekly bonus) that were not included in the regular rate in computing overtime. For example:

(1). An employee worked 48 hours and received a production bonus of $9.60 which was not included in the regular rate. Thus, $9.60 X .083 = $0.80, the additional half-time due on the bonus.

(2). Jones in the same week (example (a), (2) above) received a production bonus of $25.00. .112 X $25.00 = $2.80, the additional half-time due on the bonus. $180.25 + $20.19 + $25.00 + $2.80 = $228.24, Jones' total earnings. A further short-cut (combining (a), (2), and (b), (2)) would be: $180.25 + $25.00 = $205.25 X .112 = $22.99 + $205.25 = $228.24 Jones' total earnings.

(c) Short-cuts For Computing Back Wages. When both the overtime hours and the earnings vary, individual weekly computations must be made. However, if an employee is paid at a constant hourly rate, time can be saved by adding the unpaid overtime hours during the period and multiplying the total by one-half the hourly rate. When the weekly hours vary and the straight-time earnings are constant, add the decimals for the overtime weeks and multiply the total by the earnings for 1 week. When the weekly hours are constant but the earnings vary, add the earnings for the overtime weeks and multiply the total by the decimal for 1 week. For example,

VARYING HOURS–CONSTANT EARNINGS

Hours	Decimal	Earnings
42	0.024	$180.25
43	.035	180.25
46	.065	180.25
	.124 x $180.25 = $22.35	

CONSTANT HOURS–VARYING EARNINGS

Hours	Earnings
47	$164.50
47	159.50
47	152.15
	$476.15 x .074 = $35.24

WH-135 **<u>Coefficient tables for computing extra half-time for overtime.</u>**

(a) **Purpose**

The coefficient table may be used for computing the extra half-time for hours worked over 40 in a workweek. In addition to the coefficient table, the form includes:

(1) coefficients for converting monthly, semimonthly, yearly, and weekly salaries into weekly, hourly, and one-half equivalents;

(2) shortcuts for computing back wages;

(3) Fair Labor Standards Act minimum wage and overtime standards;

(4) 29 CFR 541 salary requirements;

(5) a salary conversion table; and

(6) calendars covering a 5-year period.

NOT FOR PUBLIC DISTRIBUTION

Coefficient Table for Computing Extra Half-Time for Overtime

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Hours	Even	1/4	1/2	3/4	1/10	2/10	3/10	4/10	6/10	7/10	8/10	9/10
40		0.003	0.006	0.009	0.0012	0.0025	0.0037	0.0049	0.0074	0.0086	0.0098	0.0110
41	0.012	.015	.018	.021	.0134	.0146	.0157	.0169	.0192	.0204	.0215	.0227
42	.024	.027	.029	.032	.0249	.0261	.0272	.0283	.0305	.0316	.0327	.0338
43	.035	.038	.040	.043	.0360	.0370	.0381	.0392	.0413	.0423	.0434	.0444
44	.045	.048	.051	.053	.0465	.0475	.0485	.0495	.0516	.0526	.0536	.0546
45	.056	.058	.060	.063	.0565	.0575	.0585	.0595	.0614	.0624	.0633	.0643
46	.065	.068	.070	.072	.0662	.0671	.0680	.0690	.0708	.0717	.0726	.0736
47	.074	.077	.079	.081	.0754	.0763	.0772	.0781	.0798	.0807	.0816	.0825
48	.083	.085	.088	.090	.0842	.0851	.0859	.0868	.0885	.0893	.0902	.0910
49	.092	.094	.096	.098	.0927	.0935	.0943	.0951	.0968	.0976	.0984	.0992
50	.100	.102	.104	.106	.1008	.1016	.1024	.1032	.1047	.1055	.1063	.1071
51	.108	.110	.112	.114	.1086	.1094	.1101	.1109	.1124	.1132	.1139	.1146
52	.115	.117	.119	.121	.1161	.1169	.1176	.1183	.1198	.1205	.1212	.1219
53	.123	.124	.126	.128	.1234	.1241	.1248	.1255	.1269	.1276	.1283	.1289
54	.130	.131	.133	.135	.1303	.1310	.1317	.1324	.1337	.1344	.1350	.1357
55	.136	.138	.140	.141	.1370	.1377	.1383	.1390	.1403	.1409	.1416	.1422
56	.143	.144	.146	.148	.1435	.1441	.1448	.1454	.1466	.1473	.1479	.1485
57	.149	.151	.152	.154	.1497	.1503	.1510	.1516	.1528	.1534	.1540	.1546
58	.155	.157	.158	.160	.1558	.1564	.1569	.1575	.1587	.1593	.1599	.1604
59	.161	.162	.164	.165	.1616	.1622	.1627	.1633	.1644	.1650	.1656	.1661
60	.167	.168	.169	.171	.1672	.1678	.1683	.1689	.1700	.1705	.1711	.1716
61	.172	.173	.175	.176	.1727	.1732	.1737	.1743	.1753	.1759	.1764	.1769
62	.177	.179	.180	.181	.1779	.1785	.1790	.1795	.1805	.1810	.1815	.1820
63	.183	.184	.185	.186	.1830	.1835	.1840	.1845	.1855	.1860	.1865	.1870
64	.188	.189	.190	.191	.1880	.1885	.1890	.1894	.1904	.1909	.1914	.1918
65	.192	.193	.195	.196	.1928	.1933	.1937	.1942	.1951	.1956	.1960	.1965
66	.197	.198	.199	.200	.1974	.1979	.1983	.1988	.1997	.2001	.2006	.2010
67	.201	.203	.204	.205	.2019	.2024	.2028	.2033	.2041	.2046	.2050	.2054
68	.206	.207	.208	.209	.2063	.2067	.2072	.2076	.2085	.2089	.2093	.2097
69	.210	.211	.212	.213	.2106	.2110	.2114	.2118	.2126	.2131	.2135	.2139
70	.214	.215	.216	.217	.2147	.2151	.2155	.2159	.2167	.2171	.2175	.2179
71	.218	.219	.220	.221	.2187	.2191	.2195	.2199	.2207	.2211	.2214	.2218
72	.222	.223	.224	.225	.2226	.2230	.2234	.2238	.2245	.2249	.2253	.2257
73	.226	.227	.228	.229	.2264	.2268	.2271	.2275	.2283	.2286	.2290	.2294
74	.230	.231	.232	.232	.2301	.2305	.2308	.2312	.2319	.2323	.2326	.2330
75	.233	.234	.235	.236	.2337	.2340	.2344	.2347	.2354	.2358	.2361	.2365
76	.237	.238	.239	.239	.2372	.2375	.2379	.2382	.2389	.2392	.2396	.2399
77	.240	.241	.242	.243	.2406	.2409	.2413	.2416	.2423	.2426	.2429	.2433
78	.244	.244	.245	.246	.2439	.2442	.2446	.2449	.2455	.2459	.2462	.2465
79	.247	.248	.249	.249	.2472	.2475	.2478	.2481	.2487	.2491	.2494	.2497
80	.250	.251	.252	.252	.2503	.2506	.2509	.2512	.2519	.2522	.2525	.2528
81	.253	.254	.255	.255	.2534	.2537	.2540	.2543	.2549	.2552	.2555	.2558
82	.256	.257	.258	.258	.2564	.2567	.2570	.2573	.2579	.2582	.2585	.2587
83	.259	.260	.261	.261	.2593	.2596	.2599	.2602	.2608	.2611	.2613	.2616
84	.262	.263	.263	.264	.2622	.2625	.2628	.2630	.2636	.2639	.2642	.2644
85	.265	.265	.266	.267	.2650	.2653	.2655	.2658	.2664	.2666	.2669	.2672

TO CONVERT INTO WEEKLY EQUIVALENT: Multiply SEMIMONTHLY salary by 0.4615; MONTHLY salary by 0.2308; ANNUAL salary by 0.01923.

TO CONVERT INTO STRAIGHT-TIME HOURLY EQUIVALENT FOR 40 HOURS: Multiply WEEKLY salary by 0.025; SEMIMONTHLY by 0.01154; MONTHLY salary by 0.00577; ANNUAL by 0.00048.

TO CONVERT INTO TIME AND ONE-HALF HOURLY RATE BASED ON 40 HOUR WEEK: Multiply WEEKLY salary by 0.0375; SEMIMONTHLY by 0.0173; MONTHLY salary by 0.00866; ANNUAL by 0.000721.

CAUTION: Be sure straight-time earnings are not below legal minimum.

(See reverse side for instructions and for use in varying hours and earnings situations)

Form WH-135
Rev. Jan. 2004

COEFFICIENT TABLE FOR COMPUTING EXTRA HALF-TIME FOR OVERTIME

In determining the extra half-time that is due for overtime pay, the method of calculation commonly used is to divide the straight-time earnings by the total number of hours worked and multiply the result by the number of overtime hours divided by two. For instance, in weeks in which overtime is due after 40 hours, the computation for 48 hours would be $\frac{\text{Earnings}}{48} \times \frac{8}{2}$; for 50 hours, $\frac{\text{Earnings}}{50} \times \frac{10}{2}$; for 47¾ hour, $\frac{\text{Earnings}}{47\frac{3}{4}} \times \frac{7\frac{3}{4}}{2}$.

The following tables contain the decimal equivalents of the fraction, $\frac{\text{O.T. Hours}}{\text{Total Hrs.} \times 2}$.

For example, in a week in which O.T. is due after 40 hours, the decimal for 48 hours is

$\frac{8}{48 \times 2} = \frac{1}{12} = .083$; for 50 hours it is $\frac{10}{50 \times 2} = \frac{1}{10} = .1$; and for 47¾ hours $\frac{7\frac{3}{4}}{47\frac{3}{4} \times 2} = \frac{7.75}{95.5} = .081$.

How to use: Multiply the straight-time earnings for an overtime week by the applicable decimal and the result will be the extra half-time due. Thus, by using the decimals in the table the computations performed are, in effect, exactly the same as if the equivalent fractions were used, with the advantage of having eliminated the long division necessitated by the fractions.

The decimal table can also be used effectively when back wages are due because of additions to wages (such as a weekly bonus) that were not included in the regular rate in computing overtime. Example: In a week in which overtime pay is due for all hours worked over 40, an employee worked 48 hours and received a production bonus of $9.60 which was not included in the regular rate. Thus $9.60 x .083 = $0.80 due.

SHORT-CUTS FOR COMPUTING BACK WAGES

When both the overtime hours and the earnings vary, individual weekly computations must be made. However, if an employee is paid at a constant hourly rate, time can be saved by adding the unpaid overtime hours during the period and multiplying the total by one-half the hourly rate. When the weekly hours vary and the straight-time earnings are constant, add the decimals for the overtime weeks and multiply the total by the earnings for 1 week. When the weekly hours are constant but the earnings vary, add the earnings for the overtime weeks and multiply the total by the decimal for 1 week. For example:

VARYING HOURS — CONSTANT EARNINGS

Hours	Decimal	Earnings
42	0.024	$350.00
43	.035	350.00
46	.065	350.00
	.124 x $350.00 = $43.40	

CONSTANT HOURS — VARYING EARNINGS

Hours	Earnings
47	$358.00
47	393.60
47	367.45
	$1,119.25 x .074 = $82.83

FAIR LABOR STANDARDS ACT
TABLE OF MINIMUM WAGES

	All Covered Employment	(Maximum Tip Credit) Minimum Cash Wage	
4/1/91	$4.25	(50%)	$2.13
10/1/96	4.75		2.13
9/1/97	5.15		2.13

SALARY REQUIREMENTS
FLSA — Reg. 541 Exemptions
All Employment

	Effective 4/1/75
Reg. 541.1	$155
Reg. 541.2	$155
Reg. 541.3	$170
Special Proviso	$250

MAXIMUM GARNISHMENT OF DISPOSABLE EARNINGS
EFFECTIVE SEPTEMBER 1, 1997 ($5.15 per Hour Minimum Wage)
NONSUPPORT PAYMENTS*

Weekly	Biweekly	Semimonthly	Monthly
$154.50 or less: NONE	$309.00 or less: NONE	$334.75 or less: NONE	$669.50 or less: NONE
More than $154.50 but less than $206.00: Amount ABOVE $154.50	More than $309.00 but less than $412.00: Amount ABOVE $309.00	More than $334.75 but less than $446.33: Amount ABOVE $334.75	More than $669.50 but less than $892.67: Amount ABOVE $669.50
$208.00 or more: MAXIMUM 25%	$412.00 or more: MAXIMUM 25%	$446.33 or more: MAXIMUM 25%	$892.67 or more: MAXIMUM 25%

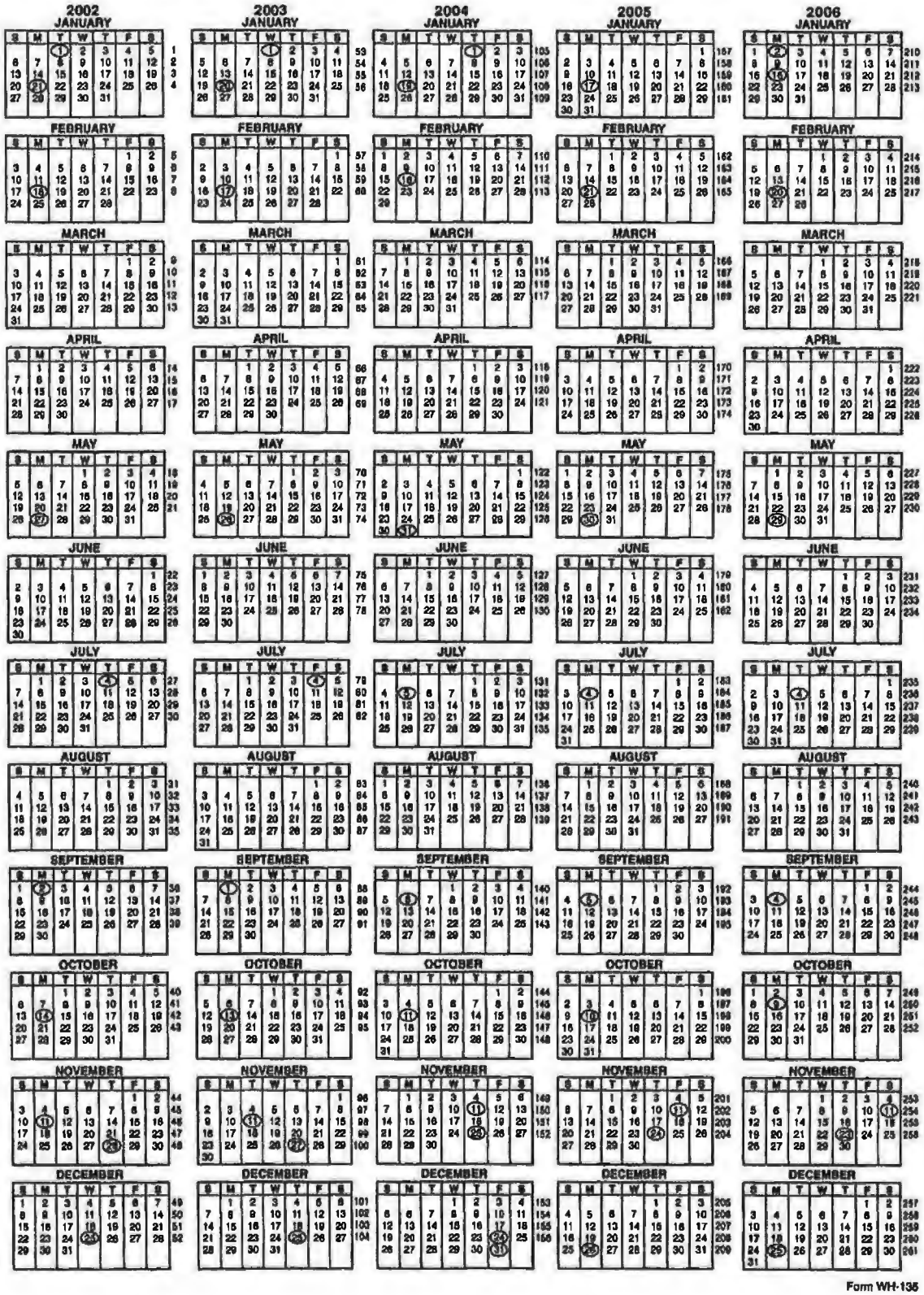
*These restrictions do *not* apply to garnishments for child support, alimony, bankruptcy, or to recover outstanding student loans or State or Federal taxes.

Form WH-135

SALARY CONVERSION TABLE

MONTHLY	WEEKLY	MONTHLY	WEEKLY	MONTHLY	WEEKLY	MONTHLY	WEEKLY
$895.00	$206.54	$1390.00	$320.77	$1980.00	$456.92	$2570.00	$593.16
900.00	207.69	1400.00	323.08	1990.00	459.23	2580.00	595.46
905.00	208.85	1410.00	325.38	2000.00	461.54	2590.00	597.77
910.00	210.00	1420.00	327.69	2010.00	463.85	2600.00	600.08
915.00	211.15	1430.00	330.00	2020.00	466.15	2610.00	602.39
920.00	212.31	1440.00	332.31	2030.00	468.46	2620.00	604.70
925.00	213.46	1450.00	334.62	2040.00	470.77	2630.00	607.00
930.00	214.62	1460.00	336.92	2050.00	473.08	2640.00	609.31
935.00	215.77	1470.00	339.23	2060.00	475.38	2650.00	611.62
940.00	216.92	1480.00	341.54	2070.00	477.69	2660.00	613.93
945.00	218.08	1490.00	343.85	2080.00	480.00	2670.00	616.24
950.00	219.23	1500.00	346.15	2090.00	482.31	2680.00	618.54
955.00	220.36	1510.00	348.46	2100.00	484.62	2690.00	620.85
960.00	221.54	1520.00	350.77	2110.00	486.92	2700.00	623.16
965.00	222.69	1530.00	353.08	2120.00	489.23	2710.00	625.47
970.00	223.85	1540.00	355.38	2130.00	491.54	2720.00	627.78
975.00	225.00	1550.00	357.69	2140.00	493.85	2730.00	630.08
980.00	226.15	1560.00	360.00	2150.00	496.15	2740.00	632.39
985.00	227.31	1570.00	362.31	2160.00	498.46	2750.00	634.70
990.00	228.46	1580.00	364.62	2170.00	500.77	2760.00	637.01
995.00	229.62	1590.00	366.92	2180.00	503.08	2770.00	639.32
1000.00	230.77	1600.00	369.23	2190.00	505.38	2780.00	641.62
1010.00	233.08	1610.00	371.54	2200.00	507.69	2790.00	643.93
1020.00	235.38	1620.00	373.85	2210.00	510.00	2800.00	646.24
1030.00	237.69	1630.00	376.15	2220.00	512.31	2810.00	648.54
1040.00	240.00	1640.00	378.46	2230.00	514.62	2820.00	650.85
1050.00	242.31	1650.00	380.77	2240.00	516.92	2830.00	653.16
1060.00	244.62	1660.00	383.08	2250.00	519.23	2840.00	655.47
1070.00	246.92	1670.00	385.38	2260.00	521.54	2850.00	657.78
1080.00	249.23	1680.00	387.69	2270.00	523.85	2860.00	660.08
1090.00	251.54	1690.00	390.00	2280.00	526.15	2870.00	662.39
1100.00	253.85	1700.00	392.31	2290.00	528.46	2880.00	664.70
1110.00	258.15	1710.00	394.62	2300.00	530.77	2890.00	667.01
1120.00	258.46	1720.00	396.92	2310.00	533.08	2900.00	669.32
1130.00	260.77	1730.00	399.23	2320.00	535.38	2910.00	671.62
1140.00	263.08	1740.00	401.54	2330.00	537.69	2920.00	673.93
1150.00	265.38	1750.00	403.85	2340.00	540.00	2930.00	676.24
1160.00	287.69	1760.00	406.15	2350.00	542.31	2940.00	678.55
1170.00	270.00	1770.00	408.46	2360.00	544.62	2950.00	680.86
1180.00	272.31	1780.00	410.77	2370.00	546.92	2960.00	683.16
1190.00	274.62	1790.00	413.08	2380.00	549.23	2970.00	685.47
1200.00	276.92	1800.00	415.38	2390.00	551.54	2980.00	687.78
1210.00	279.23	1810.00	417.69	2400.00	553.85	2990.00	690.09
1220.00	281.54	1820.00	420.00	2410.00	556.16	3000.00	692.40
1230.00	283.85	1830.00	422.31	2420.00	558.47	3010.00	694.70
1240.00	286.15	1840.00	424.62	2430.00	560.77	3020.00	697.01
1250.00	288.46	1850.00	426.92	2440.00	563.08	3030.00	699.32
1260.00	290.77	1860.00	429.23	2450.00	565.39	3040.00	701.63
1270.00	293.08	1870.00	431.54	2460.00	567.70	3050.00	703.94
1280.00	295.38	1880.00	433.85	2470.00	570.00	3060.00	706.24
1290.00	297.69	1890.00	436.15	2480.00	572.31	3070.00	708.55
1300.00	300.00	1900.00	438.46	2490.00	574.62	3080.00	710.86
1310.00	302.31	1910.00	440.77	2500.00	576.93	3090.00	713.17
1320.00	304.62	1920.00	443.08	2510.00	579.31	3100.00	715.48
1330.00	306.92	1930.00	445.38	2520.00	281.62	3110.00	717.78
1340.00	309.23	1940.00	447.69	2530.00	583.92	3120.00	720.09
1350.00	311.54	1950.00	450.00	2540.00	586.23	3130.00	722.40
1360.00	313.85	1960.00	452.31	2550.00	588.54	3140.00	724.71
1370.00	316.15	1970.00	454.62	2560.00	590.85	3150.00	727.02

Form WH-13


2002
2003
2004
2005
2006
JANUARY
FEBRUARY
MARCH
APRIL
MAY
JUNE
JULY
AUGUST
SEPTEMBER
OCTOBER
NOVEMBER
DECEMBER

Form WH-135

WH-136 <u>Investigation transmittal form.</u>

(a) Purpose

This form is designed to take the place of a memorandum and shall be used by the district director (DD) to transmit an investigation case file.

(b) Copies

Only one copy need be prepared. The DD may retain a copy because of notations or comments on the form, or for use as a tickler.

(c) Preparation

(1) All applicable items on the form, irrespective of the column, shall be checked. For example, an investigation which was being transmitted to the regional administrator (RA) because the employer had refused to pay back wages might also involve an industrial injury to a minor; thus, "Refusal to pay back wages" in the right column and "Industrial injuries to minors" in the left column would be checked.

(2) When the person who is responsible for taking a particular action that has been checked by the DD on the form has completed the action, that person shall initial the items and date them, so that it will be clear to persons subsequently handling the file that the required action has been taken.

(3) There will be instances where the same case file will be transmitted more than once to the RA by the DD. In such instances a new Form WH-136 shall be prepared each time the case file is transmitted. Each Form WH-136 shall reflect the current status of the case at the time it is transmitted. Care should be taken by the DD to avoid overlooking any items on any previous forms for which the necessary action has not been completed.

(4) *Blank box*

The blank box is provided for any additional items that the DD may wish to enter. For example, this space may be used to alert the RA that back wages have been agreed to subsequent to closing.

(5) *Remarks*

Enter any necessary amplification or explanation of any items checked above. Also, enter any inquiries, comments, information, or recommendations which may be appropriate regarding the current status of the investigation. This section is not to be used in lieu of an addendum to the narrative or for notations by persons handling the case file subsequent to its transmittal by the DD. Any comments or notations of this kind shall be included in the case file either by a separate memorandum or by an addendum to the narrative and then saved in WHISARD, as the situation requires. This form is also not to be used as a diary sheet.

NOT FOR PUBLIC DISTRIBUTION

Investigation Transmittal Form

U.S. Department of Labor
Employment Standards Administration

To:	Date:
From:	Office:

Subject:

☐ Closed Investigation

☐ Open Investigation

☐ No Further Action

☐ Notification Re Violation Other Laws

☐ Industrial Injuries To Minors

☐ Test Reinvestigation Report

☐ Unsettled Policy Question

☐ Request For Opinion

☐ Back Wages Not Approvable At AO

☐ DBRA/CWHSSA Further Action

☐ $100,000 Case To N.O. (FOH 53e06)

☐ PCA Further Action

☐ SCA Further Action

☐ Title III Further Action

☐ Potential Litigation

☐ Refusal To Pay Back Wages

☐ Consider For Reinvestigation _____ date

☐ CL/CMP

☐ MSPA CMP

☐ _____

Remarks _____

(Continue on Reverse Side if Necessary)

Form WH-136
(Rev. Sept. 1983)

WH-137 **<u>Inter-office transmittal: branch establishment, multiunit action, or farm labor contractor.</u>**

(a) Purpose

This form shall be used:

(1) To transmit investigation files between offices

(2) To communicate between offices in connection with such uses as those set out in FOH 61.

Whenever possible, the "Case Transfer/Transmittal" feature in WHISARD shall be used in all interoffice transmittal communications regarding branch establishment, multiunit actions, or farm labor contractor (FLC).

(b) Copies

(1) When used as a transmittal memorandum, a copy of the form shall be included in each file transmitted and one extra copy shall be sent for the use (control, main office file, etc.) of the receiving office. Additional copies may be prepared if they are needed for any other purpose.

(2) When used to communicate between offices, and a file is not transmitted, the form shall be prepared in duplicate. The original shall be sent to the main office region and one copy retained for the branch establishment case file. However, whenever possible, WHISARD "Case Transfer/Transmittal" feature shall be used.

(3) When used to communicate between offices relative to violations of an FLC, the form WH-137 shall be prepared in duplicate. The original shall be sent to the region where the contractor maintains a permanent address. Where it is known what region the contractor will work in next, a copy of the WH-137 shall be sent to that region, including the anticipated location and date of arrival.

(c) Preparation

(1) The "To" and "From" sections are to identify offices, not individual officials. Accordingly, in the "To" section enter the name and address of the district office (DO) or regional office (RO) of intended destination. In the "From" sections enter the name and address of the originating DO. Upon completion of the requested action, the file shall be returned to the originating DO. Where the file ("Main" and/or "Branch") are transmitted with the WH-137, no entry of North American Industry Classification System (NAICS) is required. The name and address of the main office shall be listed in each instance where this form is used. The name and address of each branch establishment involved also shall be listed. Where a file is transmitted, the abbreviation "encl." shall be written on the same line after the name and address. The number of files transmitted shall be entered in the space provided at the bottom of the form. The "Remarks" section shall be used for any necessary amplification or explanation of any item checked. If item 8 is checked, there shall be a brief summary explaining the type of violations found, the number of employees involved, the status of back wages, and any other fact of interest to the receiving region.

NOT FOR PUBLIC DISTRIBUTION

(2) When used to report violations by an FLC (*see* FOH 61(f)), the "Remarks" section shall contain a synopsis of the violations disclosed.

(d) Equivalent form or report in WHISARD

MODO E-mail Inquiry.

NOT FOR PUBLIC DISTRIBUTION

U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION WAGE AND HOUR DIVISION	INTER-OFFICE TRANSMITTAL Branch Establishment, Multi-Unit Action or Farm Labor Contractor

TO: (Receiving Office and Address) DATE:

FROM: (Originating Office and Address)

Main Office: (Industry Code) (Name and Address)

Branch(es): (Industry Code) (Name and Address)

(Industry Code) (Name and Address)

(Industry Code) (Name and Address)

1. ___ Main Office Negotiations: The attached branch establishment report(s) is (are) forwarded for use in negotiations at the main office.

2. Multi-Unit Action:
   ___ The attached branch establishment report(s) has (have) been completed as part of the multi-unit action conducted here and is (are) returned.
   ___ Report(s) of multi-unit action conducted here, involving branch establishment(s) located in your area is (are) transmitted herewith.

3. In connection with JRC consideration or ligitation:
   ___ Subject file(s) is (are) forwarded.
   ___ Subject file(s) is (are) returned.

4. The report(s) is (are) transmitted for further action at the main office because:
   ___ The branch establishment official(s) cannot take corrective action.
   ___ The violations cannot be fully determined at the branch establishment

5. ___ Further action on this (these) branch establishment investigation(s) has (have) been completed at the main office of the firm and the file(s) is (are) returned

6. ___ An investigation of the main office in your area is recommended because the attached branch establishment report(s) indicate(s) probable widespread violations resulting from company policy.

7. ___ Investigation of this (these) branch establishment(s) has (have) been closed. Records are maintained at the main office in your area but employee interviews disclosed no violations. Branch establishment record should be checked if and when the main office is investigated

8. ___ Investigation of this (these) branch establishment(s), whose main office is in your area disclosed violations. The investigation(s) has (have) been closed because violations do not appear to exist at other branches

9. ___ Investigation of this farm labor contractor, whose permanent address is in your area disclosed violations (See Remarks). This harvest season he has worked crews in _____
   (State & license number)
   It is anticipated that he will move to _____ on _____
   State Approx. Date

10. ___ Other-See "Remarks"

Remarks _____

Enclosure(s) _____ file(s) *(If necessary continue tumble-fashion on reverse side.)* Form WH-137 (Rev. 2/77)

WH-148 **Report of federal age certificates issued.**

(a) Purpose

Use this form to record and report quarterly the number of Federal Certificates of Age issued by each Age Certificate Officer (ACO). The report shall be sent by the ACO through the regional administrator (RA) to Deputy Administrator/OPA/CL.

(b) Copies

The original report is to be sent to the national office (NO) and a copy retained in the records of the ACO.

(c) Preparation

The information requested is self-explanatory. Complete all lines, including any negative report (*i.e.*, enter "0" if no certificates have been issued for a particular type of employment or age group). A supply of the old Form WH-148 may be used until depleted.

NOT FOR PUBLIC DISTRIBUTION

Report of Federal Age Certificates Issued

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

State	City	Month	Year

Prepared by	Title	Date

TYPES OF EMPLOYMENT:	TOTAL
NONAGRICULTURAL:	
Aged 18 and above	
Aged 16 and 17	
Aged 14 and 15	
Total	
AGRICULTURAL:	
Aged 16 and above	
Aged 14 and 15	
Aged 12 and 13 (parent consent)*	
Aged 10 and 11 (with approved waiver)	
Total	
GRAND TOTAL	

*written parental consent or working on same farm as parent

Form WH-148
Revised April 1985

WH-149 **Notice to minor, federal certificate of age.**

(a) Purpose

"Notice to Minor", Form WH-149, is sent to the minor with the applicable item(s) checked to inform the minor either that the Federal Certificate of Age has been sent to the employer and the evidence of age returned, or that Federal Certificate of Age has not been issued for the reason stated.

(b) Copies

Prepare in duplicate and retain one copy as a file record of the status of Federal Certificate of Age issuance and return of the evidence of age.

(c) Preparation

(1) Enter the Age Certificate Officer (ACO) office address and date; this prevents delay in the issuing procedure when the minor has to resubmit some information. Telephone number may also be added.

(2) Check the applicable item(s).

(3) Attach evidence of age when it is returned to minor.

(4) Attach the incomplete application if it is being returned to minor.

Note: more than one item may be checked and/or returned.

NOT FOR PUBLIC DISTRIBUTION

Notice To Minor On Federal Certificate of Age

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

☐ Documentary evidence of age submitted with your application shows that you are under the legal age for the type of employment for which you applied. Therefore, no Federal Certificate of Age can be issued at this time. Evidence of age is returned herewith.

☐ Federal Certificate of Age has been issued and mailed to your employer, who will ask you to sign item 14 to validate the certificate.

☐ Evidence of age submitted is returned ☐ to you ☐ to employer.

☐ Federal Certificate of Age has not yet been issued for the following reason(s):

- ☐ Employer did not complete the Intention to Employ portion of the Application (Form WH-14). The application has been sent to the employer and will again be reviewed when it is returned to this office.
- ☐ Information on application and in evidence of age is not in agreement:
  - ☐ Name
  - ☐ Age
  - ☐ Date of birth
- ☐ Please resubmit correct information or explain difference.
- ☐ No evidence of age was provided. Please submit.
- ☐ Evidence of age appears to have been altered. Please submit bona fide proof of age.
- ☐ You did not sign the Application (Form WH-14). It is herewith returned for your signature in item 11.

Please send additional or corrected information to the address noted on this form.

Form WH-149
(Rev. Jan. 1987)

WH-266 **<u>Child labor civil money penalty report: non-agriculture and/or agriculture.</u>**

(a) Purpose

The WH-266 is a report form which identifies child labor violations for consideration of civil money penalties (CMPs) based on the child labor violations data entry in WHISARD. CMP computation is automated in WHISARD. The CMP Computation Worksheet available in WHISARD replaces the paper fill-in form of WH-266.

(b) Copies

Depending on the situation, make one or more of the following copies when the form is prepared:

(1) For the case file for all investigations with child labor violations.

(2) For the main office-district office (MODO), when an establishment is part of a national or multiunit enterprise. The investigating district office (DO) should submit this copy directly to the MODO.

(3) The Wage and Hour Investigator (WHI) shall not give copies of Form WH-266 to employers, their attorney, or any person representing employers in the ordinary course of the investigation (*i.e.*, final conference). The district director (DD) shall not routinely provide a copy of the form with the Notice of Penalty. A copy may be provided by the DD upon request of the employer or his/her attorney.

(c) Preparation

CMP Computation Worksheet is prepared in WHISARD. *See* FOH 54f02. The WHI(s) that prepared the form should sign and date the form. Subsequent to review where appropriate, assistant district director (ADD)/DD should sign and date the form.

(d) WHISARD form/report

CMP Computation Worksheet.

WH-358 **<u>Investigation appointment.</u>**

(a) Purpose

This form may be used by the Wage and Hour Investigator (WHI) if an appointment is to be made by mail. *See* FOH 52a01.

(b) General

The letter has been revised by removing all references to the old "Employer's Guide to Compliance with Federal Wage-Hour Laws" and replacing it with the online Fact Sheet 44, "Visits to Employers."

WHIs who use this letter to schedule appointments may download the fact sheet from the Department of Labor, Wage and Hour Division internet site at

NOT FOR PUBLIC DISTRIBUTION

https://www.dol.gov/whd/regs/compliance/whdfs44.pdf and print copies for enclosures as needed.

Note: this form was revised earlier to provide notice to an employer that I-9 forms will be examined.

(c) Equivalent form in WHISARD

This letter can be printed in WHISARD.

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division

Scheduled Visit to Begin:
Date:
Time:

SUBJECT: Visit by Wage and Hour Investigator

The Wage and Hour Division is responsible for the administration and enforcement of a number of Federal labor standards laws. These laws are briefly described in the enclosure entitled "Visits to Employers" (Wage & Hour Fact Sheet No. 044.)

This is to advise you that I will call at your establishment on the date and at the time shown above to determine compliance with one or more of these laws. In this regard, please have available for examination employee time and payroll records for the past two years. I will also examine the I-9 forms which employers are required by the Immigration and Nationality Act to prepare and maintain as verification of employees' employment eligibility.

Every effort will be made to conduct this assignment expeditiously and with a minimum of inconvenience to you and your employees. If you or your designated representative will not be available on the date and at the time indicated above, please let me know promptly so that other arrangements can be made.

Wage and Hour Investigator

Enclosures:
Handy Reference Guide (FLSA)
Visit to Employers (Fact Sheet No. 044)

Form WH-358
Rev. May 02

Working to Improve the Lives of America's Workers

WH-467 **<u>Minimum wage and overtime pay violations civil money penalty report.</u>**

(a) Purpose

Form WH-467 is a report form which provides a means of portraying elements relating to repeated/willful Fair Labor Standards Act (FLSA) minimum wage and overtime pay violations along with their weighting factors for consideration in recommending civil money penalties (CMPs). *See* FOH 52f14(a) and (b). This form is to be prepared by the WHI at the conclusion of the investigation. If a CMP is not recommended because the employer does not meet the criteria for CMPs, it is not necessary to complete the form. The narrative shall contain the WHI's reason(s) for not recommending CMPs.

CMP computation is automated in WHISARD. The CMP Computation Worksheet available in WHISARD replaces the paper fill-in form ofWH-467.

(b) Copies

Depending on the situation, prepare one or more of the following copies:

(1) For the case file for *all* investigations with minimum wage and/or overtime pay violations, if CMPs are recommended

(2) For a minimum wage and/or overtime CMP file, when a penalty is assessed, timely notice of exception is received, and other issues are unresolved (*e.g.*, litigation)

(3) For the main office-district office (MODO), when an establishment is part of a national or multiunit enterprise, if CMPs are computed (*see* FOH 61a and b)

(4) Do *not* give a copy of this form to the employer in the ordinary course of the investigation (*i.e.*, final conference). The district director (DD) shall not routinely provide a copy of the form with the Notice of Penalty. A copy may be provided by the DD upon request of the employer or his or her attorney.

(c) Preparation

CMP Computation Worksheet is prepared in WHISARD. *See* FOH 54f01.

The WHI(s) that prepared the form should sign and date the form.

(d) WHISARD form/report

Fair Labor Standards Act Minimum Wage/Overtime Provision Civil Money Penalty Report (WH-467-WHISARD).

WH-500 **<u>WHISARD MSPA compliance action report.</u>**

(a) Purpose

(1) Form WH-500 and a narrative report shall be used to report all Migrant and Seasonal Agricultural Worker Protection Act (MSPA) enforcement activities, including follow-up investigations, regardless of whether the subject is a farm labor contractor (FLC), agricultural employer (AGER), agricultural association (AGAS), user

NOT FOR PUBLIC DISTRIBUTION

(USER), or housing provider (HP). For investigation visits as defined in FOH 51a13, case activity should be terminated and the investigation should be dropped following the appropriate WHISARD procedure.

(2) As with all other compliance actions under other acts, all compliance actions under MSPA shall be registered and assigned in WHISARD.

(3) If a compliance action is confined to MSPA, no WH-51 will be submitted.

(4) Where a concurrent investigation under the Fair Labor Standards Act (FLSA) and/or other acts is conducted, Form WH-51 must be submitted in addition to Form WH-500.

(b) Content and arrangement of investigation file

The order of contents and exhibits in a MSPA file is the standard format as that used for reporting under other acts. *See* corresponding entry for Form WH-51 and FOH 54b02.

(c) Copies and handling

An original copy shall be printed in WHISARD and placed in the investigation file. For cases referred for legal action, a copy of the WH-500 will be forwarded to the regional office (RO) at the time the file is referred to the regional solicitor of Labor (RSOL).

The lead WHI must sign and date the report prior to the submission of the case file for review. The assistant district director (ADD) or district director (DD) reviewing the compliance action must sign and date the report.

(d) Preparation

All data relating to the compliance action activities and findings are entered and reported in WHISARD. Print this report in WHISARD and place it in the case file before submitting the case for management review in WHISARD. *See* FOH 54e.

(e) WHISARD form/report

WH-500 MSPA Compliance Action Report.

NOT FOR PUBLIC DISTRIBUTION

Compliance Action Report Migrant And Seasonal Agricultural Protection Act

U.S Department of Labor
Wage and Hour Division

1. CASE NUMBER 4	2. STATE/COUNTY		3. DISTRICT OFFICE LOCATION	
7	5. SPECIAL INV		6. SUBJECT OF THIS REPORT	
9. ADDRESS			8. REGISTRATION NO.	
	10. CITY	11. STATE	12. ZIP	13. NAICS CODE
14. INVESTIGATION SITE	15. CITY	16. STATE	17. ZIP	18. COUNTY CODE

19. TYPE OF ASSIGNMENT COMPLAINT ☐ NON-COMPLAINT ☐	20. INVESTIGATION PROGRAM	21. COMPLIANCE ACTION	FULL INVESTIGATION ☐ REINVESTIGATION ☐ OTHER ☐	RECURRING VIOLATIONS ☐ NO VIOLATIONS ☐ HOUSING INSP ☐

22. STATUS OF COMPLIANCE 1. COMPLIANCE 3. NON COMPLIANCE W/REFUSAL 2. NON COMPLIANCE W/AGREEMENT 4. Not Applicable	23. MIGRANT CREW 24. SEASONAL CREW	25. WILL THERE BE FURTHER ACTION ON THIS CASE?	26. COMPLIANCE HRS	27. PERIOD OF INVESTIGATION to

28. ITINERARY OF FLC

01 Failure to disclose conditions to workers	
02 Failure to post MSPA poster at worksite	
03 Misrepresenting conditions to workers	
04 Breach of working arrangements with workers	
05 Failure to make/keep employer records	
06 Failure to provide wage statement to workers	
07 Failure to provide records to AgAs/AgEr	
08 Failure to maintain records provided by FLC	
09 Failure to pay wages owed when due	
10 Restricting workers in purchase of goods/services	
11 Failure to provide terms and conditions of occupancy of housing	
12 Failure to ensure housing safety and health	
13 Failure to provide safe transportation vehicles	
14 Failure to ensure driver has valid license	
15 Failure to obtain prescribed insurance coverage	
16 Using services of unregistered FLC	
17 Discriminate, etc. against workers	
18 Interfering with DOL official during investigation	
19 Failure to register as an FLC	
20 Failure to register employee	
21 Failure to exhibit certificate	
22 Knowingly made misrepresentation on application	
23 Failure to comply with court judgment or final order	
24 Was not the real party in interest	
25 Transported workers w/o certificate authorization	
26 Housed workers w/o certificate authorization	
27 Failure to provide change of permanent address	
28 Failure to apply to amend certificate	
29a Drove workers w/o certificate authorization	
30 Failure to abide by written agreements with AgEr or AgAs	

29. INVESTIGATOR	DATE	31 Follow Up Investigation ☐	Civil Money Penalties 503 ☐
		Admin Action 103(a) ☐	Criminal Action 501(a) ☐
30. DISTRICT DIRECTOR	DATE	Civil Action 502 ☐	Denial of Empl. Svd. 101(d) ☐

WH-500 WHISARD

Date: Case ID: Page 1

WH-517 **<u>Potential MSPA violations checklist.</u>**

(a) Purpose

This form will be used to provide the person investigated with a written record of the areas of potential Migrant and Seasonal Agricultural Worker Protection Act (MSPA) violations.

(b) Copies

Two copies shall be prepared in all investigations in which there are MSPA violations: one for the person investigated and one that shall be retained in the investigation file.

(c) Preparation

(1) *Name of person investigated*

The full name of the subject of this investigation should be reflected as shown on Form WH-500.

(2) *Potential MSPA violations*

Use only one column of Form WH-517 to reflect potential MSPA violations. The column used should correspond to item 6 of the WH-500 that states the subject of this investigation.

(3) *Investigation(s)/date*

Enter the name of each WHI who worked on this investigation and the date that this form is completed and given to the person investigated.

(4) *Name of individua1(s) served with Form WH-517*

Enter the name of the individual(s) given the form, and the date given. If possible, have the recipient sign and date the form.

(d) Equivalent form in WHISARD

WH-517 Potential MSPA Violations Checklist.

(e) Preparation

All data relating to the compliance action activities and findings are entered and reported in WHISARD. Print this report in WHISARD and place it in the case file before submitting the case for management review in WHISARD. *See* FOH 54e.

(f) WHISARD form/report

WH-500 MSPA Compliance Action Report.

NOT FOR PUBLIC DISTRIBUTION

Potential MSPA Violations Checklist

U.S. Department of Labor
Wage and Hour Division

Name and address of person investigated

Permanent Address

A review of your business operations subject to the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) disclosed the potential violations of the Act shown on this preliminary report. The investigation report of the Wage and Hour Investigator(s) will be reviewed to establish whether there were MSPA violations and what, if any, further action will be taken by the Wage and Hour Division.

If it is subsequently determined that civil money penalties are to be assessed against you for any or all of the MSPA violations disclosed, you will be advised by letter concerning specific violations involved and the civil money penalty amounts to be assessed. Persons who violate the provisions of MSPA are subject to both criminal and civil sanctions.

		MSPA Sections Violated							
		Migrant Workers	Both	Seasonal Workers	FLC	AgEr	AgAs	User	HP
Employment conditions disclosure	01 Failure to disclose conditions to workers	201(a), 201(g)		301(a), 301(f)					
	02 Failure to post MSPA poster at worksite	201(b)		301(b)					
	03 Misrepresenting conditions to workers	201(f)		301(e)					
Working arrangements	04 Breach of working arrangements with workers	202(c)		302(c)					
Recordkeeping	05 Failure to maintain employer records	201(d)(1)		301(c)(1)					
	06 Failure to provide wage statement to workers	201(d)(2)		301(c)(2)					
	07 Failure to provide records to AgAs/AgEr	201(e)		301(d)					
	08 Failure to maintain records provided by FLC	201(e)		301(d)					
Prompt payment	09 Failure to pay wages owed when due	202(a)		302(a)					
Worker purchases	10 Restricting workers in purchase of goods/services	203(b)		302(b)					
Housing standards	11 Failure to provide terms and conditions of occupancy of housing	201(c)		NA					
	12 Failure to ensure housing safety and health	203(a) and (b)		NA					
Transportation	13 Failure to provide safe transportation vehicles	401(b)(1)(A),	401(b)(2)(C)						
	14 Failure to ensure driver has valid license		401(b)(1)(B)						
	15 Failure to obtain prescribed insurance coverage		401(b)(1)(C)						
General Provisions									
Confirmation of registration	16 Using services of unregistered FLC		402						
Discrimination	17 Discriminate, etc against workers or testifies, etc		505						
Investigative interference	18 Interfering with DOL official during investigation		512(c)						
Farm Labor Contractor Violations									
Registration	19 Failure to register as an FLC		101(a)						
	20 Failure to register employee		101(b)						
	21 Failure to exhibit certificate		101(c)						
	22 Knowingly made misrepresentation on application		103(a)(1)						
	23 Failure to comply with court judgment or final order		103(a)(4)						
	24 Was not the real party in interest		103(a)(2)						
	25 Transported workers w/o certificate authorization		101(a)						
	26 Housed workers w/o certificate authorization		105(2)(c)						
	27 Failure to provide change of permanent address		105(1)						
	28 Failure to apply to amend certificate		105(2)						
	29a Drove workers w/o certificate authorization		101(a)						
Agreements with users	30 Failure to abide by written agreements with AgEr or AgAs		404						

Wage and Hour Investigator(s) Date

Name and title of individual receiving form Date

FLC - Farm Labor Contractor
AgEr - Agricultural Employer
AgAs - Agricultural Association
User - User
HP - Housing Provider

Case ID:

WH-517 (11/2014)

WH-518 **<u>MSPA civil money penalty (CMP) report.</u>**

(a) Purpose

Form WH-518 is a report form that identifies Migrant and Seasonal Agricultural Worker Protection Act (MSPA) violations for consideration of civil money penalties (CMPs) based on the violations data entries in WHISARD. CMP computation is automated in WHISARD, and the MSPA CMP Report available in WHISARD replaces the paper fill-in form of WH-518.

For the computations of MSPA Housing Safety and Health CMPs, the MSPA CMP Computation Summary Sheet available in WHISARD shall be used.

For the computations of MSPA Transportation Safety CMPs, the MSPA CMP Computation Summary Sheet available in WHISARD shall be used.

(b) Copies

One copy shall be printed from WHISARD for the investigation file in all investigations in which there are MSPA violations. Copies of Form WH-518 are not to be given to the person investigated since this is a recommendation to the office of the regional administrator for consideration in the determination of the appropriateness and amount of MSPA CMPs.

(c) Preparation

The CMP Computation Worksheet is prepared in WHISARD. *See* FOH 54f03 and FOH 57c.

The Wage and Hour Investigator (WHI)(s) that prepared the form should sign and date the form. Subsequent to review where appropriate, assistant district director (ADD)/district director (DD) should sign and date the form.

(d) WHISARD form/report

CMP Computation Summary Sheet: MSPA Civil Money Penalty Report
Housing Violations: MSPA CMP Computation Summary Sheet
Transportation Violations: MSPA CMP Computation Summary Sheet

NOT FOR PUBLIC DISTRIBUTION

MSPA CMP Computation Summary Sheet
29 CFR 500- Proposed CMP

U.S. Department of Labor
Wage And Hour Division

Establishment

Address

NAICS	Total Employees	Case ID	

Investigator

Violation Name	# Violations	Base CMP	Factors *	CMP Amount
				=
			Subtotal:	
				=
			Subtotal:	
				=
			Subtotal:	
				=
			Subtotal:	
			Adjustments:	
			Total:	

Investigator Signature: _____ Date: _____

ADD/DD Reviewer: _____ Date: _____

Date: Case ID: CMP Computation Summary Sheet (Replaces WH-518) Page 1

* MITIGATING FACTORS

Factor 1: History of violations of MSPA

Factor 2: Number of workers affected by the violation

Factor 3: Gravity of the violation

Factor 4: Efforts made in good faith to comply

Factor 5: Subject's explanation of the violation

Factor 6: Commitment to future compliance

Factor 7: Extent to which the subject achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers

Factor 8: Other applicable factors

MSPA CMP Computation Summary Sheet

U.S. Department of Labor
Wage And Hour Division

Establishment

Address

NAICS	Total Employees	Case ID	

Investigator

Violation Standard/Violation Rating	# Violations Base CMP	Factors *	CMP Amount

Subtotal:

Total:

Investigator Signature: Date:

ADD/DD Reviewer: Date:

*** MITIGATING FACTORS**

Factor 1: History of violations of MSPA

Factor 2: Number of workers affected by the violation

Factor 3: Gravity of the violation

Factor 4: Efforts made in good faith to comply

Factor 5: Subject's explanation of the violation

Factor 6: Commitment to future compliance

Factor 7: Extent to which the subject achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers

Factor 8: Other applicable factors

MSPA CMP Computation Summary Sheet

U.S. Department of Labor
Wage And Hour Division

Establishment

Address

NAICS	Total Employees	Case ID	

Investigator

Violation Standard/Violation Rating	# Violations Base CMP	Factors *	CMP Amount

Subtotal:

Total:

Investigator Signature: Date:

ADD/DD Reviewer: Date:

*** MITIGATING FACTORS**

Factor 1: History of violations of MSPA

Factor 2: Number of workers affected by the violation

Factor 3: Gravity of the violation

Factor 4: Efforts made in good faith to comply

Factor 5: Subject's explanation of the violation

Factor 6: Commitment to future compliance

Factor 7: Extent to which the subject achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers

Factor 8: Other applicable factors

WH-519a **MSPA and H-2A housing safety and health checklist (20 CFR 654.404 (ETA standards)).**

(a) Purpose

Use Form WH-519a to record housing inspection results when the inspection is conducted under the Employment and Training Administration (ETA) housing safety and health standards. The ETA housing standards apply to housing built prior to or under construction by 04/03/1980. Housing construction commenced on or after 04/03/1980 should be inspected under the Occupational Safety and Health Administration (OSHA) housing safety and health standards. *See* FOH 54: WH-519b for more information.

(b) Content

(1) A separate form should be used for each separate housing facility inspected.

(2) All identifying items must be completed concerning the housing owner/provider and/or the person who is in charge of the housing.

(3) *Violation column*

A violation of one or all of the items within each regulatory standard is recorded by a single check mark in this column.

(4) *Regulatory section column*

The form groups items within the same regulatory standard as a single requirement. For example, 20 CFR 654.407(a) contains four distinct items that make up one single requirement while 20 CFR 654.407(g) contains only one item.

(5) *# Exposed column*

Use this space to record the number of workers exposed to each violation recorded on the form.

(6) *Photo exhibit column*

Use this space to identify which photographs correlate to each violation recorded on the form.

(7) *Comments box*

The comment boxes at the end of each regulatory section should be used to record all observations necessary to make an objective determination about the gravity and severity of each violation, the precise location, how long the condition has existed, and whether the violation was foreseeable.

(8) The violations and observations recorded on this form should be corroborated in interview statements and with photographs, as necessary.

(c) Copies

NOT FOR PUBLIC DISTRIBUTION

Prepare and place the original checklist in the investigation file.

NOT FOR PUBLIC DISTRIBUTION

Housing Safety and Health Checklist
ETA 20 CFR 654

U.S. Department of Labor
Wage and Hour Division

WHI:	Date:
Location of Housing Inspected (attach map, if necessary):	Description of Housing (attach drawings or photographs if necessary):
Housing Capacity:	Number of Occupants:
Identity & Address of Housing Owner/Provider:	Identity & Address of Person in Charge of Housing (if FLC, give registration no.):
Current Permits or Licenses (identify by date & agency, attach copy):	Variances, if any, granted by ETA (attach copy):

Instructions: Record each violation of the applicable regulatory standard. In the space and columns provided for each item, record all observations necessary to make an objective determination about the gravity and severity of each violation, including the number of occupants exposed, the precise location, how long the condition has existed, and whether the violation was foreseeable. Corroborate your observations in interview statements and take photos as necessary.

Violation	Housing Site 654.404	# Exposed	Photo Exhibit
☐	*654.404(a)* • Inadequate drainage		
☐	*654.404(b)* • Housing located in proximity to conditions that create or could create offensive odors, noise, traffic, or similar hazards		
☐	*654.404(c)* • Grounds not free from debris, poisonous plants, uncontrolled weeds or brush		
☐	*654.404(d)* • Site does not provide space for recreation related to the size of the facility and the type of occupancy		

Comments:

WHI: _____
Date: _____

Housing Safety and Health Checklist
ETA 20 CFR 654

U.S. Department of Labor
Wage and Hour Division

Violation	Water Supply 654.405	# Exposed	Photo Exhibit
☐	*654.405(a)* • Inadequate or inconvenient water supply • Water supply does not meet standards of the State Health authority		
☐	*654.405(b)* • Cold water taps not available within 100 ft. of each living unit • Adequate drainage facilities not provided for overflow or spillage		
☐	*654.405(c)* • Common drinking cups used		
Comments:			

Violation	Excreta and Liquid Waste Disposal 654.406	# Exposed	Photo Exhibit
☐	*654.406(a)* • Facilities not provided for effective disposal of sewage • Raw or treated liquid waste allowed to accumulate on the ground surface		
☐	*654.406(b)* • Failure to connect to public sewer systems where available		
☐	*654.406(c)* • Privies or portable toilets not provided, where public sewers are not available • Not in compliance with requirements of the State health authority		
Comments:			

WHI: _____

Date: _____

Housing Safety and Health Checklist
ETA 20 CFR 654

U.S. Department of Labor
Wage and Hour Division

Violation	Housing 654.407	# Exposed	Photo Exhibit
☐	*654.407(a)* • Housing not structurally sound • Housing not in good repair • Housing not maintained in a sanitary condition • Housing does not provide protection against the elements		
☐	*654.407(b)* • Floors not of smooth, rigid, cleanable surface • Flooring not located to prevent entrance of ground and surface water		
☐	*654.407(c)* • Less than 50 sq. ft. per person for sleeping purposes in accommodations with single beds or in family units • Less than 40 sq. ft. per person for sleeping purposes in accommodations with double bunk beds • Less than 60 sq. ft. per person for combined cooking, eating, and sleeping purposes		
☐	*654.407(d)* • Housing used by families does not have separate or partitioned sleeping areas for parents, where there are children over 6 years old • Partition will be made of rigid materials and installed to provide reasonable privacy		
☐	*654.407(e)* • Separate sleeping facilities not provided for each sex in non-family groups • Separate sleeping facilities not provided for each family		
☐	*654.407(f)* • No facilities to hang clothes and store personal effects for each person or family • Inadequate arrangements for hanging clothes and storing personal effects for each person or family		
☐	*654.407(g)* • Ceiling height is less than 7 ft. for more than half of the floor area in each living unit		
☐	*654.407(h)* • Window space is less than 10% of usable floor space • Total space is less than 45% of minimum window area required and no other ventilation available		
Comments:			

WHI: _____

Date: _____

Housing Safety and Health Checklist
ETA 20 CFR 654

U.S. Department of Labor
Wage and Hour Division

Violation	Screening 654.408	# Exposed	Photo Exhibit
☐	*654.408(a)* • Openings in shelter not screened with not less than 16 mesh materials		
☐	*654.408(b)* • No screen doors • Screen doors not equipped with self-closing devices • Screen doors not in good repair or tight fitting		
Comments:			

Violation	Heating 654.409	# Exposed	Photo Exhibit
☐	*654.409(a)* • No heating equipment in living quarters and service rooms • When the temperature falls below 68°F, heating equipment is not capable of maintaining a temperature of 68°F in living quarters or service rooms due to disrepair or improper installation		
☐	*654.409(b)* • Portable heaters, other than electric used • Solid or liquid fuel stove used in a room with wooden or other combustible floor, without proper insulation or fire proofing on floor, walls, and ceiling		
☐	*654.409(c)* • Heating pipes not of fireproof material • Stovepipes do not have a vented metal collar • Any wall or ceiling within 18 in. of a stove not made of fireproof material		
Comments:			

WHI: _____

Date: _____

Housing Safety and Health Checklist
ETA 20 CFR 654

U.S. Department of Labor
Wage and Hour Division

Violation	Electricity and Lighting 654.410	# Exposed	Photo Exhibit
☐	*654.410(a)* • No electricity provided		
☐	*654.410(b)* • Inadequate ceiling or wall-type light fixtures in all rooms • At least one electrical outlet not provided in each living room		
☐	*654.410(c)* • Inadequate lighting for yard and pathways to common-use facilities		
☐	*654.410(d)* • Wiring and lighting fixtures in an unsafe condition		

Comments:

Violation	Toilets 654.411	# Exposed	Photo Exhibit
☐	*654.411(a)* • Toilets not constructed, located or maintained in a manner to prevent nuisance or public health hazard		
☐	*654.411(b)* • Water closets or privy seats for each sex not provided in a ratio of at least 1 unit for each 15 occupants • Common use facilities do not have a minimum of 1 water closet or privy seat for each sex		
☐	*654.411(c)* • Urinals not constructed of non-absorbent materials • Urinals not substituted for men's toilets in the proper ratio of 1 urinal or 24 inches of trough-type urinal for 1 toilet seat up to a maximum of 1/3 of the required toilet seats, when applicable		
☐	*654.411(d)* • Separate toilet facilities not provided for each sex (except in family units) • Toilets facilities for each sex in the same building not separated by a solid wall from wall to ceiling/roof • Toilets not marked "men" and "women" and in native language of occupants		
☐	*654.411(e)* • Adequate and accessible supply of toilet tissue (with holders) not provided in common-use toilet facilities		
☐	*654.411(f)* • Common use toilets and privies not well-lighted, ventilated or clean and sanitary		

WHI: _____

Date: _____

Housing Safety and Health Checklist
ETA 20 CFR 654

U.S. Department of Labor
Wage and Hour Division

Violation	Toilets 654.411 (cont'd)	# Exposed	Photo Exhibit
☐	*654.411(g)* • Toilet facilities located more than 200 ft. from living units		
☐	*654.411(h)* • Privies less than 50 ft. from living, cooking, or dining areas		
☐	*654.411(i)* • Privy structures and pits are not fly-tight • Privy pits do not have adequate capacity for the required seats		
Comments:			

WHI: _____

Date: _____

Housing Safety and Health Checklist
ETA 20 CFR 654

U.S. Department of Labor
Wage and Hour Division

Violation	Bathing, Laundry, and Hand-washing 654.412	# Exposed	Photo Exhibit
☐	*654.412(a)* • Hot and cold water under pressure not provided for bathing and hand-washing • Bathing and hand-washing facilities not in sanitary condition • Bathing and hand-washing facilities not located within 200 ft. of each living unit		
☐	*654.412(b)* • Showerheads not provided at a ratio of 1 per every 15 persons • Showerheads less than 3 ft. apart • Shower area does not include 9 sq. ft. of floor space per unit • Inadequate, dry dressing space in common-use facilities • Shower floors not constructed of nonabsorbent, nonskid materials with proper drains • Separate shower facilities not provided for each sex (except in family units) • Shower facilities for each sex in the same building not separated by a solid wall from wall to ceiling/roof • Shower facilities for each sex in the same building not marked "men" and "women" and in native language of occupants		
☐	*654.412(c)* • Lavatories/wash basins not provided in a ratio of at least 1 per every 15 persons		
☐	*654.412(d)* • No laundry facilities with hot and cold water under pressure • Laundry trays or tubs not provided in the ratio of at least 1 per 25 persons (or washing machines in the ratio of 1 per 50 persons plus 1 laundry tray per 100 persons)		
Comments:			

Violation	Cooking and Eating Facilities 654.413	# Exposed	Photo Exhibit
☐	*654.413(a) – Individual and Family Units* • No space or equipment provided for cooking and eating • Cookstove or hot plate with at least two burners not provided • Inadequate food storage shelves and counter for food preparation • No provisions for mechanical refrigeration at 45°F or less • Inadequate table and chairs or equivalent seating and eating arrangements commensurate with capacity of the unit • Inadequate lighting and ventilation		

WHI: _____
Date: _____

Housing Safety and Health Checklist
ETA 20 CFR 654

U.S. Department of Labor
Wage and Hour Division

Violation	Cooking and Eating Facilities 654.413 (cont'd)	# Exposed	Photo Exhibit
☐	*654.413(b) – Common Use Facilities* • No common facility, room, or building for cooking and eating • Stoves or hot plates not provided in ratio of 1 to 10 persons, or 1 to 2 families • Inadequate food storage shelves and counter for food preparation • No provisions for mechanical refrigeration at 45°F or less • Inadequate tables and chairs or equivalent seating • Inadequate sinks with hot and cold water under pressure • Inadequate lighting and ventilation • Floors not made of nonabsorbent, easily cleaned materials		
☐	*654.413(c) – Central Mess Facilities* • Not in proportion to the capacity of the housing • Not separate from sleeping quarters • Facilities, equipment, and/or operation not in accordance with applicable state codes		
☐	*654.413(d)* • Walls in all cooking and food preparation areas not of nonabsorbent, easily cleaned material • Walls adjacent to cooking areas not of fire-resistant material		
Comments:			

Violation	Garbage and Other Refuse 654.414	# Exposed	Photo Exhibit
☐	*654.414(a)* • Fly-tight, durable, clean 20-gallon refuse containers not provided adjacent to each housing unit • Fly-tight, durable, clean 20-gallon refuse containers not provided in a ratio of 1 per every 15 persons		
☐	*654.414(b)* • Refuse not collected at least twice per week, or more often if necessary • Disposal of refuse not in accordance with State and local law		
Comments:			

WHI: _____

Date: _____

Housing Safety and Health Checklist
ETA 20 CFR 654

U.S. Department of Labor
Wage and Hour Division

Violation	Insect and Rodent Control 654.415	# Exposed	Photo Exhibit
☐	*654.415* • Housing and facilities not free of insects, rodents, and other vermin		

Comments:

Violation	Sleeping Facilities 654.416	# Exposed	Photo Exhibit
☐	*654.416(a)* • Comfortable beds, cots, or bunks not provided for each person • Beds not provided with clean mattresses		
☐	*654.416(b)* • Bedding provided not clean and sanitary		
☐	*654.416(c)* • Triple deck bunks impermissibly used		
☐	*654.416(d)* • Double bunks do not have a minimum of 27 in. between them • Top bunk is less than 36 in. from the ceiling		
☐	*654.416(e)* • Double beds used in other than family accommodations		

Comments:

Violation	Fire, Safety, and First Aid 654.417	# Exposed	Photo Exhibit
☐	*654.417(a)* • Buildings used for sleeping or eating purposes do not meet applicable State or local fire and safety laws		
☐	*654.417(b)* • Two means of fire escape not provided in one-story housing for less than 10 persons and in family housing		
☐	*654.417(c)* • Sleeping quarters for 10 or more persons, central dining facilities, and common rooms do not have at least two doors remotely separated for fire escape		

WHI: _____
Date: _____

Housing Safety and Health Checklist
ETA 20 CFR 654

U.S. Department of Labor
Wage and Hour Division

Violation	Fire, Safety, and First Aid 654.417 (cont'd)	# Exposed	Photo Exhibit
☐	*654.417(d)* • Second floor sleeping rooms and common rooms do not have a stairway and a permanently affixed ladder or second stairway		
☐	*654.417(e)* • Sleeping and common rooms above the second story do not comply with State and local fire and building codes		
☐	*654.417(f)* • Working fire extinguishers not provided or not readily accessible		
☐	*654.417(g)* • First aid facilities equivalent to the 16-unit first aid kit recommended by the Red Cross not provided or not readily accessible • Required first aid facilities not provided in the ratio of 1 per 50 persons		
☐	*654.417(h)* • Volatile or flammable liquids (except household products) stored in or adjacent to living quarters		
☐	*654.417(i)* • Pesticides and/or toxic chemicals stored in housing area		

Comments:

Violation	MSPA Section 203(a) General Obligations	# Exposed	Photo Exhibit
☐	• The person who owns or controls the housing facility failed to comply with all applicable Federal, State, and/or local standards for such housing		

Comments:

Violation	H-2A 20 CFR 655.122(h) General Obligations	# Exposed	Photo Exhibit
☐	• The employer failed to comply with all applicable Federal, State, and/or local standards for the housing facility		

Comments:

WHI: _____

Date: _____

WH-519b **MSPA and H-2A housing safety and health checklist (29 CFR 1910.142 (OSHA standards)).**

(a) Purpose

Use Form WH-519b to record housing inspection results when the inspection is conducted under the Occupational Safety and Health Administration (OSHA) housing safety and health standards. The OSHA housing standards apply to housing construction commenced on or after 04/03/1980 should be inspected under the OSHA housing safety and health standards. Housing built prior to 04/03/1980 should be inspected under the Employment and Training Administration (ETA) housing safety and health standards. *See* FOH 54: WH-519a for more information.

(b) Content

(1) A separate form should be used for each separate housing facility inspected.

(2) All identifying items must be completed concerning the housing owner/provider and/or the person who is in charge of the housing.

(3) *Violation column*

A violation of one or all of the items within each regulatory standard is recorded by a single check mark in this column.

(4) *Regulatory section column*

The form groups items within the same regulatory standard as a single requirement. For example, 29 CFR 1910.142(a)(1) contains five distinct items that make up one single requirement while 29 CFRI 910.142(a)(3) contains only one item.

(5) *# Exposed column*

Use this space to record the number of workers exposed to each violation recorded on the form.

(6) *Photo exhibit column*

Use this space to identify which photographs correlate to each violation recorded on the form.

(7) *Comments box*

The comment boxes at the end of each regulatory section should be used to record all observations necessary to make an objective determination about the gravity and severity of each violation, the precise location, how long the condition has existed, and whether the violation was foreseeable.

(8) The violations and observations recorded on this form should be corroborated in interview statements and with photographs, as necessary.

(c) Copies

NOT FOR PUBLIC DISTRIBUTION

Prepare and place the original checklist in the investigation file.

NOT FOR PUBLIC DISTRIBUTION

Housing Safety and Health Checklist
OSHA 1910.142 Temporary Labor Camps

U.S. Department of Labor
Wage and Hour Division

WHI:	Date:
Location of Housing Inspected (attach map, if necessary):	Description of Housing (attach drawings or photographs if necessary):
Housing Capacity:	Number of Occupants:
Identity & Address of Housing Owner/Provider:	Identity & Address of Person in Charge of Housing (if FLC, give registration no.):
Current Permits or Licenses (identify by date & agency, attach copy):	Variances, if any, granted by ETA (attach copy):

Instructions: Record each violation of the applicable regulatory standard. In the space and columns provided for each item, record all observations necessary to make an objective determination about the gravity and severity of each violation, including the number of occupants exposed, the precise location, how long the condition has existed, and whether the violation was foreseeable. Corroborate your observations in interview statements and take photos as necessary.

Violation	Site 1910.142(a)	# Exposed	Photo Exhibit
☐	*1910.142(a)(1)* • Inadequate drainage • Drainage endangers domestic or public water supply • Not located at least 200 ft. away from swamps, pools, sink holes or other surface collection of water unless treated for mosquito control • Not graded, ditched, and/or rendered free from depressions in which water may become a nuisance • Subject to periodic flooding		
☐	*1910.142(a)(2)* • Overcrowding • Not 500 ft. from livestock		
☐	*1910.142(a)(3)* • Not free of rubbish, debris, waste paper, garbage, or other refuse		

Comments:

WHI: _____
Date: _____

Housing Safety and Health Checklist
OSHA 1910.142 Temporary Labor Camps

U.S. Department of Labor
Wage and Hour Division

Violation	Shelter 1910.142(b)	# Exposed	Photo Exhibit
☐	*1910.142(b)(1)* • No protection from the elements		
☐	*1910.142(b)(2)* • Sleeping room does not contain at least 50 sq. ft. of floor space per occupant • Sleeping room does not have a 7 ft. ceiling		
☐	*1910.142(b)(3)* • Sleeping room does not contain a bed, cot, or bunk for each occupant • Beds are fewer than 3 ft. apart and/or are elevated fewer than 1 ft. above the floor • Double bunk beds are fewer than 4 ft. apart • Fewer than 27 in. between upper and lower bunks • Triple bunk beds are used		
☐	*1910.142(b)(4)* • Floors are not made of wood, asphalt, or concrete • Wooden floors are not smooth and tight construction • Floors are not in good repair		
☐	*1910.142(b)(5)* • Wooden floors are not elevated at least 1 ft. above the ground level at all points & do not prevent dampness or permit free circulation of air		
☐	*1910.142(b)(7)* • Total space of windows in living quarters is less than 10% of the floor area • Windows cannot be opened half way for ventilation purposes		
☐	*1910.142(b)(8)* • Openings not screened with 16-mesh material • Screen doors not equipped with self-closing devices		
☐	*1910.142(b)(9)* • Fewer than 100 sq. ft. per person in a room where workers cook, live, and sleep • Unsanitary conditions for storing and preparing food		
☐	*1910.142(b)(10)* • Stoves provided in a ratio of fewer than one for every ten people • Stoves provided in a ration of fewer than one for every two families • Stoves not provided in an enclosed and screened shelter		
☐	*1910.142(b)(11)* • Heating, cooking, and water heating equipment not installed in accordance with State and local ordinances, codes, and regulations • If used during cold weather, heating equipment for the camp is not adequate		
Comments:			

WHI. _____
Date: _____

Violation	Water Supply 1910.142(c)	# Exposed	Photo Exhibit
☐	*1910.142(c)(1)* • An adequate and convenient water supply, approved by the appropriate health authority, is not provided in each camp for drinking, cooking, bathing, and laundry purposes		
☐	*1910.142(c)(2)* • At least 35 gallons of water, is not provided to each person each day at a rate of 2 ½ times the average hourly demand		
☐	*1910.142(c)(3)* • Distribution lines do not supply water at normal operating pressures to all fixtures for simultaneous operation • Where there are no indoor water facilities provided, the shelters are more than 100 ft. away from a yard hydrant		
☐	*1910.142(c)(4)* • Where indoor water facilities are provided, drinking fountains are not provided in the ratio of 1 for each 100 workers, or fraction thereof • Where indoor water facilities are provided, common drinking cups are used		
Comments:			

Violation	Toilet Facilities 1910.142(d)	# Exposed	Photo Exhibit
☐	*1910.142(d)(2)* • Each toilet room is not accessible without passing through a sleeping room. • Each toilet room does not have at least a 6 sq. ft. window opening directly to the outside or is not otherwise adequately ventilated. • Each outside opening in a toilet room is not screened with 16 mesh material. • A fixture, water closet, chemical toilet, or urinal is located in a room used for other than toilet purposes		
☐	*1910.142(d)(3)* • There is not a toilet room within 200 ft. of the door of each sleeping room. • Where privies are used, they are located closer than 100 ft. to a sleeping room, dining room, lunch area, or kitchen		
☐	*1910.142(d)(4)* • Where there are shared toilet facilities, separate toilet rooms are not provided for each sex or these rooms are not distinctly marked with easily understood pictures, symbols, or words in English and the native language. • Where there are shared toilet facilities in the same building, the separate toilet rooms for each sex are not separated by solid walls or partitions extending from the floor to the roof/ceiling.		

WHI: _____
Date: _____

Violation	Toilet Facilities 1910.142(d) (cont'd)	# Exposed	Photo Exhibit
☐	*1910.142(d)(5)* • Where there are shared toilet facilities, the number of water closets or privy seats is not provided in the ratio of at least 1 to each 15 occupants (based on the maximum occupancy of persons of that sex for which the camp is designed), with a minimum of 2 units		
☐	*1910.142(d)(6)* • Urinals are not provided in the ratio one unit or 2 linear ft. of trough for each 25 men • 15 in. surrounding the urinal (wall and floor) is not constructed of materials impervious to moisture • Where water pressure is available, urinal does not flush adequately • Where privies are used, urinal troughs do not drain freely into the pit/vault and/or the pit was not constructed to keep out flies and rodents		
☐	*1910.142(d)(7)* • Each water closet installed on or after August 31, 1971 is not located in a toilet room		
☐	*1910.142(d)(8)* • Each toilet room is not lighted naturally or safely by artificial light at all hours of the day and night		
☐	*1910.142(d)(9)* • An adequate supply of toilet paper is not provided in each privy, water closet, or chemical toilet compartment		
☐	*1910.142(d)(10)* • Each privy and toilet room is not kept in a sanitary condition • Each privy and toilet room is not cleaned at least daily		
Comments:			

Violation	Sewage Disposal Facilities 1910.142(e)	# Exposed	Photo Exhibit
☐	*1910.142(e)* • All camp sewer lines and floors drains are not connected to the public sewer, when available		
Comments:			

WHI: _____
Date: _____

Violation	Laundry, Hand-washing, and Bathing Facilities 1910.142(f)	# Exposed	Photo Exhibit
☐	*1910.142(f)(1)* • Hand washing facilities are not provided in the ratio of 1 basin per family shelter or 1 basin for every 6 persons in shared facilities • Bathing facilities are not provided in the ratio of 1 shower head for every 10 persons. • Laundry facilities are not provided in the ratio of 1 tray/tub for every 30 persons. • Each building does not contain a slop sink for laundry, hand washing, and bathing.		
☐	*1910.142(f)(2)* • Floors in laundry, hand washing, and/or bathing facilities are not waterproof, smooth, and/or non-slip • Floor drains are not provided in all shower baths, shower rooms, and/or laundry rooms, or they do not adequately remove waste water and facilitate cleaning • All junctions of the curbing and the floor are not coved • The walls and partitions in shower rooms are not smooth and/or waterproof up to the splash line.		
☐	*1910.142(f)(3)* • An adequate supply of hot and/or cold running water is not provided for bathing and/or laundry purposes • No facilities are provided for heating water for bathing and/or laundry purposes		
☐	*1910.142(f)(4)* • Every service building is not provided with equipment to maintain a temperature of at least 70°F during cold weather		
☐	*1910.142(f)(5)* • No facilities are provided for drying clothes		
☐	*1910.142(f)(6)* • Every service building is not kept clean		
Comments:			

WHI: _____
Date: _____

Violation	Lighting 1910.142(g)	# Exposed	Photo Exhibit
☐	*1910.142(g)* • Where electricity is available, there is not at least one ceiling-type light fixture and at least one separate floor or wall type convenience outlet • Laundry and toilet rooms and rooms where people congregate don't have at least one ceiling or wall type fixture • Light levels in toilet and storage rooms is not at least 20 foot-candles 30 in. from the floor • Other rooms (including kitchen and living quarters) do not have at least 30 foot-candles 20 in. from the floor		
Comments:			

Violation	Refuse Disposal 1910.142(h)	# Exposed	Photo Exhibit
☐	*1910.142(h)(1)* • Fly-tight, rodent-tight, impervious, cleanable or single-service containers, approved by the appropriate health authority are not provided for the storage of garbage • At least 1 fly-tight, rodent-tight, impervious, cleanable or single-service container, approved by the appropriate health authority is not provided for each family shelter • Garbage container(s) are not located within 100 ft. of each family shelter • Garbage container(s) located within 100 ft. of each family shelter are not on a wooden, metal, or concrete stand		
☐	*1910.142(h)(2)* • Garbage containers are not kept clean		
☐	*1910.142(h)(3)* • Garbage containers are not emptied when full or are not emptied at least twice per week		
Comments:			

WHI: _____
Date: _____

Violation	Construction and Operation of Feeding Facilities 1910.142(i)	# Exposed	Photo Exhibit
☐	*1910.142(i)(1)* • Food handling facilities do not comply with the requirements of the "Food Service Sanitation Ordinance and Code" • Kitchen and dining hall areas are not free from vermin, rodents, flies, etc • Kitchen and dining hall areas do not provide a place to keep food from spoilage • Poisonous and/or toxic chemicals are stored with the food and/or in the cooking or eating facility • The equipment and utensils in the kitchen and dining hall are kept unclean • The kitchen and dining hall are kept unclean • Hot and/or cold running water are not provided in the kitchen and dining hall • Leak-proof garbage containers with tight lids are not provided in the kitchen and dining hall		
☐	*1910.142(i)(2)* • Kitchen and/or dining facilities are not adequate in size • Kitchen and/or dining facilities are not separate from the sleeping quarters • There is a direct opening from the living or sleeping quarters into the kitchen or dining hall		
Comments:			

Violation	Insect and Rodent Control 1910.142 (j)	# Exposed	Photo Exhibit
☐	*1910.142(j)* • Effective measures are not taken to prevent infestation by and/or harborage of animal or insect vectors or pests		
Comments:			

WHI: _____
Date: _____

Violation	Fires Safety and First Aid Facilities 1910.142 (k)	# Exposed	Photo Exhibit
☐	*1910.142(k)(1)* • Adequate first aid facilities are not available in the labor camp for the emergency treatment of injured persons		
☐	*1910.142(k)(2)* • First aid facilities are not maintained by a person trained to administer first aid and/or are not readily accessible for use at all times		
Comments:			

Violation	Communicable Disease and Illness 1910.142(l)	# Exposed	Photo Exhibit
☐	*1910.142(l)(1)* • Failure to report the identity of anyone in the camp suspected of having a communicable disease to local health authorities		
☐	*1910.142(l)(2)* • Failure to report immediately an outbreak of suspected food poisoning or an unusual prevalence of any illness including prominent symptoms of fever, diarrhea, sore throat, vomiting, or jaundice to local health authorities		
Comments:			

Violation	MSPA Section 203(a) General Obligations	# Exposed	Photo Exhibit
☐	• The person who owns or controls the housing facility failed to comply with all applicable Federal, State, and/or local standards for such housing		
Comments:			

Violation	H-2A 20 CFR 655.122(h) General Obligations	# Exposed	Photo Exhibit
☐	• The employer failed to comply with all applicable Federal, State, and/or local standards for the housing facility		
Comments:			

WHI: _____
Date: _____

WH-520 **<u>Housing occupancy certificate.</u>**

(a) Purpose

After a preoccupancy housing inspection has been conducted by the Wage and Hour Division (WHD) in accordance with FOH 57h02(d), this form shall be completed by the WHI if the inspection indicated that the housing met the standards of either 29 CFR 1910.142 or 20 CFR 654. The award of a WH-520, Housing Occupancy Certificate constitutes one means by which the farm labor contractor (FLC), agricultural employer (AGER), agricultural association (AGAS), user (USER), or housing provider (HP) may comply with the requirements of 29 CFR 500.135. The certificate shall be given an expiration date so that it is valid for one year from the date of issuance. For example: issued 05/25/2003; expires 05/24/2004.

(b) Copies

Three copies of the certificate are to be made. The original and two copies of the certificate should be given or mailed to the person who requested the inspection. One copy must be retained in the case file. The person to whom the occupancy certificate was issued shall post a copy at the site of the housing and keep the original for 3 years from the date of issuance.

(c) Preparation

(1) *General*

A Housing Preoccupancy Inspection case needs to be set up first in WHISARD and then all the pertinent data must be entered into WHISARD. The certificate can be printed in WHISARD.

(2) *Identification of property*

The identification of the housing which has been inspected must include the following:

a. Number of units to be used

b. Physical description of the housing to be used including the type of construction and materials used. Files of such description would include: “wood frame house,’, “metal trailer on cinder blocks,” “combination brick and wood barracks,” etc.

When only a portion of the camp is to be used to house the workers of a particular crew, or when only a portion of the camp passes inspection, those units which have been certified as meeting the applicable standards trust be identified. When individual units are numbered either alphabetically or numerically, such designation accompanied by the physical description will suffice. When individual units are not numbered, they may be identified by a physical description showing their relationship to other units located within the camp site. An example of such camp description might be, “The inspection covers three wood frame units numbered A1, A2, and A3. In addition, it covers a gray brick barracks type building located approximately 100 feet east of an abandoned well and just behind the tool shed”. If

NOT FOR PUBLIC DISTRIBUTION

the description of the housing units does not require all the spaces provided for such description, the remaining spaces should be filled with diagonal lines.

(3) *Special conditions*

If there are no special conditions for occupancy, type the word "none." Special conditions under which occupancy may be permitted include:

a. the housing inspection reveals only violations rated "Marginal;"

b. the inspection reveals violations rated "serious" or "aggravated" that the responsible person remedied before the housing is occupied; or

c. the inspection reveals "serious" or "aggravated" violations which cannot be remedied prior to the scheduled occupancy date, but the responsible person has taken measures, before housing is occupied, to ensure that the health and safety of the migrant worker occupants will not be endangered by the temporary continued existence of these violating conditions.

Any special conditions that require correction will include the date by which the corrections are to be made. Other special conditions will require monitoring to see that the special conditions are met. Follow-up inspections will be scheduled as necessary to ascertain that special conditions are met, that violations are corrected as promised, and that migrant workers are not endangered.

(d) Reporting

The completed investigation file supporting the issuance or denial of Form WH-520 shall contain, at a minimum, the following:

- WH-500: file copy
- A brief narrative report
- WH-520: file copy, if WH-520 was issued
- WH-519a or 519b

The file shall be treated as any other investigation file and shall be retained at the district office (DO) for at least 3 years. It may be appropriate with respect to camps that have a pattern of violation to keep the files active for longer periods.

(e) Application for housing authorization

Where a FLC anticipates using or causing real property to be used as housing for migrant workers, a copy of the WH-520 issued may be submitted by the FLC as written proof of compliance with 29 CFR 500.48(f).

(f) Equivalent form in WHISARD

WH-520 Housing Occupancy Certificate.

NOT FOR PUBLIC DISTRIBUTION

Housing Occupancy Certificate-Migrant and Seasonal Agricultural Worker Protection Act

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB No. 1215-0158
Expires: 04-30-99

A. Identifying Information

1. Location of housing inspected:

Description of housing units and number of units

2a. Name and address of owner of housing units:	3a. Name and address of individual(s) in charge:
b. Phone:	b. Phone:
4a. Name and address of Farm Labor Contractor, if any:	5. Date inspection was requested:
b. Registration No.	6. Expected dates of occupancy: From: To:

B. Certification

The housing identified above has been inspected by the undersigned and found to meet the substantive safety and health standards prescribed in one of the following Department of Labor regulations.

☐ 29 CFR 1910.142 Occupational Safety and Health Administration Regulations

☐ 20 CFR Part 654 Employment and Training Administration Regulations

The definition of substantive safety and health standards is given in 29 CFR 500.133.

Date of inspection:

Date certificate expires:

Special Conditions (if none, write none):

District Office or Field Office Address:

(Signature and Title of Person Issuing Certificate) (Date Issued)

Important Notice: A copy of this certificate must be posted at the site of the housing identified above. This certificate is valid for one year from the date of issuance. If after one year from the date of this certificate the property identified above is to be utilized to house migrant workers, a new certificate must be requested.

The orginial of this certificate must be kept as a record for three years from the date of issuance.

This inspection certificate does not relieve any person from compliance with any applicable State, county or local ordinance. Receipt and posting of this certificate of occupancy does not relieve the persons who own or control this facility or property from the responsibility of ensuring that such facility or property meets the applicable State and Federal safety and health standards. Once such facility or property is occupied, such person shall supervise and continually maintain such facility or property to ensure that it remains in compliance with the applicable safety and health standards.

Public Burden Statement

Public reporting burden for this collection of information is estimated to average 3 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of IRM Policy, U.S. Department of Labor, Room N1301, 200 Constitution Avenue, N.W., Washington, D.C. 20210; and to the Office of Management and Budget, Paperwork Reduction Project (1215-0158), Washington, D.C. 20503.

DO NOT SEND THE COMPLETED SURVEY TO EITHER OF THESE OFFICES

Form WH-520
Rev. Sept. 1986

WH-525 **WHISARD employee polygraph protection act civil money penalty (CMP) report.**

(a) Purpose

This form provides a means of portraying violations along with their indicated monetary weights for consideration in recommending civil money penalties (CMPs). The final assessment by the regional administrator (RA) shall be based on criteria in 29 CFR 801.42 after consideration of the data in the file and the recommendation of the district director (DD).

CMP computation is automated in WHISARD, and the CMP Computation Worksheet available in WHISARD replaces the paper fill-in form ofWH-525.

(b) Copies

Depending on the situation, make one or more of the following copies:

(1) For the case file for all investigations with violations whether or not CMPs are recommended.

(2) The main office-district office (MODO), when an establishment is part of a national or multiunit enterprise, whether or not a penalty is recommended. Submit this copy through the RA of the investigating region.

(3) *Do not* give copies of the WH-525 to the employer.

(c) Preparation

CMP Computation Worksheet is prepared in WHISARD. *See* FOH 54f05.

The Wage and Hour Investigator (WHI)(s) that prepared the form should sign and date the form. Subsequent to review where appropriate, the assistant district director (ADD)/district director (DD) should sign and date the form.

(d) WHISARD form/report

CMP Computation Worksheet: EPPA CMP Computation Summary Sheet.

WH-560 **WHISARD OSHA CMP computation worksheet.**

(a) Purpose

Section 17 of the Occupational Safety and Health Act (OSH Act) contains the statutory parameters for the assessment of civil money penalties (CMPs) for violations of the act. Form WH-560 is a report form which identifies violations of the field sanitation standards (*see* 29 CFR 1928.110) and temporary labor camp (in agriculture) requirements (*see* 29 CFR 1910.142) under the OSH Act for the consideration of CMP.

CMP computation is automated in WHISARD and the OSHA CMP Computation Worksheet available in WHISARD replaces the paper fill-in form ofWH-560.

(b) Copies

NOT FOR PUBLIC DISTRIBUTION

One copy shall be printed from WHISARD for the investigation file in all investigations in which there are OSH Act violations.

Copies of the WH-560 are not to be given to the person investigated since these are recommended amounts for consideration in determining the appropriateness and amount of CMPs to be assessed, unless the copies are subpoenaed, and then only after consultation with the regional solicitor of Labor (RSOL).

(c) Preparation

OSHA CMP Computation Worksheet is prepared in WHISARD. *See* FOH 54f10.

The Wage and Hour Investigator (WHI)(s) that prepared the form should sign and date the form. Subsequent to review where appropriate, assistant district director (ADD)/district director (DD) should sign and date the form.

(d) WHISARD form/report

OSHA CMP Computation Worksheet.

WH-561 <u>Citation and notification of penalty.</u>

(a) Purpose

This form will be used to provide the person investigated with a written record of violations cited and penalties proposed made under the field sanitation standards (*see* 29 CFR 1928.110) and temporary labor camp (in agriculture) standard (*see* 29 CFR 1910.142) of the Occupational Safety and Health Act (OSH Act).

All pertinent data must be entered into WHISARD by the Wage and Hour Investigator (WHI) (*see* FOH 54f10). The district director (DD) and/or assistant district director (ADD) shall review the case file to determine whether the evidence in the file sustains the violation(s) cited and appropriateness of the recommended penalty (*see* FOH 56c01).

(b) Copies

An original and two copies shall be prepared in all investigations in which there are OSH Act violations cited and/or penalties proposed; the original to be given/mailed (certified mail, return receipt requested) to the employer, one copy for the complainant/ representative (if applicable), and one copy for the investigation file. It is not necessary to forward a copy to the National Office (NO).

(c) Preparation

The penalty computations are automated in WHISARD. This form shall be prepared in WHISARD. *See* FOH 54f10.

Subsequent to review where appropriate, ADD/DD should sign the form.

(d) WHISARD form/report

WH-561 Citation and Notice of Penalty.

NOT FOR PUBLIC DISTRIBUTION

Citation and Notification of Penalty

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Issuance Date: _____

NOTE: The violation(s) described in this Citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated within the description given below.

1. Case ID	2. Subject of Investigation	3. WHI ID	4. Insp. Date(s)

5. Business Address	6. Inspection Site	7. District Office Address

THE LAW REQUIRES that a copy of this Citation be posted immediately in a prominent place at or near the location of violation(s) cited below. The Citation must remain posted until the violations cited below have been abated, or for 3 working days (excluding weekends and Federal holidays), whichever is longer.

This Citation describes violations of the Occupational Safety and Health Act of 1970. The penalty(ies) listed below are based on these violations. You must abate the violations referred to in this Citation by the dates listed below and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this Citation and penalty you mail a notice of contest to the U.S. Department of Labor, Wage and Hour Division District Office, at the address shown above. *(Please read the booklet provided with this notice which outlines your rights and responsibilities and should be read in conjunction with this form.)* You are further notified that unless you inform the District Director *in writing* that you intend to contest the Citation or proposed penalties within 15 working days after receipt, this Citation and the proposed penalties will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency. Issuance of this Citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the Citation is affirmed by the Review Commission.

8. Violation Cite	9. Description/Penalty	10. Date by Which Violation Must Be Abated

11. District Director _____

NOTICE TO EMPLOYEES — The law gives employees or their representative(s) the opportunity to object to any abatement date set for a violation if the date is believed to be unreasonable. The contest must be mailed to the U.S. Department of Labor, Wage and Hour Division, District Office at the address shown above within 15 working days (excluding weekends and Federal holidays) of the receipt by the employer of this Citation and penalty.

EMPLOYER DISCRIMINATION UNLAWFUL — The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that prohibited discrimination has occurred may file a complaint no later than 30 days after the discrimination with the nearest office of the U.S. D.O.L. Occupational Safety and Health Administration.

EMPLOYER RIGHTS AND RESPONSIBILITIES — The booklet provided with this citation outlines employer rights and responsibilities and should be read in conjunction with this notification.

*U.S. GPO: 1997-418-42961505

WH-562 **<u>OSH Act field sanitation inspection report.</u>**

(a) Purpose

This form is to be used to record results of inspections conducted under the field sanitation standards (*see* 29 CFR 1928.110). The form is to be completed by the Wage and Hour Investigator (WHI)(s) who conducted the inspection.

(b) Copies

Prepare and place the original completed inspection report in the investigation file. Copies of the WH-562 are not to be given to the person investigated.

(c) Preparation

(1) *Case ID Number*

Enter the WHISARD Case ID Number.

(2) *Investigation subject*

Enter the full, legal name of the subject of this investigation.

(3) *WHI identification number*

Enter WHISARD User ID Number of the investigator who conducted this investigation.

(4) *Inspection date(s)*

Enter the date that the inspection was performed. If the inspection takes more than 1 day, enter inclusive days.

(5) *Business address*

Enter the business address of the subject of this investigation.

(6) *Inspection site*

Enter the address of the site at which the inspection was performed.

(7) *Number of hand-labor employees (maximum)*

Enter the greatest number of hand-laborers employed by the employer on any day during the 12 months preceding the start of this investigation.

(8) *Number of hand-labor employees (investigation date)*

Enter the number of hand-laborers employed by the employer on the day this investigation was begun.

(9) *29 CFR 1928.110(c)(2)(v) applicable*

NOT FOR PUBLIC DISTRIBUTION

Enter “yes” or “no” as to whether this section is applicable to the person being investigated. Toilet and handwashing facilities are not required for employees who perform field work for a period of 3 hours or less (including transportation time to and from the field) during the day.

(10) *Items 10 -23 of WH-562 (potential OSH Act violations)*

Items 10 through 23 shall be completed as appropriate by entry of a checkmark for each violation observed.

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OSHAct Field Sanitation Inspection Report
(29 CFR Part 1928.110)

1. Case ID	2. Investigation Subject	3. WHI ID	4. Insp. Date(s)

5. Business Address	6. Inspection Site

7. # Hand-labor EEs (Max.)	8. # Hand-labor EEs (Insp. Date)	9. 1928.110(c)(2)(v) Applicable
		Yes _____ No _____

Cost to EEs

10. Cost to EEs for facilities (§ 1928.110(c)) ..... _____

Potable Drinking Water

11. Not provided and readily accessible (§ 1928.110(c)(1)(i)) ..... _____
12. Not cool and in sufficient amounts (§ 1928.110(c)(1)(ii)) ..... _____
13. Not dispensed in single-use cups or fountains (§ 1928.110(c)(1)(iii)) ..... _____

Toilet and Handwashing Facilities

14. Facilities not provided in proper ratio (§ 1928.110(c)(2)(i)) ..... _____
15. Toilets not ventilated, screened, equipped with self-closing doors that close and latch from inside, and not constructed to insure privacy (§ 1928.110(c)(2)(ii)) ..... _____
16. Toilets and handwashing facilities not accessibly located and in close proximity to each other (½-mile walk test) (§ 1928.110 (c)(2)(iii)). _____
17. Facilities not located at point of closest vehicular access (where terrain is a factor) (§ 1928.110(c)(2)(iv)) ..... _____

Maintenance

18. Potable drinking water, toilet, and handwashing facilities not maintained according to applicable public health sanitation practices (§ 1928.110(c)(3)) ..... _____
19. Drinking water containers not constructed of materials which maintain water quality, are not refilled daily (or more often if needed), and not regularly cleaned (§ 1928.110(c)(3)(i)) ..... _____
20. Toilet(s) not operational, and not maintained in a clean and sanitary condition ..... _____
21. Facility waste disposal caused unsanitary conditions (§ 1928.110(c)(3)(iv)) .... _____

Reasonable Use

22. ER failed to notify EEs of the location of facilities and water - did not allow reasonable opportunities to use facilities and water during the workday (§ 1928.110(c)(4)) ..... _____
23. ER failed to inform EEs of following good hygiene practices (§ 1928.110(c)(4)) ..
    (i) Use water and facilities provided for drinking, handwashing and elimination _____. ___;
    (ii) Drink water as frequently as needed _____. ___;
    (iii) Urinate as often as necessary _____. ___;
    (iv) Wash hands before and after using toilet _____. ___; and
    (v) Wash hands before eating and smoking _____. ___.

Notes:

Instructions: Place a checkmark in the space provided for each violation observed. The completed form must be placed in the investigation file. DO NOT GIVE THIS FORM TO THE EMPLOYER.

WH-563 **<u>Notice of alleged imminent danger.</u>**

(a) Purpose

This form provides written notice to the employer and all affected employees of the possible existence of a danger which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through regular enforcement procedures (*see* FOH 56b07).

(b) Copies

An original and one copy of this form are prepared. The original, when completed shall be posted at the worksite by the Wage and Hour Investigator (WHI). The copy shall be placed in the investigation file.

(c) Preparation

(1) Enter the Case ID.

(2) Enter the name of the employer and address of the site at which the inspection was performed. Also include a description of the inspection site (*e.g.*, onion field, temporary labor camp, etc.).

(3) Enter a full and complete description of the alleged imminent danger.

(4) The WHI should complete the form at the bottom by stating the time of day, location, and date when the form was completed.

NOT FOR PUBLIC DISTRIBUTION

U.S Department of Labor
Employment Standards Administration
Wage and Hour Division

Case ID

NOTICE
of
Alleged Imminent Danger (to Employer(s) and Employees)

An inspection has been conducted of a place of employment in which employees of employer(s) are working, located at _____

_____

and described as follows _____

_____

On the basis of this inspection, it is alleged that an imminent danger to employees exists in that A DANGER EXISTS WHICH COULD REASONABLY BE EXPECTED TO CAUSE DEATH OR SERIOUS PHYSICAL HARM IMMEDIATELY or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), hereinafter referred as the Act.

In accordance with the provisions of section 13(c) of the Act, the employer(s) and all employees affected by these conditions constituting an alleged imminent danger are being informed of the possible danger by the posting of this Notice of Alleged Imminent Danger near the condition(s) described below. The employer(s) and all affected employees are likewise being informed that it will be recommended to the Secretary of Labor that he seek the judicial relief provided by the Act.

The Act provides that the United States District Court is empowered upon petition of the Secretary of Labor, to order the employer(s) to take such action as is necessary to avoid, correct, or remove this alleged imminent danger, including, where necessary, the removal of employees from the dangerous area.

This notice does not constitute a Citation of alleged violations or Notification of Proposed Penalty. Appropriate Citations or a Notification of Proposed Penalty will be issued to the employer(s).

Description of Alleged Imminent Danger

This Notice of Alleged Imminent Danger must remain posted until removed by a representative of the Wage and Hour Division

Signed and dated at _____

_____

this _____ day of _____ 19 _____

_____

Wage and Hour Investigator
U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Form WH-563

WH-589a **<u>Hearing request information (MSPA) (on-the-spot assessment).</u>**

(a) Purpose

This form must be used whenever Form WH-589 is used in accordance with the guidelines provided in FOH 57c03. The form identifies rights available to the recipient of the WH-589 as required by 29 CFR 500.211(c).

(b) Copies

One duplicate (carbon) copy is required for the investigation file.

(c) Preparation

(1) Insert the date that the WH-589 was issued to the recipient of the assessment in the first blank space provided at the top of the WH-589a.

(2) Insert the name(s) of the recipient(s) of the WH-589 in the second blank space provided at the top of the WH-589a.

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division

Migrant and Seasonal Agricultural Worker Protection Act
HEARING REQUEST INFORMATION

Attachment 1 to Civil Money Penalty Notice of Assessment dated _____ served upon _____.

IMPORTANT: YOU HAVE THE RIGHT TO REQUEST A HEARING ON THE DETERMINATION THAT ANY OR ALL OF THE VIOLATION(s) CITED ON THE CIVIL MONEY PENALTY NOTICE OF ASSESSMENT SERVED UPON YOU OCCURRED. Such request must be in writing; must contain specific reasons why you believe that the violation(s) for which you have been charged did not occur; and must be filed within 30 days from the date of the Civil Money Penalty Notice of Assessment that was served upon you. Your request must be filed with the Administrator of the Wage and Hour Division, at the following address:

Administrator, Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

For more expeditious processing, your hearing request may be mailed or delivered to the Wage and Hour Division District Office at the address appearing in the lower right-hand corner of the civil money penalty assessment notice served upon you.

The procedure for filing a request for a hearing is specifically provided in Regulations 29 CFR Part 500.212. If a request for a hearing is not received within the time specified, the determination of the Administrator that the violation(s) identified on the civil money penalty assessment occurred shall become a final and unappealable Order of the Secretary of Labor.

We would like to call to your attention that when a request for a hearing is filed with the Administrator of the Wage and Hour Division, the matter is referred to the Chief Administrative Law Judge. A formal hearing is then scheduled for a final determination with respect to the alleged violation(s). At the hearing you may, by yourself or through an attorney retained by you, present such witnesses, introduce such evidence and establish such facts as you believe will support your position.

If you choose to pay the civil money penalty assessed against you, you must do so within thirty (30) days of the date of the notice. Payment is to be made by certified check or money order, made payable to "Wage and Hour Division, U.S. Department of Labor", and should be delivered or mailed to the Wage and Hour Division at the District Office address appearing in the lower right-hand corner of the assessment notice.

Form WH-589a
January 1991

WH-592 **<u>IMMACT/INRA civil money penalty (CMP) computation worksheet.</u>**

(a) **Purpose**

Form WH-592 is a report form which identifies violations in longshore, specialty occupations, or nurses program investigations. Civil money penalty (CMP) computation is automated in WHISARD. The CMP Computation Worksheet available in WHISARD (b) (7)(E) [redacted]

(b) **Copies**

(b) (7)(E) [redacted]

(c) **Preparation**

(b) (7)(E) [redacted]

[redacted]

(d) **WHISARD form/report**

(b) (7)(E) [redacted]

Civil Money Penalty (CMP) Computation Worksheet

Immigration Act of 1990
Immigration Nursing Relief Act of 1989

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

1. Statute/Program

2. Establishment — Case Number

Establishment Address — Investigation Site

3. If every item in this block applies, no CMP should be computed. To validate that no computation is being made, initial each item in this block then sign and date the form in block 6 below. If any one item does not apply, proceed to block 4.

_____ First INV under program
_____ ER agrees to future compliance
_____ ER agrees to retroactive compliance
_____ Vio(s) not due to misrepresentation
_____ Vio(s) not willful or substantial in nature
_____ Fewer than 5 EEs affected by violation (s)

4. Violation (s) Disclosed

(A) Regulation Citation	(B) CMP Base	(C) Impact Multiplier	(D) Mitigation Factor	(E) Subtotal

5. Total Computed CMP: _____

6. Prepared by:

Investigator _____ Date: _____

Form WH-592
October 1994

WH-601 **<u>Potential H-2A violations checklist.</u>**

(a) Purpose

This form will be used to provide the person investigated with a written record of the areas of potential H-2A violations.

(b) Copies

Two copies shall be prepared in all investigations in which there are H-2A violations: one for the person investigated and one that shall be retained in the investigation file.

(c) Preparation

(1) *Name of person investigated*

The full name of the subject of this investigation should be recorded.

(2) *Potential H-2A violation*

Use the boxes on the left side of the form to record potential H-2A violations.

(3) *Investigator(s)/date*

Enter the name of each Wage and Hour Investigator (WHI)(s) who worked on this investigation and the date that this form is completed and given to the person investigated.

(4) *Name of individual(s) served with Form WH-601*

Enter the name of the individual(s) given the form, and the date given. If possible, have the recipient sign and date the form.

(d) Equivalent form in WHISARD

WH-601 Potential H-2A Violations Checklist.

(e) Preparation

All data relating to the compliance action activities and findings are entered and reported in WHISARD. Print this report in WHISARD and place it in the case file before submitting the case for management review in WHISARD. *See* FOH 54e.

NOT FOR PUBLIC DISTRIBUTION

Potential H-2A Violations Checklist

U.S. Department of Labor
Wage and Hour Division

Name and address of person investigated

A review of your business operations relating to the requirements applicable to the employment of H-2A and other workers under the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act, disclosed the potential violations shown on this preliminary report. The investigation report of the Wage and Hour Investigator(s) will be reviewed to establish whether there were H-2A violations and what, if any, further action will be taken by the Wage and Hour Division.

If it is subsequently determined that civil money penalties are to be assessed against you for any or all of the H-2A violations disclosed, you will be advised by letter concerning specific violations involved and the civil money penalty amounts to be assessed

U.S. Worker Protections	
☐ 01 H-2A workers given preferential treatment	20 CFR 655.122(a)
☐ 02 Unlawful rejection of U.S. workers	20 CFR 655.135(d)
☐ 35 Failed to contact prior U.S. worker(s)	20 CFR 655.153
☐ 36 Position vacant due to strike, layoff, etc.	20 CFR 655.135(b)
☐ 37 Layoff or displacement of U.S. workers	20 CFR 655.135(g)
☐ 38 Failed to accept SWA referrals	20 CFR 655.135(c)
☐ 39 Failed to satisfy requirements of the job order by not stating actual terms and conditions	20 CFR 655.121(a)(3)
Disclosure	
☐ 26 Failed to provide copy of work contract	20 CFR 655.122(q)
☐ 51 Failed to post H-2A poster	20 CFR 655.135(l)
Wage-Related Violations	
☐ 06 Failed to provide housing at no cost	20 CFR 655.122(d)(1)
☐ 09 Unlawful charges for public housing	20 CFR 655.122(d)(4)
☐ 10 Unlawful deposits - bedding/other items	20 CFR 655.122(d)(3)
☐ 13 FTC - Employer provided items requirements	20 CFR 655.122(f)
☐ 14 Failed to provide meals or kitchen facilities	20 CFR 655.122(g)
☐ 15 FTC - Inbound transportation requirements	20 CFR 655.122(h)(1)
☐ 18 FTC - Outbound transportation requirements	20 CFR 655.122(h)(2)
☐ 19 FTC - 3/4 guarantee	20 CFR 655.122(i)
☐ 27 Failed to pay required rate(s) of pay	20 CFR 655.122(l)
☐ 28 Unlawful deductions	20 CFR 655.122(p)
☐ 29 FTC - frequency of pay requirement(s)	20 CFR 655.122(m)
☐ 41 Unlawful cost-shifting	20 CFR 655.135(j)
Recordkeeping	
☐ 20 Failed to record why HW<hours offered	20 CFR 655.122(j)(3)
☐ 22 FTC - earnings records requirements (up to 8 reqs.)	20 CFR 655.122(j)(1)
☐ 23 Failed to make required records available	20 CFR 655.122(j)(2)

Date: Case ID: (FTC - Failure to Comply) WH-601 Page 1

☐ 24 Failed to keep records for 3-years	20 CFR 655.122(j)(4)
☐ 25 FTC - pay statement requirements (up to 8 reqs.)	20 CFR 655.122(k)
Housing Violations	
☐ 04 Failed to provide housing	20 CFR 655.122(d)(1)
☐ 05 Housing failed to meet safety and health requirements	20 CFR 655.122(d)(1)
☐ 05a Housing violation resulting in death/serious injury	20 CFR 655.122(d)(1)
☐ 05b Repeat/willful Housing violation resulting in death/serious injury	20 CFR 655.122(d)(1)
☐ 07 Failed to get housing pre-occupancy inspection	20 CFR 655.122(d)(1)
☐ 08 Family housing required but not provided	20 CFR 655.122(d)(5)
☐ 11 Failed to notify SWA of change in certified housing	20 CFR 655.122(d)(6)
Transportation Violations	
☐ 16 Failed to provide daily transportation to/from worksite	20 CFR 655.122(h)(3)
☐ 17 Transportation failed to meet safety requirements	20 CFR 655.122(h)(4)
☐ 17a Transportation violation resulting in death/serious injury	20 CFR 655.122(h)(4)
☐ 17b Repeat/willful Transportation violation resulting in death/serious injury	20 CFR 655.122(h)(4)
Legal Requirements	
☐ 12 FTC - workers' compensation requirements	20 CFR 655.122(e)
☐ 32 Sought waiver of rights from workers	29 CFR 501.5
☐ 33 Failed to cooperate with investigation	29 CFR 501.7
☐ 40 Failed to follow all applicable federal, state, and local laws and regulations	20 CFR 655.135(e)
☐ 42 Failed to contractually forbid cost-shifting	20 CFR 655.135(k)
☐ 44 Discriminate, intimidate, threaten, etc.	20 CFR 655.135(h)
H-2ALC Only Violations	
☐ 48 H-2ALC provided invalid "fixed-site" information	20 CFR 655.132(b)(1)
☐ 49 H-2ALC provided invalid MSPA FLC information	20 CFR 655.132(b)(2)

Wage and Hour Investigator(s) Date

Date: Case ID: (FTC - Failure to Comply) WH-601 Page 2

WH-1482 <u>Receipt for records removed from employer's premises.</u>

(a) Purpose

This form shall be used to document the receipt of records from an employer and the return of the records to the employer, when the employer's records are removed from the premises for further review, transcription, or copying. *See* FOH 52b01.

(b) Copies

Prepare two copies of the form: one copy is to be placed in the case file and the other copy is to be provided to the employer.

(c) Preparation

The entries are self-explanatory. Note: in both the "(enter name of employer)" line near the top of the form and at the "Employer Name" line at the bottom of the form, the entry needed is the name of entity providing the records and not the person authorizing the release of the records. The Wage and Hour Investigator (WHI) obtaining the records shall complete both copies of the form and shall provide a copy to the employer for the employer's records. Note: a signature from the person authorizing release of the records is required both at the time the records are removed and at the time the records are returned.

(d) Equivalent form or report in WHISARD

None.

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

District Office location _____

_____

Phone number_____

District Office Manager: _____

RECEIPT FOR RECORDS REMOVED FROM EMPLOYER'S PREMISES

On this date _____, **I,** _____, **with the express consent of**
(enter date) (enter WHI name)

_____, **removed the following records from the employer's premises**
(enter name of employer)

for further review, transcription and copying:

(Below enter a detailed description of the records removed)

_____

_____

_____

_____

_____

_____
Signature of WHI

By signing below, I am expressing my consent to permit the Wage and Hour Division to remove records from the premises of my establishment for further review, transcription and copying:

_____ _____
Signature of Owner/Person authorized to permit records to be removed **(Please print name here)**

Date_____ **Employer name** _____

The records listed above were returned to the employer on the date indicated below:

Date _____

_____ _____
Signature of WHI **Signature of Employer/Authorized Representative**

NOT FOR PUBLIC DISTRIBUTION

WH-1504 <u>MSPA and H-2A transportation safety checklist.</u>

(a) Purpose

Use Form WH-1504 to record vehicle inspection results under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and H-2A. The form includes both the *Department of Labor (DOL)* standards at 29 CFR 500.104 and the *Department of Transportation (DOT)* standards at 29 CFR 500.105. To determine which standards should be used for each vehicle inspection, *see* 29 CFR 500.102 for MSPA and 20 CFR 655.122(h)(4) for H-2A.

(b) Content

(1) A separate form should be used for each vehicle inspected.

(2) All identifying items must be completed concerning the vehicle, the vehicle owner, the responsible party, and the driver(s)/operator(s).

(3) *Violation column*

A violation of one or all of the items within each regulatory standard is recorded by a single check mark in this column.

(4) *Regulatory section column*

The form groups items within the same regulatory standard as a single requirement. For example, 29 CFR 504.104(a) contains six distinct items that make up one single requirement while 29 CFR 504.104(l) contains only one item.

(5) *# Exposed column*

Use this space to record the number of workers exposed to each violation recorded on the form.

(6) *Photo exhibit column*

Use this space to identify which photographs correlate to each violation recorded on the form.

(7) *Comments box*

The comment boxes at the end of each regulatory section should be used to record all observations necessary to make an objective determination about the gravity of each violation and its impact on worker safety. This includes the distance traveled, time of day, road conditions, speed of the vehicle, weather conditions, and whether the seats were secure.

(8) The violations and observations recorded on this form should be corroborated in interview statements and with photographs, as necessary.

(c) Copies

NOT FOR PUBLIC DISTRIBUTION

Prepare and place the original checklist(s) in the investigation file.

NOT FOR PUBLIC DISTRIBUTION

Transportation Safety Checklist

U.S. Department of Labor
Wage and Hour Division

Note: This form is intended for use by Wage and Hour Division Investigators when conducting vehicle safety inspections under MSPA or the H-2A program. This document is for internal WHD use only. Unauthorized disclosure of this form is prohibited. Use a separate form for each vehicle inspected.

Identifiers		
WHI:	Date:	
VIN:	Vehicle Owner:	
Make:	Model:	
License Plate #:	State:	
Responsible Party:	MSPA Jointly Responsible Party:	
Driver(s)/Operator(s):	Driver's License #:	Valid Doctor's Certificate:
1)		Yes No
2)		Yes No
3)		Yes No
4)		Yes No

Instructions: Provide an explanation of the violations in the comments section. Make note of factors that will help determine the gravity of each violation and its impact on worker safety (*e.g.* the distance traveled, the time of day, the road conditions (*e.g.* straight or windy, flat or bumpy, highway or local road), the speed of the vehicle, the weather conditions, weather the seats were secure, etc.)

Violation	General Obligations	# Exposed	Photo Exhibit
☐	*MSPA 500.100(a)* • Failure to comply with applicable federal standards • Failure to comply with applicable state standards • Failure to ensure driver has a currently valid driver's license		
☐	*H2A 655.122(h)4)* • Failure to comply with applicable federal standards • Failure to comply with applicable state standards • Failure to comply with applicable local standards • Failure to provide, at a minimum, the safety standards, driver licensure, and vehicle insurance requirements set forth in 29 CFR 500.105 and 29 CFR 500.120-500.128		
Comments:			

WHI. _____

Date: _____

Transportation Safety Checklist

U.S. Department of Labor
Wage and Hour Division

Violation	DOL Standards 500.104: *Passenger automobiles, station wagons*	# Exposed	Photo Exhibit
☐	*500.104(a) External Lights* • Head lights inoperable • Tail lights inoperable • Stop lights inoperable • Back up lights inoperable • Turn signals inoperable • Hazard Warning lights inoperable		
☐	*500.104(b) Brakes* • Inoperable brakes • Leaky brakes		
☐	*500.104(c) Tires* • Inadequate tread depth • Cracks/defects in sidewall		
☐	*500.104(d) Steering* • Steering wheel unsafe • Steering mechanism unsafe		
☐	*500.104(e) Horn* • Inoperable air or electric horn		
☐	*500.104(f) Mirrors* • Rear view mirror missing or broken • Side view mirrors missing or broken		
☐	*500.104(g) Windshield/windows/windshield wipers* • Windshield OR windows missing, broken, cracked, or with opaque obstruction that obscures vision • Wipers missing, inoperable, or otherwise do not allow operator full frontal vision in all weather conditions		
☐	*500.104(h) Fuel system* • Fuel lines leak • Fuel tank leaks • Fuel tank cap is missing		
☐	*500.104(i) Exhaust system* • Exhaust system missing • System leaks into passenger compartment		
☐	*500.104(j) Ventilation* • Windows not operational to allow fresh air to occupants		
☐	*500.104(k) Safe loading* • Vehicle driven when loaded beyond the manufacturer's gross vehicle weight rating		
☐	*500.104(l) Seats* • Seats not provided for each occupant or rider in, or on, the vehicle		
☐	*500.104(m) Handles and latches* • Door handles not provided or maintained • Door latches not provided or maintained		

WHI: _____

Date: _____

Transportation Safety Checklist

U.S. Department of Labor
Wage and Hour Division

Violation	DOL Standards 500.104: *Passenger automobiles, station wagons* (cont'd)	# Exposed	Photo Exhibit
☐	*500.104(n) Passenger compartment* • Compartment floor not free of openings, rusted areas, or other defects • Compartment sides not free of openings, rusted areas, or other defects		
Comments:			

	DOT Standards 500.105 • *Vehicles other than passenger automobiles and station wagons for MSPA purposes* • *All employer-provided transportation under the 2010 H-2A Rule*		
Violation	**Qualification of drivers or operators 500.105(b)(1)**	**# Exposed**	**Photo Exhibit**
☐	*500.105(b)(1)(ii)Minimum physical requirements* • Loss of foot, leg, hand, or arm • Mental, nervous, organic, or functional disease likely to interfere with safe driving • Poor eyesight • Poor hearing • Addicted to the use of narcotics, habit forming drugs, or alcohol • Drives (or requires a person to drive) without a valid physical examination in the previous 36 months • Does not have (or maintain a copy of) a valid, unexpired doctor's certificate		
☐	*500.105(b)(1)(iii) – Minimum age and experience requirements* • Does not meet minimum age (21) • Inadequate driving skill • Insufficient knowledge of regulations • Insufficient knowledge of English • Does not have proper driver's permit		
Comments:			

WHI: _____

Date _____

Transportation Safety Checklist

U.S. Department of Labor
Wage and Hour Division

DOT Standards 500.105 • *Vehicles other than passenger automobiles and station wagons for MSPA purposes* • *All employer-provided transportation under the 2010 H-2A Rule*			
Violation	**Driving of motor vehicles 500.105(b)(2)**	**# Exposed**	**Photo Exhibit**
☐	*500.105(b)(2)(ii) Driving rules to be obeyed* • Vehicle not driven in accordance with the laws, ordinance, & regulations of the jurisdiction in which it is operated		
☐	*500.105(b)(2)(iv) Alcoholic beverages* • Vehicle driven under the influence of alcohol		
☐	*500.105(b)(2)(v) Schedules to conform with speed limits* • Vehicle driven over the speed limit		
☐	*500.105(b)(2)(vi) Equipment and emergency devices not in working order* • Service brakes • Parking brake • Steering mechanism • Lighting devices & reflectors • Tires • Horn • Windshield wiper/wipers • Rear-vision mirror(s) • Coupling devices • Fire extinguisher • Road warning devices		
☐	*500.105(b)(2)(vii) Safe loading* • Improper loading distribution or inadequately secured • Tailgate, tailboard, tarpaulins, doors, equipment, and rigging not securely in place • Objects obscure driver's view, interfere with the movement of arms or legs, prevent access to emergency accessories, or prevent exit from cab • Number of passengers exceeds seating capacity • Passengers not seated		
☐	*500.105(b)(2)(viii) Rest and meal stops* • Rest stops not provided at least once between meal stops • Meal stops more than 6 hours apart • Fewer than 30 minutes given for meal breaks		
☐	*500.105(b)(2)(ix) Kinds of motor vehicles to transport workers* • Workers transported in prohibited vehicle type		
☐	*500.105(b)(2)(x) Limitation on distance* • Transportation not ceased for a period of at least eight consecutive hours when transporting migrants more than 600 miles		
☐	*500.105(b)(2)(xi) Lighting devices and reflectors* • Required lamps or reflectors are obscured by the tailboard • Lighting devices not lighted during darkness		

WHI: _____

Date: _____

Transportation Safety Checklist

U.S. Department of Labor
Wage and Hour Division

DOT Standards 500.105 • *Vehicles other than passenger automobiles and station wagons for MSPA purposes* • *All employer-provided transportation under the 2010 H-2A Rule*			
Violation	**Driving of motor vehicles 500.105(b)(2) (cont'd)**	**# Exposed**	**Photo Exhibit**
☐	*500.105(b)(2)(xii) Ignition of fuel; prevention* • Vehicle fueled when engine running • Driver or another person smokes or exposes an open flame in the vicinity of the vehicle when being fueled • Vehicle fueled while fuel hose not continuously in contact with the intake pipe of fuel tank • Driver or another person engages in an activity likely to result in fire or explosion		
☐	*500.105(b)(2)(xiii) Reserve fuel* • Fuel supply carried on the motor vehicle in an improperly mounted fuel tank or tanks		
☐	*500.105(b)(2)(xiv) Driving by unauthorized person* • Vehicle driven by unauthorized driver		
☐	*500.105(b)(2)(xv) Protection of passengers from weather* • Passengers not protected from inclement weather by use of the top or protective devices		
☐	*500.105(b)(2)(xvi) Unattended vehicles; precautions* • Vehicle left unattended without setting the parking break, chocking the wheels, or taking reasonable precautions to prevent the movement of the vehicle		
☐	*500.105(b)(2)(xvii) Railroad grade crossings; stopping required; sign on rear of vehicle* • Less than a full stop made at railroad crossing • Missing sign on rear of vehicle		
Comments:			
Violation	**Parts and accessories necessary 500.105(b)(3)**	**# Exposed**	**Photo Exhibit**
☐	*500.105(b)(3)(ii) Lighting devices* • Vehicle not equipped with required lights and reflectors		
☐	*500.105(b)(3)(iii) Brakes* • Vehicles not equipped with proper brakes		
☐	*500.105(b)(3)(iv) Coupling devices; fifth wheel mounting & locking* • Fifth wheel coupling devices unsafe/missing		
☐	*500.105(b)(3)(v) Tires* • Unsafe tires used		

WHI: _____

Date. _____

Transportation Safety Checklist

U.S. Department of Labor
Wage and Hour Division

DOL Standards 500.105 • *Vehicles other than passenger automobiles and station wagons for MSPA purposes* • *All employer-provided transportation under the 2010 H-2A Rule*			
Violation	**Parts and accessories necessary 500.105(b)(3) (cont'd)**	**# Exposed**	**Photo Exhibit**
☐	*500.105(b)(3)(vi) Passenger compartment (other than a bus)* • Inadequate floors • Inadequate sides • Nails, screws, splinters present potential injury to passengers • No or inadequate seats for each passenger • Inadequate protection from weather • Inadequate exit(s) from compartment • Inadequate gates/doors • Missing/inadequate ladders or steps • Missing/inadequate hand holds • No/inadequate emergency exit • No means of communication with driver		
☐	*500.105(b)(3)(vii) Protection from the cold* • Exhaust heaters used • Unenclosed flame heaters • Heater fuel leakage • Heater air contamination • Heater not securely fastened to the vehicle • Hours of service; maximum driving time not adhered to • Vehicle not inspected and maintained		
Comments:			

WHI: _____

Date: _____

Chapter 56

FIELD SANITATION AND TEMPORARY LABOR CAMP ENFORCEMENT IN AGRICULTURE UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

Table of Contents

56a INVESTIGATION PRINCIPLES

56a00 Field sanitation policy.
56a01 Justification for investigations.
56a02 Complaint-based investigations.
56a03 Section 9(c) limitation.
56a04 Directed investigations.
56a05 Cooperation with and referrals between agencies.
56a06 Extent of investigation.

56b INVESTIGATOR GUIDANCE

56b00 Initiating investigations.
56b01 Subpoena authority and inspection warrants.
56b02 Forcible interference encountered.
56b03 Release for entry.
56b04 Employer and/or employee participation in inspection.
56b05 Initial conference.
56b06 Employer knowledge.
56b07 Physical inspection.
56b08 Evidence.
56b09 Interviews.
56b10 Final conference and disposition.
56b11 Disposition if final conference cannot be held.
56b12 Special inspection procedures.
56b13 Abatement.

56c POST-INSPECTION PROCEDURES

56c00 Introduction.
56c01 Serious violations.
56c02 Other-than-serious violations.
56c03 Repeat violations.
56c04 Willful violations.
56c05 Combining and grouping of violations.
56c06 Citing violations.
56c07 Gravity of violations.
56c08 Computing recommended OSH Act penalties.
56c09 File preparation and reporting.
56c10 New and unsettled issues.

56d POST-INVESTIGATION PROCEDURES

56d00 Introduction.
56d01 Potential litigation.
56d02 DD and/or ADD actions.
56d03 RA and/or DRA action.
56d04 NO function.
56d05 Installment plans for OSH Act penalties.

56e SANCTIONS

56e00 Introduction.
56e01 Criminal actions.
56e02 OSHA penalties.

56f DOCUMENTS

56f00 Introduction.
56f01 WH-560: OSHA CMP Computation Summary Sheet Occupational Safety and Health Act of 1970 (WH-560).
56f02 WH-561: Citation and Notice of Penalty (WH-561).
56f03 WH-562: OSH Act Field Sanitation Inspection Report (WH-562).
56f04 WH-519b: MSPA and H-2A Housing Safety and Health Checklist (OSHA 1910.142) (WH-519b).
56f05 WH-563: NOTICE of Alleged Imminent Danger (WH-563).
56f06 WH-124: Notice of Violations of Other Laws (WH-124).
56f07 Notification of failure to abate.
56f08 Sample label.
56f09 Sample seal.
56f10 Field sample record.
56f11 Chain-of-custody record.
56f12 Sample letter #1: transmittal of informal agreement.
56f13 Sample letter #2: informal settlement agreement.
56f14 Sample letter #3: notice to employees.
56f15 Sample letter #4: letter to employer if no agreement is reached.
56f16 Sample letter #5: certification to the OSHRC.
56f17 Sample letter #6: referral of documents to the RSOL.
56f18 Sample letter #7: letter to employer regarding abatement certification.
56f19 Sample letter #8: abatement certification letter.
56f20 Sample letter #9: abatement plan or progress report.

56a INVESTIGATION PRINCIPLES

56a00 Field sanitation policy.

FOH 56 sets forth the general principles and policies that shall guide the Wage and Hour Division (WHD) in carrying out its responsibilities under the Occupational Safety and Health Act of 1970 (OSH Act), regulations, and Secretary's Order 5-96 for enforcing the OSH Act field sanitation and temporary labor camp (in agriculture) standards. FOH 56 is a synthesis of the general WHD operational procedures with those statutory provisions, regulatory standards, legal decisions, and interpretive positions that have guided the Occupational Safety and Health Administration (OSHA)'s activities under the OSH Act. It should be understood that this guidance is not meant to cover all situations that might arise (*see* FOH 56c10). As is the case under other laws and standards administered and enforced by the WHD, all those involved with executing responsibilities under the Secretary's Order must exercise sound judgment as to the proper course of action in any given situation.

29 USC 651, *et. seq.*; 29 CFR 1910.142; 29 CFR 1928.110; and OSHA Field Inspection Reference Manual

Benefits of effective enforcement of the OSH Act field sanitation standards are numerous for hand labor agricultural workers. A lack of compliance with these standards causes adverse health effects due to the lack of water for drinking, the lack of water for washing, and the lack of adequate toilet facilities for farm workers engaged in hand labor in the field. A lack of sufficient drinking water increases a field worker's risk of heat stress. Also, a worker who does not have access to potable water would be more likely to drink from a contaminated source. Lack of water for washing increases a worker's risk of illnesses caused by fomites and fecal-oral transmission of disease-causing organisms. Lack of water for washing also puts a worker at higher risk for pesticide-related illnesses, due to the increased length of contact of the chemical with the skin. The lack of toilet facilities is a factor in urinary tract infection due to urine retention, and is also responsible for increasing the field worker's exposure to disease-causing organisms found in feces-contaminated soil.

52 FR 16050-01

56a01 Justification for investigations.

(a) Investigations for field sanitation and temporary labor camp enforcement may be scheduled for any valid reason. However, when scheduling investigations, it must be kept in mind that section 9(c) of the OSH Act limits what can be cited to violations that occurred within 6 months of the issuance of the citation.

(b) (7)(E)

[redacted]

(b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

56a02 **Complaint-based investigations.**

(b) (7)(E) [redacted]

56a03 **Section 9(c) limitation.**

Section 9(c) of the OSH Act plainly limits the time within which the Department of Labor (DOL) may cite an employer for a violation and compel compliance (*i.e.*, issue a citation). Section 9(c) states that "[n]o citation may be issued... after the expiration of six months following the occurrence of any violation." The significance of the timely issuance of a citation cannot be overstated since it is the vehicle by which an employer is officially notified of the occurrence of a violation, the period within which the violation must be abated, the proposed penalty (if applicable), and the employer's notice-of-contest rights. Neither the timely filing of a complaint nor an agreement from the employer and/or other parties tolls this limitation. Therefore, all complaints accepted for investigation must be handled expeditiously.

OSH Act section 9(c)

56a04 Directed investigations.

(b) (7)(E) [redacted]

56a05 Cooperation with and referrals between agencies.

(a) As under other programs enforced by the WHD, WHIs are expected to cooperate with representatives of other agencies to the fullest extent possible without compromising the investigation. Bear in mind, however, that section 15 of the OSH Act requires that all information reported to the WHD, or otherwise obtained during the course of an inspection or proceeding, which contains or might reveal a trade secret as referred to in section 1905 of Title 18 of the United States (U.S.) Code, must be considered confidential (*see* 29 USC 664).

(b) (b) (7)(E) [redacted]

(c) Where the employer fails to provide required verification of abatement pursuant to 29 CFR 1903.19 (*see* 62 FR 15324), the failure to do so must be fully documented in the case file, and referred to the OSHA area office (AO) nearest the worksite for citation and further action (*see* FOH 36f00(n), FOH 56c06, and FOH 56d02). (b) (7)(E) [redacted]

(d) *All other referrals* should be in writing or reduced to writing, and should (at a minimum) provide the following information:

(1) The name and address of the employer

(2) The location where the potential violation was observed

(3) The date the potential violation was observed

(4) The number of employees engaged in hand labor operations at the site (if the referral is regarding any alleged field sanitation standard violations)

(5) A detailed description of the potential violation

(6) The date of the referral, and a request that the agency to which the referral was made respond to the WHD in writing, advising the WHD as to the results and disposition of the referral

(7) The WHD case number

Normally, WH-124 (*see* FOH 54: WH-124) should be used to make the referral. For field sanitation and temporary labor camp referrals to State Plan state agencies**,** two copies of each referral should be made: one for the case file**,** and one to be forwarded to the National Office (NO), Office of Policy (OP), Division of Enforcement Policy and Procedures (DEPP), Immigration/Farm Labor Branch. The original of WH-124 should be immediately forwarded to the agency to which the referral is being made. In addition, a copy of any response provided by the agency to which the referral was made should be forwarded to the NO, OP, DEPP, Immigration/Farm Labor Branch. (b) (7)(E) [redacted] Branch will follow up on field sanitation [redacted]
(b) (7)(E) [redacted]
(b) (7)(E) [redacted]

56a06 <u>Extent of investigation.</u>

(a) General

For the purpose of field sanitation and temporary labor camp enforcement, the term "extent of investigation" refers to both the period covered by the investigation and its scope.

(b) Period covered

(b) (7)(E) [redacted]

[redacted]

(c) Scope of investigation

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

(d) Jurisdiction: State Plan states

If a WHI observes apparent violations of either the OSH Act field sanitation or temporary labor camps (unless the temporary labor camp standards are being enforced by the WHD under the MSPA or the H-2A program) standards in a State Plan state that has retained jurisdiction, immediate referral to the appropriate state agency shall be made (*see* FOH 32a06(b)).

(e) Joint employment

(b) (7)(E) [redacted]

56b INVESTIGATOR GUIDANCE

56b00 Initiating investigations.

(a) Critically, section 17(f) of the OSH Act provides that "[a]ny person who gives advance notice of any inspection to be conducted under this Act, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both." *This prohibition applies to "any person," including federal or local government employees. Therefore, do not contact the employer in advance of the inspection.*

(b) Other than the above directive, (b) (7)(E) [redacted]

(c) Time of day for conducting investigations

(b) (7)(E) [redacted]

(d) Presenting credentials

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

56b01 <u>Subpoena authority and inspection warrants.</u>

(a) Background

Regarding administrative subpoenas, whenever there is a reasonable need for records, documents, testimony, and/or other supporting evidence necessary for completing an investigation, an administrative subpoena may be issued according to the guidelines set forth below. (b) (7)(E) [redacted]

(b) Subpoena authority

Section 8(b) of the OSH Act provides that the Secretary may issue administrative subpoenas requiring the attendance and testimony of witnesses and the production of evidence under oath. Such subpoenas are enforceable in the appropriate U.S. district court.

Secretary's Order 5-96 (the same order delegating the authority to enforce the OSH Act field sanitation and temporary labor camp standards to the Employee Standards Administration (ESA)) delegated the authority to issue administrative subpoenas under section 8(b) of the OSH Act to the RA level. The effective date of this delegation was 02/03/1997. (b) (7) [redacted]

(c) Inspection warrants

(1) Section 8 of the OSH Act provides for the entry, during regular working hours and at other reasonable times, and within reasonable limits, of any place of employment covered under the act for the purpose of conducting an inspection. The employer may, however, assert a Constitutional right under the Fourth Amendment to insist that a warrant authorizing the inspection be obtained.

(b) (7)(E)

(3) (b) (7)(E)

(5) (b) (7)(E)

a. The district office (DO), telephone number, and name of the DD and/or ADD involved

b. The name of the WHI attempting inspection, and the standard(s) under which inspection is being attempted

c. The legal name and address of the establishment (including city, state, and county (and include site location(s), if different from mailing address))

d. The estimated number of employees at the inspection site

e. The Standard Industrial Classification (SIC) code for the business

f. A summary of all facts concerning the refusal of entry or limitation of inspection, including the following:

1. Date and time of entry

2. Date and time of denial

3. The stage of the inspection at which denial occurred (*e.g.*, entry, opening conference, actual inspection, etc.)

g. A narrative of all actions taken by the WHI leading up to, during, and after refusal, including the following information:

1. Full name and title of the person to whom the WHI presented credentials

2. Full name and title of person(s) who refused entry

3. Reason(s), if any, stated for the denial by person(s) refusing entry

4. Response, if any, by the WHI to FOH 56b01(c)(5)g.3. above

5. Name and address of witnesses to denial of entry

h. Any and all previous inspection information under the OSH Act, including copies of previous citations

i. Any and all information regarding previous requests for warrants for the subject business

j. As much information regarding possible findings of the current inspection as is available

k. Other pertinent information, such as a description of the workplace or facilities

l. A description of investigative techniques that may be required during the inspection (*e.g.*, samples, photographs, videotaping, reviewing records, interviewing employees, etc.)

m. (b) (7)(E) [redacted]

D. (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

D. (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

6. If the warrant is obtained, the WHI is authorized to conduct the investigation in accordance with the provisions of the warrant. All questions from the employer concerning reasonableness of any aspect of the investigation conducted pursuant to the warrant shall be referred to the DD and/or ADD.

7. (b) (7)(E) [redacted]

8. (b) (7)(E) [redacted]

9. Refusal to comply with warrant

When, upon presenting the warrant, an apparent refusal to permit entry or investigation is encountered, (b) (7)(E) [redacted]

56b02 <u>Forcible interference encountered.</u>

(b) (7)(E) [redacted]

56b03 Release for entry.

(b) (7)(E) [redacted]

56b04 Employer and/or employee participation in inspection.

Section 8(e) of the OSH Act provides that a representative of the employer, and an employee representative (if any) must be afforded the opportunity to accompany the WHI during the physical inspection at the site. (b) (7)(E) [redacted]

56b05 Initial conference.

At the beginning of the initial conference, the WHI should attempt to inform all affected employers about the purpose of the investigation. In general, the WHI should 1) outline the scope of the investigation, including that it may be necessary to review certain employment records of employees (and other related documents); 2) conduct private employee interviews; and 3) conduct a physical inspection.

The employer(s) should also be notified during the initial conference that if violations are found, immediate abatement is a factor considered by the DOL in determining the appropriateness of assessing a civil money penalty (CMP). The employer should also be informed that there are no abatement verification requirements for a violation that is corrected within 24 hours after it is identified and where correction is observed (*i.e.*, visually verified) by the WHI.

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

56b06 **Employer knowledge.**

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

56b07 Physical inspection.

(b) (7)(E) [redacted]

[redacted]

[redacted]

56b08 Evidence.

(a) General

It is essential that the WHI thoroughly document each alleged violation *at the time the violation is observed.* (b) (7)(E) [redacted]

(b) Record all facts

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

[redacted]

(c) Collecting samples

(b) (7)(E) [redacted]

(1) *General*

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(2) *Drinking Water Sample Collection*

(b) (7)(E) [redacted]

a. Containers

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

- (b) (7)(E) [redacted]

  [redacted]

  [redacted]

  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

  [redacted]

- [redacted]

  [redacted]

(f) Photographs and/or videotapes

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

56b09 Interviews.

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

56b10 Final conference and disposition.

(b) (7)(E) [redacted]

[redacted]

56b11 Disposition if final conference cannot be held.

(b) (7)(E) [redacted]

[redacted]

56b12 Special inspection procedures.

(a) Imminent danger

(1) During the course of the WHD investigation and post-investigation activity, it is likely that most violations will be abated as a consequence of either action by the WHD or by some other administrative action, such as a formal hearing before an OSHRC hearing examiner. However, circumstances posing an *imminent danger* may be encountered by the WHI, and if so, *immediate* action is required to eliminate the danger.

(b) (7)(E) [redacted]

(2) *Imminent danger described*

Section 13(a) of the OSH Act describes an imminent danger as "any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."

(b) (7)(E) [redacted]

- [redacted]
- [redacted]

[redacted]

(b) (7)(E) [redacted]

- [redacted]
  - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]

    [redacted]

    [redacted]
  - [redacted]

    [redacted]
  - [redacted]
  - [redacted] section 13 of the act gives the U.S. district courts jurisdiction to restrain any condition or practice, which is an *imminent danger* to employees; (b) (7)(E) [redacted]

- (b) (7)(E) [redacted]
- [redacted]

(b) Fatality and/or catastrophe investigations

(b) (7)(E) [redacted]

Definitions:

(1) Fatality: an employee death resulting from a work-related incident or exposure; in general, from an accident or illness caused by or related to a workplace hazard.

(2) Catastrophe: the hospitalization of three or more employees resulting from a work-related incident; in general, from an accident or illness caused by a workplace hazard (*e.g.*, no drinking water on an extremely hot, humid day).

(c) Rescue operations

(b) (7)(E) [redacted] This is the responsibility of the employer and/or of local political subdivisions or state agencies. (b) (7)(E) [redacted]

OSHA Field Inspection Reference Manual Chapter II (B) and Wage and Hour Memorandum (August 29, 2007)

56b13 <u>Abatement.</u>

"Abatement verification" refers to regulatory standards enforced by the OSHA, which require a *cited* employer to provide certification (and in certain instances, documentation) demonstrating that each cited violation has been abated (*see* 29 CFR 1903.19). The WHD's role in the abatement verification process consists of 1) informing employers of the requirements (*see* (b) (7)(E) [redacted]); and 2) referring allegations of non-compliance with the abatement verification requirements to the OSHA for further action (*see* (b) (7)(E) [redacted]

(a) Abatement period

The WHI must seek the immediate abatement of all conditions deemed an imminent danger (*see* (b) (7)(E)).

(b) Establishing a reasonable period

(b) (7)(E) [redacted]

(1) *Field sanitation*

(b) (7)(E) [redacted].

OSHA Instruction CPL 2-2.42 06/22/1992

(2) *Temporary labor camps*

(b) (7)(E) [redacted]

(c) Notations in the case file

(b) (7)(E) [redacted]

[redacted]

[redacted]

(d) Abatement period must be a specific calendar date

The DD and/or ADD shall set forth in the citation a specific date for abatement to be completed for each apparent violation. Abatement dates must be stated on the citation using a specific date, not a number of days. When the abatement period is very short (*i.e.*, 5 working days or less) and it is uncertain when the employer will receive the citation, the abatement date shall be set to allow for a mail delay and the abatement time.

OSHA Field Inspection Reference Manual, Chapter IV (A)

(e) Abatement during inspection

When abatement has occurred *during* the investigation, the abatement period noted in the case file and on the citation shall be *"Corrected During Inspection."* Under such circumstances (where abatement was affected during the investigation and the citation reflects this fact), the employer is relieved from complying with the abatement verification requirements contained in 29 CFR 1903.

OSHA Field Inspection Reference Manual, Chapter IV (A)

(f) Abatement verification: certification

(b) (7)(E) [redacted]

(g) Abatement when there is no appeal

If the employer does not contest the citation or abatement period, he or she must abide by the date set forth in the citation even if such date is within the 15-working-day notice of contest period. Therefore, when the abatement period designated in the citation is 15 working days or less, and a notice of contest has not been filed, a follow-up inspection of the worksite may be conducted to determine whether abatement occurred during the time period set forth in the citation. A Failure to Abate Notice may be issued by the OSHA based on the WHI's findings (b) (7)(E) [redacted]

(h) Appeals by employer or employee

If the employer timely filed a notice of contest to the initial citation, the abatement period does not begin to run until the entry of a final order by the OSHRC. If a follow-up investigation has been initiated during the contest period and the employer timely contests the citation, (b) (7)(E) [redacted] However, if an imminent danger exists, a follow-up investigation may be conducted and appropriate proceedings must be initiated. (b) (7)(E) [redacted]

If the employer contests either 1) the period set for abatement, or 2) the citation itself, the abatement period does not begin until there has been an affirmation (*i.e.*, order from the OSHRC) of the citation and abatement period. In contested cases, the abatement period begins when a final order of the OSHRC is issued. The hearing examiner's decision becomes a final order of the OSHRC 30 days after the docketing of the decision affirming the item, unless the decision is directed for review, in which case it is final when the Occupational Safety and Health Commissioners issue a decision affirming the order. *The abatement period continues to run while an appeal to the U.S. court of appeals is pending, unless the employer is specifically granted a stay.*

(b) (7)(E) [redacted]

(i) Failure to abate after contest

If an employer contests an abatement date in good faith, a Failure to Abate Notice shall not be issued for the item contested, until a final order affirming a date is entered, the new abatement period, if any, has run, and the employer still fails to abate.

29 CFR 1903.19 and OSHA Field Inspection Reference Manual, Chapter IV

N

N

56c POST INSPECTION PROCEDURES

56c00 Introduction.

The basis for OSH Act violations can be found in section 5(a)(2), which states that employers have a responsibility to comply with the standards promulgated under the act. The specific standards and regulations enforced by the WHD are found in 29 CFR 1928.110 and 29 CFR 1910.142. When it is determined that an employer has failed to comply with the OSH Act or a particular agricultural field sanitation or temporary labor camp standard, each and every documented violation must be cited. The most specific subdivision of the standard shall be used for citing violations.

OSH Act and OSHA Field Inspection Reference Manual, Chapter III (C)

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

[redacted]

- [redacted]

- Type of violation
  - Serious or other-than-serious
  - Repeat
  - Willful
- Citation determined
- Proposed penalty

- Gravity of violation
  - Severity
  - Probability
- Violation cited
- Penalty issued

56c01 **Serious violations.**

The first classification of a violation will either be serious or other-than-serious.

(a) The term "serious" has a different meaning under the OSH Act than under the MSPA, and therefore, the determination of whether a violation is serious when conducting field sanitation or temporary labor camp inspections must be made using the OSH Act criteria. Section 17(k) of the OSH Act provides that *"a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." See* (b) (7)(E) [redacted]

Four elements are considered to determine if a violation is serious:

(1) The types of accident or health hazard exposure that the violated standard is designed to prevent

(2) The most serious injury or illness that could reasonably be expected to result from the type of accident or health hazard exposure identified in Step 1

(3) Whether the results of the injury or illness identified in Step 2 could include death or serious physical harm. Serious physical harm is defined as:

a. Impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic, or acute. Injuries involving such impairment would usually require treatment by a medical doctor.

b. Illnesses that could shorten life or significantly reduce physical or mental efficiency by inhibiting the normal function of a part of the body.

(4) Whether the employer knew, or with the exercise of reasonable diligence, could have known of the presence of the hazardous condition

a. In this regard, the supervisor represents the employer, and a supervisor's knowledge of the hazardous condition amounts to employer knowledge.

b. In cases where the employer may contend that the supervisor's own conduct constitutes an isolated event of employee misconduct, the WHI shall attempt to determine the extent to which the supervisor was trained and supervised so as to prevent such conduct, and how the employer enforces the rule.

c. If, after reasonable attempts to do so, it cannot be determined that the employer has actual knowledge of the hazardous condition, the knowledge requirement is met if the WHI is satisfied that the employer could have known through the exercise of reasonable diligence. (b) (7)(E) [redacted]

OSHA Field Inspection Reference Manual

56c02 Other-than-serious violations.

(b) (7)(E) [redacted]

[redacted]

56c03 Repeat violations.

The second aspect of a violation that needs to be considered is whether or not it is a repeat violation. An employer may be cited for a repeated violation if that employer has been cited previously for a *substantially similar condition*, and the citation has become a final order.

(a) If the requirements violated were *identical*, they are clearly substantially similar, and the current condition is a repeat violation.

(b) In some circumstances, similar conditions may exist even though different standards are violated. Where this is found to be the case, (b) (7)(E) [redacted]

The following is an example of circumstances in which a substantially similar condition could be deemed to exist and which might warrant citing the current violation as a repeat violation:

Scenario:

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

(c) Although there are no statutory or regulatory limitations upon the length of time that a citation may serve as a basis for the assertion of a repeat violation, the following policy is to be used in order to ensure uniformity:

(1) A violation may be cited as a repeat violation if the citation is issued within 3 years of the final order of the previous citation; or

(2) The citation is issued within 3 years of the final abatement date of that citation, whichever is later.

When a violation is found during an inspection, and a repeated citation has been issued for a substantially similar condition that meets the above time limitations, the violation may be classified as a repeat violation with a corresponding increase in penalty (*see* (b) (7)(E) [redacted].

(d) Special circumstances involving repeat violations

(1) *High gravity serious violations*

Anytime that a high gravity serious violation is found (*see* (b) (7)(E) [redacted]

(2) *Lesser gravity serious violations*

If a lesser gravity serious violation is found (*see* (b) (7)(E) [redacted]

(b) (7)(E)
[redacted]

(e) Citing a violation as repeat vs. willful

Repeat violations differ from willful violations in that they may result from an inadvertent, accidental, or ordinarily negligent act. Where a repeated violation also meets the criteria for willful (but not clearly so), a citation for a repeated violation should normally be issued.

(f) The difference between a repeat violation and a failure to abate

A failure to abate exists when an item of equipment or a condition previously cited was never brought into compliance and is noted at a later inspection. However, if the violation was not continuous (*i.e.*, if it had been corrected and then recurred), the subsequent occurrence is a repeat violation.

(g) The WHI must ensure that the employer is fully informed of the previous violation serving as a basis for a violation being deemed repeat in nature. In addition, WH-561 should contain the following language to inform the employer why the violation is deemed repeat:

(Employer or Company Name) was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent standard (name previously cited standard) which was contained in the WHD (or OSHA) inspection number _____, citation number _____, item number _____, issued on (date), with respect to a workplace located at _____.

OSHA Field Inspection Reference Manual, Chapter III (C)(2)(f)

56c04 <u>Willful violations.</u>

The third and final determination that needs to be made is whether or not the violation is a willful violation. A willful violation of the OSH Act exists where the evidence shows either an intentional and knowing violation of the statute or plain indifference to its requirements.

(a) An employer committed an intentional and knowing violation if:

(1) an employer representative was aware of an applicable standard, and was also aware of a condition or practice in violation of those requirements, and did not abate the hazard; or

(2) an employer representative was not aware of the requirements of the regulation, but was aware of a comparable legal requirement (*e.g.*, state or local law), and was also aware of a condition or practice in violation of that requirement, and did not abate the hazard.

(b) The employer committed a violation with plain indifference to the law where:

(1) higher management officials were aware of an OSH Act requirement applicable to the company's business, but made little or no effort to communicate the requirement to lower level supervisors and employees;

(2) company officials were aware of a continuing compliance problem, but made little or no effort to avoid violations;

(3) an employer representative was not aware of any legal requirement, but was aware that a condition or practice was hazardous to the safety or health of employees, and made little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, media coverage, or in some cases, complaints of employees or their representatives; or

(4) in particularly flagrant situations, willfulness can be found despite lack of knowledge of either a legal requirement or the existence of a hazard if the circumstances show that the employer would have placed no importance on such knowledge even if he or she had possessed it, or had no concern for the health or safety of employees.

(c) It is not necessary that the violation be committed with a bad purpose or an evil intent to be deemed willful. It is sufficient that the violation was deliberate, voluntary, or intentional as distinguished from inadvertent, accidental, or ordinarily negligent.

(d) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

[redacted]

56c05 **<u>Combining and grouping of violations.</u>**

(a) **Combining**

If multiple violations of the same regulatory requirement are found at a site during the inspection, the violations generally should be combined into one item on the citation. The following example illustrates this concept:

(b) (7)(E) [redacted]

OSHA Field Inspection Reference Manual, Chapter III (C)(5)

(b) Grouping

When a source of a hazard is identified, which involves interrelated violations of separate regulatory requirements, the violations may be grouped into a single item. The following situations normally call for grouping violations:

(1) *Grouping related violations*

When the WHI believes that violations, classified either as serious or as other-than-serious, are so closely related as to constitute a single hazardous condition, the related violations can be grouped. The following example illustrates what is meant by grouping related violations:

(b) (7)(E) [redacted]

(2) *Grouping other-than-serious violations where so doing results in a serious violation*

When two or more separate violations are found, which, if considered individually are other-than-serious violations, but if considered together reflect a substantial probability of death or serious physical harm, then the violations must be grouped. The following example illustrates this concept:

(b) (7)(E)

[redacted]

[redacted]

[redacted]

(3) *Where grouping results in higher gravity other-than-serious violation*

Where the WHI finds that a number of other-than-serious violations are present with respect to the same drinking water, toilet, or handwashing facility, which, when considered together, affect the overall gravity of possible illness resulting from the combined violations, the violations should be grouped.

(b) (7) (E) [redacted]

OSHA Field Inspection Reference Manual, Chapter III (C)(5)(b)

(c) When not to group

The following are examples of times when grouping is normally inappropriate:

(1) *Multiple inspections*

Violations discovered in multiple inspections of a single establishment or worksite may not be grouped. However, an inspection in the same establishment or at the same worksite shall be considered a single inspection even if it continues for a period

of more than 1 day or is discontinued with the intention of resuming it after a short period of time.

(2) *Separate establishments of the same employer*

Where inspections are conducted, either at the same time or different times, at two establishments of the same employer and instances of the same violation are discovered during each inspection, the employer shall be issued separate citations for each establishment. The violations should not be grouped.

(3) *Egregious violations*

Violations that are proposed as violation-by-violation citations because they are particularly egregious shall not normally be combined or grouped.

OSHA Field Inspection Reference Manual, Chapter III (C)(5)(c)

56c06 **Citing violations.**

(b) (7)(E) [redacted]

Section 9 of the OSH Act authorizes the Secretary or authorized representative to issue a citation to the employer if it failed to comply with the OSH Act or any standard, rule, or order promulgated under the OSH Act. Section 9(c) of the OSH Act states that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." This statutory limitation is not flexible; therefore, it is imperative that a timely issuance of a citation be made since it is the vehicle by which an employer is officially notified of the occurrence of a violation, the period within which the violation must be abated, the proposed penalty (if applicable), and the employer's notice-of-contest rights.

56c07 **Gravity of violations.**

(a) (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(1) *Categorization*

Greater probability results when the likelihood that an injury or illness will occur is judged to be relatively high. Lesser probability results when the likelihood that an injury or illness will occur is judged to be relatively low.

(2) Violations

The following circumstances may normally be considered when violations likely to result in injury or illness are involved: number of workers exposed; frequency of exposure or duration of employee overexposure to contaminants; employee proximity to the hazardous conditions; use of appropriate personal protective equipment; medical surveillance program; youth and inexperienced workers, especially those under 18 years old; and/or other pertinent working conditions.

(3) Final probability assessment

All of the factors outlined above shall be considered together in arriving at a final probability assessment. When strict adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the probability may be adjusted. Such decisions shall be adequately documented in the case file.

OSHA Field Inspection Reference Manual

56c08 **Computing recommended OSH Act penalties.**

Penalties that are assessed for violations of field sanitation and temporary labor camp standards are referred to as OSH Act penalties, rather than CMPs. Section 17 of the OSH Act provides for the assessment of penalties for violations of the act, or any standard, rule, order, or regulation promulgated pursuant to the act. The statute fixes different penalty limitations for different types of violations up to a maximum of $70,000.00 for each violation in cases where an employer willfully or repeatedly violates a requirement. The statutory limitations for the penalties can be found in section 17 of the OSH Act, and also are used as the base amounts in the penalty computation methodology (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

56c09 **File preparation and reporting.**

OSH Act compliance actions shall be entered in the WHISARD system.

A standard four-part narrative report shall be prepared for each case. The narrative report must fully and accurately describe:

(a) Coverage

Coverage is the basis upon which coverage asserted is both statutory and regulatory. The employer should be clearly identified. Describe the types of crops and types of activities involved with the crops, such as planting, harvesting, weeding, etc.; where the crops were shipped; and the number of employees on the date of inspection engaged in hand labor in the field.

(b) Exemptions

Exemptions: whether there is an applicable exception (field sanitation only); the terrain exception contained in 29 CFR 1928.110(c)(2)(iv) and the 3-hour exception under 29 CFR 1928.110(c)(2)(v) should be discussed.

(c) Status of compliance

Status of compliance: the employer's status of compliance (including, in violation cases, a discussion of the evidence supporting each finding of an apparent violation); and it is recommended that the compliance status be stated for each standard, including drinking water, toilet facilities, handwashing facilities, any costs, and the existence of any training. Any aggravating factors need to be mentioned as well.

(d) Disposition

Disposition: along with the WHI's recommendation(s) for post-investigation processing, an explanation of how the penalty was derived (*e.g.*, serious, repeat, willful, gravity) is suggested.

All evidence in the file should be identified and organized in accordance with general file arrangement principles outlined in FOH 54, FOH 80, and elsewhere.

56c10 <u>New and unsettled issues.</u>

All circumstances or situations involving novel or unsettled issues must be referred to the NO via the RO.

56d POST INVESTIGATION PROCEDURES

56d00 Introduction.

This section describes procedures to be followed by the DD and/or ADD and the RA and/or DRA following an investigation under the OSH Act when violations are found. When violations alleged by a complainant are not substantiated, the DD and/or ADD shall notify the complainant in writing of such determination. (b) (7)(E) [redacted]

FOH 56d also covers procedures to be followed when a notice of intention to contest is submitted (*i.e.*, a hearing is requested), when an employer fails to correct a cited violation, or when an employer fails to certify that a violation has been abated.

56d01 Potential litigation.

Every investigation in which a violation is disclosed is to be developed as a potential litigation case. To the extent necessary to fully develop the case, informal joint review committee (JRC) procedures should be used. Upon completion of the case, a formal JRC should be made. However, if the investigation involved a fatality, an imminent danger, or any high-gravity serious violation, (b) (7)(E) [redacted]

56d02 DD and/or ADD actions.

Upon receipt, the DD and/or ADD shall review the investigation file. If the contents of the file demonstrate that the employer has violated *any* field sanitation or temporary labor camp standard, the DD and/or ADD *must* issue a citation, *even if the employer immediately abates or initiates steps to abate the alleged violation(s)*. If an OSHA penalty is determined to be appropriate, it is assessed at the same time that a citation is issued. Because of the 15-working-day period the employer has after receipt of notice of citation and penalty, (b) (b) (7)(E) [redacted]

After citing any violations and assessing any OSHA penalty, the DD and/or ADD must verify that any violations were abated. The employer may also formally request contest the citation and/or penalty through an OSHRC hearing, or they may request that the citation and/or penalty by amended informally. The specific procedures that need to be followed for citing, assessing, contesting, and resolving informally are detailed below.

(a) Citation and penalty assessment

(1) Citing a violation and assessing an OSHA penalty are done simultaneously using WH-561.

A citation is the document used to notify an employer that the WHD has determined that a violation of the field sanitation and/or temporary labor camp standard has occurred (*see* FOH 54: WH-561). The citation can be viewed as somewhat analogous to, for example, a determination or assessment letter under the MSPA. However, unlike what frequently occurs under the MSPA and other programs enforced by the WHD, a citation *must* be issued by the DD and/or ADD for each case in which a violation was disclosed, regardless of whether a CMP is proposed or whether the violation was abated (*see* FOH 56c01).

The citation must specify the violation(s), the abatement period(s) within which the violation(s) must be remedied, and the proposed CMPs (if any). The citation does not become a final order until either 15 working days to contest (*e.g.*, request a hearing) have elapsed, or a final order by the OSHRC has been entered. The citation form that will be used by the WHD in carrying out its OSH Act responsibilities is WH-561 (*see* FOH 56f02 and FOH 54: WH-561).

(2) Every citation and penalty assessment must state that the issuance of a citation and penalty assessment does not constitute a finding that a violation of the OSH Act has occurred, unless there is a failure to contest the citation or penalty, or, if contested, unless the citation and penalty are affirmed by the OSHRC (language to this effect appears on WH-561 (*see* FOH 56f02)).

(3) All citations and penalty assessment must be issued as soon as reasonably possible. However, no citation or penalty assessment may be issued after 6 months following the occurrence of any violation.

(4) Each citation must describe in detail the nature of the violation(s); reference the standard alleged to have been violated; identify the penalty amount (if any) being assessed for the violation; and set reasonable time(s) for abatement of the alleged violation. Note: if the violation(s) were abated immediately, the citation should be annotated to read, “Corrected During Inspection.”

Standard violation descriptions for field sanitation violations can be found in FOH 54: WH-561. These descriptions should be used whenever possible to ensure consistency and adequacy of content.

(5) No citation may be issued to an employer because of a rescue activity undertaken by an employee of that employer with respect to an individual in imminent danger except under circumstances specified in 29 CFR 1903.14(f). It is unlikely that such a circumstance will be encountered when conducting field sanitation and temporary labor camp enforcement, but WHIs should remain alert to the possibility of such activity.

(b) Abatement verification

Due to the short duration of hand labor field operations, the abatement period shall be the shortest possible interval with particular emphasis by the WHI given to immediate abatement. However, when that is not possible, the following guidelines shall be followed by the DD and/or ADD.

OSHA Instruction CPL 2-2.42

(1) *Employer certification*

(b) (7)(E) [redacted] OSHA regulations at 29 CFR 1903.19 establish a uniform process by which an employer cited for any violation must certify that the violation has been abated. (b) (7)(E) [redacted] Generally, any employer cited for a violation under the OSH Act must certify within 10 calendar days after the abatement date that each cited violation has been abated 7E [redacted] (b) (7)(E) [redacted]

The only exception to this general rule is for situations in which, during the on-site portion of the case, the WHI observes (within 24 hours after a violation is identified) that abatement has occurred *and* it is noted on the citation that abatement occurred. (b) (7)(E) [redacted]

The employer's certification that abatement has taken place must include (for each cited violation):

a. the date and method of abatement,

b. statement that affected employees and their representatives have been informed of the abatement,

c. the employer's name and address,

d. the inspection number to which the submission relates,

e. the citation and item numbers to which the submission relates,

f. a statement that the information submitted is accurate, and

g. the signature of the employer or employer's authorized representative.

The abatement date is the date initially set forth in the citation for abatement (or the date established in an informal settlement agreement), but the date is extended if there is litigation. *See* 29 CFR 1903.19(b)(2) and 29 CFR 1903.19(b)(4).

(2) Additional documentation for certain violations

The employer is also required to submit abatement documentation for each citation violation item which is:

a. willful;

b. repeated;

c. high-gravity and serious (*see* (b) (7)(E) [redacted]); or

d. low- or medium-gravity serious (*see* FOH 54: WH-560) where, in the past 10 years, the employer has received a citation for a willful violation, or a failure to abate notification, or has a history of compliance violations that resulted in a fatality or in serious physical harm to an employee.

For those citation items in categories FOH 56d02(b)(2)c. -d. above, the words "abatement documentation required" must be written on the citation. Abatement documentation includes, but is not limited to, evidence of the purchase or repair of equipment, photographic or video evidence of abatement, or other written records. The terms "verification" and "abatement verification" include both certification and any required documentation.

[redacted] (b) (7)(E) [redacted]

(4) Referrals to OSHA for failure to verify

Referrals must be in writing, must contain a recommendation that the employer be cited, and must contain the following information:

a. Information describing the employer (*e.g.*, name, address, etc.)

b. A statement of the basis upon which coverage is asserted

c. A copy of the issued citation(s) and information on the finality of the citation (including dates)

d. A statement of each attempt to obtain from the employer verification that the violation has been abated, and a copy of each letter sent to the employer regarding abatement verification

e. Copies of any documents submitted by the employer where abatement verification is deemed inadequate

f. Information about any other violations of 29 CFR 1903.19

g. The WHD case number

The OSHA area director will notify the WHD as to the disposition of the abatement verification case referral.

(c) Request for review by the OSHRC after citation issued

(1) Any employer to whom a citation has been issued may contest such citation or proposed penalty in writing before the OSHRC.

a. Such notice of contest shall be sent to the DD and/or ADD and postmarked within 15 working days of the receipt by the employer of the citation or notice of proposed penalty; and

b. Such notice of contest shall specify whether it is directed to the citation, the proposed penalty, or both.

(2) (b) (7)(E) [redacted] may file a written notice with the DD and/or ADD asserting that the period of time fixed in the citation for the abatement of the violation is unreasonable. Such notice shall be postmarked within 15 working days of the receipt by the employer of the written notice of proposed penalty.

(d) Failure to correct a violation for which a citation has been issued

(b) (7)(E) [redacted]

(1) The period for the correction of a cited violation does not begin to run until the entry of a final order of the OSHRC in the case of any review proceedings initiated by the employer in good faith and not solely for delay or avoidance of penalties.

(2) Each notification of failure to correct a violation and of proposed additional penalty shall state that it shall be deemed to be the final order of the OSHRC and not subject to review by any court or agency unless, within 15 working days from the date of receipt of such notification, the employer notifies the DD and/or ADD in writing that

he or she intends to contest the notification or the proposed additional penalty before the OSHRC.

Any employer receiving a notification of failure to correct a violation and of proposed additional penalty may submit a notice of contest to the DD and/or ADD. Such notice of contest shall be postmarked within 15 working days of the receipt by the employer of the notification of failure to correct an alleged violation and of proposed additional penalty.

(e) (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(f) Informal conferences

The employer, employee, or employee representative may request an informal conference for the purpose of discussing any issues raised by an inspection, citation, notice of proposed penalty, notice of contest, or failure to abate.

(1) If the conference is requested by the employer, an affected employee or the employee representative shall be afforded an opportunity to participate, at the discretion of the DD and/or ADD.

(2) If the conference is requested by an employee or employee representative, the employer shall be afforded an opportunity to participate, at the discretion of the DD and/or ADD.

(3) Informal conferences may be held by any means practical. If either party chooses not to participate in the informal conference, a reasonable attempt shall be made to contact that party to solicit their input prior to signing an informal settlement agreement if the adjustments involves more than the penalty. If the requesting party objects to the attendance of the other party, separate informal conferences may be held.

(4) During the conduct of a joint informal conference, separate or private discussions shall be permitted if either party so requests. Any party may be represented by counsel at an informal conference.

(5) Informal conferences do not operate as a stay of the 15-working-day period for filing a notice of contest as prescribed in 29 CFR 1903.17.

(6) The employer shall not be requested to complete and post the "notice to employees" regarding the informal settlement agreement (b) (7)(E) [redacted] until after the informal conference has been held. (b) (7)(E) [redacted]

(g) Conducting the informal conference

The DD and/or ADD shall conduct the informal conference in accordance with the following guidelines:

(1) *Opening remarks*

The opening remarks shall include discussions of the following:

a. Purpose of the informal conference

b. Rights of participants

c. Contest rights and time restraints

d. Limitations (if any)

e. Settlement of cases

f. Other relevant information

(2) Closing

At the conclusion of the discussions, the main issues and potential courses of action shall be summarized. A copy of the summary, together with any other relevant notes or tapes of the discussion made by the DD and/or ADD, shall be placed in the case file.

(3) Decisions

At the end of the informal conference, the DD and/or ADD shall make a decision about appropriate action in light of the facts presented during the conference.

[redacted] (b) (7)(E) [redacted]

b. Employers shall be informed that they are required by 29 CFR 1903.19 to post copies of all amendments to the citation resulting from informal conferences. Employee representatives must also be provided with copies of such documents. This regulation covers amended citations, citation withdrawals, and settlement agreements.

(b) (7)(E)

(b) (7)(E)

1. If the changes proposed by the employer are acceptable to the DD and/or ADD, they should be authorized and the exact language to be written into the agreement shall be worked out mutually. The employer must be instructed to incorporate the agreed-upon language into the agreement, sign it and, return it to the DO as soon as practicable by fax (if possible).

2. Annotations incorporating the exact language of any changes authorized by the DD and/or ADD shall be made to the retained copy of the agreement, and a dated record of the authorization shall be signed by the DD and/or ADD and placed in the case file.

d. Upon receipt of the informal settlement agreement signed by the employer, the DD and/or ADD must ensure that any modified text comports with the notations made in the case file.

1. The DD and/or ADD must ensure that the CMP system is updated to reflect any changes (if any) brought about in the settlement, and a copy of the signed agreement should be immediately forwarded to the NO, Attention: OP, DEPP, Immigration/Farm Labor Branch.

2. If changes made to the copy of the agreement returned by the employer do not comport with the DD's and/or ADD's records as to what was agreed upon, and if the variations substantially change the terms of the agreement, the agreement signed by the employer shall be considered as a notice of contest and handled accordingly. The employer must be so informed as soon as possible.

e. A reasonable time shall be allowed for return of the agreement from the employer.

1. If, after that time, the agreement has not been received, the DD and/or ADD should presume that the employer is not going to sign the agreement. The citation should be treated as a final order after the expiration of the contest period.

2. The employer must be required to certify that the informal settlement agreement was signed prior to the expiration of the contest period.

f. If the DD's and/or ADD's settlement efforts are unsuccessful and the employer contests the citation, the DD and/or ADD shall state the terms of the final settlement offer in the case file.

- (b) (7)(E) [redacted]

[redacted]

- [redacted]
  - [redacted]
  - [redacted]
- [redacted]

[redacted]

  - [redacted]
  - [redacted]
- [redacted]

[redacted]

  - [redacted]

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

[redacted]

[redacted]

[redacted]

- [redacted]
- [redacted]

[redacted]

(j) Request for informal review by complainant

(1) The complainant may obtain review of a determination that a citation is not warranted with respect to a violation alleged in a complaint by submitting a written statement requesting the review with the RA and/or DRA, and simultaneously providing the employer with a copy of such statement by certified mail.

(2) The employer may submit an opposing written statement of position with the RA and/or DRA, and must simultaneously provide the complainant with a copy of such statement by certified mail.

(k) Notice of *de minimis* violations

De minimis violations are violations of standards that have no direct or immediate relationship to safety or health, and shall not be included in citations. OSHA usually does not issue a notice of *de minimis* violations, and it is expected that the WHD will not issue many (if any) of such notices in the field sanitation context, *as these standards usually have a direct and/or immediate impact on worker safety and health*.

If a *de minimis* violation is observed, the employer must still be notified of the violation, and the WHI should record it in the investigation file. The criteria for finding a *de minimis* violation are as follows:

(1) An employer complies with the clear intent of the standard, but deviates from its particular requirements in a manner that has *no* direct or immediate relationship to employee safety or health. Such deviations may, for example, involve distance specifications, construction material requirements, use of incorrect color, minor variations from recordkeeping, testing, or inspection regulations, or the like; or

(2) An employer complies with a proposed standard or amendment, or a consensus standard rather than with the standard in effect at the time of the inspection, and the employer's action clearly provides equal or greater employee protection, or the employer complies with a written interpretation issued by either the OSHA or the WHD NO; or

(3) An employer's workplace is at the state-of-the-art that is technically beyond the requirements of the applicable standard, and provides equivalent or more effective employee safety or health protection.

56d03 <u>RA and/or DRA action.</u>

(a) General statement

The principle responsibility of the RA and/or DRA is to ensure that the WHD carries out its responsibilities in the most efficient and effective means possible consistent with the OSH Act, regulations, Secretary's Order 5-96, and national policies and guidance provided in the FOH.

(b) Administrative subpoenas and inspection warrants

Secretary's Order 5-96 delegated authority to issue administrative subpoenas under the OSH Act to RAs. Guidance for issuance of such subpoenas can be found in (b) (7)(E) [redacted]

(b) (7)(E) [redacted] the RA and/or DRA should take whatever steps are deemed necessary to obtain a warrant.

(c) Informal review procedures

In cases where 1) a determination is made that an inspection is not warranted; or 2) following inspection, a determination is made that a citation is not warranted with respect to a previously alleged violation, the RA and/or DRA, upon written request from the complainant or the employer, *may* hold an informal conference in which each side may orally present its view.

After considering all written and oral views presented, the RA and/or DRA shall affirm, modify, or reverse the determination of the DD and/or ADD, and furnish both sides written notification of this decision and the reasons therefore. The decision of the RA and/or DRA shall be final and not subject to further review.

56d04 <u>NO function.</u>

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

56d05 <u>Installment plans for OSH Act penalties.</u>

(a) Introduction

Installment plans may be established for the payment of penalties due under the OSH Act.

(b) Guidelines for installment agreements

If a person is unable to make prompt payment of penalties and has provided suitable financial evidence of that fact, the WHD will supervise the payment of the penalties on an installment basis, provided the agreement is in writing, reasonable, and conforms to the following standards:

- The RO should exercise extreme caution in considering whether to establish an installment payment plan where there are repeat or serious violations, or willful violations. In such cases, an installment plan may be inappropriate.

- An installment plan for the payment of penalties would be inappropriate where there is pending civil or criminal litigation under the OSH Act. These matters require coordination with the RSOL.

- The installment plan must call for a sizeable initial payment (*i.e.*, generally 25 percent minimum) and extend no more than 1 year unless circumstances (*e.g.*, the size of the penalty and documented inability to pay) warrant a 2 year schedule. Plans extending beyond 2 years shall be submitted to the NO for approval. Installments shall be in even increments of $25.00, $50.00, $150.00, etc., with one odd payment to bring the balance to the correct total.

- The installment plan is to be in writing, contain a definite schedule of payment due dates, and amounts to be paid, including interest as mandated by the Debt Collection Act of 1982 and DOL policy, and contain a statement to the effect that if any scheduled payment is missed, the entire penalty becomes due and payable.

- If the installment agreement is being set up following a reduction in the original penalty assessment amount (*i.e.*, the amount listed in the Notice of Penalty originally sent to the employer), the original amount and date assessed should be listed in addition to the amount being covered by the installment agreement.

- Installment plans should be coordinated with the RSOL. The RSOL is aware of the types of documents that may be required, such as confessed judgment promissory note and sworn financial disclosure statements. Such sworn documents may be used in subsequent litigation, and therefore, should be executed in coordination with the RSOL.

(c) Action when default occurs

(1) Where there has been a failure to pay OSHA penalties, the DOL may initiate an action to recover the amount of the unpaid penalties and additional court costs in the appropriate U.S. district court.

(2) Normally a person who has defaulted on an installment plan will not be given a new installment plan with respect to the same penalty.

(d) Sample installment plan agreement

Installment plan agreements should closely conform to the following sample. When the party responsible for payment is represented by an attorney, the attorney should also sign the document.

INSTALLMENT PAYMENT AGREEMENT BETWEEN

John I. Doe

AND

U.S. DEPARTMENT OF LABOR

It is agreed between John I. Doe and the UNITED STATES DEPARTMENT OF LABOR as follows:

John I. Doe hereby agrees to pay the civil money penalty of $1,200 which was assessed against him by Citation and Notice of Penalty dated September 9, 20120 under the Occupational Safety and Health Act according to the Schedule of Payments below. He acknowledges that he received such notice. He acknowledges that such assessment has become the final Order of the Occupational Safety and Health Review Commission and waives any right he may have to appeal or contest such assessment.

Schedule of Payments

By May 15, 2012, John I. Doe will have paid the entire $1,200 civil money penalty.

January 15, 2012	$300
February 15, 2012	$225
March 15, 2012	$225
April 15, 2012	$225
May 15, 2012	$225

Payments must be made as scheduled and must be made by certified check, cashier's check, or money order payable to "Wage and Hour Division, U.S. Department of Labor" and must be mailed or delivered to the District Office, Wage and Hour Division, (mailing address of DO including zip code).

Should John I. Doe fail to make any agreed payment as scheduled, the entire unpaid balance will immediately become due and payable, together with such court costs as may be incurred by the U.S. Department of Labor in pursuing collection thereof.

The U.S. Department of Labor agrees to forebear pursuit of collection of the above-mentioned civil money penalty and costs stated above so long as John I. Doe adheres to the terms of this agreement. The Department of Labor reserves the right to pursue collection of the full amount of the penalty mentioned above, with costs as stated in this agreement, should John I. Doe fail to abide by the terms of this agreement.

The parties to this agreement hereby acknowledge receipt of this agreement, and they agree to its terms by signatures below.

Each party hereby agrees to bear its own fees and other expenses incurred by such party in collection with any stage of this proceeding, except as specified herein.

_____ _____

Employer or Date
Attorney for Employer

_____ _____

DD/ADD Signature Date
for Wage and Hour Division

56e SANCTIONS

56e00 Introduction.

Section 17 of the OSH Act sets the civil and criminal penalties available under the statute. It is important to bear in mind that civil proceedings do not bar criminal proceedings where appropriate. Through the full and appropriate use of all remedies available under the act, the DOL furthers the act's principle purpose of protecting workers.

56e01 Criminal actions.

(a) Section 17(e) of the act provides that "[a]ny employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both." However, higher monetary fines are applicable under the Sentencing Reform Act of 1984 (*see* 18 USC 3571). Under that act, the fine for a misdemeanor resulting in death may be up to $250,000.00 for an individual defendant and up to $500,000.00 for a corporate defendant.

(b) Section 17(f) provides that "[a]ny person who gives advance notice of any inspection to be conducted under this Act, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both." *This prohibition applies to "any person," including federal or local government employees.*

(c) Section 17(g) of the act states that "[w]hoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both."

(d) Section 17(h)(2) provides that "[n]otwithstanding the provisions of sections 1111 and 1114 of title 18, United States Code, whoever, in violation of the provisions of section 1114 of such title, kills a person while engaged in or on account of the performance of investigative, inspection, or law enforcement functions added to such section 1114 by paragraph (1) of this subsection, and who would otherwise be subject to the penalty provisions of such section 1111, shall be punished by imprisonment for any term of years or for life."

(b) (7)(E) [redacted]

56e02 OSHA penalties.

Section 17 provides for the assessment of penalties for violations of the act, or any standard, rule, order, or regulation promulgated pursuant to the act. The statute fixes different penalty limitations for different types of violations up to a maximum of $70,000.00 for each violation in cases where an employer willfully or repeatedly violates a requirement. The statutory limitations for penalties can be found in section 17 of the act, (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

[redacted]

All OSH Act penalty payments are made payable to the "U.S. Department of Labor - Wage and Hour Division," and are to be handled in accordance with established procedures for depositing penalty payments to be transmitted to the General Fund of the U.S. Department of the Treasury. All deposits are to be clearly identified as OSH Act field sanitation or temporary labor camp penalty payments.

56f DOCUMENTS

56f00 Introduction.

This section contains descriptions of forms and letters used by the WHD in administering and enforcing the OSH Act field sanitation and temporary labor camp (in agriculture) requirements. The forms and instructions for their use and completion are located in FOH 54.

56f01 WH-560: OSHA CMP Computation Summary Sheet Occupational Safety and Health Act of 1970 (WH-560).

Section 17 of the OSH Act contains the statutory parameters for the assessment of CMPs for violations of the act. WH-560 is a worksheet designed for use in computing proposed CMPs for violations of the field sanitation standards (*see* 29 CFR 1928.110) and temporary labor camp (in agriculture) requirements (*see* 29 CFR 1910.142) under the OSH Act.

In order to compute a recommended CMP, the WHI must make a number of determinations about each violation. For example, the WHI must determine whether the violation was willful, repeated, serious, or other-than-serious, and must make decisions about the gravity (*i.e.*, probability and severity) of each violation. It is essential that the WHI gather sufficient information during the inspection to enable these determinations to be made. For more information regarding these terms, *see* FOH 56c01 -04, FOH 56c07, and FOH 54: WH-560.

56f02 WH-561: Citation and Notice of Penalty (WH-561).

WH-561 is used to provide the person investigated with a written record of violations cited and any proposed penalties. Following review of the case file, the form is to be completed and mailed, via certified mail, return receipt requested, by the DD and/or ADD (*see* FOH 56c06 and FOH 56d02). WH-561 and complete instructions for the form are located at FOH 54: WH-561.

56f03 WH-562: OSH Act Field Sanitation Inspection Report (WH-562).

WH-562 is to be used to record the results of inspections conducted under the field sanitation standard (*see* 29 CFR 1928.110). The form is to be completed by the WHI either during or immediately following completion of the inspection. *See* FOH 54: WH-562.

56f04 WH-519b: MSPA and H-2A Housing Safety and Health Checklist (OSHA 1910.142) (WH-519b).

WH-519b is used to record housing safety and health inspection results for inspections performed under the OSH Act regulations at 29 CFR 1910.142. Note: this is the same form used under the MSPA for conducting housing inspections using the regulations at 29 CFR 1910.142 (*see* FOH 57f15).

56f05 WH-563: NOTICE of Alleged Imminent Danger (WH-563).

WH-563 is used to provide written notice to the employer and all affected employees of the existence of a danger, which could reasonably be expected to cause death or serious physical harm, either immediately, or before the imminence of such danger can be eliminated through regular enforcement procedures. *See* FOH 56b07, FOH 56b12, and FOH 54: WH-563.

56f06 WH-124: Notice of Violations of Other Laws (WH-124).

WH-124 is used for notifying state or other federal agencies (*see* FOH 53g03 and FOH 56a08) of possible violations of their laws that were observed by WHD personnel. *See* FOH 54: WH-124. The NO, OP, DEPP, Immigration/Farm Labor Branch is to be notified of any referrals that are a sensitive, involve an impact case, or may garner media attention.

56f07 Notification of failure to abate

This letter is to be used when circumstances arise in which, after a cited violation has become a final order of the OSHRC (either because the citation was not contested or following a hearing), the same violation is found to have continued unabated. The letter serves to notify the employer that the failure to abate is a violation of the act, and serves notice that an additional penalty for this newly cited violation is being assessed. *Prior to issuing a notification of failure to abate, the DD should consult with the RO and the RSOL to determine whether some alternative course of action would better affect compliance by the employer.*

Copies

An original and four copies shall be prepared of the notification of failure to abate. The original is to be given and/or mailed, via certified mail, return receipt requested, to the employer. One copy is to be sent to the complainant(s) or employee representative(s) (if any, and, if none, this copy is to be retained in the case file). The second copy is to be forwarded immediately to the RSOL, and the third copy is to be retained in the case file (or office copy of the case file if the case file is at the RSOL). The fourth copy is to be forwarded to the NO, Attention: OP, DEPP, Immigration/Farm Labor Branch.

Computation of proposed penalty (failure to abate)

Section 17(d) of the act provides for a CMP of not more than $7,000.00 per day for each final order violation that remains unabated. Unless an order is issued specifying a particular amount to be assessed per day for failure to abate a violation, the following guidelines shall be used to determine the amount to be assessed *for each day that the violation continues unabated* (starting from the day the finding of the violation became a final order):

Violation was serious, repeat, or willful in nature, *and* was the cause or proximate cause of a fatality: *$7,000.00*

Violation was serious, repeat, or willful in nature, *and* was the cause or proximate cause of an injury or illness: *$3,500.00*

Violation was serious, repeat, or willful in nature, but did not result in an injury or illness: *$1,000.00*

An additional CMP for failure to abate should normally not be computed for violations that are other-than-serious in nature.

NOT FOR PUBLIC DISTRIBUTION

SAMPLE LETTER

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION

(Date)

(Name and Address of Employer)

Re: Case Number _____

Dear

An inspection of your facility located at (insert address), was conducted on (insert date of original inspection). After the original inspection, a Citation(s) was issued to you in accordance with the provisions of the Occupational Safety and Health Act of 1970 (the Act), notifying you of certain violations of the Act and the dates by which they were to be abated. Based upon reinspection, it is alleged that you have failed to abate the violation(s) listed below within the time prescribed. And the following additional penalties are proposed. The additional penalty is computed by multiplying a daily penalty times the number of days the violation(s) remained unabated. You are to notify the Wage and Hour District Director in writing of the date and nature of the corrective action taken. If you do not abate the violation(s), further penalties may be proposed and other enforcement action to compel abatement may be taken under section 11(b) of the Act. You are further notified that you must pay the ADDITIONAL PENALTY unless you inform the Wage and Hour Division District Director in writing that you intend to contest the Notification or the ADDITIONAL PENALTY within 15 working days (excluding weekends and Federal holidays) from your receipt of this Notification. If you do not contest within 15 working days after receipt, this Notification and the additional penalties will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency. Issuance of this Notification does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the Notification is affirmed by the Review Commission.

(Insert: (a) the standard, regulation, or section of the Act violated; (b) a description (insert description from the WH-561) of the violation(s); and (c) the proposed additional penalty.)

Sincerely,

District Director

NOT FOR PUBLICATION

56f08 **Sample label.**

The use of labels to prevent sample misidentification and facilitate maintenance of the chain-of-custody is mandatory anytime a WHI collects a sample for testing. Special evidence labels are not necessary. Gummed paper labels or tags are adequate provided sufficient information is written on the label to properly identify the sample. At a minimum, the following information should be recorded on the label:

(a) Sample number

(b) Name of collector

(c) Date and time of collection

(d) Place of collection

(e) Case file number

Affix the label(s) to the sample container(s) before or at the time of sampling. Fill the label out with waterproof ink at the time of collection. An example of a completed gummed paper sample label appears below:

Sample #1	John Doe, WHI
98-000-00000	
Sample taken: 03/31/1998 at 10 a.m.	
NE Corner of ABC Farms field #2	

56f09 **Sample seal.**

Use seals to detect unauthorized tampering with samples prior to analysis. Formal *evidence* seals are not necessary. Gummed paper seals (like those used as labels) can be used, provided sufficient information is written on the seal to properly identify the *sample.* At a minimum, the following information should be recorded on the seal:

(a) The sample number; this must be the same as that on the label

(b) The name of the person who collected the sample

(c) The date and time the sample was collected

Attach the seal in such a way that it is necessary to break it to open the sample container. Affix the seal to the container before the sample is turned over to any other person. An example of a completed gummed paper seal appears below:

NOT FOR PUBLIC DISTRIBUTION

Sample #1	John Doe, WHI
Sample taken: 03/31/1998 at 10 a.m.	
ABC Farms Field #2	

56f10 **Field sample record.**

For every case in which a sample is collected as evidence, information regarding the sample must be recorded in the case file. No special form or format is required for this record; however, the following information must be recorded and the record placed in the file as a "D" exhibit:

(a) The reason why the sample was collected

(b) The location where the sample was collected

(c) The name and address of any field contact person(s)

(d) A description of the sample (*e.g.*, drinking water)

(e) The sample number and the volume collected

(f) A description of the sampling point and of the method used to collect the sample

(g) The date and time of collection

(h) The collector's sample identification number(s)

(i) A description of where (*i.e.*, at a given site) each sample was collected and of how the sample(s) were transported to the laboratory for analysis

(j) A listing of references, such as maps or photographs of the sampling site

(k) A listing of any field observations and measurements

(l) The printed name and written signature of the person who recorded the above information in the file

The purpose in recording the above information in the case file is to enable a reconstruction, without having to rely on memory, of the collection of the sample(s).

The following is an example of a field sample record as it might appear in a case file:

NOT FOR PUBLIC DISTRIBUTION

Sample #1: 98-000-00000 Drinking Water Suspected biological contamination, Sample collected on 03/31/1998 at 10 a.m. from NE Corner of ABC Farms Field #1. Sample volume = 100 ml. Sample transported to Jefferson County Public Health Lab for testing by POV. Sample collected using FOH methodology. Sample delivered to lab at 2 p.m. on 03/31/1998. John Doe, WHI

56f11 **Chain-of-custody record.**

For each sample or group of samples, the following information must be documented as a chain-of-custody record:

(a) The case number

(b) The sample number

(c) The signature of the person that collected the sample

(d) The date, time, and location of sample collection

(e) The type of sample collected

(f) The signature of every person involved in the chain of possession of the sample

(g) For each person involved in the chain of possession of the sample, the inclusive dates of possession

It is imperative for evidentiary purposes that there be no breaks in the chain-of-custody. WHIs must remind those to whom the evidence is surrendered for testing that each case is a potential litigation case, and therefore, it is essential to observe chain-of-custody procedures in handling samples. A set form or format for a chain-of-custody record is not necessary; however, each such record must contain the above referenced information. The chain-of-custody record should remain in the possession of the individual having custody of either the sample(s), or the laboratory test report(s) (if the samples themselves are not maintained following testing). The chain-of-custody record must be maintained until no longer needed for litigation purposes. An example of a chain-of-custody record appears below:

NOT FOR PUBLIC DISTRIBUTION

#1

WHD Case #98-000-00000

Sample Collected by John Doe, WHI 03/31/1998 at 10 a.m.

NE Corner of ABC Field #1

Sample type:	Drinking water	
Custody Dates(s)	Name	Title
03/31/1998 – 03/31/1998	John Doe	WHI
03/31/1998 – 04/03/1998	Thomas Tester	Lab Tech at Jefferson County Public Health Lab
04/03/1998 – (present)	Sally Sales	Evidence Tech Jefferson County Public Health Lab

56f12 **Sample letter #1: transmittal of informal agreement.**

Sample letter #1 is a cover letter that may be used to transmit an informal settlement agreement to the employer (*see* FOH 56d02(e)).

NOT FOR PUBLIC DISTRIBUTION

SAMPLE LETTER # 1

(Name and Address of Employer)

Dear

As a result of discussions between representatives of the Wage and Hour Division (WHD) and you or your representatives concerning the inspection of your establishment under the Occupational Safety and Health Act (OSHAct), Case Number (list WH case number), conducted on (date entered), the parties have reached a tentative agreement resolving disputed citations, penalties and abatement dates.

You have indicated that (you require additional time to consider the proposed settlement before signing it) or (you are willing to sign the settlement agreement we reached verbally on (date or other phrase as appropriate)). Attached to this letter is a written document reflecting the agreement. The document has been signed and dated by the (DD/ADD) and requires the signature of an authorized company official to make the agreement binding upon the company. The agreement must be signed on or before (date), which is the last day of the 15-working day contest period, provided for by the OSHAct.

If you agree with the terms as set forth, please sign the agreement, without change, date it and return it to the District Office. Any change will render the document invalid unless such change is accepted by the (DD/ADD) before the date of final order.

If, after further consideration, you decide not to sign the proposed settlement agreement, the citations, penalties and abatement dates as previously issued will become a final and unappealable order unless you file, on or before the last day of the contest period, a written notice of your intent to contest the citations and penalties formally before the Occupational Safety and Health Review Commission.

Please note that any notice of contest must be in writing. Any oral statements of dissatisfaction with the citations or penalties which you may have expressed to WHD personnel do not constitute a formal notice of contest.

If you have any questions regarding any of the matters discussed in this letter, please contact me at your earliest convenience.

Sincerely,

(DD/ADD)

NOT FOR PUBLIC DISTRIBUTION

56f13 <u>Sample letter #2: informal settlement agreement.</u>

Sample letter #2 is a sample informal settlement agreement (*see* FOH 56d02(e)).

NOT FOR PUBLIC DISTRIBUTION

SAMPLE LETTER # 2

U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

In the Matter of: (Name of Employer)
Case File No.:

INFORMAL SETTLEMENT AGREEMENT

The undersigned Employer and the undersigned Wage and Hour Division (WHD) (DD/ADD), in settlement of the above citation(s) and penalties which were issued on (date), hereby agree as follows:

1. The Employer agrees to correct the violations as cited in the above citations or as amended below. **(Language must be added concerning verification of abatement.)**

2. The Employer agrees to pay the proposed penalties, if any, as issued with the above citation(s), or, if amended by this agreement, as amended below.

3. The Employer and WHD agree that the following citations and penalties, if any, are not being amended:

   (list citations and/or penalties not being amended)

4. WHD agrees that the following citations and penalties are being amended as shown below: (list citations and/or penalties being amended)

5. The employer, by signing this informal settlement agreement, hereby waives its rights to contest the above citation(s) and penalties, as amended in paragraph 4 of this agreement.

6. The employer agrees to immediately post a copy of this Settlement Agreement in a prominent place at or near the location of the violation(s) referred to in paragraph 4 above. This Settlement Agreement must remain posted until the violations cited have been corrected, or for 3 working days (excluding weekends and Federal Holidays), whichever is longer.

7. The employer agrees to continue to comply with the applicable provisions of the Occupational Safety and Health Act of 1970, and the applicable safety and health standards promulgated pursuant to the Act.

8. By entering into this agreement, the employer does not admit that it violated the cited standards for any litigation or purpose other than a subsequent proceeding under the Occupational Safety and Health Act.

9. Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

(DD/ADD signature and date)
For Wage and Hour Division

(signature and date)
For the Employer

NOT FOR PUBLIC DISTRIBUTION

56f14 Sample letter #3: notice to employees.

Sample letter #3 is the notice to employees. A copy of this letter should always be given to the employer along with the informal settlement agreement (*see* FOH 56d02(e)).

NOT FOR PUBLIC DISTRIBUTION

Sample Letter #3

NOTICE TO EMPLOYEES

The law gives you or your representative the opportunity to object to any abatement date set for a violation if you believe the date to be unreasonable. Any contest to the abatement dates of the citations amended in paragraph 4 of this Settlement Agreement must be mailed to the U.S. Department of Labor District Office at (insert address, city, state, zip code), within 15 working days (excluding weekends and Federal Holidays) of the receipt by the Employer of this Settlement Agreement. You or your representative also have the right to object to any of the abatement dates set for violations, which were not amended, provided that the objection is mailed to the office shown above within the 15-working-day period established by the original citation.

NOT FOR PUBLIC DISTRIBUTION

56f15 Sample letter #4: letter to employer if no agreement reached.

Sample letter #4 is for use when no agreement has been reached with the employer (*see* FOH 56d01(e)).

NOT FOR PUBLIC DISTRIBUTION

SAMPLE LETTER # 4

(Name and Address of Employer)

Dear

The informal conference in which you have participated relating to the inspection of your establishment by the Wage and Hour Division (WHD) under the Occupational Safety and Health Act (OSHAct), Case Number (list WH case number), conducted on (date entered), has not resulted in a settlement of pending citations and penalties.

As noted on the citations and accompanying Occupational Safety and Health Administration (OSHA) pamphlet (OSHA 3000) describing employer rights and responsibilities following an inspection under the OSHAct, an employer wishing to contest formally the citations and penalties before the Occupational Safety and Health Review Commission must notify the WHD District Director of this intent in writing, within 15 working days after the receipt of the citations and penalties. If a contest is not filed in writing within the 15-day period, all citations and penalties become a final and unappealable order affirming their validity as issued. The date ending the contest period in your case is (enter date).

An informal conference, such as the one in which you have just participated, does not suspend or in any other manner alter this contest time limitation. Further, any oral communication of dissatisfaction with the citations or penalties made to Wage and Hour personnel, including telephone conversations and statements made during the informal conference, does not constitute a formal notice of contest. If you intend to contest the citations and penalties, you must do so in writing.

If you have any questions regarding any of the matters discussed in this letter, please contact me at your earliest convenience.

Sincerely,

District Director

NOT FOR PUBLIC DISTRIBUTION

56f16 Sample letter #5: certification to the OSHRC.

This letter is for use in transmitting a notice of contest to the OSHRC.

In accordance with 29 CFR 2200.33, the original notice of contest, together with copies of all relevant documents (*e.g.*, all contested Citation and Notification of Penalty and Notification of Failure to Abate Alleged Violations, and proposed additional penalty), shall be transmitted by the DD and/or ADD, using the certification form (*see* sample letter #5) following this section, to the Executive Secretary, Occupational Safety and Health Review Commission, One Lafayette Center, 1120 20th Street, N.W., Suite 980, Washington, D.C. 20036-3457. This package must be postmarked prior to the expiration of 15 working days after receipt of the notice of contest. The RSOL must be consulted in questionable cases, and until further notice, a copy of the certification letter to the OSHRC should be sent to the NO, OP, DEPP, Immigration/Farm Labor Branch as well.

(a) The envelope that contained the notice of contest shall be retained in the case file with the postmark intact.

(b) Where the DD and/or ADD is certain that the notice of contest was not mailed (*i.e.*, postmarked) within the 15-working-day period allowed for contest, the notice of contest shall be returned to the employer who shall be advised of the statutory time limitation. The employer shall be informed that the OSHRC has no jurisdiction to hear the case because the notice of contest was not filed within the 15 working days allowed, and therefore, that the notice of contest will not be forwarded to the OSHRC. A copy of all untimely notices of contest shall be retained in the case file.

(c) If the notice of contest is submitted to the DD and/or ADD after the 15-working-day period, but the notice contests only the reasonableness of the abatement period, it shall be treated as a PMA and handled in accordance with FOH 56d02(i).

(d) If written communication is received from an employer containing objection, criticism, or other adverse comment as to a citation or proposed penalty, which does not clearly appear to be a notice of contest, the DD and/or ADD shall contact the employer as soon as possible to clarify the intent of the communication. Such clarification must be obtained within 15 working days after receipt of the communication so that if, in fact, it is a notice of contest, the file may be forwarded to the OSHRC within the allowed time. The DD shall make a memorandum for the case file regarding the substance of this communication.

(e) If the DD determines that the employer intends the document to be a notice of contest, it shall be transmitted to the OSHRC in accordance with FOH 56f16(a) above. If the employer did not intend the document to be a notice of contest, it shall be retained in the case file with the memorandum of the contact with the employer. If no contact can be made with the employer, communications of the kind referred to in FOH 56f16(d) above shall be timely transmitted to the OSHRC.

(f) If the DD's and/or ADD's contact with the employer reveals a desire for an informal conference, the employer shall be informed that an informal conference does not stay the running of the 15-working-day period for contest.

Note: insert appropriate dates by numbers 1, 2, and 3 in the letter. The date for number 3 will be the date of this transmittal.

NOT FOR PUBLIC DISTRIBUTION

SAMPLE LETTER #5

_____District Office WH Case No.: _____

Re:_____
Employer's Name

Pursuant to Section 10, Occupational Safety and Health Act of 1970, the above-listed case is hereby certified to the Occupational Safety and Health Review Commission.

The documents listed below which were issued or received on the dates listed are enclosed herewith:

No.	Date	
1.		Citation and Notice of Proposed Penalty Issued
		Citation Number(s) _____
		Total Amount of Penalty $_____
2.		District Office received notice of contest from
		_____ Employer or Employee
3.		Notified Commission of receipt of contest as provided in 29 CFR 2200.33

APPEARANCE

For the Secretary of Labor

Regional Solicitor
U.S. Dept. of Labor
(RSOL address)

NOT FOR PUBLIC DISTRIBUTION

56f17 (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

SAMPLE LETTER #6

MEMORANDUM FOR: (name)
Regional Solicitor
(location)

FROM: (name)
District/Assistant District Director
(location)

SUBJECT: (Name of Employer)

WH Case No.: _____

A contest in the above-referenced matter was received on _____(date)_____. The file and copies of all documents being sent to the Review Commission are attached. The notice of contest will be forwarded to the Review Commission on (the 15th working day after receipt of the notice of contest).

Comments:

NOT FOR PUBLIC DISTRIBUTION

56f18 Sample letter #7: letter to employer regarding abatement certification.

This sample letter is for use in notifying employers of their obligation under 29 CFR 1903.19 to provide certification (and in certain cases, documentation) that all cited violations have been abated. *See* FOH 56d02.

NOT FOR PUBLIC DISTRIBUTION

SAMPLE LETTER # 7

(Date)

(Name and Address of Employer)

Dear By notice dated (insert date WH-561 issued) (copy enclosed) you were notified that an inspection of your establishment conducted on (insert date of inspection), disclosed the following violation(s):

(insert regulation cite and description of violation)

_____
_____
_____
_____
_____
_____
_____
_____
_____.

Enclosed with the citation notice was a copy of Regulations 29 CFR Part 1903.19, which describe your obligation to provide certification (insert "and documentation" if appropriate) that the violation(s) for which you were cited have/has been fully abated. Furthermore, 29 CFR Part 1903.19(c) requires that abatement certification be made within ten (10) calendar days after the date set forth on the citation notice (Form WH-561) for abatement of the violation. In addition, if the citation notice specified that abatement documentation is required, the documentation must be provided with the abatement certification (i.e., within 10 days of the abatement date specified in the citation).

Our records reflect that you have not provided this office with the required abatement certification (insert "and documentation" if appropriate). Please immediately submit to this office your certification (insert "and documentation" if appropriate) that all cited violations have been abated. Failure to comply may result in referral of this matter to the Occupational Safety and Health Administration for issuance of a citation and the possible imposition of sanctions (such as the assessment of a civil money penalty) as provided for by law.

For your reference, I have enclosed another copy of Regulations 29 CFR Part 1903.19. If you have any questions regarding any of the matters discussed in this letter, please contact me at your earliest convenience.

Sincerely,

(DD/ADD)

Enclosures

NOT FOR PUBLIC DISTRIBUTION

56f19 Sample letter #8: abatement certification letter.

This *optional* letter can be provided to employers for their use in certifying, as required by 29 CFR 1903.19, that cited violations have been abated.

NOT FOR PUBLIC DISTRIBUTION

SAMPLE LETTER # 8

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

_____
_____

RE: _____
(Company Name)
_____
_____
(Company's Address)

The hazard referenced in the Citation and Notification of Penalty Form WH-560 dated _____ for violation identified as:

(A) _____ was corrected on _____ by:
(regulation cite #) (Date)
_____.
(describe action(s) taken to abate violation)

(B) _____ was corrected on _____ by:
(regulation cite #) (Date)
_____.
(describe action(s) taken to abate violation)

(C) _____ was corrected on _____ by:
(regulation cite #) (Date)
_____.
(describe action(s) taken to abate violation)

(D) _____ was corrected on _____ by:
(regulation cite #) (Date)
_____.
(describe action(s) taken to abate violation)

(E) _____ was corrected on _____ by:
_____.
(describe action(s) taken to abate violation)

I attest that the information contained in, and attached to (if required) this document is accurate.

_____
(Signature)

_____
(Typed or printed Name)

NOT FOR PUBLIC DISTRIBUTION

56f20 **Sample letter #9: abatement plan or progress report.**

This *optional* letter may be used by employers to transmit either an abatement plan or a progress report (if required and pursuant to 29 CFR 1903.19(e) -(f)) to the WHD regarding the abatement of cited violations.

NOT FOR PUBLIC DISTRIBUTION

SAMPLE LETTER #9

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

_____
_____
_____

_____
(Company Name)

_____
_____
(Company's Address)

Re: _____
(WH Case number)

Check one: Abatement Plan [ ] Progress Report [ ]

Note: If this optional letter is being used to submit an Abatement Plan to the Wage and Hour Division, describe the action you plan to take to abate the violation(s) and enter a proposed completion date in the space provided. If this letter is being used to submit a Progress Report, describe the action taken to abate the violation and enter the date the action was completed in the space provided.

Regulatory Requirement Violated	Action Taken or to be Taken	Proposed Completion Date	Completion Date

Date required for final abatement: _____

I attest that the information contained in this document is accurate.

_____
(Signature)

_____
(Typed or Printed Name)

NOT FOR PUBLIC DISTRIBUTION

Chapter 57

MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA)

Source: FOH Modernization revision 724, published 11/28/2016. Substantive revisions made *after* 11/28/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 11/28/2016 can be found here: http://esa.esa.dol.gov/whd/FOH/revisionchart.htm.

Table of Contents

57a GENERAL INVESTIGATION PROCEDURES

57a00 General.
57a01 Scheduling compliance actions.
57a02 Forestry.
57a03 Complaints from farmworker representatives.
57a04 Cooperation with state workforce agencies.
57a05 Extent of investigation.
57a06 Coverage.
57a07 Principles for applying exemptions.
57a08 Statutory exemptions.
57a09 Migrant and seasonal agricultural workers.
57a10 Investigation guidelines.
57a11 Initial conference.
57a12 Records examination.
57a13 Employee interviews.
57a14 Enforcement and penalties.
57a15 Case analysis prior to disposition.
57a16 Final conference and disposition.
57a17 Disposition when a final conference cannot be held.
57a18 MSPA investigation tracer list.
57a19 MSPA back wages.

57b COMPLIANCE PROGRAMMING

57b00 Program planning purpose and primary considerations.
57b01 Complaint investigation scheduling.
57b02 Non-complaint investigation scheduling.
57b03 Follow-up investigations.
57b04 Coordination of migrant and seasonal farmworker investigations.
57b05 Remedies.
57b06 Tracer list and statistical reporting system.

57c SANCTIONS

57c00 Multiple sanctions and remedies.
57c01 Criminal actions.
57c02 Civil actions.
57c03 Civil money penalties (CMPs).

NOT FOR PUBLIC DISTRIBUTION

57c04 Potential litigation.
57c05 Administrative actions: recommendation for certificate revocation.
57c06 Recommendation of sanctions.
57c07 Notification of civil money penalties.

57d SERVICE

57d00 Service of administrative determinations.
57d01 Service by mail.
57d02 Delivery of a copy of the administrative determination.
57d03 Leaving a copy of the determination at the principal office, place of business, or residence.
57d04 RO procedures after service of CMP notice is made.

57e EVIDENCE

57e00 General.
57e01 Failed to disclose conditions to workers.
57e02 Failed to post MSPA poster at worksite.
57e03 Misrepresented conditions to workers.
57e04 Breach of working arrangements with workers.
57e05 Failed to make and/or keep employer records.
57e06 Failed to provide wage statement to workers.
57e07 Failed to provide records.
57e08 Failed to maintain records provided by FLC.
57e09 Failed to pay wages when due.
57e10 Restricted workers in purchase of goods or services.
57e11 Failed to post housing conditions.
57e12 Failed to ensure housing safety and health.
57e13 Failed to provide safe transport vehicles.
57e14 Failed to ensure driver has valid license.
57e15 Failed to obtain prescribed insurance coverage.
57e16 Utilized the services of an unregistered FLC.
57e17 Discriminated against workers, etc.
57e18 Interfered with a DOL official during investigation.
57e19 Failed to register.
57e20 Failed to register employee.
57e21 Failed to exhibit certificate.
57e22 Knowingly made misrepresentations in application.
57e23 Failed to comply with any court judgment or Secretary's final order.
57e24 Was not the real party in interest.
57e25 Transported workers without certificate authorization.
57e26 Housed workers without certificate authorization.
57e27 Failed to provide notice of change of permanent residence.
57e28 Failed to apply to amend certificate to engage in another contracting activity, to use another vehicle, or to use another facility or real property site for housing.
57e29 Engaged illegal aliens.
57e30 Failed to abide by agreements with AGERs and AGASs.

57f MSPA FORMS

NOT FOR PUBLIC DISTRIBUTION

57f00 General.
57f01 WH-510: Application for a Farm Labor Contractor Certificate of Registration.
57f02 WH-511: Farm Labor Contractor Certificate of Registration.
57f03 WH-512: Application for a Farm Labor Contractor Employee Certificate of Registration.
57f04 WH-513: Farm Labor Contractor Employee Certificate of Registration.
57f05 WH-514: Vehicle Mechanical Inspection Report for Transportation Subject to Department of Transportation Requirements.
57f06 WH-514a: Vehicle Mechanical Inspection Report for Transportation Subject to Department of Labor Safety Standards.
57f07 WH-515: Doctor's Certificate.
57f08 FD-258: Applicant (*i.e.*, fingerprint card).
57f09 WH-509: Declaration of Citizenship.
57f10 WH-516: Worker Information–Terms and Conditions of Employment. (English and Spanish)
WH-516a: Worker Information. (English and Haitian: Creole)
WH-516b: Worker Information. (English and Vietnamese)
57f11 WH-521: Housing Terms and Conditions. (English and Spanish)
WH-521a: Housing Terms and Conditions. (English and Haitian: Creole)
WH-521b: Housing Terms and Conditions. (English and Vietnamese)
57f12 WH-501: Wage Statement. (English)
WH-501b: Wage Statement. (Spanish)
57f13 WH-1376: MSPA Poster. (English and Spanish)
WH-1376-A: MPSA Poster. (English and Haitian: Creole)
WH-1376-B: MSPA Poster. (English and Vietnamese)
57f14 WH-520: Housing Occupancy Certificate – Migrant and Seasonal Agricultural Worker Protection Act.

57g GROVE CARE CONTRACTORS AND SIMILAR OPERATIONS

57g00 General.
57g01 Perennial crops other than groves of fruit or nut trees.
57g02 Harvesting operations done without prior farming.

57h HOUSING SAFETY AND HEALTH

57h00 Coordination with the ETA and OSHA.
57h01 Liaison with the OSHA and ETA.
57h02 Statutory requirements: housing safety and health.
57h03 Owns or controls.
57h04 Housing safety and health inspections.
57h05 Reporting housing safety and health findings.
57h06 Disposition of safety and health findings.
57h07 Housing standards for workers camping on the land.
57h08 The OSHA and ETA housing safety and health standards.

57i INSTALLMENT PLANS FOR CMPs

57i00 General.
57i01 Guidelines for installment agreements.
57i02 Action when default occurs.

NOT FOR PUBLIC DISTRIBUTION

57i03 Sample installment plan agreement.

57j EMPLOYMENT RELATIONSHIP, JOINT EMPLOYMENT, AND JOINT RESPONSIBILITY

57j00 Employment relationship.
57j01 Joint employment.
57j02 Joint responsibility.

57k PINE STRAW

57k00 General.

57a GENERAL INVESTIGATION PROCEDURES

57a00 General.

(a) FOH 57 contains the principles and procedures for the enforcement of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). These procedures will be used in conjunction with the regular investigation procedures contained in FOH 52.

(b) These principles and procedures are intended to provide only general guidance and are not meant to cover all situations. As under other laws enforced by the Wage and Hour Division (WHD), the Wage and Hour Investigator (WHI) must constantly exercise judgment as to the proper course of action in a given situation. Where appropriate, additional guidelines will be developed on the basis of experience. Procedural and interpretative questions involving novel or unsettled issues shall be referred to the WHD National Office (NO), Assistant Administrator (AA) for Policy. *See* FOH 57c07.

57a01 Scheduling compliance actions.

(a) General

Compliance actions under the MSPA may be scheduled for any valid reason. (b) (7)(E) [redacted]

[redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

(c) (Reserved)

(d) Joint operations between the WHD and INS

(b) (7)(E)

(e) MSPA, FLSA, and/or H-2A concurrent investigations

(b) (7)(E)

(f) MSPA back wages

Where MSPA back wages are found due, they shall be computed on the WH-56: Summary of Unpaid Wages (WH-56) and shown on the WH-58: Receipt for Payment of Back Wages, Liquidated Damages, Employment Benefits, or Other Compensation, which is furnished to the employer.

(g) FLCs

Investigations of FLCs as defined in section 3(7) of the MSPA (b) (7)(E)

(h) Agricultural employers, associations, users, and housing providers

(b) (7)(E)

(b) (7)(E)

57a02 **Forestry.**

(a) The Ninth Circuit Court of Appeals, in an opinion filed 11/18/1987 (*Bresgal v. Brock*, 833 F. 2d 763), held that forestry workers are covered by the MSPA. The nationwide injunction issued by the court concluded that the MSPA applied to "recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal worker for all predominantly manual forestry work, including but not limited to tree planting, brush cleaning, pre-commercial tree thinning and forest firefighting." In addition, the Solicitor of Labor (SOL) was enjoined to cease refusing to enforce the MSPA in connection with such activities.

(b) The nationwide injunction became effective 01/07/1988. The injunction impacts both the WHD and the United States (U.S.) Employment Service (USES) functions. Forestry contractors engaged in the activities named in the injunction are required to register with the Department of Labor (DOL) as FLCs and comply with all the provisions of the MSPA. Further, before referring workers to any such contractor for employment, the state workforce agencies are required to ascertain that the contractor is registered with the DOL. (b) (7)(E)

57a03 **Complaints from farmworker representatives.**

(b) (7)(E)

(b) (7)(E) [redacted]

57a04 **Cooperation with state workforce agencies.**

(a) Services to farmworkers and employers, including recruitment of migrants, are available in more than 2,000 local offices of the public employment service operating in every state. State workforce agencies are affiliated with the USES, through the Employment and Training Administration (ETA) of the DOL.

(b) (b) (7)(E) [redacted]

57a05 **Extent of investigation.**

(a) **General**

(b) (7)(E) [redacted]

(b) **Farm labor contractors**

(b) (7)(E) [redacted]

(c) **Reporting**

(b) (7)(E) [redacted]

57a06 **Coverage.**

(a) **Covered persons**

The MSPA statutory responsibilities exist for five categories of persons. Each FLC and farm labor contractor employee (FLCE), agricultural employer (AGER) and agricultural association (AGAS) must meet prescribed statutory responsibilities unless a specific statutory exemption applies. The act does not define users and HPs as such; however, it assigns them certain responsibilities whenever they perform certain specified activities. *See* FOH 57a07 for a discussion of how these responsibilities may be affected by statutory exemptions.

(1) *FLC: MSPA section 3(7), 29 CFR 500.20(j); and MSPA section 101(b), 29 CFR 500.20(l)*

FLCs and FLCEs are subject to the act and are required to register before recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker for money or any other valuable consideration.

(2) *AGER: MSPA section 3(2), 29 CFR 500.20(d)*

(3) *AGAS: MSPA section 3(1), 29 CFR 500.20(c)*

AGERs and AGASs are subject to the act but they and their employees are not required to register when recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.

(4) *User: MSPA section 402, 29 CFR 500.71*

For statistical reporting purposes a user is a person who does not fit within the definition of an FLC, FLCE, AGER, or AGAS and is subject to the act because of utilizing the services of an FLC. For example, a farmer and his or her spouse plant and cultivate a crop. The farmer is not an AGER because he or she does not utilize migrant or seasonal agricultural workers. At harvest time, he or she contracts with an FLC to bring in a crew and harvest the crop. He or she does not supervise, pay, or oversee the crew, but deals solely with the FLC. He or she is the user of that FLC. A user may also own or control housing which is provided to migrant agricultural workers and would then be subject also to section 203 of the act.

(5) *HP: MSPA section 203, 29 CFR 500.130*

For statistical reporting purposes an HP is a person not otherwise subject to the act who provides housing to migrant workers.

(b) Joint employment: MSPA section 3(5), 29 CFR 500.20(h)(4)

The term "joint employment" means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. The act's own definition of the term "employ" has the same meaning as it has under the FLSA. For further guidance, refer to 29 CFR 791. (b) (7)(E) [redacted] Other aspects of the MSPA, such as housing and transportation requirements, impose joint responsibility for compliance under certain conditions, but joint responsibility is not established solely through a joint employment analysis. *See* FOH 57e00(d).

57a07 <u>Principles for applying exemptions.</u>

NOT FOR PUBLIC DISTRIBUTION

(a) The act has 12 specific exemptions. These exemptions are to be construed narrowly and their application limited to those shown to be plainly within their terms. If all the requirements set forth in any statutory exemption are met, the person meeting the terms of the exemption is relieved from complying with the statutory obligations and prohibitions imposed by the act which relate to the exempted operations.

An exempt person, as specified in section 4 of the act, therefore, is relieved from the requirements of section 402 of the act pertaining to the confirmation of registration and the utilization of only a registered FLC. (b) (7)(E) [redacted] All of the worker protections and other statutory provisions must be complied with by an FLC who is subject to the act even though the FLC and the workers provided by the FLC are utilized by an exempt person.

(b) An exempt person, as specified in section 4 of the act, who owns or controls housing used for migrant agricultural workers who work for other persons, is not exempt from the provisions of section 203 of the act related to housing since the provision of housing to such workers is not related to the exempt operations. On the other hand, when housing is provided by an exempt person for only those workers employed in exempt operations by such person, the exemption applies also to the housing of such workers.

(c) The principles stated above apply to a family business, a small business, or any other operation which qualifies for exemption under section 4 of the act that owns or controls housing used for migrant workers who work for other persons. (b) (7)(E) [redacted]

57a08 **<u>Statutory exemptions.</u>**

(a) The following persons are not subject to the act:

(1) *Family business exemption: MSPA section 4(a)(1), 29 CFR 500.30(a)*

"Any individual who engages in a farm labor contracting activity on behalf of a farm, processing establishment, seed conditioning establishment, cannery, gin, packing shed, or nursery, which is owned or operated exclusively by such individual or an immediate family member, but without regard to whether such individual has incorporated or otherwise organized for business purposes."

a. <u>General</u>

The family business exemption applies only when its FLC activities are done by an individual who exclusively owns or operates the business or an immediate family member of such individual as specified in the act. When this exemption applies, the family business is not subject to the MSPA. The

NOT FOR PUBLIC DISTRIBUTION

family business exemption will not apply when the business has engaged an FLC or an AGAS to perform FLC activities or when activities are performed by any person other than the owner, operator, or an immediate family member thereof, such as a foreman or recruiter.

b. Treatment of partnerships

However, the exemption will not be denied when a partnership that consists of immediate family members (*e.g.*, brother and sister) own or operate a farm and one or both of them have sons and/or daughters performing FLC activities for the farm. Technically, the children of one of the partners would be nieces or nephews of the other partner. However, in this type example, the spirit of the family business exemption is still being met. Of course, if the partners were not immediate family members, the exemption would not apply; nor would it apply if someone other than an immediate family member of one of the immediate family partners were performing FLC activities (*e.g.*, a nephew of the immediate family partners who was not the son of either partner).

c. Translators

Should the owner, operator, or immediate family member utilize a non-family member fluent in a foreign language to assist as a translator in the family member's FLC activities, the exemption will apply unless the duties of the translator are found to extend to engagement in FLC activities, as such, rather than being limited to translation. When the exemption is found to be inapplicable, all of the FLC activities done on behalf of such non-exempt establishment, whether done by family members or others, are subject to the act.

d. Utilization of a state workforce agency

An employer whose activities are otherwise exempt under section 4(a)(1) does not lose the exemption by using the services of a local state workforce agency office to obtain workers. The state workforce agency is a public agency that provides employment services for employers seeking workers and for persons who seek employment. When a state workforce agency supplies workers to an AGER it is not itself engaging in covered FLC activities. Therefore, a farmer who is otherwise exempt under section 4(a)(1) does not lose this exemption by using a state workforce agency to obtain workers.

(2) *Small business exemption: MSPA section 4(a)(2), 29 CFR 500.30(b)*

"Any person, other than a farm labor contractor, for whom the man-days exemption for agricultural labor provided under section 13(a)(6)(A) of the Fair Labor Standards Act of 1938 (29 USC 213(a)(6)(A)) is applicable."

An exempt small business is not required to comply with section 402 of the act regarding confirmation of registration nor any other provision of the act except when acting as an HP as noted below. It should be noted, however, that the FLSA

NOT FOR PUBLIC DISTRIBUTION

exemption is limited to any employee employed in agriculture, as defined under the FLSA, if such employee is employed by an employer who utilized 500 man-days or fewer of *agricultural labor* during any calendar quarter during the preceding calendar year. Agricultural labor under section 3(f) of the FLSA does not include packing shed operations unless such operations are performed by a farmer or on a farm as an incident to or in conjunction with such farming operations. Any FLC utilized by an exempt small business must nevertheless comply with all provisions of the act that are applicable to an FLC. The section 13(a)(6)(A) exemption of the FLSA should be carefully examined since an AGER or AGAS that requires any substantial FLC services may very well have utilized sufficient man-days in a calendar quarter of the prior year to be disqualified for such exemption. *See* 29 CFR 780.304 and 29 CFR 780.331. The term "man-day" is defined in 29 CFR 500.30(b)(2). In determining the man-days used by an AGER or AGAS, the determination shall include:

a. the man-days worked by its own employees (excluding only the parents, spouse, child, or other members of the employer's immediate family as defined in 29 CFR 500.20(o)) and

b. the man-days it employed as a result of the workers provided to it by any FLC or other employer, association, or person. *See* 29 CFR 500.30(b)(3).

(b) Other exemptions

(1) *Common carriers: MSPA section 4(a)(3)(A), 29 CFR 500.30(c)*

"Any common carrier which would be a farm labor contractor solely because the carrier is engaged in the farm labor contracting activity of transporting any migrant or seasonal agricultural worker."

a. The Congress continued this exemption, which was in the Farm Labor Contractor Registration Act (FLCRA), with the intention that it be applied in the same manner as it was in that act. This exemption was added to the FLCRA in 1974, without legislative history, to exempt common carriers and their employees whose only FLC activity was to transport agricultural workers. Such common carriers are required to obtain the insurance coverage currently applicable to vehicles used in the transportation of passengers in interstate commerce under the Interstate Commerce Act and utilize vehicles which conform to all applicable federal and state safety standards. Accordingly, Congress exempted such carriers from the requirements of the act since the workers were already receiving identical statutory protection through applicable Interstate Commerce Commission (ICC) insurance and Department of Transportation (DOT) vehicle safety requirements.

b. A "common carrier" by motor vehicle is one which holds itself out to the general public to engage in the transportation of passengers for hire over regular or irregular routes, and which holds a valid certificate of authorization for such purpose from an appropriate local, state or federal agency. One example of such a carrier would be a large commercial bus company which makes its services available to the general public but may also provide an exclusive service to specific groups or persons. A

NOT FOR PUBLIC DISTRIBUTION

corporation licensed by a state and limited to the transportation of agricultural workers only would not qualify as a common carrier.

c. A common carrier licensed by the ICC that makes its services available to the public may qualify for the exemption even if the persons transported are predominately migrant or seasonal agricultural workers.

d. A common carrier continuing to operate after revocation of its ICC, state, or local permit will not qualify for the exemption.

e. The performance of any FLC activity, other than transporting, by a common carrier would result in its loss of the exemption.

(2) *Labor organizations: MSPA section 4(a)(3)(B), 29 CFR 500.30(d)*

"Any labor organization, as defined in section 2(5) of the Labor Management Relations Act (29 USC 152(5)) (without regard to the exclusion of agricultural employees in that Act) or as defined under applicable State labor relations law."

Section 2(5) of the National Labor Relations Act states:

"The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Examples of the kinds of labor organizations intended to be exempt under this section include such entities as the United Farmworkers of America (AFL-CIO) and certain teamster locals that represent migrant or seasonal agricultural workers.

(3) *Non-profit charitable organizations: MSPA section 4(a)(3)(C), 29 CFR 500.30(e)*

"Any nonprofit charitable organization or public or private nonprofit educational institution."

a. The exemption is available only if the organization is both non-profit and charitable or if it is a public or private non-profit educational institution. The Congress continued this exemption, which was in the FLCRA, with the intention that it be applied in the same manner as in that act. The exemption applies only to the two classes of organizations and institutions specifically set forth. Congress did not exempt all non-profit organizations, whether operated for charitable, educational, or business purposes. Charitable and educational organizations characteristically do not engage in activities calculated to afford financial gain, incidental or otherwise, to their members. Charities and educational institutions are operated exclusively for purposes that benefit the community they serve, either by relieving it from an obligation owed to objects of charity as members of the community or by contributing to the processes of learning and the acquisition of general knowledge. A business enterprise is organized and operated for none of these purposes and, accordingly, is not entitled to the exemption in section

NOT FOR PUBLIC DISTRIBUTION

4(a)(3)(C).

b. The exemption provided by section 4(a)(3)(C) applies where a public or private non-profit educational institution such as, for example, an agricultural college or agricultural vocational school that engages in FLC activities in connection with its own agricultural activities. The activities of a charitable organization or educational institution, to qualify for exemption under section 4(a)(3)(C), must be conducted in good faith and not for the purpose of making a profit or in the belief that a profit can be realized thereon.

While agricultural cooperative associations are organized and operated on a non-profit basis, as business enterprises they are essentially distinguishable from and dissimilar to the charitable and educational organizations described in section 4(a)(3)(C). The organization and operation of such an agricultural cooperative association is obviously a matter of economic and business necessity to the member-growers who support it. While an agricultural cooperative association does not earn a profit, the fact remains that its operations are intended to increase the profits of the membership by reducing overhead in the harvesting and/or marketing of each member's crop. Accordingly, the operations of such entities are not similar to the activities described in section 4(a)(3)(C). The act's legislative history demonstrates that such entities as defined in section 3(1) of the act must comply with its provisions unless subject to some other specific statutory exemption.

(4) *Local short-term contracting activity: MSPA section 4(a)(3)(D), 29 CFR 500.30(f)*

"Any person who engages in any farm labor contracting activity solely within a twenty-five mile intrastate radius of such person's permanent place of residence and for not more than thirteen weeks per year."

a. Within a 25 mile intrastate radius

This exemption will not be denied to any person solely on the basis of their contact with the state workforce agency in any state provided the conditions of this exemption are otherwise fully met. If, however, a person goes to a state workforce agency office beyond 25 intrastate miles from his or her permanent place of residence in order to interview prospective workers or to engage in other recruitment, solicitation, or hiring activity, the exemption will not apply. Similarly, if a person makes contact with the prospective workers by telephone, mail, or other means of communication, and if it involves a distance greater than 25 intrastate miles from such person's permanent place of residence, then the scope of this exemption is exceeded and the exemption does not apply.

b. Permanent place of residence

A corporation's permanent place of residence for these purposes shall be a single designated location. *See* 29 CFR 500.30(f)(1).

c. Not more than 13 weeks per year

NOT FOR PUBLIC DISTRIBUTION

Performance of named FLC activities for more than 13 weeks per year defeats the exemption. It is not the intent of the act to exempt all persons for their first 13 weeks of FLC activity in a year. *See* 29 CFR 500.30(f)(2). As noted there, the number of weeks of contracting activity during the prior year is also a factor. When the limit of weeks for the exception is exceeded in a calendar year, the person is subject immediately to the act and is also presumed subject to the act in the next calendar year unless it can be shown that the tests of section 4(a)(3)(D) are met.

(5) *Custom combine: MSPA section 4(a)(3)(E), 29 CFR 500.30(g)*

"Any custom combine, hay harvesting, or sheep shearing operation." The term "custom combine" applies only to grain harvesting operations and does not apply to potatoes or other mechanized harvesting operations. The term "grain" includes the following commodities: wheat, rice, corn, barley, dry beans, oats, peas, soybeans, and other such grains. This exemption does not apply if any non-exempt work is performed.

(6) *Custom poultry operations: MSPA section (4)(a)(3)(F), 29 CFR 500.30(h)*

"Any custom poultry harvesting, breeding, debeaking, desexing, or health service operation, provided the employees of the operation are not regularly required to be away from their permanent place of residence other than during their normal working hours."

The phrase "permanent place of residence" (*see* 29 CFR 500.20(p)(2)) as used in this exemption means a person's permanent home to which in time he or she intends to return, and cannot under any circumstances include temporary or seasonal accommodations such as a labor camp. The activities intended to be exempted under this provision include poultry catching, which is performed on a contract basis, typically by the company that hauls the poultry from growing house to processing plant. The workers who catch poultry are residents in the area where they work and have stable employment ties with their contractor. A single contractor may serve only one large poultry producer/processor or may serve several smaller producer/processors. Poultry breeding is performed on a contract basis similar to poultry catching. The contractor brings his or her crew to the farm and performs artificial insemination services at that location. The same situation exists with respect to poultry sexing, debeaking, and health service operations. This exemption is not applicable if any non-exempt work is performed.

(7) *Seed production exemption: MSPA section 4(a)(3)(G), 29 CFR 500.30i*

29 CFR 500.30(i)(1): "Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment, to detassel, rogue, or otherwise engage in the production of seed and to engage in related and incidental agricultural employment, unless such full-time students or other individuals are required to be away from their permanent place of residence overnight or there are individuals under eighteen years of age who are providing transportation on behalf of such person."

NOT FOR PUBLIC DISTRIBUTION

29 CFR 500.30(ii)(2): "Any person to the extent he is supplied with students or other individuals for agricultural employment in accordance with paragraph (i)(1) of this section by a person who is exempt thereunder."

Any person who supplies seed production workers may be exempt provided all the statutory requirements are met:

a. The person engaged in supplying workers must have a principal occupation other than agricultural employment. Examples of persons who could be exempt as suppliers of workers include school teachers, coaches, and college students.

b. The workers supplied must be full-time students or other persons whose principal occupation is not agricultural employment such as high school or college students. The supplying of traditional migrant or seasonal agricultural workers is not within the scope of the exemption.

c. The workers must be employed to:

1. detassel, rogue, or

2. otherwise engage in the production of seed, and/or

3. engage in related and incidental agricultural employment. This phrase refers only to activities which are related and incidental to detasseling, roguing, or the production of seed. This limited phraseology would include scientific research and plant breeding activities associated with the production of seed if such activities are performed by professionally trained students (*i.e.*, graduate student researchers or those in a similar accredited educational training program). These research activities are substantially different in their nature and purpose from traditional field work done by migrant and seasonal workers and are exempt from the act. Such research activities necessitate visits to various research plots for pollination and on-site examinations that because of their locations require overnight travel, and therefore, notwithstanding the overnight provision, such described activities when performed by such described individuals are exempt. However, an exemption based on the "related and incidental" phraseology may not be used to exempt a supplier or the one to whom such labor is supplied unless the other requirements of the exemption are met, in particular the transportation limitations.

4. The full-time students and other workers may not be away from their permanent place of residence overnight (except for professionally trained students in plant research activities referred to in FOH 57a08(b)(7)c.3. above).

5. There may not be individuals under 18 years of age providing transportation to the seed production workers on behalf of the person who supplies the students.

NOT FOR PUBLIC DISTRIBUTION

6. A supplier of workers is not exempt if he or she supplies workers within the exempt class (such as full-time students) and also supplies other workers whose primary occupation is in agriculture.

7. Any person supplied seed production workers by a person who is exempt under the standards given above is also exempt provided that all of the workers supplied are within the exempt class (*i.e.*, full-time students or others not principally employed in agriculture).

(8) *Shade grown tobacco: MSPA section 4(a)(3)(H), 29 CFR 500.30(j):*

29 CFR 500.30(j)(1): "Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to string or harvest shade grown tobacco and to engage in related and incidental agricultural employment, unless there are individuals under eighteen years of age who are providing transportation on behalf of such person."

29 CFR 500.30(j)(2): "Any person to the extent he is supplied with students or other individuals for agricultural employment in accordance with paragraph (j)(1) of this section by a person who is exempt thereunder."

Any person who supplies workers for the stringing and harvesting of shade grown tobacco may be exempt provided all the statutory requirements are met:

a. The person engaged in supplying workers must have a principal occupation or business other than agricultural employment. Examples of persons who could be exempt as suppliers of workers include school teachers, coaches, and college students.

b. The workers supplied must be full-time students or other persons whose principal occupation is not agricultural employment such as high school or college students. The supplying of traditional migrant or seasonal agricultural workers is not within the scope of the exemption.

c. The workers must be employed to:

1. string or harvest shade grown tobacco and/or

2. engage in related and incidental agricultural employment.

d. There may not be individuals under 18 years of age providing transportation to the shade grown tobacco workers on behalf of the person who supplies the students.

e. A supplier of workers is not exempt if he or she supplies workers within the exempt class (such as full-time students) and also supplies other workers whose primary occupation is in agriculture.

NOT FOR PUBLIC DISTRIBUTION

(c) The act exempts all employees of persons otherwise exempt under FOH 57a08(b)(1) -(8) above provided that such employees perform FLC activities within the scope of such exemptions and exclusively for such exempted person.

(d) The act exempts from registration AGERs, AGASs, and employees of an AGER and AGAS. *See* MSPA section 4(b).

57a09 **Migrant and seasonal agricultural workers.**

(a) The MSPA applies and provides protection to two types of workers:

(1) *Migrant agricultural workers: MSPA sections 3(8)(A) -(B), 29 CFR 500.20(p)(1)*

a. Migrant agricultural workers are those individuals who are employed in agricultural employment of a seasonal or other temporary nature and are required to be absent overnight from their permanent place of residence.

b. Migrant agricultural workers do not include any immediate family member of an AGER or an FLC or any temporary non-immigrant alien authorized to work in agricultural employment in the U.S. (*i.e.*, H-2A workers).

(2) *Seasonal agricultural workers: MSPA sections 3(10)(A) -(B), 29 CFR 500.20(r)*

Seasonal agricultural workers are those individuals employed in agricultural employment of a seasonal or other temporary nature and not required to be absent overnight from their permanent place of residence when:

a. employed on a farm or ranch performing field work relating to planting, cultivating, or harvesting operations ("field work" encompasses any boxing of commodities done in the field, and the off-and-on field loading of trucks and other similar transports; nursery, mushroom, and similar workers are intended to be covered if the requirements stated above are otherwise met); or

b. when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported or caused to be transported to or from the place of employment by means of day haul operations. "Day haul operations" mean the assembly of workers at a pickup point waiting to be hired and employed, transportation of such workers to agricultural employment, and the return of such workers to a drop-off point on the same day.

(3) *Seasonal basis of field work defined*

A worker, other than a migrant worker, who performs field work during any part of a day is defined as a seasonal agricultural worker during that period of time. A worker may be employed on a seasonal basis even though he or she may continue to be employed during a major portion of the year if the work is of a seasonal or intermittent nature, such as planting, cultivating, or harvesting. It is the nature of the work, rather than the duration of employment, which controls (*e.g.*, a hen house

NOT FOR PUBLIC DISTRIBUTION

produces a new crop of eggs daily and a hatchery continually provides replacements to the hen house).

(4) *Persons who are not seasonal agricultural workers*

a. Seasonal agricultural workers do not include any migrant agricultural workers, any immediate family member of an AGER or FLC, or any temporary non-immigrant alien who is authorized to work in agricultural employment in the U.S. (*i.e.*, H-2A workers).

Foremen, supervisors, and local residents employed on a year-round basis to perform a variety of tasks for their employer and not primarily employed to do field work are excluded from treatment as seasonal workers by virtue of the definitions provided in 29 CFR 500.20(r)(2)(iv) -(v). A local resident operating a machine, such as a picker or tractor, is excluded from treatment as a seasonal worker. *See* 29 CFR 500.20(r)(2)(ii).

57a10 **<u>Investigation guidelines.</u>**

(a) The primary objective of investigations under the MSPA is to secure maximum compliance with the most effective use of investigation time. Investigations will involve the examination of activities of FLCs, AGERs, AGASs, users, and HPs. The purposes are threefold:

(1) To determine whether the FLC, FLCE, AGER, AGAS, user, or HP has complied with all applicable provisions of the law

(2) If full compliance is not found, to ascertain any reason for the non-compliance and the most efficient, quickest way to achieve compliance

(3) To initiate, as quickly as possible, appropriate administrative or legal action consistent with investigation findings

(b) Investigations of FLCs (and their FLCEs), AGERs, AGASs, users, or HPs shall include a determination as to whether these persons have fulfilled their obligations under the act. (b) (7) (E)

[redacted]

[redacted]

[redacted]

57a11 **<u>Initial conference.</u>**

NOT FOR PUBLIC DISTRIBUTION

The purpose of the initial conference is the same as under other acts: to inform the persons with whom the conference is held of the nature and scope of the investigation, inform them of the provisions of the act, determine the application of the act, furnish appropriate reference material, and obtain information concerning the activity being investigated.

57a12 **Records examination.**

(a) Records shall be examined to the extent necessary to determine compliance with the MSPA as well as other laws administered by the WHD. (b) (7)(E) [redacted]

[redacted]

57a13 **Employee interviews.**

(a) Complainants shall be interviewed for purposes of the MSPA in the same general manner as under other acts.

(b) (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b)(7)(E)

57a14 **Enforcement and penalties.**

Appropriate administrative or legal action will be instituted without delay to impose statutory sanctions where there is clear evidence of aggravated, serious, or repeated violations of the act or its regulations or when public health, interest, or safety requires such action. These actions are fully explained in FOH 57c.

57a15 **Case analysis prior to disposition.**

(a) (b) (7)(E)

57a16 **Final conference and disposition.**

(a) Upon completion of the fact-finding phase of an investigation under the MSPA, a conference will be held with the person investigated. As appropriate the FLC, AGER, AGAS, user, or HP may be present at the same conference. In any case the conference will be conducted with someone who can speak with authority and ensure that compliance is achieved.

(1) Each person investigated may be furnished a copy of the completed WH-517: Potential MSPA Violations Checklist (WH-517) showing areas of potential MSPA violations and advised how compliance can be achieved.

(2) The WHI shall ascertain the reasons for any violations and obtain an agreement to comply. The WHI shall point out to the FLC, AGER, AGAS, or HP the seriousness of the violations, and the possible consequences of operating in violation, and the WHD policy that compliance should be achieved immediately.

(3) The narrative shall concisely discuss what the persons were told and also state what response was made regarding issues discussed.

(4) The WHI must exercise a practical judgment as to the best way of achieving immediate compliance.

If the FLC and/or FLCE has failed to register, the WHI will take whatever steps are necessary to see that registration is achieved immediately. In some cases it may be appropriate for the WHI to have registration forms and to assist the FLC and/or FLCE with the application, which should be immediately forwarded to the regional office (RO) for processing. The forms used for registration are summarized in FOH 57f.

(b) In other instances it may be appropriate to direct the contractor to the nearest state workforce agency office to apply for registration. In this event the FLC and/or FLCE shall be advised that application for registration should be made within 2 working days. If the FLC and/or FLCE agrees to register, the WHI will re-contact either the FLC and/or FLCE or the local employment services office to determine if application has been made. In cases where an unregistered contractor leaves the area without applying for registration, the FLC and/or FLCE should be investigated at the next location.

57a17 **<u>Disposition when a final conference cannot be held.</u>**

(a) (b) (7)(E) [redacted]

[redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) The investigation should then proceed in the same manner as if the final conference had been held: CMPs should be pursued, certificate action should be recommended, if applicable; and/or civil or criminal action should be sought, as appropriate, based on the violations disclosed and the documentation in the file.

57a18 **<u>MSPA investigation tracer list.</u>**

(b) (7) (E)

Introduction

Among the required written disclosures before the employment of covered workers are the wage rates to be paid. When the wage rate agreed to is the FLSA minimum wage and the investigation discloses a minimum wage violation. (b) (7)(E)

Examples of MSPA investigation findings and the reporting instructions are contained in this section.

(b) **General**

Workers are to be promptly paid all wages owed when due. Wages owed depend on what wages were agreed to by the employer but can be no less than the FLSA minimum wage, where applicable. A pay period shall not be greater than 2 weeks (or semi-monthly). (b) (7) (E)

(b) (7)(E)

(c) Wages owed

Wages owed includes *all* monies due to the workers (*e.g.*, a state minimum wage, which may be higher than the FLSA minimum wage; overtime pay, where applicable; or deductions for federal, state, or local taxes; levies; and/or assessments from the workers' pay) that have *not* been forwarded by the employer to the appropriate agency. (b) (7)(E)

(d) Were the agreed wages paid?

(b) (7)(E)

(e) Back wages and CMPs

(b) (7)(E)

(f) Social security and income tax withholding

(b) (7)(E)

(2) Federal district courts have held that an FLC's failure to forward to the government the employees' contributions under the Federal Insurance Contributions Act (FICA) constitutes a violation of the MSPA, and that failure to forward FICA taxes may constitute a violation of the FLSA because the employer is not entitled to credit the taxes withheld against its minimum wage obligations. Accordingly, an employer who retains a social security deduction withheld from a worker's wages is subject to enforcement under these statutes to recover the improperly withheld sums.

(3) Court cases thus far have dealt with the failure to remit FICA and unemployment insurance taxes and make no reference to *income* taxes. This is because farm workers' wages did not become subject to the federal income tax withholding requirement until the beginning of calendar year1990. However, an FLC's failure to remit withheld income taxes is subject to the same principle.

(4) (b) (7)(E) [redacted]

(5) Apparent discrepancies should promptly be reported to the local Social Security Administration (SSA) field office with all pertinent documentation regarding such employment. (b) (7)(E) [redacted]

(g) MSPA and FLSA unpaid wages distinguished

(b) (7)(E) [redacted]

(1) An employer promises to pay $0.50 per hour above the FLSA minimum wage but pays only the minimum wage. The difference between the amount paid and the amount promised is recorded on the WH-500 as a violation of *failure to pay wages when due*. If this employer pays less than the FLSA minimum wage, the difference between the amount actually paid and the FLSA minimum wage is recorded on the WH-51.

(2) An employer promises to pay $0.50 per bushel but pays only $0.45 per bushel, which yields an amount in excess of the FLSA minimum wage. The difference between $0.45 and $0.50 for each bushel harvested is recorded on the WH-500 as a violation of *failure to pay wages when due*. If the employer pays $0.45 per bushel, which

yields less than the FLSA minimum wage, the difference between the amount paid and the FLSA minimum wage for all hours worked is recorded on the WH-51. An employer promises to pay $10.00 per hour but does not pay anything. An amount equal to the FLSA minimum wage for all hours worked is recorded on the WH-51. The difference between the FLSA minimum wage and $10.00 per hour for all hours worked is recorded on the WH-500 as a violation of *failure to pay wages when due*. If such employer is obligated to pay transportation costs and fails to do so, any amount for transportation deducted from workers' pay or that workers were required to give back to the employer is a violation of MSPA and where the FLSA minimum wage was cut into, it is an FLSA violation to such extent.

(h) Reporting of MSPA back wages

(b) (7)(E) [redacted]

(i) Back wages found due are less than $20.00

(b) (7)(E) [redacted]

57b COMPLIANCE PROGRAMMING

57b00 Program planning purpose and primary considerations.

(a) Compliance programming provides general guidelines for planning MSPA compliance operations and related activities and instructions for their implementation. FOH 57c discusses in detail the bringing of administrative, civil, and criminal sanctions according to the investigation findings. Effective MSPA enforcement operations depend upon efficient use of investigation resources to attain maximum effective coverage. To achieve this goal, use the following guidelines in scheduling compliance operations.

(b) Type of investigation assignment

(b) (7)(E) [redacted]

(1) *State workforce agency complaint*

(b) (7)(E) [redacted]

(2) *Non-complaint directed investigations*

In (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(3) *Complaint*

[redacted]

(c) Scope of investigation assignments

[redacted]

(d) Investigation selection criteria

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

57b01 Complaint investigation scheduling.

(b) (7)(E)

(b) (7)(E)

57b02 **Non-complaint investigation scheduling.**

(a) General

A strong enforcement effort is the most effective tool for achieving compliance with the provisions of the MSPA. In addition to handling complaints, a directed program is an essential enforcement requirement.

(b) Priorities for non-complaint investigation scheduling

(b) (7)(E)

57b03 **Follow-up investigations.**

(a) **General**

(b) (7)(E)

(b) **Follow-up not required**

It will not be necessary to consider a follow-up investigation if the violations found were corrected during the course of the investigation.

57b04 **Coordination of migrant and seasonal farmworker investigations.**

(a) **General**

In order to provide the greatest protection to workers, we must take swift, meaningful action against those persons who are shown to be in serious violation. This requires a close and cooperative working arrangement with the regional solicitor of labor (RSOL). This

cooperation for priority enforcement effort must be established and defined prior to the implementation of any strategy or plan.

(b) Farm labor contractor

Because of the mobility of many of the FLCs identified for priority enforcement effort, successful enforcement requires a coordinated effort, including the use of MODO procedures.

(b)(7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(c) Unpaid CMPs owed by FLCs.

An unpaid CMP that has become a final order of the Secretary of Labor (Secretary) will result in revocation of or refusal to renew and/or issue a Certificate of Registration as provided in section 103(a)(4) of the act. Section 500.220 provides that service of a determination to assess a CMP is complete upon mailing, when done by certified mail and sent to the last known address of the individual, officer, or attorney. (b)(7)(E) [redacted]

57b05 **Remedies.**

In light of DOL experience, most violation cases will not be resolved solely on the basis of assurance of future compliance. Consideration will be given to the multiple remedies available under the act. (b) (7)(E) [redacted]

57b06 **Tracer list and statistical reporting system.**

(a) (b) (7)(E) [redacted]

(b) WHMIS statistics are published on an NO, RO, and DO basis indicating the number of compliance actions, violations (item by item), workers protected, and other pertinent statistical data. It is important, therefore, that the WH-500 be prepared accurately.

57c **SANCTIONS**

57c00 **Multiple sanctions and remedies.**

Multiple sanctions may be imposed against those found in violation of the act (*see* 29 CFR 500.141). When violations are found, consideration must be given to all appropriate sanctions provided for i (b) (7)(E) [redacted]

57c01 **Criminal actions.**

(a) Section 501(a) of the act provides for the possible imposition of criminal sanctions against FLCs, AGERs, AGASs, users, and HPs. Under section 501(a), any person who willfully and knowingly (*see* FOH 57c03(k) for the definition of "willful and knowing") violates the act or any regulations issued thereunder may be fined not more than $1,000.00 or sentenced to a prison term not to exceed one year, or both. Upon conviction for any subsequent violation of the act or its regulations, such person may be fined not more than $10,000.00 or sentenced to a prison term not to exceed 3 years, or both.

(b) The regional director of enforcement (DOE) or the regional criminal enforcement coordinator (if a different person than the DOE) should be contacted during the development of the case when criminal action is being contemplated.

57c02 **Civil actions.**

NOT FOR PUBLIC DISTRIBUTION

(a) Any person aggrieved by a violation of the act or any regulation under the act committed by an FLC, AGER, AGAS, or other person has a private right of action and may file civil suit in any U.S. district court having jurisdiction without regard to the amount in controversy or to the person's citizenship and without having to exhaust any alternative administrative remedies of the act (*see* section 504(a)).

(b) Section 502 of the act provides that the Secretary may, after a compliance action that discloses a violation of the act or any regulation issued thereunder, seek temporary or permanent injunctive relief from any appropriate U.S. district court. Such injunctive relief may be sought against FLCs, AGERs, AGASs, users, and HPs.

(b) (7)(E) [redacted] Sections 505(a) -(b) of the act provide that where a complaint alleging specified discriminatory action (*i.e.*, retaliation) has been filed with the Secretary by any migrant or seasonal agricultural worker within 180 days after such violation occurs, and if upon investigation the Secretary determines that section 505(a) has been violated, the Secretary may bring a civil action in an appropriate federal district court. In such circumstances, the district court has jurisdiction to restrain any future violation of section 505(a) and to order all appropriate relief, including the rehiring or reinstatement of the worker, with back pay and/or damages. Note: the rehiring and reinstatement of the worker is not limited to the current season.

(c) Section 101(d) of the act provides that the facilities and services of the state workforce agency (formerly known as state employment service agencies) shall be denied to any FLC upon refusal or failure to produce their Certificate of Registration when asked.

57c03 **<u>Civil money penalties.</u>**

(a) **General CMP policy**

The WHD policy is to obtain compliance through a vigorous enforcement program based on the most efficient and effective use of available tools and resources.

(b) (7)(E) [redacted]

Seeking back wages (and, as appropriate under the FLSA, liquidated damages), and assessing CMPs helps to achieve compliance. While back wages and FLSA liquidated damages make an employee whole for losses incurred as a result of his or her employer's failure to abide by the law, CMPs are intended to change an employer's behavior by deterring future unlawful conduct and providing an employer who has not been investigated with the incentive to comply with the law. CMPs create a substantial financial incentive for an employer who might otherwise violate laws and regulations enforced by the WHD to comply with those laws. CMPs can have a significant impact on not only investigated employers but also on other employers within a local area or more broadly within a larger industry.

(b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b)(7)(E)

In order to give full meaning to the requirements of the act, violations will be cited for non-compliance, CMPs assessed, and any other enforcement action taken as necessary. (b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(d) CMP computation formula

As a general rule, WHIs should start the CMP calculation at the statutory maximum of $1,000.00 for each violation being cited and then consider all mitigating factors individually for each violation. Each applicable mitigating factor may reduce the CMP by 10 percent. Aggravating factors, such as a serious injury or exposure to a safety or health violation that poses an immediate danger, should be considered part of the initial analysis (b)(7)(E)

(b)(7)(E)

(b) (7)(E) [redacted]

(e) List of violations, CMP base amount, number of violations, and overview of each item

For the purposes of CMP computation under the MSPA, the CMP base amount is the statutory maximum of $1,000.00 per violation. (b) (7)(E) [redacted]

[redacted]

(b) (7)(E) [redacted]

Item	Violation description	Person that may be cited	(b) (7)(E) [redacted]
01	Failure to disclose conditions to workers	FLC, AGER, AGAS	(b) (7)(E) [redacted]
02	Failure to post MSPA poster at worksite	FLC, AGER, AGAS	(b) (7)(E) [redacted]
03	Misrepresenting conditions to workers	FLC, AGER, AGAS	(b) (7)(E) [redacted]
04	Breach of working arrangements with workers	FLC, AGER, AGAS	(b) (7)(E) [redacted]
05	Failure to make/keep employer records	FLC, AGER, AGAS	(b) (7)(E) [redacted]
06	Failure to provide wage statement to workers	FLC, AGER, AGAS	(b) (7)(E) [redacted]
07	Failure to provide records to AGAS/AGER	FLC only	(b) (7)(E) [redacted]

Item	Violation description	Person that may be cited	(b) (7)(E)
08	Failure to maintain records provided by FLC	FLC, AGER, AGAS	(b) (7)(E)
09	Failure to pay wages owed when due	FLC, AGER, AGAS	(b) (7)(E)
10	Restricting workers in purchase of goods/services	FLC, AGER, AGAS	(b) (7)(E)
11	Failure to provide terms and conditions of housing occupancy	FLC, AGER, AGAS	(b) (7)(E)
12	Failure to ensure housing safety and health	FLC, AGER, AGAS, HP	(b) (7)(E)
13	Failure to provide safe transportation vehicles	FLC, AGER, AGAS	(b) (7)(E)
14	Failure to ensure driver has valid license	FLC, AGER, AGAS	(b) (7)(E)
15	Failure to obtain prescribed insurance coverage	FLC, AGER, AGAS	(b) (7)(E)
16	Using services of unregistered FLC	FLC, AGER, AGAS, user	(b) (7)(E)
17	Discriminate, etc. against workers	FLC, AGER, AGAS, user, HP	(b) (7)(E)
18	Interfering with DOL official during investigation	FLC, AGER, AGAS, user, HP	(b) (7)(E)
19	Failure to register as an FLC	FLC only	(b) (7)(E)
20	Failure to register employee	FLC only	(b) (7)(E)
21	Failure to exhibit certificate	FLC only	(b) (7)(E)
22	Knowingly made misrepresentation on application	FLC only	(b) (7)(E)
23	Failure to comply with court judgment or final order	FLC only	
24	Was not the real party in interest	FLC only	(b) (7)(E)
25	Transported workers w/o certificate authorization	FLC only	(b) (7)(E)
26	Housed workers w/o certificate authorization	FLC only	(b) (7)(E)

NOT FOR PUBLIC DISTRIBUTION

Item	Violation description	Person that may be cited	(b) (7)(E)	(b) (7)(E)
27	Failure to provide change of permanent address	FLC only		
28	Failure to apply to amend certificate	FLC only		(b) (7)(E)
29	Drove workers w/o certificate authorization	FLC only		(b) (7)(E)
30	Failure to abide by written agreements with AGER or AGAS	FLC only		(b) (7)(E)

(1) *Item 1: failure to disclose conditions to workers: MSPA sections 201(a), 201(g), 301(a), and 301(f)*

(b) (7)(E)

(b) (7)(E)

See 29 CFR 500.75(b) for migrant agricultural workers and *see* 29 CFR 500.76(b) -(c) for seasonal agricultural workers.

(b) (7)(E)

(2) *Item 2: failure to post the MSPA poster at worksite: MSPA sections 201(b), 301(b), and 403*

(b) (7)(E)

(b) (7)(E)

(b) (7)(E) [redacted] The objective of the poster requirement is that all covered workers are entitled to the information provided on the poster pertaining to rights and protections required under the act. The information should be posted in a conspicuous place at the place of employment.

(b) (7)(E) [redacted] and 29 CFR 500.75(c) for migrant agricultural workers and 29 CFR 500.76(d) for seasonal agricultural workers.

(b) (7)(E) [redacted]

(3) *Item 3: misrepresenting conditions to workers: MSPA sections 201(f) and 301(e)*

FLCs, AGERs, AGASs, and their authorized representatives are required to provide accurate information, to the best of their ability and to the extent they have obtained such information, about the terms, conditions, and existence of agricultural employment. Such persons must not knowingly misrepresent the terms, conditions, or existence of agricultural employment and housing that are required to be disclosed to any migrant or seasonal agricultural worker. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

(b) (7)(E) [redacted]

[redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted] and 29 CFR 500.77.

(b) (7)(E) [redacted]

(4) *Item 4: breach of working arrangements with workers: MSPA sections 202(c) and 302(c)*

FLCs, AGERs, and AGASs are prohibited from violating, without justification, the terms of any working arrangements made with the workers. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

See FOH 57e04 and 29 CFR 500.72.

(b) (7)(E) [redacted]

(5) *Item 5: failure to make and/or keep employer records: MSPA sections 201(d)(1) and 301(c)(1)*

(b) (7)(E) [redacted] The seven required items are: each worker's name, address, and social security number; the basis on which wages are paid; the number of piecework units earned, if paid on a piecework basis; the number of hours worked; the total pay period earnings; the specific sums withheld and the purpose of each sum withheld; and the net pay. (b) (7)(E) [redacted] Records must be maintained for each individual worker and kept for a period of 3 years.

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

See FOH 57e05 and 29 CFR 500.80(a) -(b).

(b) (7)(E) [redacted]

(6) *Item 6: failure to provide complete wage statement to workers: MSPA sections 201(d)(2) and 301(c)(2)*

The regulation specifies each item of information that must be on the wage statement. (b) (7)(E) [redacted] The eight items required to be listed are: the basis on which wages are paid; the number of piecework units earned, if paid on a piecework basis; the number of hours worked; the total pay period earnings; the specific sums withheld and the purpose of each sum withheld; the net pay; the employer's name, address, and employer identification number; and the worker's name, permanent address, and social security number. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

See FOH 57e06 and 29 CFR 500.80(d).

(b) (7)(E) [redacted]

(7) *Item 7: failure to provide complete records to AGAS and/or AGER: MSPA sections 201(e) and 301(d)*

For purposes of this violation, the number of records not provided should be based on the number of *complete* payroll records (one set for all workers) that the FLC failed to provide to each AGER, AGAS, or other FLC by the end of the season. Complete records includes everything that was required to be kept in the records by the FLC, as discussed in item 5 above. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E)

See FOH 57e07 and 29 CFR 500.60(a).

(b) (7)(E)

(8) *Item 8: failure to maintain records provided by the FLC: MSPA sections 201(e) and 301(d)*

(b) (7)(E)

(b) (7)(E)

See FOH 57e08 and 29 CFR 500.80(c).

(b) (7)(E)

(9) *Item 9: failure to pay wages when due: MSPA sections 202(a) and 302(a)*

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

See FOH 57e09 and 29 CFR 500.81.

(b) (7)(E) [redacted]

(10) *Item 10: restricting workers in purchase of goods or services: MSPA sections 202(b) and 302(b)*

It is a violation of this requirement to require workers to purchase any goods or services solely from the FLC, AGER, or AGAS or their agents, regardless of whether the FLC, AGER, or AGAS has disclosed that such charges will be made. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

See FOH 57e10 and 29 CFR 500.73.

(b) (7)(E) [redacted]

(11) *Item 11: failure to provide terms and conditions of housing occupancy: MSPA sections 201(c) and 203(b)(1)*

The terms and conditions of occupancy of the housing (*e.g.*, curfew, noise level restrictions, etc.) must either be posted or provided in writing. (b) (7)(E) [redacted] Optional WH-521: Housing Terms and Conditions (WH-521) may be used to meet this requirement.

(b) (7)(E) [redacted] Optional form WH-520: Housing Occupancy Certificate, may be used to meet this requirement. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

See FOH 57e11, 29 CFR 500.75(f), and 20 CFR 500.135(b).

(b) (7)(E) [redacted]

(12) *Item 12: failure to ensure housing safety and health: MSPA sections 203(a) and 203(b)*

This violation applies to any covered facility or real property used for the housing of migrant agricultural workers that fails to conform to all applicable substantive federal and state safety and health standards. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

See FOH 57e12 and 29 CFR 500.130.

(b) (7)(E) [redacted]

(13) *Item 13: failure to provide safe transportation vehicles: MSPA sections 401(b)(1)(A) and 401(b)(2)(C)*

This violation applies to all vehicles used to transport any covered, non-exempt migrant or seasonal agricultural worker for all transportation subject to the MSPA and the regulations. *See* 29 CFR 500.103 for exceptions to the vehicle safety standards. All vehicles that are subject to the transportation requirements must meet the applicable vehicle safety standards at 29 CFR 500.104 or 29 CFR 500.105.

(b) (7)(E) [redacted]

(b) (7)(E)

(b) (7)(E)

See FOH 57e13 and 29 CFR 500.100 -.105.

(b) (7)(E)

(14) *Item 14: failure to ensure driver has valid license: MSPA section 401(b)(1)(B)*

Any individual who drives a vehicle to transport any covered, non-exempt migrant or seasonal agricultural workers must have a current and valid motor vehicle operator's permit or license, as provided by the applicable state law of the state that issued the license, to operate the vehicle. (b) (7)(E) ote: the licensing requirements may differ depending on whether the vehicle being driven is subject to the 29 CFR 500.104 or 29 CFR 500.105 vehicle standards.

(b) (7)(E)

(b) (7)(E) [redacted]

See FOH 57e14 and 29 CFR 500.100(a).

(b) (7)(E) [redacted]

(15) *Item 15: failure to obtain prescribed insurance coverage: MSPA section 401(b)(1)(C)*

Applies to all vehicles used to transport any migrant or seasonal agricultural worker for all transportation subject to the MSPA and the regulations. Any vehicle used to transport workers which is owned, operated, or caused to be operated by an FLC, AGER, or AGAS must be covered by either a liability bond, a policy of liability insurance, or workers' compensation, along with a policy of insurance that provides coverage for property damage. Such insurance or liability bond must meet the requirements of the act and regulations, as applicable, but need only be in effect during the period the vehicle is used for such covered transportation.

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

See FOH 57e15 and 29 CFR 500.120 -.128.

(b) (7)(E) [redacted]

(16) *Item 16: using services of unregistered or unauthorized FLC: MSPA section 402*

(b) (7)(E) [redacted]

(b) (7)(E)

(b) (7)(E)

See FOH 57e16 and 29 CFR 500.71.

(b) (7)(E)

(b) (7)(E)

(17) *Item 17: discriminate, etc. against workers: MSPA section 505*

A violation of this provision occurs when a worker is intimidated, threatened, restrained, coerced, blacklisted, discharged, or discriminated against for exercising his or her rights under the act or regulations.

(b) (7)(E)

See FOH 57e17 and 29 CFR 500.9.

(b) (7)(E)

(18) *Item 18: interfering with a DOL official during the investigation: MSPA section 512(c)*

A violation exists when a person resists, opposes, impedes, intimidates, or interferes with a DOL official in the performance of official duties pursuant to the MSPA. (b) (7) (E)

(b) (7)(E)

See FOH 57e18 and 29 CFR 500.8.

(b) (7)(E)

(19) *Item 19: failure to register as a FLC: MSPA sections 101(a), 102, and 105(2)*

(b) (7)(E)

(b) (7)(E)

A violation of this item occurs whenever a person subject to the act and not otherwise exempt from the registration requirements engages in any one of these activities prior to being registered.

A violation also exists when the registration of a previously certified FLC has expired and he or she has not timely applied for a renewal certificate.

(b) (7)(E)

See FOH 57e19, 29 CFR 500.40, and 29 CFR 500.44 -.50.

(b) (7)(E)

(20) *Item 20: failure to register FLCE: MSPA sections 101(b) and 105(2)*

(b) (7)(E)

(b) (7)(E) [redacted]

See FOH 57e20 and 29 CFR 500.40 -.41(a).

(b) (7)(E) [redacted]

(21) *Item 21: failure to exhibit certificate: MSPA section 101(c)*

A violation of this item exists when an FLC or FLCE who is registered fails to produce the certificate upon request. (b) (7)(E) [redacted]

See FOH 57e21 and 29 CFR 500.42.

(b) (7)(E) [redacted]

(22) *Item 22: knowingly made misrepresentation on application: MSPA section 103(a)(1)*

A violation of this item exists if the misrepresentation is of a material nature, such as, but not limited to, matters relating to convictions for crimes or felonies listed in 29 CFR 500.51(f).

(b) (7)(E) [redacted]

See FOH 57e22 and 29 CFR 500.51(a).

(b) (7)(E) [redacted]

(23) *Item 23: failure to comply with court judgment or final order: MSPA section 103(a)(4)*

The failure by an FLC to comply with a court judgment or final order under the MSPA or regulations can serve as a basis for initiating certificate action. This includes court judgments obtained by the DOL or any other person under the act or regulations. (b) (7)(E) [redacted]

[redacted]

(b) (7)(E) [redacted]

See FOH 57e23 and 29 CFR 500.51(d) -(e).

(b) (7)(E) [redacted]

(24) *Item 24: was not the real party in interest: MSPA section 103(a)(2)*

(b) (7)(E) [redacted]

(b) (7)(E)

(b) (7)(E)

See FOH 57e24 and 29 CFR 500.51(b).

(b) (7)(E)

(25) *Item 25: transported workers without certificate authorization: MSPA sections 101(a) and 105(2)(B)*

Potential violations of this item are applicable to both registered and unregistered FLCs. Each vehicle used to transport any migrant or seasonal worker must be listed on the FLC certificate and must be unexpired during the time the transportation will occur. (b) (7)(E)

Note: 29 CFR 500.55(b) states that the FLC must submit documentation to amend the certificate within 10 days after obtaining or learning of the intended use of such vehicle. The 10-day grace period only applies to an FLC who is already authorized to transport and is adding or amending vehicles to their certificate. The 10-day grace period does not apply to an FLC who is registered or registering for first time and is not already authorized to transport.

(b) (7)(E)

(b) (7)(E) [redacted]

[redacted]

(b) (7)(E) [redacted]

See FOH 57e25, 29 CFR 500.40, and 29 CFR 500.55(a).

(b) (7)(E) [redacted]

(26) *Item 26: housed workers without certificate authorization: MSPA sections 101(a) and 105(2)(C)*

Housing migrant agricultural workers is not a farm labor contracting named activity. However, the regulations require that an FLC must have authorization from the DOL prior to providing housing for migrant agricultural workers. Potential violations of this item are applicable to both registered and unregistered FLCs. Each facility or real property used for housing a migrant agricultural worker must be listed on the certificate and must have met the requirements of the pre-occupancy housing inspection. (b) (7)(E) [redacted]

Note: the regulation at 29 CFR 500.55(b) states that an FLC who is authorized to house must submit documentation to amend the certificate within 10 days after obtaining or learning of the intended use of any housing facility or real property not listed on the Certificate of Registration. The 10-day grace period only applies to an FLC who is already authorized to house and is adding or amending housing to their certificate. The 10-day grace period does not apply to an FLC who is registered (or registering for first time) and is not already authorized to house.

(b) (7)(E)

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

[redacted]

See FOH 57e26, 29 CFR 500.40, and 29 CFR 500.55(a).

(b) (7)(E) [redacted]

(27) *Item 27: failure to provide change of permanent residence: MSPA section 105(1)*

(b) (7)(E) [redacted]

[redacted]

[redacted]

See FOH 57e27 and 29 CFR 500.54.

(b) (7)(E) [redacted]

(28) *Item 28: failure to apply to amend certificate: MSPA section 105(2)*

(b) (7)(E) [redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

See FOH 57e28 and 29 CFR 500.55(a).

(b) (7)(E)

(29) *Item 29: drove workers without certificate authorization: MSPA sections 101(a) and 105(2)(B)*

Potential violations of this item are applicable to both registered and unregistered FLCs. (b) (7)(E)

(b) (7)(E)

See FOH 57e25, 29 CFR 500.40, and 29 CFR 500.55(a).

(b) (7)(E)

(30) *Item 30: failure to abide by written agreements with the AGER or AGAS: MSPA section 404*

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

See FOH 57e30 and 29 CFR 500.60(c)(1).

(b) (7)(E)

(f) (b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

(b) (7)(E)

A single action may violate several different items listed above.

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]	[redacted]	[redacted]

[redacted]

- [redacted]

[redacted]

- [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(i) Application of mitigating factors

[redacted] Mitigating factors should be used to reduce the base CMP amount only under circumstances in which that particular factor clearly applies. Each factor is discussed in detail below. *See* FOH 57e03(i)(1) -(8). [redacted]

[redacted]

29 CFR 500.143 identifies seven factors, referred to herein as mitigating factors, to consider in determining the amount of a penalty to be assessed for each violation. [redacted]

(b) (7)(E) [redacted] Three of the mitigating factors relate to the violator's compliance history (*i.e.*, previous history of violations, efforts made in good faith to comply, and subject's explanation of the violation) and three relate to the gravity of the violation (*i.e.*, number of workers affected, gravity of the violations, and extent to which subject achieved a financial gain). The mitigating factors provided for in 29 CFR 500.143(b) are listed below and are to be applied as follows:

(1) *History of violations of the MSPA*

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

(b) (7)(E) [redacted]

[redacted]

(b) (7)(E) [redacted]

[redacted]

(2) *Number of workers affected by the violation*

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

(3) *Gravity of the violation*

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(4) *Efforts made in good faith to comply*

[redacted]

[redacted]

(b) (7)(E)

(5) *Subject's explanation of the violation*

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

[redacted]

(6) *Commitment to future compliance*

[redacted]

(b) (7)(E)

(7) *Extent to which the subject achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers*

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

[redacted]

(j) CMPs for willful violations

"Willful," for the purposes of CMP assessment (*i.e.*, not for criminal sanctions), means knowing or reckless disregard for compliance with MSPA requirements. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). (b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

(k) Criminal penalties for willful and knowing violations

In addition to CMPs, the statutory language in the MSPA specifically addresses willful and knowing violations and allows the WHD to pursue criminal penalties of such violations. *See* FOH 57c01. (b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(m) WHI action

- (b) (7)(E)
-
  -
  -
  -
  -
-
-

(n) DD and/or ADD action

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

[redacted]

(b) (7)(E) [redacted]

(5) (b) (7)(E) [redacted] The certified mail number shall be typed on the letter as well as on the envelope to identify it for evidence. Note: a sticker version of the certified mail number may be available for the envelope. (b) (7)(E) [redacted]

(6) (b) (7)(E) [redacted]

(7) (b) (7)(E) [redacted] 9 CFR 500.220 provides that service of determinations to assess a CMP are either complete upon mailing, if done by certified mail and sent to the last known address of the individual, officer, or attorney; or complete upon receipt by the addressee or the addressee's representative, if done by regular mail or in person. (b) (7)(E) [redacted]

(o) Receipt of CMP payment

The Notice of Penalty directs the person assessed to send the payment for the CMP directly to the RO. In the event a certified check or money order is received by the DO as payment for penalties assessed, a photocopy of the check shall be retained in the compliance action file, and the check will be forwarded to the RO for handling according to current protocols.

(p) Follow-up of non-CMP payment

[redacted] (b) (7)(E) [redacted]

(b) (7)(E)

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

- [redacted]

[redacted]

(r) Unpaid CMPs owed by FLCs

An unpaid CMP that has become a final order of the Secretary may result in revocation of or refusal to renew and/or issue a Certificate of Registration as provided in section 103(a)(4) of the act. (b) (7)(E) [redacted]

Under the MSPA, an assessment becomes a final order upon the expiration of the 30th day from the date of the assessment letter. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(s) Request for hearing

Hearing requests may be received by the DO or NO. The DO will be advised by the NO if a request for a hearing has been received by that office. Exceptions to the Notice of Assessment or Notice of Penalty normally are addressed and sent to the Administrator, but may also be sent to the DO. (b) (7)(E) [redacted]

[redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]

(b) (7)(E) [redacted]

(t) RA action

When certified checks or money orders are received by the RO, either directly or from the DO, they will be logged into the electronic check register in the CMP system immediately upon receipt. A photocopy of the check shall be retained in the physical case file with the CMP assessment letter and WH-518. MSPA CMPs should be deposited to the general CMP account unless payment is combined with either FLSA sections 6 and 7 CMP or money for back wages. In that event the money will be deposited to the clearing account where it will be apportioned out to the correct accounts via transfer by the OMAP back wage accountant. Particular attention should be given to the requirement that checks should be deposited with the Federal Reserve Bank within 24 hours after their receipt in the RO provided there is no conflict with the 3-day cutoff period at the end of each month as stated in section 6814 of the ESA Manual. These payments will be identified as MSPA CMPs and posted to the CMP system as payments against the applicable CMP debt.

57c04 <u>Potential litigation.</u>

- [redacted] (b) (7)(E) [redacted]
- [redacted]
- [redacted]

57c05 <u>Administrative actions: recommendation for certificate revocation.</u>

Section 103 provides that the Secretary, in accordance with regulations, may refuse issuance or renewal, suspend, or revoke a Certificate of Registration (including an FLCE certificate) if any of the conditions of that section are determined to be present.

(a) Revocation or refusal to issue or suspend FLC or FLCE certificates

29 CFR 500.140 summarizes the various penalty provisions of the MSPA, and 29 CFR 500.141 further provides that the taking of any one such action shall not be a bar to the concurrent taking of any other action authorized by the act and these regulations. (E)

57c06 **Recommendation of sanctions.**

(a)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E) [redacted]

57c07 **Notification of civil money penalties.**

A sample of the WHISARD Notice of Penalty - MSPA Violations and an illustrative list of violations that may be listed in the letter are contained on the following pages. The description of each violation needs to be presented in sufficient detail.

(a) Assessment letter

Notice of Penalty - MSPA Violations (WHISARD)

To be sent by certified mail. The certified mail number shall be typed on the letter itself as well as on the envelope to identify it for evidence. Enclose a listing of each violation for which a penalty is being assessed and the amount for each violation. *See* attached example.

NOT FOR PUBLIC DISTRIBUTION

MSPA ASSESSED AGAINST INDIVIDUAL AND BUSINESS

[Letterhead]

RETURN RECEIPT REQUESTED: [Return Receipt Number]

[ASSESSED PERSON'S NAME]
[EMPLOYER TRADE NAME]
[EMPLOYER ADDRESS]
[EMPLOYER CITY], [EMPLOYER STATE] [EMPLOYER ZIP CODE]

Subject: Assessment of Civil Money Penalty for MSPA Violations
Against [EMPLOYER LEGAL NAME] dba [EMPLOYER TRADE NAME] and
[ASSESSED PERSON'S NAME], an individual

Case File No.: [CASE ID] ([ACT ID])

Dear [ASSESSED PERSON'S NAME]:

An investigation of your operation at [INVESTIGATION LOCATION] under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) covering the period [BEGINNING DATE FOR INVESTIGATION PERIOD] to [ENDING DATE FOR INVESTIGATION PERIOD] disclosed that you failed to comply with the Act. As a result of these violations and pursuant to Section 503(a) of the Act and 29 CFR Part 500, a civil money penalty is hereby assessed. The specific violation(s) and the amount assessed for the violation(s) are set forth on the attached.

The total civil money penalty assessed is [ASSESSED AMOUNT].

The amount is due and payable within 30 days to "Wage and Hour Division, U.S. Department of Labor". Payment by certified check or money order should be mailed to [REGIONAL OFFICE NAME], [REGIONAL OFFICE ADDRESS], [REGIONAL OFFICE CITY], [REGIONAL OFFICE STATE] [REGIONAL OFFICE ZIP CODE]. The fact that a penalty is being assessed for the MSPA violations found at this time does not preclude the taking of other enforcement action as is deemed appropriate by the Department of Labor, or the

NOT FOR PUBLIC DISTRIBUTION

additional assessment of a penalty for violations of the MSPA provisions found at some future time.

This debt is subject to the assessment of interest, administrative cost charges and penalties in accordance with the Debt Collection Improvement Act of 1995 and departmental policies. Interest will be assessed at the Treasury Tax and loan account rate on any principle that becomes delinquent. This rate is currently [INTEREST RATE] %. Administrative cost charges will be assessed to help defray the Government's cost of collecting this debt. A penalty at the rate of [PENALTY RATE] % will be assessed on any portion of the debt remaining delinquent for more than 90 days. In order to avoid these charges, forward payment to the Regional Office address listed above by the indicated due date.

You have the right to request a hearing on the determination that any or all of the violations occurred. Such request must be in writing; must contain specific reasons why you believe that the violations for which you have been charged did not occur; and must be filed within 30 days from the date of this letter with the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, in care of the originator of this letter at the address list in the letterhead above.

Procedure for filing a request for a hearing is provided in 29 CFR 500.212. <u>If a request for a hearing is not received within the time specified, the determination of the Administrator shall become the final and unappealable Order of the Secretary.</u>

When a request for a hearing is filed with the Wage and Hour Administrator, the matter is referred to the Chief Administrative Law Judge. A formal hearing is then scheduled for a final determination with respect to the alleged violation(s). At such hearing you may, by yourself or through an attorney retained by you, present such witnesses, introduce such evidence and establish such facts as you believe will support your position.

Copies of the Migrant and Seasonal Agricultural Worker Protection Act and 29 CFR Part 500 are enclosed for your reference and assistance.

Further, we wish to point out that there may be a question as to the deductibility of civil money penalties paid as a business expense under the Internal Revenue Code. In this regard, you may wish to contact the Internal Revenue Service.

If you need additional information, please contact me.

Sincerely,

[DO MANAGER NAME]
[DO MANAGER TITLE]

Enclosures:
MSPA
Regulations Part 500
Summary of violations and amounts assessed

NOT FOR PUBLIC DISTRIBUTION

(b) Sample description of violation language

NOT FOR PUBLIC DISTRIBUTION

EXAMPLE

Summary of violations of the Migrant and Seasonal Agricultural Worker Protection Act and Civil Money Penalty assessment for each violation.

15. Failed to obtain prescribed insurance coverage 401(b)(1)(C).....$ 600
You operated or caused to be operated a vehicle [IDENTIFY/DESCRIBE VEHICLE] to transport workers without having any insurance or without furnishing proof of financial responsibility.

19. Failed to register 101(a)..... $ 600
You did not register as a Farm Labor Contractor prior to engaging in farm labor contracting activities.

TOTAL AMOUNT OF ASSESSMENT ……$1200.

NOT FOR PUBLIC DISTRIBUTION

57d SERVICE

57d00 Service of administrative determinations.

Service of administrative determinations (*e.g.*, CMP assessments or certificate actions) shall be made either by:

(a) Mailing to the last known address of such individual, partner, officer, or attorney of record

(b) Delivering a copy of the individual, partner, officer of a corporation, or attorney of record

(c) (b) (7)(E) [redacted]

57d01 Service by mail.

- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

(b) (7)(E) [redacted]

57d02 **Delivery of a copy of the administrative determination.**

(a) If service by mail is not feasible, service may be accomplished by delivery of a copy of the administrative determination to the individual, partner, officer of a corporation, or attorney of record. If delivery is to be made by a WHI in another jurisdiction, forward with the document to be delivered a copy of pertinent information from the case file (*e.g.*, the narrative report) that may assist in locating the individual. Any delivery to such person shall be verified for the record. The WHI will ask, but not demand, the person to sign and date a copy of the administrative determination being delivered that bears the following legend:

I have received a copy of this document as witnessed by my signature.

_____
Signed

_____
Date

(b) The WHI will prepare a memorandum for the file giving the following facts:

(1) The identity of the document delivered

(2) Name of the person to whom delivered and date; time and place of delivery

(3) Whether place of delivery was the home or a place of business of the person to whom the determination is addressed. If not the home or place of business, explain why an alternative location was chosen as a reasonable place for delivery.

(4) Details of any conversation with the person to whom delivery was made. The contents of the administrative determination should be fully explained to that person.

(5) The WHI(s) shall sign and date such memorandum and place it in the file. (b) (7) (E) [redacted]

(c) The above procedure will be followed when personal service of a certificate action letter is requested by the NO.

57d03 **Leaving a copy of the determination at the principal office, place of business, or residence.**

(a) This method of service will generally be used *only* when it was not feasible to make service by mail or by delivering a copy to the individual, partner, officer of a corporation, or attorney of record. When none of these parties are present, the WHI may leave the notice of administrative determination with another person on the premises of the principal office, place of business, or residence.

NOT FOR PUBLIC DISTRIBUTION

(b) The WHI will prepare a memorandum for the file giving the following facts:

(1) The identity of the document delivered

(2) The date of delivery, the address and identity of the premises to which delivery was made, and the reason such premises were chosen.

(3) If the notice of determination was left with a person on the premises, the name of such person and their relationship (if any) to the person to whom the administrative determination was addressed (*e.g.*, relative, employee, etc.). When delivery is made to such a person the importance of immediate transmittal to the addressee should be emphasized and the details of any such conversation recorded.

(b) (7)(E) [redacted]

(4) The WHI(s) shall sign and date such memorandum and place it in the file.

57d04 **<u>RO procedures after service of CMP notice is made.</u>**

[redacted] (b) (7)(E) [redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

F2-16 Letter of Notification — Violations of MSPA Housing S & H

FLC
Current Address

Subject: MSPA housing S & H violations

Dear

This letter is in reference to the recent investigation of your operations under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The investigation disclosed violation(s) of housing safety and health standards in housing facilities found to be under your ownership and/or control.

The specific violations are set forth on the attached.* They should be corrected as soon as possible. Please contact (Wage-Hour local office, address, telephone number) to arrange a schedule for correction of the violations. You are also advised that violations may result in the assessment of civil money penalties and/or other sanctions provided for under the Act.

Sincerely,

Area Director

Enclosure

*Refer to the language of either Form WH-519a (OSHA standard) or Form WH-519b (ETA standard). Locate the items that pertain and list them on a separate enclosure to accompany the above Letter of Notification.

EXAMPLE

Summary of Violations of Housing Safety and Health Standards

Item 12. Shelter(s) do not provide protection against the elements (29 CFR 1910.142(b)(1)).

Item 26. Broken windows (29 CFR 1910.142(b)(1).

Item 34. Adequate heating not provided in every shelter used during cold weather to maintain a comfortable temperature (29 CFR 1910.142(b)(11)).

Item 46. Separate toilet facilities not provided for each sex (29 CFR 1910.142(d)(4)).

Item 68. No hot water available (29 CFR 1910.142(f)(3)).

Item 89. Kitchen area unclean (29 CFR 1910.142(i)).

57e EVIDENCE

57e00 General.

(a) Investigation reports regarding violations of the act should contain the evidence needed to support the imposition of the act's sanctions. (b) (7)(E) [redacted]

(b) The compliance standards in this subsection are divided into the following categories as shown below. Whether an individual party may be responsible for a particular standard can be determined by reviewing the listing next to each standard.

Compliance standard category	Compliance standard	Citation
Wage-related protections	Employment condition disclosure	FOH 57e01 -03
Wage-related protections	Working arrangements with workers	FOH 57e04
Wage-related protections	Recordkeeping	FOH 57e05 -08
Wage-related protections	Prompt payment	FOH 57e09
Employment conditions protections	Worker purchases	FOH 57e10
Employment conditions protections	Housing standards	FOH 57e11 -12
Employment conditions protections	Transportation standards	FOH 57e13 -15
General provisions	Confirmation of registration	FOH 57e16
General provisions	Discrimination against workers testifying	FOH 57e17
General provisions	Interfering with DOL official during investigation	FOH 57e18
FLC responsibilities	Registration	FOH 57e19 -28

NOT FOR PUBLIC DISTRIBU

FLC responsibilities	Illegal aliens	FOH 57e29
FLC responsibilities	Failure to abide by agreements with users	FOH 57e30

(c) An FLC will be cited for any violation by his or her FLCE in accordance with section 101(b) of the MSPA. The FLC will be cited for FLCE violations regardless of whether the FLCE is registered. (b) (7)(E) [redacted]

(d) In investigations involving violations of any wage-related standards under the MSPA (*see* FOH 57e01 -09), the WHI may determine that a joint employment relationship exists. Any such determination must be based on all the factors described in 29 CFR 500.20(h)(4) (b) (7) (E) [redacted]

[redacted]

(e) Responsibility for violations of the housing standards (*see* FOH 57e11 -12) will be imposed upon the person or persons who *owns or controls* the housing facility or real property used as housing for migrant workers. (b) (7)(E) [redacted] for guidance in this area. The WHI

should document fully the ownership or control. Failure to comply may be cited against more than one party (*e.g.*, where a HP owns a housing facility), but an AGER or an FLC controls it.

57e01 **Failed to disclose conditions to workers.**

FLC, AGER, AGAS

See sections 201(a), 201(b) -last sentence, 201(g), 301(a)(1), 301(a)(2), 301(b) -last sentence, 301(f), and 403 (requirement for FLCs); 29 CFR 500.60(b); 29 CFR 500.75 -.76; and 29 CFR 500.78.

Were specified employment conditions disclosed in a language common to the workers? There is no requirement that employment conditions be posted. An FLC must always obtain and make available for inspection to each worker, at the place of employment, a written statement of the conditions.

(a) With regard to migrant agricultural worker

(b) (7)(E)

(b) With regard to seasonal agricultural worker

(b) (7)(E)

(c) Sources of information on working conditions

(b) (7)(E)

(d) Information given to workers

(b) (7)(E) [redacted]

(e) Worker requests for information

If the worker requests a written copy of the information disclosed, it must be provided by the FLC, AGER, or AGAS.

(f) Joint employment

In a joint employment situation, each employer is equally responsible for the disclosure. However, needless duplication is not required as provided in 29 CFR 500.75(e) and 29 CFR 500.76(e).

(g) Housing information

The failure to disclose information on housing to be provided and costs to be charged to a migrant agricultural worker for housing, *either at the time of recruitment or at the place of employment*, will be treated under this item. However, the failure to post or present housing terms and conditions of occupancy *at the housing site* will be treated under FOH 57e11.

57e02 <u>Failed to post MSPA poster at worksite</u>

FLC, AGER, AGAS

See sections 201(b), 201(g), 301(b), 301(f), and 403; 29 CFR 500.75(c); 29 CFR 500.75(e); 29 CFR 500.76(d) -(e), and 29 CFR 500.78.

Was a MSPA poster posted at the worksite?

(a) (b) (7)(E) [redacted]

(b) The form required to be posted is the WH-1376: MSPA Poster or a facsimile. It is in English and Spanish. English/Haitian Creole and Vietnamese versions are being developed.

(c) In a joint employment situation, each employer is responsible for posting, but needless duplication is not required. *See* 29 CFR 500.75(e) and 29 CFR 500.76(e).

57e03 <u>Misrepresented conditions to workers.</u>

FLC, AGER, AGAS

NOT FOR PUBLIC DISTRIBUTION

See sections 201(f) and 301(e), and 29 CFR 500.77.

Was false or misleading information knowingly provided to workers?

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]

(b) (7)(E)

57e04 **Breach of working arrangements with workers.**

FLC, AGER, AGAS

See sections 202(c) and 302(c), and 29 CFR 500.72.

Was there a violation of the terms of working arrangements made with the workers?

(b) (7)(E)

57e05 **Failed to make and/or keep employer records.**

FLC, AGER, AGAS

See sections 201(d) and 301(c), 29 CFR 500.60(d), and 29 CFR 500.80(a) -(b).

Was there a failure to keep specified employment records?

(b) (7)(E)

57e06 **Failed to provide wage statement to workers.**

FLC, AGER, AGAS

See sections 201(d)(2) and 301(c)(2), and 29 CFR 500.80(d).

Were wage statements containing the required information provided to the workers?

(b) (7)(E) [redacted]

57e07 **Failed to Provide Records.**

FLC

See sections 201(e) and 301(d)(1), 29 CFR 500.60(a), and 29 CFR 500.80(c)

Did the FLC provide the required records to the person to whom agricultural workers were furnished?

[redacted] (b) (7)(E) [redacted]

[redacted] [redacted]

57e08 **Failed to maintain records provided by FLC.**

FLC, AGER, AGAS

See sections 201(e) and 301(d), 29 CFR 500.60(a), and 29 CFR 500.80(c).

Did the AGER, AGAS, or any other FLC maintain the employment record provided by the FLC who furnished them agricultural workers?

(a) The FLC must provide any other FLC, AGER, or AGAS to whom he or she has furnished workers copies of all payroll records. Records must be maintained by recipient for 3 years from the end of the period of employment.

(b) (7)(E)

(c) All records required to be kept and information required to be provided under section 201(e) and 301(d) of the act must be maintained by the recipient. (b) (7)(E)

57e09 **Failed to pay wages when due.**

FLC, AGER, AGAS

See sections 202(a) and 302(a), and 29 CFR 500.81.

Were workers paid wages owed when due?

(a) Workers are to be paid promptly all wages owed when due. Wages owed depend on what wages were agreed to by the employer, but can be no less than the FLSA minimum wage, where applicable. A pay period shall not be greater than 2 weeks (or semimonthly). (b) (7)(E)

57e10 **Restricted workers in purchase of goods or services.**

FLC, AGER, AGAS

See sections 202(b) and 302(b), and 29 CFR 500.73.

Were workers required to purchase goods solely from the FLC, AGER, and/or AGAS?

(a) This provision prohibits any schemes where an FLC, AGER, or AGAS shall require workers to purchase any goods or services solely from them or solely from their agent.

(b) (7)(E)

57e11 **Failed to post housing conditions.**

FLC, AGER, AGAS

Section 201(c), 203(b)(1); 29 CFR 500.75(f) & (g), 500.78, 500.135.

Were housing conditions posted or presented as required? Was the occupancy certificate posted?

(a) Any person who owns or controls a facility or real property used as housing for migrant agricultural worker must comply with substantive federal and state safety and health standards applicable to that housing. However, posting of housing terms and conditions of occupancy is required only of the FLC, AGER, or AGAS that provides housing. The posting must be in a conspicuous place at the site of the housing and be in a language common to the migrant agricultural workers in the crew. (b) (7)(E)

(b) (b) (7)(E)

(b) (7)(E)

(b) (7)(E)

57e12 **Failed to ensure housing safety and health.**

FLC, AGER, AGAS, user, HP

Section 203, 29 CFR 500.130 -135; and FOH 57h.

Did persons housing workers ensure their safety and health?

(a) Each person who owns or controls a facility or real property that is used as housing for migrant agricultural workers is responsible that the facility or real property complies with substantive federal and state safety and health standards. The only exception is the so- called innkeeper's exemption, described in 29 CFR 500.131. If more than one person is involved in providing the housing (*e.g.*, when an AGER owns the housing and an FLC controls it), both are responsible for ensuring the facility or real property meets the applicable federal and state housing standards. (b) (7)(E)

(b) A request for a preoccupancy housing inspection by an FLC, or a person acting on behalf of an FLC, who does not own the property must be in writing, dated, and signed by the applicant or other person who controls the facility or real property. If a request for inspection has been

made to the appropriate state, federal, or local agency at least 45 days prior to occupancy and the inspection has not been conducted, the housing can be occupied. A property owner who made such a request in writing would be protected if the 45 days passed without inspection, but the request is not required to be in writing. (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

57e13 **<u>Failed to provide safe transport vehicles.</u>**

FLC, AGER, AGAS

See sections 401(b)(1)(A) and 401(b)(2)(C), 29 CFR 500.45(b), and 29 CFR 500.100 -.105.

Were safe transportation vehicles provided?

(a) General

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

(b) FLC requirements

If an FLC intends to use or cause to be used a vehicle to transport workers, he or she must submit a completed WH-514 or WH-514a for each vehicle. An FLC may not have authorization to transport, and yet be in compliance with this item. If the certificate does not authorize transportation, or if the vehicle used is not listed on the certificate's transportation authorization, the WHI should call the registering region to determine if the WH-514 or WH-514a has been submitted. (b) (7)(E) [redacted]

(c) AGER and AGAS

An AGER or AGAS using or causing to be used a vehicle or vehicles to transport workers pursuant to the MSPA is also subject to the vehicle safety standards. Since an AGER or AGAS does not have to register, there will be no WH-514 or WH-514a on file.

(d) Vehicle inspection

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) (7)(E)

57e14 **Failed to ensure driver has valid license.**

FLC, AGER, AGAS

See section 401(b)(1)(B), 29 CFR 500.45(b), and 29 CFR 500.100(a).

Did each driver of a transportation vehicle possess a valid state license to operate such vehicle?

(a) FLC requirements

Any FLC shall ensure that each driver, whether the FLC or FLCE, who operates (*i.e.*, drives) a vehicle to transport workers in connection with farm labor contracting activities, has a current Certificate of Registration that authorizes the operator to drive, and that each driver carries:

(1) a copy of a current WH-515 and

(2) a valid and proper driver's license.

(b) (7)(E)

(b) AGER and AGAS requirements

An AGER, AGAS, or employee of an AGER or AGAS who operates a vehicle subject to the act's transportation provisions must possess a valid driver's license which qualifies the driver to operate the type of vehicle driven in the jurisdiction by which the permit is issued. If the transportation is subject to DOT standards, the requirement for a doctor's certificate applies, even though registration is not required.

(c) Requirement to carry the doctor's certificate

NOT FOR PUBLIC DISTRIBUTION

(1) FLCs and FLCEs who drive a vehicle transporting migrant and seasonal agricultural workers must obtain a doctor's certificate as part of the registration process. *See* 29 CFR 500.48(e). The text of the doctor's certificate requires that it be in the possession of the FLC or FLCE while driving.

(2) An AGER, AGAS, or employee of an AGER or AGAS must have a doctor's certificate in his or her possession while driving a vehicle transporting migrant and seasonal agricultural workers subject to the DOT motor vehicle safety standards. *See* 29 CFR 500.105(b)(1)(H).

(3) (b) (7)(E) [redacted]

(4) (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

57e15 **Failed to obtain prescribed insurance coverage.**

FLC, AGER, AGAS

See section 401(b)(1)(C) and 29 CFR 500.120 -128.

Was proper insurance coverage obtained and maintained?

(a) FLC requirements

If the FLC is or will be owning, operating, controlling, or causing to be operated a vehicle or vehicles to be used to transport workers, the FLC must obtain and file with the registering RO written proof of financial responsibility or proof of the existence of a policy of insurance that insures the applicant against liability for damage to persons or property arising out of the FLC's ownership of, operation of, or causing to be operated any vehicle to be used for transportation of workers within the meaning of the MSPA. The minimum amounts of insurance or proof of financial responsibility provided must not be less than those specified in 29 CFR 500.121(b), 29 CFR 500.124, or proof of worker's compensation coverage in accordance with 29 CFR 500.122. (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted] the case of substituted vehicles not authorized, recognition should be given to 29 CFR 500.55(b), which allows 10 days to submit appropriate information to the Secretary. However, any vehicle used must be properly insured any time workers are transported.

(b) AGER and AGAS requirements

An AGER or AGAS transporting or causing to be transported migrant or seasonal agricultural workers pursuant to the MSPA is subject to the insurance coverage requirements of the act. Where an AGER or AGAS is found to be transporting pursuant to the MSPA, (b) (7)(E) [redacted]

(c) Workers compensation

(b) (7)(E) [redacted]

57e16 <u>Utilized the services of an unregistered FLC.</u>

FLC, AGER, AGAS

See section 402 and 29 CFR 500.71.

Were the services of an unregistered FLC utilized?

(b) (7)(E) [redacted]

(b) (7)(E)

57e17 Discriminated against workers, etc.

FLC, AGER, AGAS, user, HP

See section 505 and 29 CFR 500.9.

Has there been discrimination against any worker who filed a complaint or testified at any proceeding in exercising his or her rights under the act?

(a) Under section 505 of the act, a MAW or SAW has been discriminated against if he or she has been intimidated, threatened, restrained, coerced, blacklisted, discharged, or in any manner discriminated against for any action taken or about to be taken in the exercise of any right or protection afforded by the MSPA. (b) (7)(E)

57e18 <u>Interfered with a DOL official during investigation.</u>

FLC, AGER, AGAS, user, HP

See section 512(c) and 29 CFR 500.8.

Has there been interference with a DOL official during an investigation?

(a) A violation of this section occurs when any *person* unlawfully resists, opposes, impedes, intimidates, or interferes with any official (*e.g.*, WHI) of the DOL assigned to perform an investigation, inspection, or law enforcement function pursuant to the MSPA.

(b) The MSPA provides that WHIs, either as a result of a complaint or otherwise (*i.e.*, directed investigation), may investigate; enter and inspect places, including housing and vehicles; review and transcribe records; question; interview; and gather information pursuant to the act or regulations.

(b) (7)(E)

NOT FOR PUBLICATION

- [redacted]

57e19 **Failed to register.**

FLC

See sections 3(6), 3(7), (4), and 101(a); and 29 CFR 500.40.

Has the FLC registered?

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

57e20 **Failed to register employee.**

FLC

See section 101(b) and 29 CFR 500.40 -.41.

Has the FLC hired, employed, or used an FLCE to perform farm labor contracting activities who is unregistered?

(a) An FLC who is not exempt is required to register all FLCEs. An FLCE can never be exempt if he or she is employed by an FLC who is subject to the act.

(b) The FLC is required to hire, employ, or use only registered FLCEs to perform farm labor contracting activities on his or her behalf. The FLC must be named on the face of the FLCE's Certificate of Registration. (b) (7)(E) [redacted]

57e21 **Failed to exhibit certificate.**

FLC

See sections 101(a) and 101(c), and 29 CFR 500.42 -.43.

Did the FLC and/or FLCE exhibit, upon request, his or her Certificate of Registration?

(a) FLCs must have a Certificate of Registration in their immediate possession at all times while engaging in any farm labor contracting activities. FLCs must also, upon request, exhibit the certificate to all persons with whom they intend to deal in their capacity as an FLC prior to so dealing. (b) (7)(E) [redacted]

(b) (7)(E)

57e22 **Knowingly made misrepresentations in application.**

FLC

See section 103(a)(1) and 29 CFR 500.51(a).

Did the FLC and/or FLCE knowingly make any misrepresentation in his or her application for a certificate?

(b) (7)(E)

57e23 **Failed to comply with any court judgment or Secretary's final order.**

FLC

See section 103(a)(4), 29 CFR 500.4, and 29 CFR 500.51(d) -(e).

Has the FLC failed to comply with any court judgment or final order of the Secretary?

(a) During an investigation of a FLC, information concerning a final order of the Secretary (*e.g.*, CMP and/or certificate action) or an unsatisfied court judgment may be found. The actions may have been taken under either FLCRA or the MSPA.

(b) (7)(E)

NOT FOR PUBLIC DISTRIBUTION

- (b)(7)(E)

57e24 **Was not the real party in interest.**

FLC

See section 103(a)(2) and 29 CFR 500.51(b).

If the certificate holder is not the real party in interest, has the real party had a certificate revoked, suspended, or denied, or did not qualify?

(b)(7)(E)

-
-
-
-
-
-
-
-
-

(b) (7)(E)

57e25 **Transported workers without certificate authorization.**

FLC

See sections 101(a) and 105(2)(B); 29 CFR 500.48, and 29 CFR 500.55.

Did the FLC transport workers without certificate authorization? If the FLC did have transportation authorization, did he or she transport in any vehicle that was not identified on the transportation authorization?

(a) The FLC must have a Certificate of Registration authorizing transportation if the FLC is to transport workers. The certificate will list those vehicles that the FLC is authorized to use and will also list the dates through which each vehicle may be used. If the FLC transports in a vehicle other than one that is listed on the certificate, the FLC is in violation unless the FLC can show that the vehicle has just been acquired and that notification has been made to the Secretary as required by section 105(2)(B) of the MSPA and 29 CFR 500.55. (b) (7)(E)

NOT FOR PUBLICATION

(b) (7)(E)

57e26 **Housed workers without certificate authorization.**

FLC

See sections 101(a) and 105(2)(c), 29 CFR 500.48, and 29 CFR 500.55.

Did the FLC house migrant agricultural workers without certificate authorization?

(a) The applicant for a Certificate of Registration must submit a written statement identifying each facility or real property to be used for housing migrant workers and documentation that such housing complies with all substantive federal and state safety and health standards, to the extent such housing is under the applicant's ownership or control.

(b) (7)(E)

(b) (7)(E) [redacted]

57e27 **Failed to provide notice of change of permanent residence.**

FLC

See section 105(1) and 29 CFR 500.54.

Has the FLC failed to provide to the Secretary a notice of each change of permanent residence?

(a) During the period a certificate is in effect, the FLC must provide the Secretary, via the registering RO or state office, where a state registration plan is in effect, notice of each change of permanent place of residence within 30 days of the change.

[redacted] (b) (7)(E) [redacted]

57e28 **Failed to apply to amend certificate to engage in another contracting activity, to use another vehicle, or to use another facility or real property site for housing.**

FLC

See section 105(2) and 29 CFR 500.55.

Did the FLC apply to amend his or her certificate prior to using unauthorized real property or facilities to house and/or using an unauthorized vehicle?

(a) Since the basic MSPA Certificate of Registration authorizes the holder to recruit, solicit, hire, employ, and furnish workers, this violation applies only to the activities of transportation, housing, and driving, which require special certificate authorization. Any registered FLC who undertakes transportation or housing that was not previously authorized under the current registration authority is entitled to the 10-day grace period referred to in 29 CFR 500.55(b). Such 10-day period is for any registered FLC to apply for authorization.

(b) **Transportation**

Whenever the FLC obtains a vehicle or learns of the intended use of a vehicle for the transportation of workers in connection with FLC activities, the FLC must, within 10 days after obtaining or learning of such intended use, furnish a statement identifying each vehicle along with proof that the vehicle meets the applicable safety standards and, further, provide proof of required insurance or financial responsibility for each such vehicle. (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

(c) Housing

A registered FLC is required to provide the registering RO with all necessary documentation, within 10 days after obtaining or learning of the intended use of any facility or real property for the housing of migrant workers, and prior to its actual use. Submission of the application will serve as temporary authority to house. However, such temporary authority does not relieve any person from compliance with the applicable housing safety and health standards. (b)(7)(E)

57e29 <u>Engaged illegal aliens.</u>

FLC

See section 106 and 29 CFR 500.58 -.59.

Has the FLC recruited, hired, employed, or used, with knowledge, the services of any illegal aliens?

(a) General

Recruitment, hiring, employment, or use of illegal aliens with knowledge is crucial to proving this violation. (b) (7)(E)

- (b) (7)(E)
-
-
-

[redacted]

57e30 **Failed to abide by agreements with AGERs and AGASs.**

FLC

See section 404 and 29 CFR 500.60(c).

Has the FLC abided by the terms of the written agreements made with the AGER and AGAS?

(a) (b) (7)(E) [redacted]

57f **MSPA FORMS**

57f00 **General.**

This section contains samples of forms used in administering the MSPA as follows:

(a) **FLC and FLCE registration-related forms**

Form number	Form name
WH-510	Application for a Farm Labor Contractor Certificate of Registration
WH-511	FLC Certificate of Registration
WH-512	Application for a Farm Labor Contractor Employee Certificate of Registration
WH-513	Farm Labor Contractor Employee Certificate of Registration
WH-514	Vehicle Mechanical Inspection Report for Transportation Subject to Department of Transportation Requirements
WH-514a	Vehicle Mechanical Inspection Report for Transportation Subject to Department of Labor Safety Standards

NOT FOR PUBLIC DISCLOSURE

Form number	Form name
WH-515	Doctor's Certificate
FD-258	Fingerprint Card (FBI Form)

The application forms may be obtained from the nearest state workforce agency office or WHD RO. Certificates of registration are issued by WHD ROs and certain states to which such authority has been delegated.

(b) Prohibition against the FLC and/or FLCE employing illegal aliens

Form number	Form name
WH-509	Declaration of Citizenship

This form may be obtained from the nearest state workforce agency office or WHD RO.

(c) Disclosure of information to workers by the FLC, AGER, and AGAS

Form number	Form name
WH-516	Worker Information (English and Spanish)
WH-516a	Worker Information (English and Haitian-Creole)
WH-516b	Worker Information (English and Vietnamese)
WH-521	Housing Terms and Conditions (English and Spanish)
WH-521a	Housing Terms and Conditions (English and Haitian-Creole)
WH-521b	Housing Terms and Conditions (English and Vietnamese)
WH-501	Wage Statement (English)
WH-501b	Wage Statement (Spanish)

Poster number	Poster name
WH-1376	MSPA Poster (English and Spanish)
WH-1376a	MSPA Poster (English and Haitian-Creole)
WH-1376b	MSPA Poster (English and Vietnamese)

[redacted] (b) (7)(E)

NOT FOR PUBLIC DISTRIBUTION

Form number	Form name
(b) (7) (E)	[redacted]

[redacted]

57f01 **WH-510: Application for a Farm Labor Contractor Certificate of Registration.**

(a) Purpose

This form is used to apply for an initial or renewal Farm Labor Contractor Certificate of Registration (WH-511). The applicant may obtain and file the form and related documents with any office of the United States Employment Services or Wage and Hour Division (WHD).

(b) Preparation and distribution

The WH-510 will be completed by the applicant. The applicant should be advised to keep a copy for his or her file. The completed form, after it has been subscribed and sworn to before a person authorized to witness the applicant's signature, will be filed at the local state workforce agency or WHD regional office (RO). State workforce agency personnel and WHD personnel are authorized to witness the applicant's signature. The local office will send the properly completed WH-510 with attachments, if any, to the appropriate WHD RO or designated state office in those states that have entered into an agreement with the Secretary to conduct the MSPA registration.

NOT FOR PUBLIC DISTRIBUTION

Rev. 519 FIELD OPERATIONS HANDBOOK - 6/27/84

OMB No. 1215-0038
Expires: 03/31/86

57f01 -3

Application For A Farm Labor Contractor Certificate of Registration

Migrant and Seasonal Agricultural Worker Protection Act

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Please read instructions before completing this application. No Farm Labor Contractor Certificate of Registration may be issued unless a completed form has been received (29 U.S.C. 1801 et. seq.)

FOR OFFICIAL USE ONLY

Number: C - - - - - - -

Housing Authorized ☐ Yes ☐ No
Trans Authorized ☐ Yes ☐ No
Driving Authorized ☐ Yes ☐ No
Issue Date: __/__/__
Exp. Date: __/__/__
DA Eff. Date __/__/__

FA ☐ Yes ☐ No Certificate ☐ Yes ☐ No

1. Application for Certificate of Registration for

Federal ☐ Initial ☐ Renewal
Consolidated Federal-State ☐ Initial ☐ Renewal

Give number of last certificate _____

2. The Applicant is a/an (Check one).

☐ Individual ☐ Corporation
☐ Partnership ☐ Other (Specify)

If incorporated, give date and State of Incorporation.

Date _____
State _____

3. Applicant Identification: (Please Print)

Name (Last, first, middle)

Permanent Place of Residence. (This address may not be a P.O. Box.)

Street: _____
City: _____ State: _____ Zip Code: _____

Telephone Number | Social Security Number

Social Security Employer Identification No. (If none, enter "none".)

State Unemployment Insurance Reporting No. (If none, enter "none".)

4. Person Making Application (whether in person's own behalf or for a corporation, etc. If same as item 3, write "same as item 3".) (Please Print)

Name (Last, first, middle)

Address (Number & Street, RFD or P.O. Box, City or Town, State, Zip Code)

Street: _____
City: _____ State: _____ Zip Code: _____

Telephone Number | Social Security Number

5. To be Completed by "Individual" Applicant Only (See item 2)

Height _____ ft. _____ in Weight _____ Color of: Eyes _____ Hair _____ ☐ Male ☐ Female
Date of Birth (Mo., day, year):
Place of Birth:

6. Give Address to Which Notices and Documents Should be Sent. (This address may include P.O. Box).

Street: _____
City: _____ State: _____ Zip Code: _____

7. Check Each Activity to be Performed Involving Migrant and/or Seasonal Agricultural Workers for Agricultural Employment.

☐ Recruit, solicit, hire, employ, furnish, pay
☐ Transport

8. Give the Greatest Number of Migrant and/or Seasonal Agricultural Workers That Will Be in the Crew(s) at Any Time.

9. Will Transportation be Provided the Workers?

☐ Yes (Give number and type of vehicles used to transport migrant and seasonal agricultural workers.)
☐ No (Explain how workers get to the work site.)

10. Will You Drive a Vehicle to Transport Workers? (To be completed by an "individual" applicant)

☐ No ☐ Yes If "Yes", read instructions and complete the following:

Drivers License No. _____
State _____ Date Issued _____
Expiration Date _____. Vehicles Qualified to Operate:
Type _____ Capacity _____
Restriction(s):

11. Will the Applicant Farm Labor Contractor Own or Control any Facility or Real Property Which Will be Used by Migrant Agricultural Workers in the Crew at any Time During the Period for Which Registration is Sought or in any Location?

☐ Yes (Submit statement identifying all housing to be used and proof that such housing meets all applicable Federal and State safety and health standards.)

☐ No (Give the name and address of all persons who own or control housing to be used by Migrant Agricultural Workers in the crew.)

Formerly Form WH-410 which is obsolete.

Form WH-510 MIS
Jan. 1984

NOT FOR PUBLIC DISTRIBUTION

12. Have you been convicted within the past 5 years, under State or Federal law, of any of the following crimes?

A. Any crime relating to gambling, or to the sale, distribution or possession of alcoholic beverages, in connection with or incident to any farm labor contracting activities.

☐ Yes ☐ No

B. Any felony involving robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, prostitution, peonage, or smuggling or harboring individuals who have entered the United States illegally.

☐ Yes ☐ No

(If "YES" to any of the above, state crime and give date and place of conviction.)

13. The intended farm labor contracting activities will begin approximately _____ *(month, day, year)*

Describe your method of operation *(Specify crops, agricultural activity, places of employment, location, etc.)*

I certify that compensation is to be received for the intended farm labor contractor services and that all representations made by me in this application are true to the best of my knowledge and belief.

_____
(Applicant's Signature and Title)

Subscribed and sworn to before me this

_____ day of _____, 19____

_____
(Witness to signature - may be authorized government representative or notary public)

A false answer or misrepresentation to any question on this application may be punishable by fine or imprisonment (U.S. Code, title 18, sec. 1001).

NOT FOR PUBLIC DISTRIBUTION

Statement of Intention to Comply With Housing Requirements of the Migrant and Seasonal Agricultural Worker Protection Act

Section 102 (3) of the MSPA requires that an applicant for a certificate of registration with authorization to house migrant agricultural workers shall file a statement identifying each facility or real property to be used by the applicant to house any migrant agricultural worker during the period for which registration is sought. If the facility or real property is or will be owned or controlled by the applicant, such statement shall provide documentation showing that the applicant is in compliance with all substantive Federal and State safety and health standards with respect to each such facility or real property. I hereby declare that I will not house migrant agricultural workers in any facility or real property I own or control until I have submitted all necessary written evidence and have been issued a Certificate or Registration with housing authorized. I understand that I may then house migrant agricultural workers only in facilities or real property which has been authorized by the Secretary of Labor.

_____
(Signature of Applicant)

Subscribed and sworn to me before this_____day of _____, 19___.

_____
(Witness to signature - may be authorized government representative or notary public)

Authorization of the Secretary of Labor to Accept Legal Process

The following authorization is executed pursuant to section 102 (5) of the Migrant and Seasonal Agricultural Worker Protection Act.

"I do hereby designate and appoint the Secretary of Labor, United States Department of Labor, as my lawful agent to accept service of summons in any action against me at any and all times during which I have departed from the jurisdiction in which such action is commenced or otherwise have become unavailable to accept service, and under such terms and conditions as are set by the court in which such action has been commenced."

_____
(Signature of Applicant)

Subscribed and sworn to me before this_____day of_____, 19___.

_____
(Witness to signature - may be authorized government representative or notary public)

NOT FOR PUBLIC DISTRIBUTION

INSTRUCTIONAL AND INFORMATION GUIDE FOR APPLYING FOR A CERTIFICATE OF REGISTRATION

(FOR FURTHER DETAILS, REFER TO THE REGULATIONS (29 CFR, Part 500) AND TO THE U.S. DEPARTMENT OF LABOR PAMPHLET "MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT.

NOTE: SUBMISSION OF THIS APPLICATION FORM DOES NOT AUTHORIZE THE APPLICANT TO ENGAGE IN FARM LABOR CONTRACTING ACTIVITIES. If the application is approved, the applicant will be issued a *Farm Labor Contractor Certificate of Registration.*

ITEM 1.- Application for certificate.

Federal - Check this block when applying for a Federal Certificate of Registration.

Consolidated Federal-State - Check this block when applying for both a Federal and State Certificate of Registration. For further information, contact the local Employment Service Office.

If no Farm Labor Contractor Certificate of Registration (Form WH-511) has ever been issued to you by the U.S. Department of Labor (even though you previously applied for one), check "initial". If a certificate has been issued to you by the U.S. Department of Labor, check "renewal" and enter the number of the last certificate issued to you. If you are applying for an initial certificate, attach to this application a completed Form FD-258, Fingerprint Card.

ITEM 2. - Operating as an individual or organization. If application is for a Corporation, Partnership, or other organization, each officer, director, partner, or employee who will engage in any of the covered farm labor contracting activities on behalf of the organization must obtain either a Farm Labor Contractor Certificate of Registration or a Farm Labor Contractor Employee Certificate of Registration prior to so engaging in farm labor contracting activities. (Form WH-512 is the application form for a Farm Labor Contractor Employee Certificate of Registration.)

ITEM 3. - Enter the complete legal name and address of the applicant. The Social Security Number is used for identification purposes; its submission is authorized by Title 29 of the Code of Federal Regulations, Part 500.

ITEM 4. - This item is to identify the person submitting an application on behalf of an organization. If the information requested is the same as that furnished under item 3, enter "same as item 3".

ITEM 9. - A certificate of registration *AUTHORIZING THE APPLICANT TO TRANSPORT MIGRANT WORKERS* in connection with the applicant's business, activities, or operations as a farm labor contractor shall be issued when the following have been submitted:

a. Evidence of compliance with applicable Federal and State rules and regulations as follows:
All vehicles which the applicant is to provide or arrange to furnish to transport migrant or seasonal agricultural workers must first be inspected and approved each year by a Federal or State inspector or by a responsible garage or mechanic. A completed Form WH-514 or WH-514a, Vehicle Identification and Mechanical Inspection Report, must be submitted each year for each vehicle to be used to transport workers.

b. Evidence of compliance with the insurance or financial responsibility requirements of the Migrant and Seasonal Agricultural Worker Protection Act and the Regulations issued thereunder, as follows:
A worker's compensation coverage policy of insurance; and/or a FARM LABOR CONTRACTOR MOTOR VEHICLE LIABILITY CERTIFICATE OF INSURANCE showing the *passenger hazard included* (i.e., workers are covered by liability insurance while being transported) as evidence that the required insurance has been obtained for the protection of persons and their property while being transported.

NOT FOR PUBLIC DISTRIBUTION

ITEM 10. - This item applies to individuals applying for a certificate in their own name rather than on behalf of a corporation or other organization. (See item 2 above.) If you drive a motor vehicle to transport migrant or seasonal agricultural workers and you are applying for an initial certificate, submit a completed Form WH-515, DOCTOR'S CERTIFICATE with this application. If applying for a renewal and your last DOCTOR'S CERTIFICATE is more than three years old, submit a new Form WH-515.

ITEM 11. - A farm labor contractor is considered an "owner" of migrant agricultural worker facilities or real property if the farm labor contractor has a legal or equitable interest in such facilities or real property. A farm labor contractor is in "control" of facilities or real property when the contractor is in charge of or has the power or authority to oversee, manage, superintend or administer facilities or real property either personally or through an authorized agent or employee acting in any of the aforesaid capacities.

Proof that facilities or real property owned or controlled by a farm labor contractor complies with applicable Federal and State safety and health standards and can be satisfied by one of the following:

1. A certification issued by a state or local health authority or other appropriate agency, or

2. A dated and signed written request for the inspection of a facility or real property made to the appropriate State or local agency at least forty five (45) days prior to the date on which it is to be occupied by migrant agricultural workers.

CERTIFICATION. This application must be subscribed and sworn to by you before a person authorized to administer oaths. The completed application and related forms and documents should be submitted to any local employment service office or other designated office in the State. Each applicant for a Certificate of Registration, in addition to all other requirements, must sign the statement on page 5 of this form, authorizing the Secretary of Labor to accept legal service of summons in any action against the applicant when such applicant is unavailable to accept summons, or has departed from the jurisdiction of the court in which such action is commenced.

NOT FOR PUBLIC DISTRIBUTION

57f02 WH-511: Farm Labor Contractor Certificate of Registration.

(a) Purpose

This form will be issued by the Wage and Hour Division (WHD) regional administrator or designated state official in those states that have entered into an agreement with the Secretary to conduct MSPA registration, and will be used as the certificate that authorizes the holder to perform farm labor contracting activities covered by the act, subject to the restrictions shown on the certificate regarding the authorized transportation, housing, and/or driving a vehicle used to transport migrant and seasonal agricultural workers.

(b) Preparation and distribution

The form is prepared by the WHD regional office or designated state office in an original only and sent to the farm labor contractor who qualifies for its issuance.

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Farm Labor Contractor Certificate of Registration
No. _____
Expires _____

Name _____
(Last) (First) (Middle)

I certify that the person named above is registered pursuant to the Migrant and Seasonal Agricultural Worker Protection Act and is authorized to perform the following activities covered by the Act: Recruit, solicit, furnish, hire and employ.

Transportation	☐ Authorized	☐ Not Authorized
Housing	☐ Authorized	☐ Not Authorized
Driving	☐ Authorized	☐ Not Authorized

Transportation and/or Housing Authorization is specified on the reverse of this Certificate.

Approved _____ Date _____
(Assistant Regional Administrator) WH-411 (4/83)

The following vehicle(s) is/are authorized to transport migrant and seasonal agricultural workers within the meaning of the Act as specified below unless such authorization is otherwise terminated.

Year	Make and Model	Serial or Motor Number	Ins. Liability Limits	Authorization Ending

Worker's Compensation Insurance Holders (if applicable): _____

Social Security Account No. _____

Social Security Employer ID No. _____

Permanent Home Address _____
(No. & Street) (R.F.D. or P.O. Box)

_____
(City or Town) (State) (Zip Code)

Date of Birth _____ Height _____ Weight _____
(Month) (Day) (Year)

This certificate is based on the Migrant and Seasonal Agricultural Worker Protection Act and regulations issued thereunder, and on my application for registration. It may be revoked or suspended, or its renewal denied, for noncompliance with the Act or regulations, including applicable requirements for transporting and housing migrant workers. Such noncompliance may constitute a criminal offense.

_____ _____
(Signature of Holder) (Title)

Location of Facility or Real Property _____
(Name) (Street or Road) (County) (State)

Type of Construction _____ Number of Units _____

Owner's Name and Mailing Address _____

_____

Location of Facility or Real Property _____
(Name) (Street or Road) (County) (State)

Type of Construction _____

Owner's Name and Mailing Address _____

_____

_____

Based on the contractor's submission, housing is authorized at the above locations unless such authorization is otherwise terminated.

Formerly WH-411

57f03 WH-512: Application for a Farm Labor Contractor Employee Certificate of Registration.

(a) Purpose

This form is used to apply for an initial or renewal the WH-513: Farm Labor Contractor Employee Certificate of Registration. The applicant may obtain and file the form and related documents with any office of the United State Employment Service or Wage and Hour Division (WHD).

(b) Preparation and Distribution

The WH-512 will be completed by the applicant. The applicant should be advised to keep a copy for his or her file. The completed form, after it has been subscribed and sworn to before a person authorized to witness the applicant's signature, will be filed at the local state workforce agency or WHD regional office (RO). State workforce agency and WHD personnel are authorized to witness the applicant's signature. The local office will send the properly completed WH-512 with attachments, if any, to the appropriate WHD RO or designated state office in those states that have entered into an agreement with the Secretary to conduct MSPA registration.

NOT FOR PUBLIC DISTRIBUTION

OMB No. 1215-0037
Expires: 03/31/86

Application For A Farm Labor Contractor Employee Certificate Of Registration

Migrant and Seasonal Agricultu .. Worker Protection Act

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

NOTE: Please read information on reverse before completing this application. No Farm Labor Contractor Employee Certificate of Registration may be issued unless a completed form has been received (29 U.S.C. 1801 et. seq.)

FOR OFFICIAL USE ONLY

Number: E-___-___-___-___

Driving Authorized ☐ Yes ☐ No DA Eff. Date: __/__/__

Issue Date: __/__/__ Expiration Date __/__/__

FA ☐ Yes ☐ No Certificate ☐ Yes ☐ No

1. Application for Employee Certificate of Registration for:

Federal ☐ Initial ☐ Renewal

Consolidated Federal State ☐ Initial ☐ Renewal

If renewal, give number of previous certificate _____

2. Name (Last, first, middle)

3. Organization Title, if any

4. Permanent home address (Include No., Street or RFD, city or town, State, and Zip Code. This address must be a physical location and may not be a P.O. Box)

Street _____

City _____ State _____ Zip _____

5. Address to which notices and documents should be sent (If same as above, write Same. This address may include P.O. Box).

Street _____

City _____ State _____ Zip _____

6. Check Each Activity to be Performed Involving Migrant and/or Seasonal Agricultural Workers for Agricultural Employment.

☐ Recruit, solicit, hire, furnish, employ, pay.

☐ Transport

7. Telephone Number (Include Area Code)

8. ☐ Male or ☐ Female

9. Height: ft. in.

10. Weight:

11. Date of birth

12. Place of birth

13. Color of Hair

14. Color of eyes

15. Social Security Number ___-___-____

16. Will you DRIVE a vehicle used to transport migrant or seasonal agricultural workers?

☐ Yes ☐ No. If "Yes", see reverse of this form for information and complete the following:

Drivers License No. _____

Date Issued _____

Expiration Date _____

Vehicles Qualified to Operate: _____

Type/Class: _____ Capacity: _____

Restrictions:

17. Have you been convicted within the past 5 years, under State or Federal law, of any of the following crimes?

A. Any crime relating to gambling, or to the sale, distribution or possession of alcoholic beverages, in connection with or incidents to any farm labor contracting activities.

☐ Yes ☐ No

B. Any felony involving robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, prostitution, peonage, or smuggling or harboring individuals who have entered the United States illegally.

☐ Yes ☐ No

18. Employer identification: (Name, Farm Labor Contractor Registration No.)

Name: _____

Number: C-___-___-___-___

19. Approximate date the planned farm labor activity will begin (Mo., day, year)

I certify that I am an employee of the farm labor contractor identified above and will perform farm labor contracting activities only for that farm labor contractor and for no other person. I certify that all representations made by me in this application are true to the best of my knowledge and belief.

Subscribed and sworn to before me this ___ day of ____, 19___.

_____
(Signature of Applicant)

_____
(Witness to Signature — may be authorized government representative or notary public)

A false answer or misrepresentation to any question may be punishable by fine or imprisonment (U.S. Code, Title 18, Sec. 1001).

Form WH-512 MIS
January 1984

NOT FOR PUBLIC DISTRIBUTION

AUTHORIZATION OF THE SECRETARY OF LABOR TO ACCEPT LEGAL PROCESS

The following authorization is executed pursuant to section 102(5) of the Migrant and Seasonal Agricultural Worker Protection Act.

"I do hereby designate and appoint the Secretary of Labor, United States Department of Labor, as my lawful agent to accept service of summons in any action against me at any and all times during which I have departed from the jurisdiction in which such action is commenced or otherwise have become unavailable to accept service, and under such terms and conditions as set by the court in which such action has been commenced."

_____
(Signature of Applicant)

Subscribed and sworn to before me this _____ day of _____, 19_____.

_____
(Witness to signature - may be authorized government representative or notary public)

INFORMATION FOR APPLYING FOR A FARM LABOR CONTRACTOR EMPLOYEE CERTIFICATE OF REGISTRATION

NOTE: This application does not authorize you to perform Farm Labor Contracting Activities. If your application is approved, you will be issued a FARM LABOR CONTRACTOR EMPLOYEE CERTIFICATE OF REGISTRATION.

1. *Item 1.—Application for Certificate of Registration.*

   Federal — Check this block when applying for a Federal Employee Certificate of Registration.

   Consolidated Federal - State — Check this block when applying for both a Federal and State Employee Certificate. For further information, contact the local Employment Service Office.

   If no Farm Labor Contractor Employee Certificate has ever been issued to you by the U.S. Department of Labor (even though you previously applied for one), check "initial". If a certificate has been issued to you by the U.S. Department of Labor, check "renewal" and enter the number of the last certificate issued to you. If you are applying for an initial certificate, attach to this application a completed Form FD-258, Fingerprint Card.

2. *Item 16.—Driving a vehicle used to transport migrant or seasonal agricultural workers.*
   If YES and you are applying for an "initial" certificate, with this application submit a completed Form WH-515, Doctor's Certificate. If applying for a "renewal" and your Doctor's Certificate is more than 3 years old, submit a new Form WH-515 with this application. Note, under the Act you will also be responsible for insuring that any vehicle you operate in transporting migrant or seasonal agricultural workers complies with applicable Federal and State safety and health standards and is insured as required by the Act.

3. *Item 18.—Employer Identification.*
   Section 101(b) of the Act requires that a person issued a Farm Labor Contractor Employee Certificate of Registration be an employee of a person holding a valid Farm Labor Contractor Certificate of Registration. The employer identification should be in the name in which your employer's Farm Labor Contractor Certificate was issued. If no certificate has been issued but your employer has applied, enter "applied" and the date in the space provided for the registration number.

4. *CERTIFICATION.*—This application must be subscribed and sworn to by you before a person authorized to administer oaths. The completed application and all related forms and documents should be submitted to any local employment service office or other designated office.

IMPORTANT—Privacy Act Statement

The Privacy Act of 1974 requires that the Department of Labor provide the following statements with respect to this form:

1. Submission of this information is required under the Migrant and Seasonal Agricultural Worker Protection Act.
2. The purpose of this form is to provide the Department of Labor with sufficient information to determine the qualifications of the applicant for the requested certificate to serve as a Farm Labor Contractor employee.
3. Information from this form may be used in the course of presenting evidence to a court or administrative tribunal or in the course of settlement negotiations.
4. Failure to provide the information precludes the issuance of necessary documents required under the law. Your social security number is used for identification purposes; its submission is authorized by Title 29 of the Code of Federal Regulations, Part 500.

Formerly Form WH-412 which is obsolete.

NOT FOR PUBLIC DISTRIBUTION

57f04 WH-513: Farm Labor Contractor Employee Certificate of Registration.

(a) Purpose

This form will be issued by the Wage and Hour Division (WHD) regional administrator or designated state official in those states that have entered into an agreement with the Secretary to conduct MSPA registration, and will be used as the certificate that authorizes the holder to perform farm labor contracting activities covered by the act solely on behalf of the registered farm labor contractor specified thereon.

(b) Preparation and distribution

The form is prepared by the WHD regional office or designated state office in an original only and sent to the farm labor contractor employee who qualifies for its issuance.

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Farm Labor Contractor Employee Certificate of
Registration No. E. _____
Expires _____

Name _____
(Last) (First) (Middle)

I certify that the person named above is registered pursuant to the Migrant and Seasonal Agricultural Worker Protection Act and is authorized to perform the following activities covered by the Act: Recruit, solicit, furnish, hire and employ.

_____ _____
(Employer's Name) (Registration Number)

Driving ☐ Authorized ☐ Not Authorized

Approved _____ Date _____
(Assistant Regional Administrator) Form WH-513 (4/83)

Social Security Account No. _____

Permanent Home Address _____
(No. & Street) (R.F.D. or P.O. Box)

_____
(City or Town) (State) (ZIP Code)

Date of Birth ____ / ____ / ____ Height: Ft. _____ In. _____
Mo. Day Year

Weight _____ Color Hair _____ Color Eyes _____

This Certificate of Registration is based on the Migrant and Seasonal Agricultural Worker Protection Act and regulations issued thereunder, and on my application for registration. It may be revoked or suspended, or its renewal denied, for noncompliance with the Act or regulations. Such noncompliance may constitute a criminal offense.

_____ _____
(Signature of Holder (Title)

Formerly Form WH-413

57f05 WH-514: Vehicle Mechanical Inspection Report for Transportation Subject to Department of Transportation Requirements.

(a) Purpose

This form must be completed on each vehicle subject to the Department of Transportation (DOT) requirements to be used to transport migrant and seasonal agricultural workers by the person making the application for a Farm Labor Contractor Certificate of Registration that authorizes transportation. The applicant may obtain and file the form with any office of the Unites States Employment Service or Wage and Hour Division (WHD).

(b) Preparation and distribution

An applicant who transports migrant and seasonal agricultural workers should be given three copies of the WH-514 for each vehicle subject to the DOT standards to be used that must be inspected. When the vehicles are inspected and the WH-514s are properly completed and signed, the original of each completed form may be filed at the local state workforce agency or WHD office. One copy of the form is for the garage or mechanic conducting the inspection and one copy is for the applicant. The local office will send the properly completed forms to the appropriate WHD regional office or designated state office in these states which have entered into an agreement with the Secretary to conduct MSPA registration.

NOT FOR PUBLIC DISTRIBUTION

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division

OMB No. 1215-0036

VEHICLE MECHANICAL INSPECTION REPORT FOR TRANSPORTATION SUBJECT TO DEPARTMENT OF TRANSPORTATION REQUIREMENTS

Name of Carrier _____ Date _____

Address _____ State _____ Zip Code _____

IMPORTANT:
The Migrant and Seasonal Agricultural Worker Protection Act requires that farm labor contractors subject to this law who transport any migrant and seasonal agricultural workers for agricultural employment obtain from the U.S. Department of Labor a certificate of registration. Applicants for a certificate of registration must produce evidence that the vehicles they use for this purpose meet Department of Transportation requirements. Provided below is a list of major items which should be checked. On the reverse side of this form is a brief summary of the Department of Transportation standards for each of these items. A check (✓) should be placed adjacent to each item which meets these minimum standards. In those instances where an item does not meet these standards, necessary repairs must be completed before the transportation of migrant and seasonal agricultural workers will be authorized. This form must be properly completed and signed, certifying that the vehicle meets Department of Transportation requirements.

VEHICLE: Serial or Motor No. _____

Truck ☐ Tractor ☐ Semitrailer ☐ Full Trailer ☐ Bus ☐

Registration No. _____ State _____ Make _____

LIGHTING DEVICES		BRAKES		PASSENGER COMPARTMENT	
(1) Headlights	☐	(8) Service (Foot)	☐	(14) Protection from Weather	☐
(2) Stop Lights	☐	(9) Parking Brake	☐	(15) Floors	☐
(3) Tail Lights	☐	(10) Brake Tubing	☐	(16) Sides	☐
(4) Clearance Lights	☐	(11) Brake Hoses	☐	(17) Seats	☐
(5) Side Markers	☐	(12) Connections	☐	(18) Exit	☐
(6) Reflectors	☐	(13) Brake Warning Device on Vehicles With Air or Vacuum Brakes	☐	(19) Gates/Doors	☐
(7) Turn Signals	☐			(20) Emergency Exit	☐

EMERGENCY EQUIPMENT		PARTS AND ACCESSORIES			
(21) Fire Extinguisher	☐	(25) Tires	☐	(29) Windshield Wipers	☐
(22) Fusee	☐	(26) Wiring	☐	(30) Rear Vision Mirrors	☐
(23) Flares, Reflectors, Lanterns	☐	(27) Steering	☐	(31) Fuel System	☐
(24) Simultaneous Flashing Turn Signals	☐	(28) Horn	☐	(32) Exhaust System	☐

REMARKS:

_____

_____

Date _____

Place of Inspection _____ Name of Person Making Inspection _____

Name of Shop (Garage) _____ Title _____

Formerly Form WH-414 which is obsolete

Form WH-514
April 1983

NOT FOR PUBLIC DISTRIBUTION

1. Headlights—On the front, at least two headlamps, an equal number at each side, shall provide an upper and lower distribution of light selected at the driver's will.
2. Stoplights—On the rear, two stoplamps, one at each side; shall be actuated from application of the service brakes.
3. Taillights—On the rear, two taillamps, one at each side.
4. Clearance Lights—On the front, two amber clearance lamps, one at each side. Three amber identification lamps located at center. On rear, two red clearance lamps, one at each side. Three red identification lamps located in the center.
5. Side Markers—On each side, one amber side marker lamp at or near the front, one red side marker lamp at or near the rear.
6. Reflectors—On each side, one amber reflector located at or near the front and one red reflector at or near the rear. On the rear, two red reflectors, one on each side.
7. Turn Signals—On the front, two amber signals, one on each side; on the rear, two red turn signals, one on each side.
8. Service Brake (Foot)—Shall be equipped with one application valve, which, when applied, operates all service brakes. It shall be adequate to control the movement of, and to stop the vehicle.
9. Parking Brake—Must be capable of holding the vehicle under any condition of loading on any grade despite exhaustion of any source of energy or leakage of any kind.

10 and 11. Brake Tubing, Brake Hoses—Must be secured against chafing, kinking or other mechanical injury.

12. Connections—Must be free of leaks, constrictions or other devices.
13. Brake Warning Device—Equipped with either audible or visual warning signals to indicate any loss of air or lack of vacuum.
14. Protection from Weather—Be equipped with a top at least 80 inches high above the floor and facilities for enclosing side and ends of passenger-carrying compartment.
15. Floors—Substantially smooth floor, without protruding obstructions more than 2 inches high (except when necessary to secure seats or other devices to the floor) and void of cracks and holes.
16. Sides—At least 60 inches high by attachment of side boards to the permanent body construction if necessary.
17. Seats—A seat shall be provided for each worker transported, and must be securely attached to the vehicle; not less than 16 inches, nor more than 19 inches above the floor; at least 13 inches deep; equipped with back rests extending to a height of at least 36 inches above the floor, with at least 24 inches between seats.
18. Exit—Adequate means of ingress and egress shall be provided on the rear or at the right side.
19. Gates/Doors—Designed to close the means of ingress and egress and shall be equipped with at least one latch or other fastening device constructed so as to keep the gates or doors securely closed.
20. Emergency Exit—Vehicles with permanently affixed roofs shall be equipped with at least one emergency exit; shall be inaddition to the exit provided above, and comply with the requirements of gates or doors.
21. Fire Extinguisher—At least one fire extinguisher of the following type, properly mounted—1½ quart carbon tetrachloride, 4 pounds dry chemical, 4 pounds carbon dioxide.
22. Fusee—At least one burning red fusee.
23. Flares, Reflectors, Lanterns—At least three flares, red electric lanterns, or red emergency reflectors.
24. Simultaneous Flashing Turn Signals—A switch must be provided that will cause the two front and two rear turn signals to flash simultaneously as a vehicular hazard traffic warning. This must be capable with the ignition of the vehicle turned on or off.
25. Tires—Shall have tread configuration on all parts of the tire which are in contact with the road surface. Cannot use regrooved, recapped, or retread tires on front wheels.
26. Wiring—Bare, loose, dangling, chafing, or poorly constructed wires prohibited.
27. Steering—All parts of steering mechanism, including wheel bearings, tie rods, king pins, and bushings, centered control assembly, drag link, springs, shackles, etc., shall be maintained in safe operating conditions.
28. Horn—Must be capable of giving adequate and reliable warning signal.
29. Windshield Wipers—At least two automatically operating blades, one on each side of the center line of the windshield.
30. Rear Vision Mirrors—Two required, one at each side firmly attached to the outside provided that only one shall be required which shall be at the driver's side on those vehicles so constructed that the driver has a view by the means of an interior mirror.
31. Fuel System—Cannot be located in or above passenger carrying portion. Shall be free of leaks, securely attached to the vehicle, and shall have a properly fitted plug cap to cover its filling opening. Cannot project beyond overall width of vehicle, nor shall it be located forward of the front axle of the power unit from which it is located.
32. Exhaust System—Shall discharge to the atmosphere at or within 6 inches forward of the rearmost part of the vehicle.

NOT FOR PUBLIC DISTRIBUTION

57f06 WH-514a: Vehicle Mechanical Inspection Report for Transportation Subject to Department of Labor Safety Standards.

(a) Purpose

This form must be completed on each vehicle subject to the Department of Labor (DOL) requirements to be used to transport migrant and seasonal agricultural workers by the person making application for a Farm Labor Contractor Certificate of Registration that authorizes transportation. The applicant may obtain and file the form with any office of the United States Employment Service or Wage and Hour Division (WHD).

(b) Preparation and distribution

An applicant who transports migrant and seasonal agricultural workers should be given three copies of the WH-514a for each vehicle subject to the DOL standards to be used that must be inspected. When the vehicles are inspected and the WH-514a forms are properly completed and signed, the original of each completed form may be filed at the local state workforce agency or WHD office. One copy of the form is for the garage or mechanic conducting the inspection and one copy is for the applicant. The local office will send the properly completed forms to the appropriate WHD regional office or designated state office in those states that have entered into an agreement with the Secretary to conduct MSPA registration.

NOT FOR PUBLIC DISTRIBUTION

OMB No. 1215-0036
Expires 02/28/86

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division

VEHICLE MECHANICAL INSPECTION REPORT FOR TRANSPORTATION SUBJECT TO DEPARTMENT OF LABOR SAFETY STANDARDS

Name of Carrier _____ Date _____

Address _____ State _____ Zip Code _____

IMPORTANT:
The Migrant and Seasonal Agricultural Worker Protection Act requires that farm labor contractors subject to this law who transport any migrant and seasonal agricultural workers for agricultural employment obtain from the U.S. Department of Labor a certificate of registration. Applicants for a certificate of registration must produce evidence that the vehicles they use for this purpose meet Department of Labor requirements. Provided below is a list of major items which should be checked. On the reverse side of this form is a brief summary of the Department of Labor standards for each of these items. A check (✓) should be placed adjacent to each item which meets these minimum standards. In those instances where an item does not meet these standards, necessary repairs must be completed before the transportation of migrant and seasonal agricultural workers will be authorized. This form must be properly completed and signed, certifying that the vehicle meets Department of Labor requirements.

This form (WH-514a) is to be used for the inspection of any passenger car or station wagon regardless of the distance traveled and for other vehicles used to transport migrant and seasonal agricultural workers (except day-haul operations) for distances of seventy five (75) miles or less. Vehicles used in day-haul operations and those used to transport workers for more than 75 miles are subject to Department of Transportation standards. Form WH-514 must be used for inspection of such vehicles.

VEHICLE: Serial or Motor No. _____

Truck ☐ Tractor ☐ Semitrailer ☐ Full Trailer ☐ Bus ☐ Passenger Car ☐ Station Wagon ☐

Registration No. _____ State _____ Make _____

LIGHTING DEVICES

(1) Headlights ☐
(2) Stop Lights ☐
(3) Tail Lights ☐
(4) Back-up Lights ☐
(5) Turn Signals ☐

BRAKES

(6) Service (Foot) ☐
(7) Parking Brake ☐

PASSENGER COMPARTMENT

(8) Windshield/Windows ☐
(9) Ventilation ☐
(10) Seats ☐
(11) Door-Handles/Latches ☐

EMERGENCY EQUIPMENT

(12) Hazard Warning Lights ☐

PARTS AND ACCESSORIES

(13) Tires ☐
(14) Side Mirrors ☐
(15) Steering ☐
(16) Horn ☐
(17) Windshield Wipers ☐
(18) Rear Vision Mirrors ☐
(19) Fuel System ☐
(20) Exhaust System ☐

REMARKS _____

Date _____

Place of Inspection _____ Name of Person Making Inspection _____

Name of Shop (Garage) _____ Title _____

Form WH-514a
April 1983

NOT FOR PUBLIC DISTRIBUTION

MSPA

29 CFR 500.105 DOL VEHICLE SAFETY STANDARDS

External Lights:	Operable headlights, tail lights, stop lights and, if so equipped, back-up lights, turn signals, and hazard warning lights.
Brakes:	Operable and free of leaks.
Tires:	No cracks/defects in sidewall and tread depth at least 2/32 inch.
Steering:	Steering wheel and linkage properly adjusted and maintained.
Horn:	Operable air or electric horn.
Mirrors:	Must provide full vision to the sides and rear.
Windshield/ Windshield Wipers:	Windshields must have no cracks which obscure vision and no opaque obstructions. Windshield wipers must be operable in all weather conditions.
Fuel System:	Fuel lines and tank must be free of leaks and filling opening securely covered by a cap.
Exhaust System:	Must discharge carbon monoxide away from passenger compartment and be free of leaks.
Ventilation:	Windows must be operable to allow fresh air to occupants.
Safe Loading:	Loading must not exceed gross vehicle weight rating.
Seating:	Seat required for each passenger except that seating not required for vehicles used on trips of less than 10 miles which begin and end on the farm and transportation is primarily on farm roads.
Handles & Latches:	Door handles and latches operable to allow exiting for occupants.
Passenger Compartment:	Floor and sides of any part of the vehicle to be occupied by passengers must be free of openings or rusted areas which are likely to result in injury to passengers.

NOT FOR PUBLIC DISTRIBUTION

57f07 WH-515: Doctor's Certificate.

(a) FLC and/or FLCE

(1) *Purpose*

This form must be completed by a Farm Labor Contractor or Farm Labor Contractor Employee applicant who intends to drive a vehicle used to transport migrant and seasonal agricultural workers. The applicant may obtain and file the form with any office of the United States Employment Service or Wage and Hour Division (WHD). Submission of this form is not required if a properly completed form has been furnished within the previous 3 years.

(2) *Preparation and distribution*

The WH-515 will be prepared in an original and three copies made by the doctor who examines the applicant. The original is to be submitted by the applicant at the local state workforce agency or WHD office. One copy of the form is for the applicant, one copy is for the doctor, and one copy is for the employer (if different from the applicant).

(b) AGER and/or AGAS

While not required to register, the requirement for a doctor's certificate also applies to any agricultural employer (AGER) or agricultural association (AGAS) providing transportation subject to the Department of Transportation standards. *See* 29 CFR 500.105. Such AGERs and AGASs must have a doctor's certificate for each such driver in their files at their principal place of business and each such driver must have such a certificate in his or her possession while driving. *See* 29 CFR 500.105(b)(1)(ii)(G) -(H). An AGER or AGAS may reproduce the form contained in 29 CFR 500 or may request and use the WH-515, disregarding the registration instructions, as an aid in complying with 29 CFR 500.105.

(c) The WH-415 should be used until the supply is exhausted.

NOT FOR PUBLIC DISTRIBUTION

Doctor's Certificate

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

This is to certify that I have this day examined:

_____
(Name) (Age)

_____
(Type of Operator's License) (Number) (State)

In accordance with Section 398.3(b) of the Motor Carrier Safety Regulations of the Department of Transportation, and that I find the applicant

_____ **Qualified under said rules.**

_____ **Qualified only when wearing glasses.**

_____ **Not Qualified.**

I have kept on file a completed examination.

_____
(Date) (Place)

_____
(Signature of examining doctor)

_____
(Address of doctor)

_____
(Signature of driver)

_____
(Address of driver)

Copy 1 — To be submitted with application
Copy 2 — Applicant's Copy
Copy 3 — Employer's Copy
Copy 4 — Doctor's Copy

Form WH-615
(Rev. Dec. 1983)

NOT FOR PUBLIC DISTRIBUTION

Take this form to your doctor. Ask the doctor to read this section, examine you, and fill in the certificate (located on the front of this form). You must carry this with you at all times.

To the Doctor:

Section 398.3(b) provides:

No person shall drive any vehicle carrying migrant workers without possessing the following minimum qualifications:

No mental, nervous, organic, or functional disease likely to interfere with safe driving:

No loss of foot, leg, hand, arm;

No loss of fingers, impairment of use of foot, leg, hand, fingers, arm or other structural defects or limitation likely to interfere with safe driving.

Eyesight: visual acuity of at least 20/40 (Snellen) in each eye either without glasses or by correction with glasses; form field of vision in the horizontal meridian shall not be less than a total of 140 degrees, ability to distinguish colors, red, green, and yellow; drivers requiring correction by glasses shall wear properly prescribed glasses at all times when driving.

Hearing shall not be less than 10/20 in the better ear for conversational tones without a hearing aid.

Shall not be addicted to the use of narcotics or habit-forming drugs, or to the excessive use of alcoholic beverages or liquors.

NOT FOR PUBLIC DISTRIBUTION

57f08 FD-258: Applicant (*i.e.*, fingerprint card).

(a) Purpose

This form must be submitted with an application for a Farm Labor Contractor or Farm Labor Contractor Employee Certificate of Registration, WH-510, or WH-512. The form may be obtained and filed with any office of the United States Employment Service or Wage and Hour Division (WHD). Submission of the form is not required if a properly completed form has been filed within the previous 3 years.

(b) Preparation and distribution

This form, upon completion by the applicant, should be returned to the local state workforce agency or WHD office. The local office will send the properly completed Form FD-258 to the appropriate WHD regional office or designated state office in those states that have entered into an agreement with the Secretary to conduct MSPA registration. Applicants may be fingerprinted by the local U.S. Marshall's office, sheriff's office, police station, or government or state agencies that require fingerprinting of employees.

NOT FOR PUBLIC DISTRIBUTION

APPLICANT

LEAVE BLANK — For FBI use

TYPE OR PRINT ALL INFORMATION IN BLACK

LAST NAME NAM: DOE — FIRST NAME: JOHN — MIDDLE NAME: JOSEPH

FBI LEAVE BLANK — For FBI use

SIGNATURE OF PERSON FINGERPRINTED: Applicant's signature

ALIASES AKA: ROBERT SMITH
Other names used by subject

ORI: Your agency number and address will be preprinted by FBI

RESIDENCE OF PERSON FINGERPRINTED: Applicant's home address

DATE OF BIRTH DOB (Month Day Year): 7 - 21 - 52

CITIZENSHIP CTZ: U.S. (or other)

SEX: M — RACE: W — HGT.: 5'8" — WGT.: 165 — EYES: BRN — HAIR: BRN — PLACE OF BIRTH POB: City & State

DATE PRINTS TAKEN — SIGNATURE OF OFFICIAL TAKING FINGERPRINTS: Your signature

YOUR NO. OCA: Identifying number to be quoted in FBI reply

LEAVE BLANK

EMPLOYER AND ADDRESS: Employing or licensing agency

FBI NO. FBI: Fill in whenever known

CLASS.

ARMED FORCES NO. MNU: Military enlistment number

FOR FBI USE

REASON FINGERPRINTED: Position or license sought

SOCIAL SECURITY NO SOC: Insert if known

MISCELLANEOUS NO MNU: Other identifying nos.

Indicate any amputations or fingers missing at birth in the correct finger blocks. See Instruction #7 on reverse side of this card regarding other physical problems in taking prints.

If date of birth is unknown, give best approximate age, e.g.; "age 20".

1 R THUMB | 2 R INDEX | 3 R MIDDLE | 4 R RING | 5 R LITTLE

SPECIMEN FINGERPRINT CARD

6 L THUMB | 7 L INDEX | 8 L MIDDLE | 9 L RING | 10 L LITTLE

Make certain all impressions are taken in proper order, legible, fully rolled and classifiable. All data called for are essential. Use care and save time.

LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY | L THUMB | R THUMB | RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY

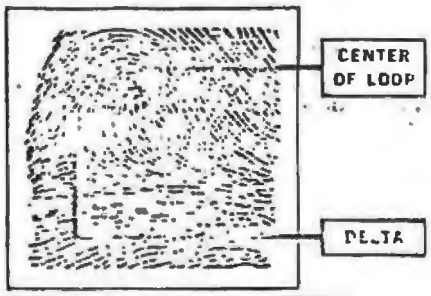
FBI/DOJ

NOT FOR PUBLIC DISTRIBUTION

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20537

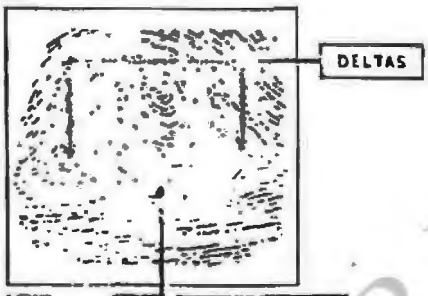
APPLICANT

1. LOOP



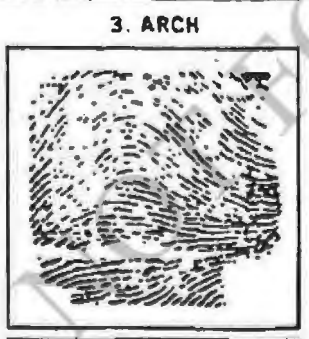
THE LINES BETWEEN CENTER OF LOOP AND DELTA MUST SHOW

2. WHORL



THESE LINES RUNNING BETWEEN DELTAS MUST BE CLEAR

3. ARCH



ARCHES HAVE NO DELTAS

TO OBTAIN CLASSIFIABLE FINGERPRINTS:

1. USE BLACK PRINTER'S INK.
2. DISTRIBUTE INK EVENLY ON INKING SLAB.
3. WASH AND DRY FINGERS THOROUGHLY.
4. ROLL FINGERS FROM NAIL TO NAIL, AND AVOID ALLOWING FINGERS TO SLIP.
5. BE SURE IMPRESSIONS ARE RECORDED IN CORRECT ORDER.
6. IF AN AMPUTATION OR DEFORMITY MAKES IT IMPOSSIBLE TO PRINT A FINGER, MAKE A NOTATION TO THAT EFFECT IN THE INDIVIDUAL FINGER BLOCK.
7. IF SOME PHYSICAL CONDITION MAKES IT IMPOSSIBLE TO OBTAIN PERFECT IMPRESSIONS, SUBMIT THE BEST THAT CAN BE OBTAINED WITH A MEMO STAPLED TO THE CARD EXPLAINING THE CIRCUMSTANCES.
8. EXAMINE THE COMPLETED PRINTS TO SEE IF THEY CAN BE CLASSIFIED, BEARING IN MIND THAT MOST FINGERPRINTS FALL INTO THE PATTERNS SHOWN ON THIS CARD (OTHER PATTERNS OCCUR INFREQUENTLY AND ARE NOT SHOWN HERE).

THIS CARD FOR USE BY:

1. LAW ENFORCEMENT AGENCIES IN FINGERPRINTING APPLICANTS FOR LAW ENFORCEMENT POSITIONS *
2. OFFICIALS OF STATE AND LOCAL GOVERNMENTS FOR PURPOSES OF EMPLOYMENT, LICENSING AND PERMITS, AS AUTHORIZED BY STATE STATUTES AND APPROVED BY THE ATTORNEY GENERAL OF THE UNITED STATES. LOCAL AND COUNTY ORDINANCES, UNLESS SPECIFICALLY BASED ON APPLICABLE STATE STATUTES, DO NOT SATISFY THIS REQUIREMENT. *
3. LAW GOVERNMENT AGENCIES **
4. OFFICIALS OF FEDERALLY CHARTERED OR INSURED BANKING INSTITUTIONS TO PROMOTE OR MAINTAIN THE SECURITY OF THOSE INSTITUTIONS

LEAVE THIS SPACE BLANK

INSTRUCTIONS:

*1. PRINTS MUST FIRST BE CHECKED THROUGH THE APPROPRIATE STATE IDENTIFICATION BUREAU, AND ONLY THOSE FINGERPRINTS FOR WHICH NO DISQUALIFYING RECORD HAS BEEN FOUND LOCALLY SHOULD BE SUBMITTED FOR FBI SEARCH.

2. PRIVACY ACT OF 1974 (P.L. 93-579) REQUIRES THAT FEDERAL, STATE, OR LOCAL AGENCIES INFORM INDIVIDUALS WHOSE SOCIAL SECURITY NUMBER IS REQUESTED WHETHER SUCH DISCLOSURE IS MANDATORY OR VOLUNTARY, BASIS OF AUTHORITY FOR SUCH SOLICITATION, AND USES WHICH WILL BE MADE OF IT.

**3. IDENTITY OF PRIVATE CONTRACTORS SHOULD BE SHOWN IN SPACE "EMPLOYER AND ADDRESS". THE CONTRIBUTOR IS THE NAME OF THE AGENCY SUBMITTING THE FINGERPRINT CARD TO THE FBI.

4. FBI NUMBER, IF KNOWN, SHOULD ALWAYS BE FURNISHED IN THE APPROPRIATE SPACE.

MISCELLANEOUS NO. – RECORD: OTHER ARMED FORCES NO., PASSPORT NO. (PP), ALIEN REGISTRATION NO. (AR), PORT SECURITY CARD NO. (PS), SELECTIVE SERVICE NO. (SS), VETERANS' ADMINISTRATION CLAIM NO. (VA.).

FD-258 (REV. 8-17-76) ☆ U.S. GOVERNMENT PRINTING OFFICE 1976—220-099

NOT FOR PUBLIC DISTRIBUTION

57f09 WH-509: Declaration of Citizenship.

(a) Purpose

A prospective employee of an Farm Labor Contractor (FLC) may self-certify United States citizenship for purposes of the MSPA by executing this form. When properly executed and filed with the USES or affiliated office, this form meets the requirements of 29 CFR 500.59(a)(11). Under these conditions, an FLC and/or Farm Labor Contractor Employee may rely upon this form in good faith to demonstrate compliance with the prohibition against knowingly recruiting, hiring, employing, or using the services of an illegal alien. This form may be obtained at any office of the United States Employment Service (USES) or the Wage and Hour Division.

(b) Preparation and distribution

An original and one copy of the WH-509 will be prepared and executed by the person making the declaration. It must be countersigned by a USES official. The completed document must be filed at a USES or affiliated state office, with a copy retained by the person executing the declaration.

NOT FOR PUBLIC DISTRIBUTION

OMB No. 1215-0091

U.S. DEPARTMENT OF LABOR Employment Standards Administration Wage and Hour Division	DECLARATION OF CITIZENSHIP

OPTIONAL STATEMENT: The information contained in this form meets the requirements of 29 CFR 500.59(a) (11). While you are not required to fill out this form, it is designed to assist you in providing evidence that you are a citizen of the United States.

NOTE: Please read information on reverse before completing this declaration.

SECTION I - TO BE COMPLETED BY DECLARANT

I, _____ (Name), presently residing at _____ (Street Address), _____ (City, State, ZIP Code), do hereby declare that I am a citizen of the United States, that I was born on _____ (Date (Day/Month/Year)), at _____ (City/State), _____ (Country), and that my Social Security Account Number (voluntary) is _____. The following three persons, all of whom are adult citizens of the United States, can verify my citizenship.

1. Name:	Address: (Street, City, State, ZIP Code)
2. Name:	Address: (Street, City, State, ZIP Code)
3. Name:	Address: (Street, City, State, ZIP Code)

I understand that, under Federal law (18 U.S.C. 1001), I am subject to a fine of not more than $10,000 or imprisonment for not more than five years, or both, for making a false or misleading statement on this declaration.

_____ (Signature of Declarant) _____ (Date)

SECTION II - TO BE COMPLETED BY USES OFFICIAL

The above statement was signed in my presence by the declarant, who stated to me, under penalty of law, that it was true in all respects and that he/she understood it fully.

Name:	Signature:
Title:	Office Address: (Street, City, State, ZIP Code)

PRIVACY ACT STATEMENT: The collection, method of handling and storing the information to be collected complies with the provisions of the Privacy Act of 1974, and OMB Circular No. 108.

Formerly Form WH-409 which is obsolete.

Form WH-509
April 1983

NOT FOR PUBLIC DISTRIBUTION

INSTRUCTIONS FOR COMPLETING WAGE HOUR FORM WH-509
(Farm Labor Declaration of Citizenship Form)

IMPORTANT: The Declarant should read all of the following instructions before completing the face of this form.

This form or a facsimile, must be completed and signed by the person making the declaration. It must be countersigned by a United States Employment Service (USES) official. The completed declaration of citizenship must be filed with the USES or any of its affiliated offices, and a copy is to be retained by the person executing the declaration.

Section I (The Declarant is to provide the following information)

Declarant's full name.

The location where the declarant presently resides (street address, city, state and ZIP code)

Declarant's date of birth (Day/Month/Year)

Declarant's place of birth (city, state, country).

Declarant's social security account number. This information is voluntary.

The declarant is to provide the names and addresses (street, city, state, ZIP code) of three persons, all of whom are adult citizens of the United States, who can verify declarant's citizenship.

Signature of declarant stating that he/she understands that under Federal Law (18 USC 1001), declarant is subject to a fine of not more than $10,000 or imprisonment for not more than 5 years or both, for making a false or misleading statement on this declaration.

SECTION II

To be completed by USES Official.

NOT FOR PUBLIC DISTRIBUTION

57f10 WH-516: Worker Information-Terms and Conditions of Employment (English).

(English and Spanish)

WH-516a: **(English and Haitian Creole)**

WH-516b: **(English and Vietnamese)**

(a) Purpose

This form may be completed by any farm labor contractor (FLC), agricultural employer (AGER), or agricultural association (AGAS) that recruits any migrant and seasonal agricultural worker. When properly completed, this form may be utilized to provide written disclosure to the worker, either at the time of recruitment or when an offer of employment is made, of the terms and conditions of employment, and the form may also be given to the worker, upon request, as the written statement of such terms and conditions of employment required by the act. The applicant may obtain the form at any office of the Wage and Hour Division.

(b) Preparation and distribution

The WH-516 will be prepared by the FLC, AGER, or AGAS. Additional copies may be made for distribution to the workers as he or she deem necessary.

NOT FOR PUBLIC DISTRIBUTION

MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

WORKER INFORMATION

1. Place of employment

_____

_____

_____

2. Period of employment

From _____ To _____

3. Wage rates to be paid

Hourly $ _____

Piece rate $ _____ per _____

4. Crops and kinds of activities

_____

_____

5. Transportation and other benefits, if any

Transportation _____ charges _____

_____ _____

Unemployment compensation insurance provided ☐ Yes ☐ No
Worker's compensation insurance provided ☐ Yes ☐ No

Other benefits _____ charges _____

6. For migrant workers who will be housed, the kind of housing available and cost, if any

_____ charges _____

_____ _____

7. List any strike, work stoppage, slowdown, or interruption of operation by employees at the place where the workers will be employed (If there are no strikes, etc., enter "None")

_____

8. List any arrangements which have been made with establishment owners or agents for the payment of a commission or other benefits for sales made to the workers (if there are no such arrangements, enter "None")

_____

_____

_____

Name of person providing this information

The Migrant and Seasonal Agricultural Worker Protection Act requires the disclosure in writing of the foregoing information to migrant and day-haul workers upon recruitment, and to seasonal workers other than day-haul workers upon request when an offer of employment is made. This optional form may be used to provide the required information. Thereafter, any migrant or seasonal worker has the right to have, upon request, a written statement provided to him by his employer of the information described above. The optional form may also be used for this second requirement.

LA LEY DE PROTECCION DE TRABAJADORES MIGRANTES Y TEMPORALES EN LA AGRICULTURA

INFORMACION PARA LOS TRABAJADORES

1. Lugar de empleo

_____

_____

_____

2. Período de empleo

Desde el _____ Hasta el _____

3. Base de pago

Por hora $ _____

Por contrato $ _____ por _____

4. Clases de cultivos y de trabajo

_____

_____

5. Transportación y cualquier beneficio adicional que sea proporcionado

Transportación _____

Costo al trabajador _____

Beneficios adicionales _____

Costo al trabajador _____

Se provee seguro de trabajo bajo la ley de impuestos de desempleo.
☐ sí ☐ no
Se provee seguro de compensación de trabajo. ☐ sí ☐ no

6. Para los trabajadores a quienes se les proporcionen viviendas, la clase de viviendas y cualquier costa

_____ Costo al _____

_____ trabajador _____

7. Indique si hay una huelga, un paro de trabajo, una huelga intermitente, o una interrupción del trabajo efectuada por trabajadores en el lugar donde van a trabajar (si no hay ninguna huelga, etc., escriba "Ninguna")

_____

_____

8. Indique si el patrón tiene acuerdos con comerciantes o agentes de los cuales recibe una comisión u otro beneficio por las compras que los trabajadores hagan (si no existe tal acuerdo, escriba "Ninguno")

_____

_____

_____

Nombre de la persona que proporciona esta información

La Ley Protección de Trabajadores Migrantes y Temporales en la Agricultura exige que reciban estos datos por escrito al ser reclutados los trabajadores migrantes y los que se reúnen diariamente en algún lugar para ser reclutados, ocupados, y transportados al lugar de empleo. La ley también les concede a los trabajadores temporales el derecho de pedir esta información cuando se les haga una oferta de trabajo. El patrón puede utilizar esta forma para proporcionar los informes necesarios.

De ahí en adelante los trabajadores migrantes y temporales tienen derecho de pedirle a su patrón que les dé una declaración escrita persentando todos los datos a los cuales se refiere más arriba. El patrón puede utilizar esta forma también para este segundo propósito.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Departamento del Trabajo de los EE. UU.
Administración de Normas de Empleo
División de Salarios y Horas

Form WH-516 (Apr. 1983)

NOT FOR PUBLIC DISTRIBUTION

MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

WORKER INFORMATION

1. Place of employment

_____

_____

_____

2. Period of employment

From _____ To _____

3. Wage rates to be paid

Hourly $ _____

Piece rate $ _____ per _____

4. Crops and kinds of activities

_____

_____

5. Transportation and other benefits, if any

Transportation _____ charges _____

_____ _____

Unemployment compensation insurance provided ☐ Yes ☐ No
Worker's compensation insurance provided ☐ Yes ☐ No

Other benefits _____ charges _____

6. For migrant workers who will be housed, the kind of housing available and cost, if any

_____ charges _____

_____ _____

7. List any strike, work stoppage, slowdown, or interruption of operation by employees at the place where the workers will be employed (If there are no strikes, etc., enter "None")

_____

8. List any arrangements which have been made with establishment owners or agents for the payment of a commission or other benefits for sales made to the workers (If there are no such arrangements, enter "None")

_____

_____

_____

Name of person providing this information

The Migrant and Seasonal Agricultural Worker Protection Act requires the disclosure in writing of the foregoing information to migrant and day-haul workers upon recruitment, and to seasonal workers other than day-haul workers upon request when an offer of employment is made. This optional form may be used to provide the required information. Thereafter, any migrant or seasonal worker has the right to have, upon request, a written statement provided to him by his employer of the information described above. The optional form may also be used for this second requirement.

LWA KI PROTEJE CULTIVATE VA E VIEN E CILTIVATE PA REKOLTE

INFOMASION POU TRAVAYE

1. Koté travay la yé

_____

_____

_____

2. Tan travay la ap diré:

dépi, _____ jiska _____

3. Conbien cob yap péyé nou.

Pa è : _____

Sou couray : _____ Pa _____

4. Ki jan dé rékolte é dé travay:

_____

_____

5. Transpotasion é lot avantage si gin y in.

Transportasion _____ Pri _____

Assirance pou you péyé nou lè nou lan chomaj. Oui Non
Assirance pou lè malè rivè nou nan travay la Oui Non

6. Ou ciltivate kap fè va é vien é ké yap bay cay, è-ce ké koté ya vid é combien lajan? Si gin yin: _____

_____ Pri _____

7. E-çe-ké ouvrié koté ou pral travay la pa jam fè grèv, sispan, ralanti ou interomp travay yo? (Si pa jam gin grèv etc. . . méte "Non"). _____

_____

8. Gin you kontra ki fèt, sou chak bagay ké nou acheté you koté, mèt koté a ou bien mounn ki van nou an siposé péyé contracté a, ou bien bali nimpot lot avantage (sou ça nacheté a), (si kontra ça pa fèt méte "Non" _____

_____

Non mounn ki bay infomasion ça.

Lwa ça mandé pou yo distribié ou bien ékri infomasion ké nou sot li e pou travayè kap voyagé é pou travayè kap poté pa jou, lè yap pran yo pou travay la pou mounn kap travay pa rékolte é pou lot travayè ki pap poté çé pou yo ba nou infomasion ça si nou mandé. Cé fom ça ou bien ou lot parey ki représanté infomasion ké nou mandé a.

Cé pou tèt ça tout travayè kap voyagé ou bien kap travay pa séson gin dwa pou you résévva you prèv sou paplé de infomasion ké patron an bayo a, si you mandé.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Depatman di Travay

Form WH-516a (Haitian)
October 1983

NOT FOR PUBLIC DISTRIBUTION

OMB No. 1215-0145
Expires: 03/31/85

MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

WORKER INFORMATION

1. Place of employment

_____

_____

_____

2. Period of employment

From _____ To _____

3. Wage rates to be paid

Hourly $ _____

Piece rate $ _____ per _____

4. Crops and kinds of activities

_____

_____

5. Transportation and other benefits, if any

Transportation _____ charges _____

_____ _____

Unemployment compensation insurance provided ☐ Yes ☐ No
Worker's compensation insurance provided ☐ Yes ☐ No

Other benefits _____ charges _____

6. For migrant workers who will be housed, the kind of housing available and cost, if any

_____ charges _____

_____

7. List any strike, work stoppage, slowdown, or interruption of operations by employees at the place where the workers will be employed (If there are no strikes, etc., enter "None")

_____

8. List any arrangements which have been made with establishment owners or agents for the payment of a commission or other benefits for sales made to the workers (if there are no such arrangements, enter "None")

_____

_____

Name of person providing this information

The Migrant and Seasonal Agricultural Worker Protection Act requires the disclosure in writing of the foregoing information to migrant and day-haul workers upon recruitment, and to seasonal workers other than day-haul workers upon request when an offer of employment is made. This optional form may be used to provide the required information. Thereafter, any migrant or seasonal worker has the right to have, upon request, a written statement provided to him by his employer of the information described above. The optional form may also be used for this second requirement.

LUẬT BẢO VỆ NÔNG PHU LƯU-ĐỘNG LÀM MUÀ

BẢNG CHỈ DẪN CHO NÔNG PHU

1. Nơi làm việc

_____

_____

_____

2. Thời gian làm việc

Từ _____ Đến _____

3. Công xá được lãnh

Công theo giờ $ _____

Công theo việc $ _____ Mỗi _____

4. Ngũ cốc và loại việc làm

_____

_____

5. Được chuyên chở và các bổng lộc khác.

Chuyên chở _____ Phí tổn _____

_____ _____

Có bảo đảm trợ cấp thất nghiệp ☐ Có ☐ Không

Có bảo đảm trợ cấp tai nạn ☐ Có ☐ Không

Những bổng lộc khác _____ Phí tổn _____

6. Cho các nông phu lưu động được cấp nhà ở, ghi loại nhà ở và phí tổn, nếu có

_____ Phí tổn _____

_____ _____

7. Ghi rõ các cuộc đình công, ngưng việc, lãng công hay làm ngưng do nhân viên tại nơi mà các công nhân sẽ được xử dụng (nếu không có đình công v.v. thì ghi rõ "không có").

_____

8. Ghi rõ mối giao ước với các cơ sở hay các đại diện về việc trả hoa hồng hay các bổng lộc gì khác cho những hàng hóa được đem bán cho công nhân (nếu không có thỏa thuận gì thì ghi rõ "không có").

_____

_____

_____

Tên người viết bảng chỉ dẫn này

_____

Luật Bảo Vệ Nông Phu Lưu-Động Làm Muà đòi hỏi là những chi tiết nói trên phải được viết ra và thông báo cho các nông phu lưu động và công nhật ngay khi tuyển mộ và cho các nông phu làm muà không phải là công nhật, nếu có lời yêu cầu khi họ được nhận vào làm việc. Bản chỉ dẫn nhiệm ý này có thể đem dùng để thông báo những điều chỉ dẫn do luật định. Từ đó trở đi thì bất cứ nông phu lưu động hay làm muà nào cũng có quyền xin chủ nhân phải cho một văn kiện có ghi những điều chỉ dẫn nói trên. Bản chỉ dẫn nhiệm ý lại cũng có thể đem dùng để thoả mãn điều luật định thứ hai này

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Bộ Lao-Động Hoa Kỳ
Cơ Quan Tiêu Chuẩn Lao Công
Nha Công Xá và Giờ Giấc

Form WH-516b (Vietnamese)
December 1983

57f11 WH-521: Housing Terms and Conditions.

(English and Spanish)

WH-521a: **(English and Haitian-Creole)**

WH-521b: **(English and Vietnamese)**

(a) Purpose

This form may be completed by any farm labor contractor (FLC), agricultural employer (AGER), or agricultural association (AGAS) that provides housing for any migrant agricultural worker. When properly completed, this form may be used to comply with the requirements of 29 CFR 500.75(f). This form may be utilized to provide, through posting in a conspicuous place or by presenting a copy to each worker, a statement of the terms and conditions, if any, of occupancy of such housing. The applicant may obtain the form at any office of the Wage and Hour Division.

(b) Preparation and distribution

The WH-521 will be prepared by the FLC, AGER, or AGAS. Additional copies may be made for distribution to the workers as he or she deem necessary.

NOT FOR PUBLIC DISTRIBUTION

HOUSING TERMS AND CONDITIONS

Important Notice to Migrant Agricultural Worker: The Migrant and Seasonal Agricultural Worker Protection Act requires the furnishing of the following information.

1. This housing is provided by

   Name _____

   Address _____

   _____

2. Individual(s) in charge

   Name _____

   Address _____

   _____

   Phone _____

3. Mailing address of housing facility

   Address _____

   _____
   City & state/Zip code

   Phone _____

4. Conditions of occupancy

Who may live in housing facility
Charges made for housing (if none, so state)
Meals provided (if none, so state)
Charges for utilities (if none, so state)
Other charges, if any
Other conditions of occupancy

Important Notice to Farm Labor Contractor, Agricultural Employer, or Agricultural Association:

This form may be used for the disclosure required by section 201(c) of the act. It must be posted in a conspicuous place or presented to each worker in English, Spanish, or another language, as appropriate.

CONDICIONES DE OCUPACION DE LA VIVIENDA

Aviso Importante Para el Trabajador Migrante en la Agricultura: La Ley de Protección de Trabajadores Migrantes y Temporales en la Agricultura exige que Ud. conozca los informes siguientes.

1. Dueño de la vivienda (casa, apartamento, etc.)

   Nombre _____

   Dirección _____

   _____

2. Persona encargada de la vivienda

   Nombre _____

   Dirección _____

   _____

   Teléfono _____

3. Dirección de la vivienda

   Número y calle _____

   _____
   Ciudad y estado/número ZIP

   Teléfono _____

4. Condiciones de ocupación

Personas que pueden ocupar la vivienda
Renta por semana: $____ por mes: $____(si no se cobra, escriba "Ningún costo al trabajador")
Comida (si no proporciona comida, escriba "Ninguna comida")
Costo de la comida (si no hay, escriba "Ningún costo al trabajador")
Costo de la luz, el agua, el gas, etc. (si no hay, escriba "Ningún costo al trabajador)
Cualquier otro costo
Otras condiciones de ocupación

Aviso Importante Para el Contratista de Mano de Obra Agrícola (el Troquero), el Patrón, o la Asociación Agrícola:

Puede utilizar esta forma para darles a los trabajadores migrantes los informes que exige la sección 201(c) de la ley. Tiene que exhibirlo en un lugar donde puedan verlo fácilmente los trabajadores o presentarle una copia a cada trabajador, y tiene que usar el inglés, el español, u otro idioma que sea apropiado.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Departamento del Trabajo de los EE. UU.
Administración de Normas de Empleo
División de Salarios y Horas

Form WH-521 (Apr. 1983)

NOT FOR PUBLIC DISTRIBUTION

HOUSING TERMS AND CONDITIONS

Important Notice to Migrant Agricultural Worker: The Migrant and Seasonal Agricultural Worker Protection Act requires the furnishing of the following information.

1. This housing is provided by

   Name _____

   Address _____

   _____

2. Individual(s) in charge

   Name _____

   Address _____

   _____

   Phone _____

3. Mailing address of housing facility

   Address _____

   _____
   City & state/Zip code

   Phone _____

4. Conditions of occupancy

Who may live in housing facility
Charges made for housing (if none, so state)
Meals provided (if none, so state)
Charges for utilities (if none, so state)
Other charges, if any
Other conditions of occupancy

Important Notice to Farm Labor Contractor, Agricultural Employer, or Agricultural Association:

This form may be used for the disclosure required by section 201(c) of the act. It must be posted in a conspicuous place or presented to each worker in English, Spanish, or another language, as appropriate.

CONDISION KOTE YO BA NOU RETE A

AVI INPOTANT POU CILTIVATE CAP FE VA E VIEN:

Lwe mandé infomasion ça yo:

1. Ki moun ki ba nou kay pou nou rèté:

   Non li _____

   Adres li _____

2. Ki Moun ki réponsab la:

   Non li _____

   adrès li _____

   téléfon li _____

3. Adrès pou récévoi lèt

   adrès _____

   vil la _____

   zip code _____

4. Condision Kay la

Ki moun ki capab rété nan Kay la
Conbien nou péyé kay la (si nou pa péyé mété zéro)
Manjé yo ba nou: (si yo pa banou ékri ça sou féil la)
Conbien cob nou péyè pou manjé: (si nou pa péyé, mété zéro)
Conbien nou péyè pou limiè ak lot bézouin: (si nou pa péyé mété zéro)
Si gin lot bagay ké you fè nou péyé pou yo: (ékri you sou fèil la)
Lot condision pou nou rété nan kay la:

Avi impotan pou contractè, patron, ou bian associasion agriclitl.

Séksion 201 (c) ki nan lwe mandé pou yo distribué fom ça ou bien ou lot parey li, ou bien koléi you koté tout mounn ka ouè li ou bien montré chak ouvriél nan you lang ké yo capab li é conpran bien.

NOT FOR PUBLIC DISTRIBUTION

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Depatman di Travay
Administrasion dé Condision dé Travay
Séksion Wage & Hour

Form WH-521a (Haitien)
October 1983

OMB No. 1215-0148
Expires: 03/31/85

HOUSING TERMS AND CONDITIONS

Important Notice to Migrant Agricultural Worker: The Migrant and Seasonal Agricultural Worker Protection Act requires the furnishing of the following information.

1. This housing is provided by

   Name _____

   Address _____

   _____

2. Individual(s) in charge

   Name _____

   Address _____

   _____

   Phone _____

3. Mailing address of housing facility

   Address _____

   _____
   City & state/Zip code

   Phone _____

4. Conditions of occupancy

Who may live in housing facility	
Charges made for housing (If none, so state)	
Meals provided (If none, so state)	
Charges for utilities (If none, so state)	
Other charges, if any	
Other conditions of occupancy	

Important Notice to Farm Labor Contractor, Agricultural Employer, or Agricultural Association:

This form may be used for the disclosure required by section 201(c) of the act. It must be posted in a conspicuous place or presented to each worker in English, Spanish, or another language, as appropriate.

GIAO ƯỚC VÀ ĐIỀU KIỆN NHÀ Ở

Thông cáo quan trọng cho Nông Phu Lưu Động: Luật Bảo Vệ Nông Phu Lưu Động làm mục đích hỏi phải thông báo các chỉ dẫn sau đây:

1. Nhà ở này được cung ứng bởi:

   Tên _____

   Địa Chỉ _____

   _____

2. Nhân viên phụ trách

   Tên _____

   Địa Chỉ _____

   _____

   Điện thoại _____

3. Địa chỉ gửi thư tín của nhà ở này:

   Địa chỉ _____

   _____
   Thành phố & Tiểu Bang/Khu bưu chính

   Điện thoại _____

4. Điều kiện lưu trú:

Ai được ở trong nhà này?	
Phí tổn thuê nhà (nếu không mất phí tổn, ghi không có)	
Cho mấy bữa ăn (ghi rõ nếu không có cho ăn)	
Phí tổn về xử dụng tiện nghi (Ghi rõ nếu không có)	
Các phí tổn khác, nếu có	
Các điều kiện lưu trú khác	

Thông cáo quan trọng cho Nhà Thầu Lao Công Nông Tác, Chủ Nhân Nông Nghiệp và các Hiệp Hội Nông Nghiệp:

Mẫu in này có thể dùng để thông báo, do phần 201 (c)của đạo luật ấn định. Cần phải niêm yết ở nơi dễ thấy hay phải đọc cho mọi công nhân bằng tiếng Anh, tiếng I-Pha-Nho, hay tiếng nào khác khi xét ra cần thiết.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Bộ Lao Động Hoa Kỳ
Cơ Quan Tiêu Chuẩn Lao Công
Nha Công Xá và Giờ Giấc

Form WH-521b (Vietnamese)
December 1983

NOT FOR PUBLIC DISTRIBUTION

57f12 **WH-501: Wage Statement.**

(English)

WH-501b: (Spanish)

(a) Purpose

These forms may be completed by any farm labor contractor (FLC), agricultural employer (AGER), or agricultural association (AGAS) that employs any migrant or seasonal agricultural worker. When properly completed, the forms may be utilized to maintain the individual employee payroll information required by the act. The completed forms may also be given to each worker as the required written statement of such payroll information which must be provided. Any person may purchase these forms in pads of 100 through the superintendent of documents, Government Printing Office, by requesting:

Stock No. 029-014-00213-5 (English): $4.00 per pad of 100

Stock No. 029-014-00214-3 (Spanish): $4.50 per pad of 100

(b) Preparation and distribution

The FLC, AGER, or AGAS may prepare one copy for their records and additional copies, as deemed necessary, for distribution to the workers or for the contractor to furnish to the person to whom the workers are furnished.

NOT FOR PUBLIC DISTRIBUTION

JB378 Federal Register / Vol. 48, No. 164 / Tuesday, August 23, 1983 / Rules and Regulations

Employee _____ Social Security No. _____

Address _____

Workweek Ending (Month, day, year)

Day/Date	Sun/	Mon/	Tues/	Wed/	Thurs/	Fri/	Sat/
Starting Time							
Quitting Time							
Hours Worked							
Crop/Task Units Done							
Rate of Pay (Hourly or Piece Rate)							
Daily Pay							

Total Hours Worked in Week

Total Gross Pay

ITEMIZED DEDUCTIONS	
FICA	
Federal Tax	
State Tax	
Rent	
Food	
Transportation	
Other	
Other	
Other	
Total Deductions	
Net Pay (Amount Due Employee)	Date Paid:

Employer _____

Address _____

Social Security Employer I.D. No. _____

Note: Properly filled out, this form will satisfy the requirements of sections 201(d) (2) and 301(c) (2) of the Migrant and Seasonal Agricultural Worker Protection Act. The act requires farm labor contractors, agricultural employers and agricultural associations to make, keep and preserve records for three years of the above information. Each worker must be given an itemized statement of this information covering each pay period. This is an optional form which may be used to comply with the Act.

Instructions are on the reverse.

Form WH-501 (April 1983)

INSTRUCTIONS

IDENTIFYING INFORMATION Employee – Enter employee's full name and Social Security number. Address – Enter Employee's permanent address Employer Address – Enter name of the employer making the payment, the permanent address of the employer and the Social Security employer identification number. The employer may preprint his name, address, and Social Security employer identification number.

PAYROLL INFORMATION: Workweek Ending – Enter the month, day and year on which the employee's payroll workweek ends. Day/Date – Enter the calendar date of the day worked Starting Time – Quitting Time – Enter the time work started and ended each day. Hours Worked – Enter the total time actually worked each day. Subtract bona fide meal periods. Crop/Task – Units Done – Enter the kind of work (such as pickers or oranges per bin) Enter the number of units produced if the employee is paid on a piece work or task basis. Rate of Pay – Enter the hourly or piece rate of pay. Daily Pay – Enter the amount of the daily pay computed at the hourly and/or piece rate.

WEEKLY TOTALS Total Hours Worked in Week – Total the daily hours worked and enter the total. Total Gross Pay – Total the daily pay and enter the total

ITEMIZED DEDUCTIONS: FICA (Social Security) – Enter amount withheld, Federal Tax – Enter the amount withheld. State Tax – Enter the amount withheld. Rent, Food, Transportation, and Other – Enter deductions, if made, for each. Identify the purpose of "other" deductions. Total Deductions – Enter total deductions in right column and then transfer to left. Subtract total deductions from total Gross Pay – Enter the result as Net Pay (Amount Due Employee). Enter date worker is paid.

NOT FOR PUBLIC DISTRIBUTION

Trabajador _____ Número del Seguro Social _____

Dirección _____

DMB No. 1218-0148
Expires: 03-31-88

Fin de la semana trabajada (mes, día, año)

Día/fecha	domingo/	lunes/	martes/	miércoles/	jueves/	viernes/	sábado/	Total de horas trabajadas en la semana	DEDUCCIONES	
Hora de comenzar									Impuesto del Seguro Social	
Hora de terminar									Impuesto federal	
Horas trabajadas									Impuesto estatal	
Cultivo/trabajo									Renta	
Unidades terminadas								Salario bruto	Comida	
									Transportación	
									Otra deducción	
Base de pago (por hora o por contrato)									Otra deducción	
Salario diario									Otra deducción	
									Total de deducciones	
									Salario neto (Cantidad debida al trabajador)	Día de pago

Patrón _____

Dirección _____

Número de identidad del patrón para el Seguro Social _____

Aviso: Al llenar correctamente esta forma, el patrón satisface los requisitos de las secciones 201(d) (2) y 301(c) (3) de la Ley de Protección de Trabajadores Migrantes y Temporales en la Agricultura. Esta ley exige que los contratistas de mano de obra agrícola (los troqueros), los patrones agrícolas, y las asociaciones agrícolas lleven libros o cuentas que contengan los datos citados anteriormente, y que los preserven por tres años. Cada día de pago el patrón tiene que darles a los trabajadores un recibo que indique el método de determinar el salario y la razón de cualquier deducción. Se puede utilizar esta forma para cumplir con la ley.

Form WH-301(c) (April 1982)

INSTRUCCIONES

IDENTIDAD: Trabajador y su dirección — Anote el nombre y apellido del trabajador, su número de Seguro Social, y su domicilio permanente. Patrón y su dirección — Anote el nombre del patrón quien les paga a los trabajadores, su domicilio permanente, y su número de identidad para el Seguro Social. El patrón puede imprimir por anticipado su nombre, su dirección, y su número de identidad.

REMUNERACION DEL TRABAJADOR: Fin de la semana trabajada — Anote el mes, el día, y el año en que termina la semana de trabajo. Día/fecha — Anote la fecha del día de trabajo. Hora de comenzar y hora de terminar — Para cada día, anote la hora de comenzar el trabajo y la hora de terminarlo. Horas trabajadas — Anote el total de horas trabajadas cada día. Puede excluir el tiempo verdaderamente concedido para las comidas. Cultivo/trabajo y unidades terminadas —Anote la clase de trabajo (por ejemplo, el piscar naranjas en canastas, cajas, etc.). Si le paga por contrato al trabajador, anote el número de unidades de trabajo terminadas. Base de pago — Anote el salario por hora o por contrato. Salario diario — Anote el salario diario que se calcula a base del salario por hora, del salario por contrato, o de ambos.

TOTALES PARA LA SEMANA: Total de horas trabajadas en la semana — Sume las horas trabajadas cada día y anote el total. Salario bruto — Sume los salario diarios y anote el total.

DEDUCCIONES: Impuesto del Seguro Social — Anote la cantidad deducida. Impuesto federal — Anote la cantidad deducida. Impuesto estatal — Anote la cantidad deducida. Renta, comida, transportación, y otra deducción — Anote cualquier deducción de estas categorías. Identifique la clase de la "otra deducción." Total de deducciones — Anote el total de deducciones en la columna de la derecha y luego en la columna de la izquierda. Reste el total de las deducciones al salario bruto, y anote el resto como el salario neto. Anote la fecha en que se lo paga al trabajador como el día de pago.

☆ U.S. Government Printing Office: 1983-[illegible]

[FR Doc. 83-22987 Filed 8-22-83; 8:45 am]
BILLING CODE 4510-27-C

NOT FOR PUBLIC DISTRIBUTION

57f13 **WH-1376: MSPA Poster.**

(English and Spanish)

1376a MSPA: (English and Haitian-Creole)

1376b MSPA Poster: (English and Vietnamese)

The appropriate poster is required to be posted in a conspicuous place as provided in sections 201(b) and 301(b) of the Migrant and Seasonal Agricultural Worker Protection Act, 29 CFR 500.75(c), and 29 CFR 500.76(d)(1).

NOT FOR PUBLIC DISTRIBUTION

Federal Register / Vol. 48, No. 164 / Tuesday, August 23, 1983 / Rules and Regulations 38375

Migrant and Seasonal Agricultural Worker Protection Act

This federal law requires agricultural employers, agricultural associations, farm labor contractors and their employees to observe certain labor standards when employing migrant and seasonal farmworkers unless specific exemptions apply. Further, farm labor contractors are required to register with the U.S. Department of Labor.

Migrant and Seasonal Farmworkers Have These Rights

- To receive accurate information about wages and working conditions for the prospective employment
- To receive this information in writing and in English, Spanish or other languages, as appropriate
- To have the terms of the working arrangement upheld
- To have farm labor contractors show proof of registration at the time of recruitment
- To be paid wages when due
- To receive itemized, written statements of earnings for each pay period
- To purchase goods from the source of their choice
- To be transported in vehicles which are properly insured and operated by licensed drivers, and which meet federal and state safety standards
- For migrant farmworkers who are provided housing
  - * To be housed in property which meets federal and state safety and health standards
  - * To have the housing information presented to them in writing at the time of recruitment
  - * To have posted in a conspicuous place at the housing site or presented to them a statement of the terms and conditions of occupancy, if any

Workers who believe their rights under the act have been violated may file complaints with the departments Wage and Hour Division or may file suit directly in federal district court. The law prohibits employers from discriminating against workers who file complaints, testify or in any way exercise their rights on their own behalf or on behalf of others. Complaints of such discrimination must be filed with the division within 180 days of the alleged event.

For further information, get in touch with the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

The law requires employers to display this poster where employees can readily see it.

Ley de Protección de Trabajadores Migrantes y Temporales en la Agricultura

Esta ley federal exige que los patrones agrícolas, las asociaciones agrícolas, los contratistas de mano de obra agrícola (o troqueros), y sus empleados cumplan con ciertas normas laborales cuando ocupan a los trabajadores migrantes y temporales en la agricultura, a menos que se apliquen excepciones específicas. Los contratistas, o troqueros, tienen además la obligación de registrarse con el Departamento del Trabajo.

Los Trabajadores Migrantes y Temporales en la Agricultura Tienen los Derechos Siguientes

- Recibir detalles exactos sobre el salario y las condiciones de trabajo del empleo futuro
- Recibir estos datos por escrito en inglés, en español, o en otro idioma que sea apropiado
- Cumplimiento de todas las condiciones de trabajo como fueron presentadas cuando se les hizo la oferta de trabajo
- Al ser reclutados para un trabajo, ver una prueba de que el contratista se haya registrado con el Departamento del Trabajo
- Cobrar el salario en la fecha fijada
- Recibir cada día de pago un recibo indicando el salario y la razón de cualquier deducción
- Comprar mercancías al comerciante que ellos escojan
- Ser transportados en vehículos que tengan seguros adecuados y que hayan pasado las inspecciones federales y estatales de seguridad, y conducidos por choferes que tengan permisos de manejar
- Las garantías para los trabajadores migrantes a quienes se les proporcionen viviendas o alojamiento
  - * Viviendas que satisfazcan los requisitos federales y estatales de seguridad y de sanidad
  - * Al ser reclutados, recibir por escrito informes sobre las viviendas y su costo
  - * Recibir de su patron un aviso escrito explicando las condiciones de ocupación de la vivienda, o que tal aviso esté colocado en un lugar visible de la vivienda

Los trabajadores que crean haber sufrido una violación de sus derechos pueden presentar sus quejas a la División de Salarios y Horas o pueden presentar una demanda directamente a los tribunales federales. La ley prohibe cualquier discriminación o sanción hacia los trabajadores que presenten tales quejas, que hagan declaraciones, o que reclamen de cualquier manera sus derechos, sea a beneficio de sí mismos o a beneficio de otros. Hay que presentar las quejas de discriminación o de sanción a la división dentro de 180 días del suceso.

En caso de que se necesite más información, comuníquense con la oficina de la División de Salarios y Horas más cercana, que aparece en la mayoría de los directorios telefónicos bajo el título U.S. Government, Department of Labor.

Departamento del Trabajo de los EE.UU.
Administración de Normas de Empleo
División de Salarios y Horas

La ley exige que los patrones fijen este aviso en un lugar donde puedan verlo fácilmente los trabajadores.

NOT FOR PUBLICATION

Notice

Migrant and Seasonal Agricultural Worker Protection Act

This federal law requires agricultural employers, agricultural associations, farm labor contractors and their employees to observe certain labor standards when employing migrant and seasonal farmworkers unless specific exemptions apply. Further, farm labor contractors are required to register with the U.S. Department of Labor.

Migrant and Seasonal Farmworkers Have These Rights

- To receive accurate information about wages and working conditions for the prospective employment
- To receive this information in writing and in English, Spanish or other languages, as appropriate
- To have the terms of the working arrangement upheld
- To have farm labor contractors show proof of registration at the time of recruitment
- To be paid wages when due
- To receive itemized, written statements of earnings for each pay period
- To purchase goods from the source of their choice
- To be transported in vehicles which are properly insured and operated by licensed drivers, and which meet federal and state safety standards
- For migrant farmworkers who are provided housing
  - To be housed in property which meets federal and state safety and health standards
  - To have the housing information presented to them in writing at the time of recruitment
  - To have posted in a conspicuous place at the housing site, or presented to them a statement of the terms and conditions of occupancy, if any

Workers who believe their rights under the act have been violated may file complaints with the department's Wage and Hour Division or may file suit directly in federal district court. The law prohibits employers from discriminating against workers who file complaints, testify or in any way exercise their rights on their own behalf or on behalf of others. Complaints of such discrimination must be filed with the division within 180 days of the alleged event.

For further information, get in touch with the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

The law requires employers to display this poster where employees can readily see it.

Avètissman

Ak ki Proteje Ciltivate cap fe va e vien e cultivate cap travay pa saison (MSPA)

Lwa fédéral ça mandé patron, associasion agriculté contracté agriclti é ouvrié yo pou yo obsèvé ou séri de règ, lè yap employé ciltivatè cap fè va, é vien ou bien ciltivatè ki travay pa récolte. Cé pou yo obsèvé lwa ça yo a moins ké sé ou kotè la lwa fè éxcéption. Lè fini, yo mandé contracté agriclti pou yal enrejistré yo nan depatman di travay américain.

MIN DWA CILTIVATE CAP FE VA E VIEN OU BIEN CAP TRAVAY PA RECOLTE GIN YIN

- Pou yo résèvwa infomasion éxacte sou travay yo pral fè ya.
- Cé pou infomasion ça ékri nan you lang ké yo palé é conpran bien, swa anglé ou bien panyol ou bien you lot lang.
- Pou yo ba yo condision travay la é pou yo akonpli sa yo promèt o
- Pou contracté ya montré yo prèv ké li enrejistré nan dépatman di travay, lè lap pran yo pou travay la.
- Pou péyé yo lè yo dwé yo.
- Pou yo résèvwa an délay prèv lajan ké yo fè pou chak foua ké touchéé pou yo bay yo rézon si contracté pran nan lajan a.
- Pou yo acheté koté ki fè yo plési.
- Pou yo monté machin ki gin bon assirans, ké chofè ki gin licens condi, é machin ça yo dwé an rüg avèk sékirité fédéral é sékirité nan coté ké yap viv la.
- Pou ciltivatè cap fè va é vien ké yo ba yo cay
  - *Cé pou yo rété nan you cay ki gin sékirité ak ijiène.
  - *Pou yo ba yo sou papié tout condision lojeman an lè yap pran yo pou travay la.
  - *Tout condision ki ginyin koté yo pral rété a fèt pou koté you koté ké tout mounn ka ouè yo ou bien ékri sou papié.

Ouvrié ki kouè ké patron yo violé lwa ça kapab poté plint nan dépatman di travay, nan séksion Wage & Hour ou bien yo ka fè patron yo procé dirèktéman nan tribinal fédéral. Le lwa pa pèmèt patron baye ouvrié au kin traca ni punitiion lè li poté plint, sèvi témouin, ou bien réclamé dwa li nan tribinal pou li mim ou pou lot. Si patron nou révoké nou pou ça, nou gin 180 jou pou nou poté plint nan dépatman di travay.

Si nou bézouin gin plis infomasion pran contak avèk biro di ravay ki pi pré nou. Nap join adrès é téléfon yo nan liv téléfon nan, koté ki maké: U.S. Government Department of Labor.

Depatman di Travay
Administrasion dé Cordision dé Travay
Séksion Wage & Hour

La lwa di ké tout patron obligé posté papier-sas koté pou tout travayè ouè li bien.

WH Publication
(English-Haitian)

NOT FOR PUBLIC DISTRIBUTION

Notice

Migrant and Seasonal Agricultural Worker Protection Act

This federal law requires agricultural employers, agricultural associations, farm labor contractors and their employees to observe certain labor standards when employing migrant and seasonal farmworkers unless specific exemptions apply. Further, farm labor contractors are required to register with the U.S. Department of Labor.

Migrant and Seasonal Farmworkers Have These Rights

- To receive accurate information about wages and working conditions for the prospective employment
- To receive this information in writing and in English, Spanish or other languages, as appropriate
- To have the terms of the working arrangement upheld
- To have farm labor contractors show proof of registration at the time of recruitment
- To be paid wages when due
- To receive itemized, written statements of earnings for each pay period
- To purchase goods from the source of their choice
- To be transported in vehicles which are properly insured and operated by licensed drivers, and which meet federal and state safety standards
- For migrant farmworkers who are provided housing
  - * To be housed in property which meets federal and state safety and health standards
  - * To have the housing information presented to them in writing at the time of recruitment
  - * To have posted in a conspicuous place at the housing site or presented to them a statement of the terms and conditions of occupancy, if any

Workers who believe their rights under the act have been violated may file complaints with the department's Wage and Hour Division or may file suit directly in federal district court. The law prohibits employers from discriminating against workers who file complaints, testify or in any way exercise their rights on their own behalf or on behalf of others. Complaints of such discrimination must be filed with the division within 180 days of the alleged event.

For further information, get in touch with the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

The law requires employers to display this poster where employees can readily see it.

Phụ Đính A

LUẬT BẢO VỆ NÔNG PHU LỮU ĐỘNG LÀM MÙA

Đạo luật liên bang này đòi hỏi các chủ nhân nông nghiệp, hiệp hội nông nghiệp, các nhà thầu lao công nông tác cùng nhủ các nhân viên của họ phải tuân theo một số tiêu chuẩn lao động thuê mướn nông phu lữu động làm mùa ngoại trừ trường hợp được đặc miễn. Ngoài ra các nhà thầu lao công nông tác lại còn phải đăng ký nơi Bộ Lao Động Hoa Kỳ.

CÁC NÔNG PHU LỮU ĐỘNG LÀM MÙA CÓ QUYỀN:

- được biết rõ các chi tiết về công việc phải làm.
- được biết những chi tiết đó qua những văn kiện bằng tiếng Anh, tiếng I Pha Nho, hay tiếng nào khác khi xét ra cần thiết.
- được chủ nhân tôn trọng các điều kiện làm việc nhủ đã thoả thuận.
- được nhà thầu cho thấy bằng chứng là có đăng ký khi được tuyển mộ.
- được trả tiền công đúng kỳ hạn.
- được lãnh khiếu trả lường có ghi rõ từng khoản vào mỗi kỳ lường.
- mua sắm hàng hoá từ nơi nào tùy sở thích.
- được chuyên chở bằng nhủng xe cộ có bảo kê cẩn thận và do tài xế có bằng lái xe cầm lái, các xe chuyên chở phải hội đủ các tiêu chuẩn an toàn do liên bang hay tiểu bang ấn định.
- Đối với nhủng nông phu lữu động được cấp nhà ở thì cũng có quyền:
  - *Được trao cho văn kiện ghi rõ các chi tiết về nhà ở khi được tuyển mộ.
  - *Được trao cho đọc một bản các lệ luật và điều kiện lữu trú hay được thấy bản đó treo ở một nơi dễ thấy tại khu nhà ở.

Nếu có nông phu nào cảm thấy là quyền lợi do luật này ấn định đã bị vi phạm thì có thể nộp đơn khiếu nại nơi Nha Công Xá và Giờ Giấc thuộc Bộ Lao Động hay có thể vô đơn kiện thẳng tại Tòa Án Liên Bang tại các khu tủ pháp. Luật cấm các chủ nhân không được kỳ thị chống các công nhân nào đứng đơn khiếu nại, làm chứng, hay thi hành quyền lợi cho chính mình hay cho kẻ khác. Đơn khiếu nại về các sự kỳ thị thì phải được nộp cho Nha nội trong 180 ngày sau khi sự việc xảy ra.

Muốn biết thêm chi tiết xin liên lạc với văn phòng gần nhất của Nha Công Xá và Giờ Giấc, có ghi trong điện thoại niên giám dưới mục Chính Phủ Hoa Kỳ, Bộ Lao Động.

Bộ Lao Động Hoa Kỳ
Cơ Quan Tiêu Chuẩn Lao Động
Nha Công Xá và Giờ Giấc

Luật đòi hỏi chủ nhân phải niêm yết bích chương này tại nơi nào mà các nhân viên dễ nhìn thấy được.

W H PUBLICATION 1376B
ENGLISH VIETNAMESE

NOT FOR PUBLIC DISTRIBUTION

57f14 WH-520: Housing Occupancy Certificate – Migrant and Seasonal Agricultural Worker Protection Act.

(a) Purpose

MSPA provides that property used for housing a migrant worker shall not be occupied unless an appropriate agency, including a federal agency, has certified that the facility or real property meets applicable safety and health standards. (b) (7)(E) [redacted]

(b) Preparation and distribution

See FOH 54: WH-520.

NOT FOR PUBLIC DISTRIBUTION

Housing Occupancy Certificate—Migrant and Seasonal Agricultural Worker Protection Act

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

A. IDENTIFYING INFORMATION

1. Location of housing inspected:

Description of housing units and number of units

2a. Name and address of owner of housing units:	3a. Name and address of individual(s) in charge:
b. Phone:	b. Phone:
4a. Name and address of Farm Labor Contractor, if any:	5. Date inspection was requested:
	6. Expected dates of occupancy: From: To:
b. Registration No.	

B. CERTIFICATION

The housing identified above has been inspected by the undersigned and found to meet the substantive safety and health standards prescribed in one of the following Department of Labor regulations.

☐ 29 CFR 1910.142 Occupational Safety and Health Administration Regulations

☐ 20 CFR Part 654 Employment and Training Administration Regulations

The definition of substantive safety and health standards is given in 29 CFR 500.133.

Date of inspection:

Date certificate expires:

Special Conditions (if none, write none):

Area Office or Field Station Address:

(Signature and Title of Person Issuing Certificate) (Date Issued)

IMPORTANT NOTICE: A copy of this certificate must be posted at the site of the housing identified above. This certificate is valid for one year from the date of issuance. If after one year from the date of this certificate the property identified above is to be utilized to house migrant workers, a new certificate must be requested.

The original of this certificate must be kept as a record for three years from the date of issuance.

This inspection certificate does not relieve any person from compliance with any applicable State, county or local ordinance. Receipt and posting of this certificate of occupancy does not relieve the persons who own or control this facility or property from the responsibility of ensuring that such facility or property meets the applicable State and Federal safety and health standards. Once such facility or property is occupied, such person shall supervise and continually maintain such facility or property to ensure that it remains in compliance with the applicable safety and health standards.

Form WH-520
March 1984

NOT FOR PUBLIC DISTRIBUTION

57f15 **(Reserved.)**

See FOH 54: WH-519a: MSPA and H-2A Housing Safety and Health Checklist (ETA 654.404), and FOH 54: WH-519b: MSPA and H-2A Housing Safety and Health Checklist (OSHA 1910.142).

57g GROVE CARE CONTRACTORS AND SIMILAR OPERATIONS

57g00 **General.**

Under the predecessor statute, the FLCRA, the DOL had followed the position stated on page 7 of Senate Report 93-1295. That report accepted the DOL's position that:

"…[G]rove care contractors who perform all farming operations for fruit grove owners required prior to harvest in producing a crop of fruit from the owner's groves have been considered 'farmers'… and would not be deemed farm labor contractors…."

Accordingly, the DOL will treat such grove care contractors who perform all the farming operations required prior to harvest, as noted above, as AGERs under the MSPA. Such grove care contractors are not required to register.

57g01 **Perennial crops other than groves of fruit or nut trees.**

(a) Under the principles discussed in FOH 57g00 above, certain vineyard contractors have been found to perform all farming operations prior to harvest and have been treated as AGERs and not as FLCs. The recognition of such agricultural operators as AGERs will depend upon whether:

(1) the services are on a year-round basis; and whether

(2) the duties performed by the workers constitute all farming operations on perennial crops prior to harvest. Such activities would commonly include planting young trees or plants, cultivating, fertilizing, spraying, pruning, etc.

(b) Under the MSPA, farmers are treated as AGERs and are clearly distinguished from FLCs. Under the MSPA, farmers and their foremen are no longer required to register as FLCs. No other AGER is required to register under the MSPA. The statutory purposes of the MSPA, the protection of migrant and seasonal agricultural workers, may be achieved by treating both fruit contractors and others who provide similar comprehensive services as AGERs provided that they perform all farming operations prior to harvest.

(c) (b) (7)(E) [redacted]

57g02 **Harvesting operations done without prior farming.**

If a grove care contractor or other agricultural operator engages in harvesting operations in any grove or operation where he or she did not perform all the farming operations required

NOT FOR PUBLIC DISTRIBUTION

prior to harvest, he or she will be considered an FLC. Such a person must comply with the registration requirements under the MSPA and all the duties imposed by the act upon FLCs.

57h HOUSING SAFETY AND HEALTH

57h00 Coordination with the ETA and OSHA.

(a) The WHD has statutory responsibility under section 203 of the MSPA for housing safety and health. Under other statutes, the OSHA and ETA also have migrant housing safety and health responsibilities. In order to achieve the greatest possible coverage via inspections of migrant housing, a tri-agency agreement sets forth the priorities that the OSHA, ETA, and ESA will follow (*see* FOH 50f03). The WHD will assume those responsibilities delegated to the ESA in the tri-agency agreement. In addition, housing inspections should be exchanged on a regional level through the Regional Farm Labor Coordinated Enforcement Committee.

(b) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

[redacted]

[redacted]

57h01 **Liaison with the OSHA and ETA.**

(a)

(1) To minimize overlap in housing inspections, the DD will establish liaison with the OSHA field office in the area to establish an exchange of housing inspection information.

(2) [redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

57h02 **Statutory requirements: housing safety and health.**

(a) General

Section 203(a) of the MSPA requires each person who owns or controls a facility or real property which is used for housing migrant agricultural workers to ensure that the facility or real property complies with *substantive* federal and state safety and health standards. "Person," for purposes of housing, means anyone, not just an FLC or FLCE, who owns or controls the facility or real property where migrant agricultural workers are housed.

(b) Inspection required before occupancy

(1) Section 203(b)(1) of the MSPA provides that a facility or real property used to house migrant agricultural workers shall not be occupied by any migrant agricultural worker unless either a state or local health authority or other appropriate agency has certified that the facility or property meets applicable safety and health standards. The applicable federal housing safety and health standards are the standards promulgated at 20 CFR 654.404 and 29 CFR 1910.142. Section 203(b)(1) also provides that the person who owns or controls such a facility or real property shall not permit it to be occupied by any migrant agricultural worker unless a copy of the certificate of occupancy is posted at the site. The original certificate of occupancy shall be retained by such person for *3* years and shall be made available for inspection in accordance with section 512 of the act. *See* 29 CFR 500.135(a) -(b).

However, a state or local government health authority making a housing inspection prior to occupancy of the housing by a migrant agricultural worker may utilize the

NOT FOR PUBLIC DISTRIBUTION

applicable state or local housing safety and health standards. Of course, a state or local government agency may apply either of the federal housing safety and health standards in determining whether housing qualifies to receive a certificate of housing inspection. Where the housing qualifies for occupancy, under either the state or federal housing safety and health standards, such housing may be granted a certificate of occupancy.

(c) Result when requested inspection was not made

Section 203(b)(2) provides that if a request for an inspection of a facility or real property is made to the appropriate state or local agency at least *45* days prior to the date of occupancy by migrant agricultural workers, and the agency has not conducted the inspection by such date, the facility or property may be occupied by the migrant workers unless prohibited by state law. *See* FOH 57e12(d) concerning inspections requested less than 45 days before occupancy.

(b) (7)(E)

(e) Statutory exclusion for innkeepers.

(1) MSPA section 203(c) excludes from the housing safety and health requirements any person who, in the ordinary course of that person's business, regularly provides housing on a commercial basis to the general public, and who provides housing to migrant agricultural workers that is of the same character and on the same or comparable terms and conditions as is provided to the general public.

(2) If the housing being provided for migrant workers meets the definition in section 203(c), the innkeeper exemption applies and there is no enforcement authority over the housing under the MSPA. A contractor who places a crew in a motel owned or operated by a person who qualifies for the innkeeper exemption is, therefore, not required to obtain housing authorization.

The exemption under section 203(c) of the MSPA applies where the contractor has made the rental arrangements in a commercial motel for the workers, because this fact does not in and of itself put the contractor in control of that portion of the motel, unless the contractor also has the power or authority to oversee, manage, supervise, or administer that portion of the motel.

(3) The innkeeper exemption does not apply to any person who provides housing to migrant workers differently than to members of the public.

(b) (7)(E)

[redacted]

[redacted]

57h03 **Owns or controls.**

(a) Owns

An FLC, AGER, AGAS, or any other person is deemed an owner of a housing facility or real property if such person has a legal or equitable interest in such facility or real property.

(b) Controls

An FLC, AGER, AGAS, or any other person is in control of a housing facility or real property if such person is in charge of or has the power or authority to oversee, manage, superintend, or administer the housing facility or real property, either personally or through an authorized agent or employee, irrespective of whether compensation is paid for engaging in any of the aforesaid capacities.

[redacted] (b) (7)(E)

[redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

57h04 **Housing safety and health inspections.**

(a) (b) (7)(E)

(b) The WHI shall conduct a safety and health investigation using the applicable federal standard. The term "applicable" is a generic reference to the type of housing standard rather than a jurisdictional limitation of the standard. The federal standard to be used is either 29 CFR 1910.142 (OSHA) or 20 CFR 654 (ETA). *See* FOH 54: WH-519a or WH-519b checklists. (b) (7)(E)

(c) Wells, springs, and other non-public water sources used by migrant agricultural workers must be tested at least every 12 months. Evidence that the water supply in a migrant labor camp is the local public water system is sufficient to indicate that this water is safe (*i.e.*, no additional testing is required). (b) (7)(E)

(d) **Hot water generating and storage equipment**

The minimum acceptable hot water generating and storage equipment necessary at a temporary labor camp may be determined from local codes or, when local codes are unavailable, from the data and analytic procedures published by the American Society of

Heating, Refrigeration, and Air Conditioning Engineers (ASHRAE) Handbook-1987, chapter 54. The minimum hot water system recovery and storage capacities required to meet the OSHA standard at 29 CPR 1910.142 are:

(1) The minimum gallons per hour recovery capacity of the hot water heater or coil is equal to 2.625 times the number of persons served by the system. 2.625 × number of persons = ___ gallons per hour heater capacity required.

(2) The minimum gallons of hot water storage capacity is equal to 3.28 times the number of persons served by the system. 3.28 × number of persons = ___ gallons tank capacity required.

Hot water system requirements must be evaluated on the basis of the number of persons served by each system installed. Instantaneous type water heaters need not be equipped with a hot water tank but must, at a minimum, provide the gallons per hour delivery capacity as determined from the above equation. It is recommended that the minimum system recovery rate be 10 to 15 percent greater than the calculated values to allow for heat losses.

57h05 **Reporting housing safety and health findings.**

(b) (7)(E)

(b) (7)(E)

NOT FOR PUBLIC DISTRIBUTION

[redacted]

[redacted]

[redacted]

57h06 **Disposition of safety and health findings.**

[redacted]

[redacted]

[redacted]

[redacted]

United States Department of Labor

Inter-Agency Migrant Housing Inspection Information Form

_____
Name of Housing Owner/Provider

_____
Number, Street Address

_____ _____
City, County, State, Zip Code Telephone # -

Physical Location of Housing _____
(Give Details)
_____

Name and Permanent Address _____
of Farm Labor Contractor
_____
_____

No. of Employees _____

Date of Inspection _____

Violations Observed _____
(If none, so state)
_____
_____

Inspection Made by: _____
Name

_____
Title

_____
Agency

Copy to: ESA_____(Location)_____(Date)

ETA_____(Location)_____(Date)

OSHA_____(Location)_____(Date)

57h07 **Housing standards for workers camping on the land.**

(a) Workers camping on the land in connection with forestry or agricultural employment are subject to housing safety and health standards

The MSPA does not require that migrant workers be provided with housing. However, under section 203 each person who owns or controls a facility or real property that is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive federal and state safety and health standards applicable to that housing. When migrant workers camp on a landowner's property, using tents or any other type of shelter (whether supplied by the landowner, the workers, or some third party such as the contractor), the landowner's property is being used in housing the workers, and the MSPA requirements are applicable. Thus, it is the DOL's position that such a landowner would be subject to the MSPA housing requirements. (b) (7)(E) [redacted]

(b) The innkeeper exemption does not apply to owners of unimproved property who permit campers to use their raw land

A limited exemption from the housing requirements applies to persons who regularly provide housing on a commercial basis to the general public and who also provide housing to migrant agricultural workers on the same terms and conditions. *See* section 203 of the MSPA, 29 CFR 500.131, and FOH 57h02(e). It is the DOL's position that this so-called innkeeper exemption applies only to operators of commercial lodging facilities (*e.g.*, motels), and not to owners of unimproved property who permit campers to use their raw land. The statute expressly speaks of "housing," and the implementing regulations speak of "housing" and "lodging." The legislative history shows that Congress intended the exemption to be narrowly construed and to be available to businesses such as motels and hotels. Thus, forestry and agricultural landowners would not be eligible for this exemption.

(c) OSHA standards in 29 CFR 1910.142 generally apply

Generally, facilities or real property used as housing for migrant agricultural workers must comply with *all* substantive federal and state safety and health standards applicable to such housing, as prescribed in the MSPA regulations at 29 CFR 500.130 -.135. Pursuant to 29 CFR 500.132 the applicable federal standards for all migrant housing built after 04/03/1980 are those promulgated by the OSHA for temporary labor camps: 29 CPR 1910.142.

(d) Standards must be met for drainage, potable water, toilet, handwashing, bathing, and first aid facilities; laundry; and refuse disposal.

(b) (7)(E) [redacted] hese requirements must be met regardless of the type of shelters used by the workers, and regardless of the length of stay of the workers at the camp site. (b) (7)(E) [redacted] workers are temporarily in remote forest locations, the requirements for bathing and laundry facilities may be met by transporting the

NOT FOR PUBLIC DISTRIBUTION

workers to bathing facilities at least every other day and by providing laundry pick-up and delivery service frequently enough that the workers have a change of clean clothing available on a daily basis.

(e) The WHD will enforce the other housing standards that most reasonably apply to workers housed for brief periods in temporary shelters at camp sites

(b) (7)(E) [redacted]

(f) Camp site issues not addressed

The above information will provide general guidance to ensure compliance with the MSPA, where it is applicable. (b) (7)(E) [redacted]

57h08 The OSHA and ETA housing safety and health standards

NOT FOR PUBLIC DISCLOSURE

1910.142—TEMPORARY LABOR CAMPS

(a) Site.

(1) All sites used for camps shall be adequately drained. They shall not be subject to periodic flooding, nor located within 200 feet of swamps, pools, sink holes, or other surface collections of water unless such quiescent water sufaces can be subjected to mosquito control measures. The camp shall be located so the drainage from and through the camp will not endanger any domestic or public water supply. All sites shall be graded, ditched, and rendered free from depressions in which water may become a nuisance.

(2) All sites shall be adequate in size to prevent overcrowding of necessary structures. The principal camp area in which food is prepared and served and where sleeping quarters are located shall be at least 500 feet from any area in which livestock is kept.

(3) The grounds and open areas surrounding the shelters shall be maintained in a clean and sanitary condition free from rubbish, debris, waste paper, garbage, or other refuse.

(4) Whenever the camp is closed for the season or permanently, all garbage, manure, and other refuse shall be collected and so disposed of as to prevent nuisance. All abandoned privy pits shall be filled with earth and the grounds and buildings left in a clean and sanitary condition. If privy buildings remain, they shall be locked or otherwise secured to prevent entrance.

(b) Shelter.

(1) Every shelter in the camp shall be constructed in a manner which will provide protection against the elements.

(2) Each room used for sleeping purposes shall contain at least 50 square feet of floor space for each occupant. At least a 7-foot ceiling shall be provided.

(3) Beds, cots, or bunks, and suitable storage facilities such as wall lockers for clothing and personal articles shall be provided in every room used for sleeping purposes. Such beds or similar facilities shall be spaced not closer than 36 inches both laterally and end to end, and shall be elevated at least 12 inches from the floor. If double-deck bunks are used, they shall be spaced not less than 48 inches both laterally and end to end. The minimum clear space between the lower and upper bunk shall be not less than 27 inches. Triple-deck bunks are prohibited.

(4) The floors of each shelter shall be constructed of wood, asphalt, or concrete. Wooden floors shall be of smooth and tight construction. The floors shall be kept in good repair.

(5) All wooden floors shall be elevated not less than 1 foot above the ground level at all points to prevent dampness and to permit free circulation of air beneath.

(6) Nothing in this section shall be construed to prohibit "banking" with earth or other suitable material around the outside walls in areas subject to extreme low temperatures.

(7) All living quarters shall be provided with windows the total of which shall be not less than one-tenth of the floor area. At least one-half of each window shall be so constructed that it can be opened for purposes of ventilation.

(8) All exterior openings shall be effectively screened with 16-mesh material. All screen doors shall be equipped with self-closing devices.

(9) In a room where workers cook, live, and sleep a minimum of 100 square feet per person shall be provided. Sanitary facilities shall be provided for storing and preparing food.

(10) In camps where cooking facilities are used in common, stoves (in ratio of one stove to 10 persons or one stove to two families) shall be provided in an enclosed and screened shelter. Sanitary facilities shall be provided for storing and preparing food.

(11) All heating, cooking, and water heating equipment shall be installed in accordance with State and local ordinances, codes, and regulations governing such installations. If a camp is used during cold weather, adequate heating equipment shall be provided.

(c) Water supply.

(1) An adequate and convenient water supply, approved by the appropriate health authority, shall be provided in each camp for drinking, cooking, bathing, and laundry purposes.

(2) A water supply shall be deemed adequate if it is capable of delivering 35 gallons per person per day to the campsite at a peak rate of 2½ times the average hourly demand.

(3) The distribution lines shall be capable of supplying water at normal operating pressures to all fixtures for simultaneous operation. Water outlets shall be distributed throughout the camp in such a manner that no shelter is more than 100 feet from a yard hydrant if water is not piped to the shelters.

(4) Where water under pressure is available, one or more drinking fountains shall be provided for each 100 occupants or fraction thereof. The construction of drinking fountains shall comply with ANSI Standard Specifications for Drinking Fountains, Z4.2-1942. Common drinking cups are prohibited.

(d) Toilet facilities.

(1) Toilet facilities adequate for the capacity of the camp shall be provided.

(2) Each toilet room shall be located so as to be accessible without any individual passing through any sleeping room. Toilet r ns shall have a window not less than 6 sq re feet in area opening directly to the outside area or otherwise be satisfactorily ventilated. All outside openings shall be screened with 16-mesh material. No fixture, water closet, chemical toilet, or urinal shall be located in a room used for other than toilet purposes.

(3) A toilet room shall be located within 200 feet of the door of each sleeping room. No privy shall be closer than 100 feet to any sleeping room, dining room, lunch area, or kitchen.

(4) Where the toilet rooms are shared, such as in multifamily shelters and in barracks type facilities, separate toilet rooms shall be provided for each sex. These rooms shall be distinctly marked "for men" and "for women" by signs printed in English and in the native language of the persons occupying the camp, or marked with easily understood pictures or symbols. If the facilities for each sex are in the same building, t ey shall be separated by solid walls o tions extending from the floor to or ceiling.

(5) Where toilet facilities are shared, the number of water closets or privy seats provided for each sex shall be based on the maximum number of persons of that sex which the camp is designed to house at any one time, in the ratio of one such unit to each 15 persons, with a minimum of two units for any shared facility.

(6) Urinals shall be provided on the basis of one unit or 2 linear feet of urinal trough for each 25 men. The floor from the wall and for a distance not less than 15 inches measured from the outward edge of the urinals shall be constructed of materials impervious to moisture. Where water under pressure is available, urinals shall be provided with an adequate water flush. Urinal troughs in privies shall drain freely into the pit or vault and the construction of this drain shall be such as to exclude flies and rodents from the pit.

(7) Every water closet installed on or after August 31, 1971, shall be located in a toilet room.

(8) Each toilet room shall be lighted naturally, or artificially by a safe type of lighting at all hours of the day and night.

(9) An adequate supply of toilet paper shall be provided in each privy, water closet, or chemical toilet compartment.

(10) Privies and toilet rooms shall be kept in a sanitary condition. They shall be cleaned at least daily.

(e) Sewage disposal facilities.

In camps where public sewers are available, all sewer lines and floor drains from buildings shall be connected thereto.

(f) Laundry, handwashing, and bathing facilities.

(1) Laundry, handwashing, and bathing facilities shall be provided in the following ratio:

(i) Handwash basin per family shelter or per six persons in shared facilities.

(ii) Shower head for every 10 persons.

(iii) Laundry tray or tub for every 30 persons.

(iv) Slop sink in each building used for laundry, hand washing, and bathing.

(2) Floors shall be of smooth finish but not slippery materials; they shall be impervious to moisture. Floor drains shall be provided in all shower baths, shower rooms, or laundry rooms to remove waste water and facilitate cleaning. All junctions of the curbing and the floor shall be coved. The walls and partitions of shower rooms shall be smooth and impervious to the height of splash.

(3) An adequate supply of hot and cold running water shall be provided for bathing and laundry purposes. Facilities for heating water shall be provided.

(4) Every service building shall be provided with equipment capable of maintaining a temperature of at least 70° F. during cold weather.

(5) Facilities for drying clothes shall be provided.

(6) All service buildings shall be kept clean.

(g) Lighting.

Where electric service is available, each habitable room in a camp shall be provided with at least one ceiling-type light fixture and at least one separate floor- or wall-type convenience outlet. Laundry and toilet rooms and rooms where people congregate shall contain at least one ceiling- or wall-type fixture. Light levels in toilet and storage rooms shall be at least 20 foot-candles 30 inches from the floor. Other rooms, including kitchens and living quarters, shall be at least 30 foot-candles 30 inches from the floor.

(h) Refuse disposal.

(1) Fly-tight, rodent-tight, impervious, cleanable or single service containers, approved by the appropriate health authority shall be provided for the storage of garbage. At least one such container shall be provided for each family shelter and shall be located within 100 feet of each shelter on a wooden, metal, or concrete stand.

(2) Garbage containers shall be kept clean.

(3) Garbage containers shall be emptied when full, but not less than twice a week.

(i) Construction and operation of kitchens, dining hall, and feeding facilities.

(1) In all camps where central dining or multiple family feeding operations are permitted or provided, the food handling facilities shall comply with the requirements of the "Food Service Sanitation Ordinance and Code," Part V of the "Food Serv-

ice Sanitation Manual," U.S. Public Health Service Publication 934 (1965).

(2) A properly constructed kitchen and dining hall adequate in size, separate from the sleeping quarters of any of the workers or their families, shall be provided in connection with all food handling facilities. There shall be no direct opening from living or sleeping quarters into a kitchen or dining hall.

(3) No person with any communicable disease shall be employed or permitted to work in the preparation, cooking, serving, or other handling of food, foodstuffs, or materials used therein, in any kitchen or dining room operated in connection with a camp or regularly used by persons living in a camp.

(j) Insect and rodent control.

Effective measures shall be taken to prevent infestation by and harborage of animal or insect vectors or pests.

(k) First aid.

(1) Adequate first aid facilities approved by a health authority shall be maintained and made available in every labor camp for the emergency treatment of injured persons.

(2) Such facilities shall be in charge of a person trained to administer first aid and shall be readily accessible for use at all times.

(l) Reporting communicable disease.

(1) It shall be the duty of the camp superintendent to report immediately to the local health officer the name and address of any individual in the camp known to have or suspected of having a communicable disease.

(2) Whenever there shall occur in any camp a case of suspected food poisoning or an unusual prevalence of any illness in which fever, diarrhea, sore throat, vomiting, or jaundice is a prominent symptom, it shall be the duty of the camp superintendent to report immediately the existence of the outbreak to the health authority by telegram or telephone.

GPO 924 503

Subpart E—Housing for Agricultural Workers

AUTHORITY: Sec. 12 of the Wagner-Peyser Act, (29 U.S.C. 49k); 41 Op. A.G. 406 (1959).

SOURCE: 45 FR 14182, Mar. 4, 1980, unless otherwise noted.

PURPOSE AND APPLICABILITY

§ 654.400 Scope and purpose.

(a) This subpart sets forth the Employment and Training Administration standards for agricultural housing. Local Job Service offices, as part of the State employment service agencies and in cooperation with the United States Employment Service, assist employers in recruiting agricultural workers from places outside the area of intended employment. The experiences of the employment service indicate that employees so referred have on many occasions been provided with inadequate, unsafe, and unsanitary housing conditions. To discourage this practice, it is the policy of the Federal-State employment service system, as set forth in § 653.108 of this chapter, to deny its intrastate and interstate recruitment services to employers until the State employment service agency has ascertained that the employer's housing meets certain standards.

(b) To implement this policy, § 653.108 of this chapter provides that recruitment services shall be denied unless the employer has signed an assurance, a preoccupancy inspection has been conducted and the ES staff has ascertained that, with respect to intrastate clearance, if the workers are to be housed, the employer's housing meets or, with respect to interstate clearance, that the employer will provide housing for the workers which meets either the full set of standards set forth at 29 CFR 1910.142 or the full set of standards set forth in this subpart. Whichever is applicable under the criteria set forth in § 654.401; except that for mobile range housing for sheepherders, the housing shall meet existing Departmental guidelines.

[45 FR 14182, Mar. 4, 1980; 45 FR 22901, Apr. 4, 1980]

§ 654.401 Applicability; transitional provisions.

(a) Employers whose housing was constructed in accordance with the ETA housing standards may continue to follow the full set of ETA standards set forth in this subpart only where prior to April 3, 1980 the housing was completed or under construction, or where prior to March 4, 1980 a contract for the construction of the specific housing was signed.

(b) To effectuate these transitional provisions, agricultural housing to which this subpart applies and which complies with the full set of standards set forth in this subpart shall be considered to be in compliance with the Occupational Safety and Health Administration temporary labor camp standards at 29 CFR 1910.142.

§ 654.402 Variances.

(a) An employer may apply for a permanent, structural variance from a specific standard(s) in this subpart by filing a written application for such a variance with the local Job Service office serving the area in which the housing is located. This application must be filed by June 2, 1980 and must:

(1) Clearly specify the standard(s) from which the variance is desired;

(2) Provide adequate justification that the variance is necessary to obtain a beneficial use of an existing facility, and to prevent a practical difficulty or unnecessary hardship; and

(3) Clearly set forth the specific alternative measures which the employer has taken to protect the health and safety of workers and adequately show that such alternative measures have achieved the same result as the standard(s) from which the employer desires the variance.

(b) Upon receipt of a written request for a variance under paragraph (a) of this section, the local Job Service office shall send the request to the State office which, in turn, shall forward it to the Regional Administrator, Employment and Training Administration (RA). The RA shall review the matter and, after consultation with OSHA, shall either grant or deny the request for a variance.

(c) The variance granted by the RA shall be in writing, shall state the particular standard(s) involved, and shall state as conditions of the variance the specific alternative measures which have been taken to protect the health and safety of the workers. The RA shall send the approved variance to the employer and shall send copies to the Regional Administrator of the Occupational Safety and Health Administration, the Regional Administrator of the Employment Standards Administration, and the appropriate State agency and the local Job Service office. The employer shall submit and the local Job Service office shall attach copies of the approved variance to each of the employer's job orders which is placed into intrastate or interstate clearance.

(d) If the RA denies the request for a variance, the RA shall provide written notice stating the reasons for the denial to the employer, the appropriate State agency and the local Job

Service office. The notice shall also offer the employer an opportunity to request a hearing before a DOL Hearing Officer, provided the employer requests such a hearing from the RA within 30 calendar days of the date of the notice. The request for a hearing shall be handled in accordance with the employment service complaint procedures set forth at §§ 658.421 (i) and (j), 658.422 and 658.423 of this chapter.

(e) The procedures of paragraphs (a) through (d) of this section shall only apply to an employer who has chosen, as evidenced by its written request for a variance, to comply with the ETA housing standards at §§ 654.404—654.417 of this subpart.

§ 654.403 Conditional access to the intrastate or interstate clearance system.

(a) An employer whose housing during a period of nonuse has fallen out of compliance and who has not had a reasonable opportunity to bring its housing into compliance with the applicable standards may file, but only with the local Job Service office serving the area in which its housing is located, a written request that its job orders be conditionally allowed into the intrastate or interstate clearance system, provided:

(1) The employer's request includes a written statement, verified by the local Job Service office serving the area in which the housing is located, that the employer's housing was in compliance with the applicable housing standards during the period of its use in the previous year, and that, if the employer was granted such a request in the previous year, the employer complied with the conditions of that authorization; and

(2) The employer's request assures that its housing will be in full compliance with the requirements of the applicable housing standards at least 45 days (giving the specific date) before the housing is to be occupied.

(b) Upon receipt of a written request for conditional access to the intrastate or interstate clearance system under paragraph (a) of this section, the local Job Service office shall send the request to the State office which, in turn, shall forward it to the Regional Administrator, Employment and Training Administration (RA). The RA shall review the matter and, as appropriate, shall either grant or deny the request.

(c) The authorization for conditional access to the intrastate or interstate clearance system shall be in writing, and shall state that although the housing does not comply with the applicable standards, the employer's job orders may be placed into intrastate or interstate clearance until a specified date. The RA shall send the authorization to the employer and shall send copies to the appropriate State agency and local Job Service office. The employer shall submit and the local Job Service office shall attach copies of the authorization to each of the employer's job orders which is placed into intrastate or interstate clearance.

(d) If the RA denies the request for conditional access to the intrastate or interstate clearance system, the RA shall provide written notice stating the reasons for the denial to the employer, the appropriate State agency and the local Job Service office.

(e) The local Job Service office serving the area containing the housing of any employer granted conditional access to the intrastate or interstate clearance system shall assure that the housing is inspected prior to three working days after the date by which the employer has promised to have its housing in compliance with the requirements of this subpart. An employer, however, may request an earlier preliminary inspection. If upon inspection, or if on the date set forth in the authorization, whichever is later, the housing does not meet the standards set forth in this subpart, the local Job Service office shall immediately remove the employer's job orders from intrastate or interstate clearance, and, if workers have been recruited against these orders, shall, in cooperation with the employment service agencies in other States, make every reasonable attempt to locate and notify the appropriate crew leaders or workers, and to find alternative and comparable employment for the workers.

HOUSING STANDARDS

§ 654.404 Housing site.

(a) Housing sites shall be well drained and free from depressions in which water may stagnate. They shall be located where the disposal of sewage is provided in a manner which neither creates nor is likely to create a nuisance, or a hazard to health.

(b) Housing shall not be subject to, or in proximity to conditions that create or are likely to create offensive odors, flies, noise, traffic, or any similar hazards.

(c) Grounds within the housing site shall be free from debris, noxious plants (poison ivy, etc.) and uncontrolled weeds or brush.

(d) The housing site shall provide a space for recreation reasonably related to the size of the facility and the type of occupancy.

§ 654.405 Water supply.

(a) An adequate and convenient supply of water that meets the standards of the State health authority shall be provided.

(b) A cold water tap shall be available within 100 feet of each individual living unit when water is not provided in the unit. Adequate drainage facilities shall be provided for overflow and spillage.

(c) Common drinking cups shall not be permitted.

§ 654.406 Excreta and liquid waste disposal.

(a) Facilities shall be provided and maintained for effective disposal of excreta and liquid waste. Raw or treated liquid waste shall not be discharged or allowed to accumulate on the ground surface.

(b) Where public sewer systems are available, all facilities for disposal of excreta and liquid wastes shall be connected thereto.

(c) Where public sewers are not available, a subsurface septic tank-seepage system or other type of liquid waste treatment and disposal system, privies or portable toilets shall be provided. Any requirements of the State health authority shall be complied with.

§ 654.407 Housing.

(a) Housing shall be structurally sound, in good repair, in a sanitary condition and shall provide protection to the occupants against the elements.

(b) Housing shall have flooring constructed of rigid materials, smooth finished, readily cleanable, and so located as to prevent the entrance of ground and surface water.

(c) The following space requirements shall be provided:

(1) For sleeping purposes only in family units and in dormitory accommodations using single beds, not less than 50 square feet of floor space per occupant;

(2) For sleeping purposes in dormitory accommodations using double bunk beds only, not less than 40 square feet per occupant;

(3) For combined cooking, eating, and sleeping purposes not less than 60 square feet of floor space per occupant.

(d) Housing used for families with one or more children over 6 years of age shall have a room or partitioned sleeping area for the husband and wife. The partition shall be of rigid materials and installed so as to provide reasonable privacy.

(e) Separate sleeping accommodations shall be provided for each sex or each family.

(f) Adequate and separate arrangements for hanging clothing and storing personal effects for each person or family shall be provided.

(g) At least one-half of the floor area in each living unit shall have a minimum ceiling height of 7 feet. No floor space shall be counted toward minimum requirements where the ceiling height is less than 5 feet.

(h) Each habitable room (not including partitioned areas) shall have at least one windown or skylight opening directly to the out-of-doors. The minimum total window or skylight area, including windows in doors, shall equal at least 10 percent of the usable floor area. The total openable area shall equal at least 45 percent of the minimum window or skylight area required, except where comparably adequate ventilation is supplied by mechanical or some other method.

§ 654.408 Screening.

(a) All outside openings shall be protected with screening of not less than 16 mesh.

(b) All screen doors shall be tight fitting, in good repair, and equipped with self-closing devices.

§ 654.409 Heating.

(a) All living quarters and service rooms shall be provided with properly installed, operable heating equipment capable of maintaining a temperature of at least 68° F. if during the period of normal occupancy the temperature in such quarters falls below 68°.

(b) Any stoves or other sources of heat utilizing combustible fuel shall be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. No portable heaters other than those operated by electricity shall be provided. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there shall be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(c) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or a stovepipe shall be of fireproof material. A vented metal collar shall be installed around a stovepipe, or vent passing through a wall, ceiling, floor or roof.

(d) When a heating system has automatic controls, the controls shall be of the type which cut off the fuel supply upon the failure or interruption of the flame or ignition, or whenever a predetermined safe temperature or pressure is exceeded.

[45 FR 14182, Mar. 4, 1980; 45 FR 22901, Apr. 4, 1980]

§ 654.410 Electricity and lighting.

(a) All housing sites shall be provided with electric service.

(b) Each habitable room and all common use rooms, and areas such as: Laundry rooms, toilets, privies, hallways, stairways, etc., shall contain adequate ceiling or wall-type light fixtures. At least one wall-type electrical convenience outlet shall be provided in each individual living room.

(c) Adequate lighting shall be provided for the yard area, and pathways to common use facilities.

(d) All wiring and lighting fixtures shall be installed and maintained in a safe condition.

§ 654.411 Toilets.

(a) Toilets shall be constructed, located and maintained so as to prevent any nuisance or public health hazard.

(b) Water closets or privy seats for each sex shall be in the ratio of not less than one such unit for each 15 occupants, with a minimum of one unit for each sex in common use facilities.

(c) Urinals, constructed of nonabsorbent materials, may be substituted for men's toilet seats on the basis of one urinal or 24 inches of trough-type urinal for one toilet seat up to a maximum of one-third of the required toilet seats.

(d) Except in individual family units, separate toilet accommodations for men and women shall be provided. If toilet facilities for men and women are in the same building, they shall be separated by a solid wall from floor to roof or ceiling. Toilets shall be distinctly marked "men" and "women" in English and in the native language of the persons expected to occupy the housing.

(e) Where common use toilet facilities are provided, an adequate and accessible supply of toilet tissue, with holders, shall be furnished.

(f) Common use toilets and privies shall be well lighted and ventilated and shall be clean and sanitary.

(g) Toilet facilities shall be located within 200 feet of each living unit.

(h) Privies shall not be located closer than 50 feet from any living unit or any facility where food is prepared or served.

(i) Privy structures and pits shall be fly tight. Privy pits shall have adequate capacity for the required seats.

§ 654.412 Bathing, laundry, and handwashing.

(a) Bathing and handwashing facilities, supplied with hot and cold water under pressure, shall be provided for the use of all occupants. These facilities shall be clean and sanitary and located within 200 feet of each living unit.

(b) There shall be a minimum of 1 showerhead per 15 persons. Showerheads shall be spaced at least 3 feet apart, with a minimum of 9 square feet of floor space per unit. Adequate, dry dressing space shall be provided in common use facilities. Shower floors shall be constructed of nonabsorbent nonskid materials and sloped to properly constructed floor drains. Except in individual family units, separate shower facilities shall be provided each sex. When common use shower facilities for both sexes are in the same building they shall be separated by a solid nonabsorbent wall extending from the floor to ceiling, or roof, and shall be plainly designated "men" or "women" in English and in the native language of the persons expected to occupy the housing.

(c) Lavatories or equivalent units shall be provided in a ratio of 1 per 15 persons.

(d) Laundry facilities, supplied with hot and cold water under pressure, shall be provided for the use of all occupants. Laundry trays or tubs shall be provided in the ratio of 1 per 25 persons. Mechanical washers may be provided in the ratio of 1 per 50 persons in lieu of laundry trays, although a minimum of 1 laundry tray per 100 persons shall be provided in addition to the mechanical washers.

§ 654.413 Cooking and eating facilities.

(a) When workers or their families are permitted or required to cook in their individual unit, a space shall be provided and equipped for cooking and eating. Such space shall be provided with:

(1) A cookstove or hot plate with a minimum of two burners; and (2) adequate food storage shelves and a counter for food preparation; and (3) provisions for mechanical refrigeration of food at a temperature of not more than 45° F.; and (4) a table and chairs or equivalent seating and eating arrangements, all commensurate with the capacity of the unit; and (5) adequate lighting and ventilation.

(b) When workers or their families are permitted or required to cook and eat in a common facility, a room or building separate from the sleeping facilities shall be provided for cooking and eating. Such room or building shall be provided with:

(1) Stoves or hot plates, with a minimum equivalent of two burners, in a ratio of 1 stove or hot plate to 10 persons, or 1 stove or hot plate to 2 families; and (2) adequate food storage shelves and a counter for food preparation; and (3) mechanical refrigeration for food at a temperature of not more than 45° F.; and (4) tables and chairs or equivalent seating adequate

for the intended use of the facility; and (5) adequate sinks with hot and cold water under pressure; and (6) adequate lighting and ventilation; and (7) floors shall be of nonabsorbent, easily cleaned materials.

(c) When central mess facilities are provided, the kitchen and mess hall shall be in proper proportion to the capacity of the housing and shall be separate from the sleeping quarters. The physical facilities, equipment and operation shall be in accordance with provisions of applicable State codes.

(d) Wall surface adjacent to all food preparation and cooking areas shall be of nonabsorbent, easily cleaned material. In addition, the wall surface adjacent to cooking areas shall be of fire-resistant material.

§ 654.414 Garbage and other refuse.

(a) Durable, fly-tight, clean containers in good condition of a minimum capacity of 20 gallons, shall be provided adjacent to each housing unit for the storage of garbage and other refuse. Such containers shall be provided in a minimum ratio of 1 per 15 persons.

(b) Provisions shall be made for collection of refuse at least twice a week, or more often if necessary. The disposal of refuse, which includes garbage, shall be in accordance with State and local law.

§ 654.415 Insect and rodent control.

Housing and facilities shall be free of insects, rodents, and other vermin.

§ 654.416 Sleeping facilities.

(a) Sleeping facilities shall be provided for each person. Such facilities shall consist of comfortable beds, cots, or bunks, provided with clean mattresses.

(b) Any bedding provided by the housing operator shall be clean and sanitary.

(c) Triple deck bunks shall not be provided.

(d) The clear space above the top of the lower mattress of a double deck bunk and the bottom of the upper bunk shall be a minimum of 27 inches. The distance from the top of the upper mattress to the ceiling shall be a minimum of 36 inches.

(e) Beds used for double occupancy may be provided only in family accommodations.

§ 654.417 Fire, safety, and first aid.

(a) All buildings in which people sleep or eat shall be constructed and maintained in accordance with applicable State or local fire and safety laws.

(b) In family housing and housing units for less than 10 persons, of one story construction, two means of escape shall be provided. One of the two required means of escape may be a readily accessible window with an openable space of not less than 24 x 24 inches.

(c) All sleeping quarters intended for use by 10 or more persons, central dining facilities, and common assembly rooms shall have at least two doors remotely separated so as to provide alternate means of escape to the outside or to an interior hall.

(d) Sleeping quarters and common assembly rooms on the second story shall have a stairway, and a permanent, affixed exterior ladder or a second stairway.

(e) Sleeping and common assembly rooms located above the second story shall comply with the State and local fire and building codes relative to multiple story dwellings.

(f) Fire extinguishing equipment shall be provided in a readily accessible place located not more than 100 feet from each housing unit. Such equipment shall provide protection equal to a 2½ gallon stored pressure or 5-gallon pump-type water extinguisher.

(g) First aid facilities shall be provided and readily accessible for use at all time. Such facilities shall be equivalent to the 16 unit first aid kit recommended by the American Red Cross, and provided in a ratio of 1 per 50 persons.

(h) No flammable or volatile liquids or materials shall be stored in or adjacent to rooms used for living purposes, except for those needed for current household use.

(i) Agricultural pesticides and toxic chemicals shall not be stored in the housing area.

57i INSTALLMENT PLANS FOR CMPS

57i00 General.

Installment plans may be established for the payment of CMPs due under the MSPA or FLCRA.

57i01 Guidelines for installment agreements.

[redacted]

(b) (7)(E)

57i02 **Action when default occurs.**

(a) Where there has been a failure to pay CMPs, the DOL may initiate an action to recover the amount of the unpaid CMPs and additional court costs in the appropriate U.S. district court.

(b) In the event an FLC defaults on the installment plan, the file shall be referred to the NO for consideration of certificate action and entry on the clearance list.

(c) Normally a person who has defaulted on an installment plan will not be given a new installment plan with respect to the same penalty.

57i03 **Sample installment plan agreement.**

Installment plan agreements for FLCs should closely conform to the following sample. When the FLC is represented by an attorney, the attorney should also sign the document.

NOT FOR PUBLIC DISTRIBUTION

INSTALLMENT PAYMENT AGREEMENT BETWEEN

John I. Doe

AND

U.S. DEPARTMENT OF LABOR

It is agreed between John I. Doe and the UNITED STATES DEPARTMENT OF LABOR as follows:

John I. Doe hereby agrees to pay the civil money penalty of $1,200 which was assessed against him by notice of assessment dated September 9, 1983 under the Farm Labor Contractor Registration Act and/or the Migrant and Seasonal Agricultural Worker Protection Act according to the Schedule of Payments below. He acknowledges that he received such notice. He acknowledges that such assessment has become the final Order of the Secretary and waives any right he may have to appeal or contest such assessment.

Schedule of Payments

By May 15, 1984, John I. Doe will have paid the entire $1,200 civil money penalty.

January 15, 1984	$300
February 15, 1984	$225
March 15, 1984	$225
April 15, 1984	$225
May 15, 1984	$225

Payments must be made as scheduled and must be made by certified check, cashier's check, or money order payable to "Wage and Hour Division, U.S. Department of Labor" and must be mailed or delivered to the Regional Office, Wage and Hour Division, 1371 Peachtree Street, Northeast, Atlanta, Georgia 30367.

Should John I. Doe fail to make any agreed payment as scheduled, the entire unpaid balance will immediately become due and payable, together with such court costs as may be incurred by the U.S. Department of Labor in pursuing collection thereof.

Should John I. Doe fail to make any agreed payment as scheduled, the Wage and Hour Division of the U.S. Department of Labor may revoke any certificate of registration issued to him under the Migrant and Seasonal Agricultural Worker Protection Act and/or may refuse to issue or renew such certificate in the future, and John I. Doe hereby waives any right to hearing on such revocation or refusal.

The U.S. Department of Labor agrees to forbear pursuit of collection of the above-mentioned civil money penalty and costs stated above so long as John I. Doe adheres to the terms of this agreement. The Department of Labor reserves the right to pursue collection of the full amount of the penalty mentioned above, with costs as stated in this agreement, should John I. Doe fail to abide by the terms of this agreement.

The parties to this agreement hereby acknowledge receipt of this agreement, and they agree to its terms by signatures below.

Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding, except as specified herein.

_____ _____
John I. Doe Date

_____ _____
Leonard Law, Esq. Date
Attorney for
John I. Doe

_____ _____
United States Department of Date
Labor by Robert Roe
Assistant Regional Administrator
for Wage and Hour Division

57j EMPLOYMENT RELATIONSHIP, JOINT EMPLOYMENT, AND JOINT RESPONSIBILITY

[01/03/2017]

57j00 Employment relationship.

Because the MSPA uses the FLSA's definition of "employ" and specifically incorporates the broad suffer or permit standard for determining the scope of the employment relationship, the same analysis is used in both FLSA and MSPA cases for determining whether a worker is an employee.

Policy guidance is contained in FOH 10b05 -07 (b) (7)(E) [redacted]

29 CFR 500.20(h)(1) -(4)

[01/03/2017, 07/07/2017]

57j01 Joint employment.

Both the FLSA and MSPA have regulations providing guidance regarding joint employment. Given that the FLSA and MSPA define the scope of employment and joint employment in the same manner, guidance in the FLSA joint employment regulation may be applied in MSPA investigations, and guidance in the MSPA joint employment regulation may be applied in FLSA investigations.

Policy guidance is contained in FOH 10f (b) (7)(E) [redacted]

29 CFR 791.2

29 CFR 500.20(h)

[01/03/2017, 07/07/2017]

57j02 Joint responsibility.

(a) Many MSPA requirements are applicable to the person or entity responsible for the matter at issue, even without an employment relationship between that person or entity and the affected farmworkers. When any person not otherwise exempt from the MSPA recruits, solicits, hires, employs, furnishes, or transports workers, that person is required to comply with the applicable protective provisions of the MSPA.

(b) Housing responsibility

Any person not specifically exempt from the MSPA who owns or controls real property which is used as housing for any migrant agricultural worker must ensure that the facility or real property complies with all applicable federal and state safety and health provisions. When an AGER or AGAS has an FLC operate housing which it owns or controls, the AGER or AGAS, as well as the FLC, is responsible for ensuring compliance with the applicable safety and health provisions.

NOT FOR PUBLIC DISTRIBUTION

(c) Transportation responsibility

Responsibility for compliance with the motor vehicle safety and insurance requirements resides with the person or entity using or causing any vehicle to be used for the transportation of any migrant or seasonal agricultural worker. When an AGER or an AGAS specifically directs or requests an FLC to use the FLC's vehicle to carry out a task, such direction constitutes causing the vehicle to be used and the AGER or AGAS is jointly responsible with the FLC for assuring that the vehicle meets the insurance and safety requirements.

[01/03/2017]

57k PINE STRAW

57k00 General.

(a) Pine straw is the fresh, undecomposed pine needles that have fallen from pine trees. It is produced commercially and collected for use as a mulch and groundcover. The raking, gathering, baling, and loading of pine straw for commercial purposes is usually performed in pine stands or plantations, from pine trees being grown for forestry and lumbering operations. Pine straw workers are typically not engaged in agricultural employment as defined within the FLSA (*see* 29 USC 203(f)) or the Internal Revenue Code (*see* 26 USC 3121(g)).

(b) In *Morante-Navarro v. T & Y Pine Straw, Inc.*, 350 F.3d 1163, 1172 (11th Cir. 2003), the Eleventh Circuit held that raking, gathering, baling, and loading of pine straw qualifies as agricultural employment under the third prong of the MSPA definition, which states that agricultural employment includes "the handling... of any agricultural or horticultural commodity in its unmanufactured state." *See* 29 USC 1802(3). Pine straw workers are therefore generally entitled to the protections of the MSPA as long as their work is of a seasonal or temporary nature and their employer is subject to the statute. *See* FOH 57a06 and FOH 57a09.

(c) Unless specifically exempt, pine straw contractors must register with the DOL as FLCs prior to performing any one of the named activities with respect to a migrant or seasonal agricultural worker, and must also receive special authorization for housing, transporting, and driving.

(d) Certified contractors may use the H-2B temporary nonimmigrant program to employ workers in the pine straw industry as long as all other program criteria are met. Since H-2B workers are not specifically excluded from coverage under the MSPA, such workers are generally entitled to receive all the protections afforded by the MSPA, FLSA, and field sanitation standards under the OSH Act, and such employers must simultaneously comply with all applicable requirements.

(e) (b) (7)(E) for the application of the FLSA to pine straw workers and FOH 36b07 for the application of the OSH Act Field Sanitation Standards to pine straw workers.

NOT FOR PUBLIC DISTRIBUTION

Chapter 58

ENFORCEMENT OF CONTRACTUAL OBLIGATIONS OF EMPLOYERS OF TEMPORARY AGRICULTURAL WORKERS (H-2A) AND U.S. WORKERS IN CORRESPONDING EMPLOYMENT

Source: FOH Modernization revision 705, published 11/28/2016. Substantive revisions made *after* 11/28/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 11/28/2016 can be found here: http://esa.esa.dol.gov/whd/FOH/revisionchart.htm.

NOT FOR PUBLIC DISTRIBUTION

Table of Contents

58a INTRODUCTION

58a00 Background and standards.
58a01 Responsibilities of the ETA and the ESA.

58b GENERAL

58b00 Enforcement and scheduling priorities.
58b01 Order of investigation priorities.
58b02 Objectives of investigation.
58b03 Novel or unsettled issues.
58b04 Investigation period.
58b05 Investigation of complaints.
58b06 Certification and job order necessary before starting investigation.
58b07 Refusal of permission to investigate.
58b08 Investigation procedures.

58c COVERAGE

58c00 General.
58c01 Job order cancellation.
58c02 Extent of domestic worker protection.
58c03 Job order extension(s).
58c04 Alien status.

58d WORKER CONTRACTUAL PROTECTIONS

58d00 Agricultural clearance or job order.
58d01 Written work contract.
58d02 Preferential treatment: foreign workers.
58d03 Place of hire.
58d04 Meal charges.
58d05 Contract termination date.
58d06 Worker representative(s).
58d07 Deductions and voluntary assignment of wages.

58e ENFORCEMENT OF WORK CONTRACTS AND REGULATORY STANDARDS

58e00 General.
58e01 Failed to provide copy of work contract and/or job order.
58e02 Failed to make and/or keep employer records.
58e03 Failed to provide wage statements.
58e04 Failed to pay wages when due.
58e05 Failed to pay proper rate.
58e06 Failed to pay three-quarter guarantee.
58e07 Illegal deductions.
58e08 Failed to ensure housing safety and health.
58e09 Illegal charges for housing.
58e10 Failed to provide transportation and/or subsistence.
58e11 Failed to provide safe transportation vehicles.
58e12 Failed to provide meals at reasonable cost.
58e13 Failed to provide necessary supplies at no charge.
58e14 Failed to provide worker's compensation.
58e15 Illegal dismissal of workers engaged in corresponding employment.
58e16 Preferential treatment given to H-2A workers.
58e17 Discrimination against worker testifying, etc.
58e18 Procured waiver of rights.
58e19 Failed to permit investigation.
58e20 Interfered with DOL official.
58e21 Knowingly provided false information to the DOL.
58e22 Failed to provide records.
58e23 Failed to comply with employment-related laws.
58e24 Unlawful cost-shifting (prohibited fees) (20 CFR 655.135(j)).
58e25 Failed to contractually forbid cost-shifting (20 CFR 655.135(k)).
58e26 Failed to comply with notification requirements for abandonment or termination for cause at 20 CFR 655.122(n).

58f SANCTIONS

58f00 General.
58f01 Potential litigation.
58f02 Civil money penalties.
58f03 DD and/or ADD review of CMP and unpaid wage recommendation.
58f04 DD and/or ADD issuance of CMP assessment and back wage notice.
58f05 CMP post-assessment procedures.
58f06 Installment payments.

58g SERVICE

58g00 Service of administrative determinations.
58g01 Service by mail.
58g02 Delivery of a copy of the administrative determination.

58h ENFORCEMENT COORDINATION

58h00 General.
58h01 Notification to the ETA of investigative findings and enforcement actions.
58h02 Notification to the WHD of complaints and labor certifications.
58h03 Notification to the INS.

NOT FOR PUBLIC DISTRIBUTION

58i SPECIAL PROCEDURES

58i00 (Reserved.)
58i01 H-2A workers employed in range sheep herding, goat herding, and production of livestock occupations.

58a INTRODUCTION

58a00 <u>Background and standards.</u>

(a)

(1) Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA) authorizes the lawful admission of temporary, non-immigrant workers to perform agricultural labor or services of a temporary or seasonal nature. The individuals who are admitted to the United States (U.S.) under these provisions of the INA are known as H-2A workers.

(2) Any person who wishes to employ H-2A workers must:

a. be certified by the Department of Labor (DOL), Employment and Training Administration (ETA);

b. obtain approval from the U.S. Attorney General; and

c. comply with the contractual obligations, which apply to H-2A workers and workers engaged in corresponding employment.

(3) The Wage and Hour Division (WHD) is responsible for the enforcement of the contractual obligations, pursuant to section 216 of the INA, which apply to employment of H-2A workers and workers who are engaged in corresponding employment (*see* FOH 58a02 for a discussion of the work contract).

(b)

(1) Section 216(a) of the INA provides that a petition to import a worker as an H-2A worker may not be approved by the Attorney General unless the petitioner has applied to the DOL for a certification that:

a. there are not sufficient workers who are able, willing, qualified, and available to perform the labor or services involved in the petition; and

b. the employment of workers in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. who are similarly employed.

(2) Section 216(g)(2) of the INA provides that the Secretary of Labor (Secretary) is authorized to take such actions as may be necessary to assure employer compliance with the terms and conditions of employment under section 216 of the INA (*see* FOH 58e).

NOT FOR PUBLIC DISTRIBUTION

(c) The employer's contractual obligations extend not only to H-2A workers, but also to workers hired by the employer in the occupations and for the period of time set forth in the original job order, or any extension approved by the ETA, as a condition for granting H-2A certification. Such workers hired by H-2A employers are referred to as workers employed in corresponding employment.

58a01 **Responsibilities of the ETA and the ESA.**

(a) The issuance and denial of labor certification under section 216 of the INA have been delegated by the Secretary to the ETA. Matters concerning the obligations of an employer of H-2A workers related to the labor certification process are administered and enforced by the ETA. Included within ETA jurisdiction are determinations related to such issues as the availability of U.S. workers, positive recruitment, existence of a strike or a lockout, methodology for establishing the adverse effect wage rate (AEWR), offer of employment to U.S. workers for up to 50 percent of the contract period, and similar matters. The regulations pertaining to the issuance and denial of labor certification for temporary workers by the ETA are found in 20 CFR 655.

(b) Investigation, inspection, and law enforcement functions to carry out the provisions of section 216 of the INA have been delegated by the Secretary to the WHD. Included within the enforcement responsibility of the WHD are all contractual obligations for H-2A workers and U.S. workers in corresponding employment, including such matters as wages, transportation, meals, housing, three-quarter guarantee, etc. The WHD is authorized to conduct investigations or inspections and, in appropriate instances, to impose penalties, collect back wages, and seek injunctive relief. The regulations that pertain to enforcement by the WHD of contractual obligations for temporary alien agricultural workers admitted under section 216 of the INA and for U.S. workers in corresponding employment are found in 29 CFR 501. The substantive obligations of the work contract and/or job order are found in 20 CFR 655.

58b **GENERAL**

58b00 **Enforcement and scheduling priorities.**

(a) (b) (7)(E) [redacted]

(1) As an H-2A employer is an agricultural employer, the MSPA may also be applicable to any U.S. employee employed in corresponding employment by the H-2A employer (an H-2A worker is excluded from the definition of a migrant worker under the MSPA). Housing safety and health provisions are applicable to any employee hired by an H-2A employer, whether enforced under the MSPA or H-2A. If an employer is using a vehicle to transport both H-2A workers and U.S. workers in corresponding employment, such vehicle is subject to the MSPA and must meet applicable MSPA vehicle safety and insurance requirements.

(2) Workers admitted under H-2A are covered by the FLSA in the same manner as any U.S. worker. Such workers are also included in the man-day count under section 13(a)(6)(A) of the FLSA. Since the application of the small business exemption, section 4(a)(2) of the MSPA, is dependent on the application of section 13(a)(6)(A)

NOT FOR PUBLIC DISTRIBUTION

of the FLSA, H-2A workers employed during the previous calendar year will be counted toward the determination of the application of the small business exemption.

(3) For example, if an agricultural employer exceeded 500 man-days in any calendar quarter of the previous year by employing in agriculture *any* combination of H-2A workers and U.S. workers, the employer is denied the small business exemption in the current year for any U.S. workers employed.

(b) (b) (7)(E) [redacted]

58b01 **Order of investigation priorities.**

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted] including evidence of serious communicable disease, such as typhoid

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
  - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
- [redacted]
  - [redacted]
    - [redacted]
    - [redacted]

NOT FOR PUBLIC DISTRIBUTION

c. An imminent danger to workers may still exist.

d. The DD and/or ADD believe that the particular circumstances (*e.g.*, the number and/or type of violations, past history of the employer, etc.) indicate the need for a follow-up investigation.

58b02 Objectives of investigation.

(a) The objectives of investigative activity by the WHD under section 216 of the INA are:

(1) to determine whether or not the employer has complied with the terms and conditions of the contracts with H-2A workers and/or other individuals who are engaged in corresponding employment;

(2) if necessary, to inform the employer of the violations and the steps, which are required to achieve compliance; and

(3) to initiate appropriate administrative or legal action consistent with the investigative findings.

58b03 Novel or unsettled issues.

The procedures described in this part are intended to provide only general guidance and are not meant to cover all situations. Where appropriate, additional guidelines will be developed on the basis of experience. Procedural and interpretative questions involving novel or unsettled issues shall be referred to the Assistant Administrator for the Office of Policy (OP), Attention: Immigration/Farm Labor Branch.

58b04 Investigation period.

(b) (7)(E) [redacted]

58b05 Investigation of complaints.

[redacted] (b) (7)(E) [redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

58b06 **Certification and job order necessary before starting investigation.**

(a) The regional administrator (RA) of the ETA will provide copies of the certification and job order to the WHD RA for distribution to the WHD district office (DO). (b) (7)(E) [redacted] It is important that the job order, which is reviewed by the WHI, include any approved amendments to the original conditions of certification. The ETA RO that issued the job order should also be contacted if the job order exempts the employer from any of the normal requirements of H-2A; such exemption should be verified by the ETA RA (*see* FOH 58e00(a)(1)).

- [redacted] (b) (7)(E) [redacted]
- [redacted]
- [redacted]

58b07 **Refusal of permission to investigate.**

(a) When WHIs are refused permission to make an investigation and/or denied access to records, employees, or evidence, the refusal will be treated as a violation of 29 CFR 501.5 -.6. The matter will be referred to the regional solicitor of Labor (RSOL) with a recommendation that appropriate injunctive relief be sought. (b) (7)(E) [redacted]

- [redacted]
- [redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC DISTRIBUTION

[redacted] (b) (7)(E) [redacted]

(d) Per FOH 58h03(a), a report should be made to the Immigration and Naturalization Service (INS) on ESA-91: Employment Eligibility Verification Report (ESA-91) relating to the employer, noting that the denial of access appears to be a violation of the INS regulations found at 8 CFR 214.2(h)(3)(vi)(A).

58b08 **Investigation procedures.**

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

58c **COVERAGE**

58c00 **General.**

(a) When certification is granted by the ETA, the H-2A employer must comply with all its contractual obligations with respect to any H-2A worker and/or any other worker employed in corresponding employment as established under the conditions approved in the work contract and/or job order or certification for the specific job openings and during the period of

NOT FOR PUBLIC DISTRIBUTION

time involved. Such employer must comply with all H-2A contractual obligations, even in the event that none of the workers employed are H-2A workers.

(b) If an employer applied for certification to hire H-2A workers and the certification was not granted, the employer is not subject to the H-2A requirements. However, any workers may have MSPA protection (*e.g.*, failure to abide by agreements with workers) if the employer is subject to the MSPA.

58c01 **Job order cancellation.**

(a) The obligation to comply with the provisions of the H-2A work contract and/or job order and labor certification extends until the end of the period specified in the job order for workers employed under the terms and conditions of the job order. When a request for cancellation of the job order and certification has been submitted by the employer and accepted by the ETA, only prospective employees are affected and are not protected by the H-2A provisions. Such cancellation does not affect any individuals who have been given a hiring commitment.

(b) For example, an employer is certified in March for H-2A workers for a contract period of July and August. The employer recruits 10 U.S. workers in April under the job order and offers them employment, beginning in July, which they accept. The employer cancels and/or withdraws the application and job order in May. When the 10 U.S. workers arrive in July, the employer is obligated to provide all the wages, benefits, working conditions, and protection called for in the contract (*i.e.*, AEWR, copy of contract, housing, three-fourths guarantee, etc.). The employer's failure to provide any or all of these requirements would constitute a violation of H-2A making him or her liable for any of the appropriate sanctions. If the employer is subject to the MSPA, the failure to provide the full wages, benefits, and protection called for in the work contract and/or job order would also be a violation of the MSPA and could subject the business to other penalties, such as MSPA CMPs.

58c02 **Extent of domestic worker protection.**

(a) A worker who performs any work on the contract is subject to all of the labor standards specified in the H-2A contract, and must receive at least the minimum benefits and protection called for in the contract and H-2A regulations. Thus, an employee who performs work called for in the contract for 1 hour during the contract period would be protected under all of the applicable H-2A protection. However, an employee who voluntarily abandons employment or who is dismissed for cause (*and* the employer so notifies the local Job Service (JS) office) is not subject to the protection of the three-fourths guarantee.

(b) For example, in a particular week, a year-round employee, who is paid a $300.00 per week salary, works 10 hours in a job described in the job order during the period when a labor certification is in effect. The employee also worked an additional 50 hours at other jobs not subject to H-2A. The AEWR in this example is $5.25 per hour. To test whether the year-round employee received the applicable $5.25 per hour AEWR, divide $300.00 (total earnings) by 60 hours (total hours, including H-2A hours), which equals $5.00 regular rate. To meet the AEWR, $0.25 per hour is owed for 10 hours. If the applicable AEWR were less than the regular rate in this example, no additional monies would be owed. On the other hand, when employees are not paid on a salary basis, payment of more than the AEWR for non-H-2A work cannot be credited against the AEWR due for H-2A work. *See* FOH 58e05(a)(5).

NOT FOR PUBLIC DISTRIBUTION

58c03 **Job order extension(s).**

An employer who wishes to extend the period of a contract beyond its original completion date must apply to the ETA for such an extension. No changes can be made in the benefits, wages, or working conditions of the job order unless approved by the ETA RA.

58c04 **Alien status.**

An H-2A worker admitted temporarily to the U.S. for employment in agriculture may be employed only in the agricultural occupation for which the labor certification was granted. However, any out of status employment, as such, is not a WHD enforcement issue. Such employment should be reported to the ETA RO and the INS office for their disposition. *See* FOH 58h01(c) and FOH 58h03.

58d **WORKER CONTRACTUAL PROTECTIONS**

58d00 **Agricultural clearance or job order.**

An employer seeking an H-2A labor certification must submit an application to the ETA RA in whose region the area of intended employment is located. The application will include ETA Form 790: Agricultural and Food Processing Clearance Order (ETA Form 790), referred to as a job order, that will specify the conditions of employment relative to such matters as wages, transportation, meal charges, and housing provided. The minimum requirements of such job orders are established by the ETA, pursuant to 20 CFR 655 (*see* FOH 58e). The job order specifies the minimum worker contractual protection for any worker on the H-2A contract. *See* FOH 58d01(b) below.

58d01 **Written work contract.**

(a) In addition to the ETA job order, a written work contract, which specifies the terms and conditions of the employment agreement between the employer and a particular H-2A worker (or worker in corresponding employment), may exist. If such a written work contract exists and if it provides the same or greater, and/or additional labor standards as those in the job order, then it is a work contract that will be enforced by the WHD, in addition to the job order in FOH 58d00 above. Labor standards in the work contract, which are not greater than the labor standards in the job order, are ignored by the WHD for enforcement purposes.

(b) In the absence of a written work contract between the employer and a worker, the job order becomes the contract that is enforced in accordance with 29 CFR 501. If there is a written work contract, the job order *plus* the work contract (assuming the work contract does not contain lesser standards) become the contract that is enforced by the WHD.

(c) In the past, the ETA did not require employers to submit the H-2A worker contracts (if any existed) with their certification applications. However, contract language that had been inconsistent with or in conflict with the job order has been a source of confusion to the workers. Beginning in the fall of 1991, the ETA's review has included the examination of all H-2A contract(s) as a step in the labor certification process. Accordingly, the ETA now examines any existing H-2A contracts to ensure that the work contracts are written consistently with the regulations and job offer. *See* FOH 58e01.

58d02 **Preferential treatment: foreign workers.**

NOT FOR PUBLIC DISTRIBUTION

(a) A concept in the relationship between employment of H-2A workers and U.S. workers in corresponding employment (*i.e.*, domestic workers) is that preferential treatment of H-2A or domestic workers is prohibited under 20 CFR 655.102(a). U.S. workers must be offered and provided the same benefits, wages, and working conditions as are offered and provided to the H-2A workers. No preferential treatment, obligation, or restriction may be placed on the U.S. workers that is not also placed on the H-2A workers. U.S. workers are permitted to receive higher wages and benefits than foreign workers, whose rights are set out in the job order and regulations. The following examples illustrate how the equal treatment concept is to be implemented.

(b) An employer is certified for H-2A workers to pick apples at a minimum rate of $5.00 per hour. The employer also hires U.S. workers to pick apples during the contract period and pays them $4.75 per hour. The employer is in violation of the H-2A requirements and must pay the U.S. workers an additional $0.25 for each hour they have worked. All workers must be paid no less than $5.00 per hour in the future, and the employer is subject to potential sanctions, such as CMPs, denial of future certification, etc.

58d03 **Place of hire.**

(a) The geographical point where the individual is located at the time the worker and the employer make an agreement to have the person work for the employer is the place of hire, and the location from where the employer must provide for the person transportation to the work site or reimburse the worker for costs incurred to get to the work site.

(b) Any worker contract must show the actual place where the worker was hired for purposes of determining transportation and subsistence costs. For H-2A workers from the Caribbean, contract language, which in the past deemed the place of recruitment always to be Kingston, Jamaica (no matter from which island the worker was hired), is not permissible. The fact that the language is incorrect in the contract is a matter of concern for the ETA, and the ETA should be notified following the procedures outlined in FOH 58h01. The actual place of hire must be determined by the investigation. *See* FOH 58e10.

58d04 **Meal charges.**

Any meals provided by the employer can be charged against the worker. The charge is established by the ETA. This charge must include any tax involved in providing the meal. *See* FOH 58e12.

58d05 **Contract termination date.**

A work contract in the past contained language that provided, at the employer's prerogative, for an earlier termination of a contract period than specified in the ETA-approved job offer. As this practice is contrary to the regulations, the WHD has ignored this notation in the worker contracts when investigating whether a worker received the appropriate three-fourths guarantee. This earlier termination date is not permissible, and where it is found, the ETA should be notified following the procedures outlined in FOH 58h01. Three-fourths protection is computed according to the dates found in the job order. *See* FOH 58e06.

58d06 **Worker representative(s).**

NOT FOR PUBLIC DISTRIBUTION

A worker contract in the past also contained language that provided that the worker was required to appoint an organization, such as the West Indies Central Labour Organization (WICLO), as the exclusive representative to pursue claims against an employer. This language is not permissible, and the WHD has ignored this notation in the worker contracts. The contract language is an ETA matter and should be referred to the ETA through channels.

58d07 Deductions and voluntary assignment of wages.

(a) General

Under the H-2A program, some deductions are never permitted (*see* FOH 58e07), while other deductions are permissible when certain criteria are met. Voluntary assignments are a specific form of deduction. Field Assistance Bulletin No. 2012-3, "General Guidance on Voluntary Assignments of Wages under the H-2A Program" issued 05/17/2012, enumerates the principles for permissible deductions and for a voluntary assignment of wages.

(b) Permissible deductions

(1) *Deduction must be disclosed*

The deduction must be disclosed in the job offer (if not required by law to be deducted). DOL considers the job offer essential for providing the workers sufficient information to make informed employment decisions.

If the deduction is not disclosed in the job offer, the WHI should cite it as an unlawful deduction (*see* FOH 58e07).

(2) *Deduction must be reasonable*

The deduction must be reasonable. Apply the same principle for "reasonable" that is used under the FLSA, but test whether the deduction brings the worker below the H-2A required wage rate. A reasonable deduction cannot be primarily for the benefit or convenience of the employer. Additionally, a reasonable deduction does not include a profit or benefit to the employer or to any affiliated person.

a. The term "affiliated person" is broad and includes but is not limited to agents, agricultural associations, petitioners, recruiters, facilitators, placement services, employment services, and others who furnish workers; any person acting in the employer's behalf or interest (directly or indirectly); or any person who has an interest in the employment relationship.

(3) *Deduction must comply with applicable laws and regulations*

The deduction must be made in accordance with other H-2A regulatory requirements as well as other applicable federal, state, and local law requirements. For example, wage deductions for health insurance coverage or savings programs may constitute employee contributions to an employer sponsored group health plan or retirement savings plan subject to the reporting, disclosure, fiduciary, enforcement, and other provisions of the Employee Retirement Income Security Act of 1974 (ERISA). Many states have specific requirements addressing voluntary assignment of wages, including capping the total amount that may be assigned per pay period, requiring

NOT FOR PUBLIC DISTRIBUTION

specific authorization forms, and establishing the amount of time in which amounts must be deposited. Unless preempted by a federal law, such as ERISA, these and other state law deduction requirements must be accounted for in ensuring that wages are received free and clear. *See* FOH 58e23.

(c) Common voluntary assignments

(1) *Personal savings programs*

a. An employee's voluntary participation is best evidenced by a signed and dated document in which the employee is provided an option to participate.

b. The employer shall provide the employee with some flexibility in choosing the amount or percentage of the deduction, and an option to change the amount or percentage. The employer may choose to offer a limited number of options for amounts or percentages for administrative practicality. The employee must also be allowed to stop the deduction as soon as administratively feasible during the course of employment.

c. Wages must be paid when owed. The employer must remit the deducted amount no later than the payday on which the amount is due.

d. Neither the employer, nor any person acting in the employer's behalf or interest, nor any other affiliated person may derive any benefit or profit from the transaction or profit directly or indirectly from any market or exchange rates used in the transaction. Any accrued interest must be provided to the employee.

e. If the employer transmits the deduction to an affiliated party for transmission to the recipient designated by the employee, the employer must be able to demonstrate that its affiliate promptly transmitted the money to the designated recipient on behalf of the employee.

(2) *Health insurance plans*

a. Health insurance companies that provide health insurance to a variety of individuals are not considered "affiliated persons." For example, if an employer provides a health insurance plan through a nationwide health insurance provider, that company has no interest in the employment relationship of the H-2A or corresponding workers and is, therefore, not an affiliated person. On the other hand, if an employer is providing a self-funded health insurance plan, or a plan through an affiliated party, the employer has a responsibility to ensure that neither the employer nor any other affiliated person profits from the plan.

b. Depending on the structure of the health insurance plan, the employer may be subject to the requirements of ERISA, and the WHI should consider making a recommendation to the DD/ADD for a referral to the Employee Benefits Security Administration (EBSA).

(d) Enforcement

NOT FOR PUBLIC DISTRIBUTION

(1) *Initial conference*

The WHI should ask the employer during the initial conference about any deductions, including those made pursuant to a voluntary assignment of wages. Examples of such questions include:

a. Apart from the Federal Insurance Contributions Act tax (FICA), Medicare, or related deductions required by law, do you make deductions from workers wages?

1. What is the purpose of each deduction?

2. How are these deductions disclosed on the H-2A job order?

3. Are each of the deductions disclosed in the required advertisements?

4. How do you know how much to deduct for each type of deduction?

5. Can the worker cease having the deduction made during the period of employment?

Note: it would be appropriate to request copies of the advertisements and other documentation discussing potential deductions to verify the employer's statements.

b. How do you remit this money?

1. At what interval do you remit deducted amounts (each pay period or at different intervals)?

c. Are any deductions remitted to any other organization?

1. How does the other organization know what dollar amount to attribute to each worker for percentage deductions?

2. Do you provide the other organization a copy of the payroll or wage statements for each pay period?

Note: the WHI should pay particular attention to cases where the employer remits the deductions to another organization, to ensure the organization is not an affiliated party or engaged in the recruitment of workers (in which case the deductions could be prohibited fees (*see* FOH 58e24)).

d. What steps do you take to ensure that workers receive the benefits from deductions?

e. Do the workers sign any type of form authorizing certain deductions to be made?

(2) *Preferential treatment*

NOT FOR PUBLIC DISTRIBUTION

An H-2A employer must offer no less than the same benefits, terms, and conditions to workers employed in corresponding employment as are offered to H-2A workers and must handle deductions and remittances in a manner that does not provide preferential treatment to the H-2A workers. *See* 20 CFR 655.122(a) and FOH 58d02. Note: if a violation is being cited for preferential treatment and for unlawful deductions, it is more appropriate to assess the CMP and collect any back wage due under unlawful deductions.

(3) *Authorization forms*

The WHI should not rely solely on a document signed by a prospective worker stating that he/she has agreed to pay a fee or have a particular voluntary assignment of wages. Rather, the WHI must examine the circumstances surrounding the signing of such documents to ascertain that the agreement was truly voluntary. The WHI should consider the following questions:

a. Who presents the authorization form(s) to the worker?

b. When is the authorization form signed? (At the time disclosure was made, or later?)

c. Is agreeing to one or all of the deductions a *de facto* condition of employment?

d. Is the form written in a language the worker can understand?

e. Does the worker receive a copy of the signed form?

(4) *Voluntary and permissible factors*

The WHI should closely scrutinize an assignment of wages to ensure that a deduction is truly voluntary and permissible and not a *de facto* condition of employment. The WHI should consider such factors as whether:

a. The deduction is initiated at the worker's request

b. The employer or any person acting in the employer's interest or behalf, or any other person derives any profit from the transaction

c. The wages were paid free and clear

d. The worker has an independent choice to have the deduction or not

e. The worker may designate the amount or cease having the deduction made (within administrative practicalities) and designate the disposition of any such deduction

1. Administrative practicalities allow time for the employer to implement the requested change. For example, an employer may not be able to stop a deduction from being made when the employee makes such a request the day before the deduction is scheduled to

NOT FOR PUBLIC DISTRIBUTION

begin, but the employer should take proactive steps to implement the change by the following pay period as long as it is administratively feasible. Similarly, while the employer must allow an employee some ability to designate the amount of the deduction, the employer may provide a limited number of amounts/percentages.

2. Note: it is the totality of the circumstances that controls whether or not the deduction is voluntary and permissible. Although an employer may wait 1 month before making the change, this alone may not be enough to substantiate an impermissible deduction if other factors were met, the employer did not make a profit from the deduction, and the worker received the benefit of the money.

f. The worker's current or future participation in the H-2A program has been impacted by a decision not to have the deduction made

g. The employer (or anyone acting on the employer's behalf or any other affiliated person) has in any manner influenced or coerced the worker in regard to the deduction

(5) *Improper deductions*

In the case of improper deductions, the WHI should pursue the recovery of those deductions and recommend CMPs as appropriate. *See* 29 CFR 501.16. For an H-2A LC who refuses to pay the back wages, or who after agreeing to pay neglects to abide by this agreement, the DD/ADD should contact the regional solicitor of Labor (RSOL) about perfecting a claim on the surety bond.

[12/12/2016]

58e ENFORCEMENT OF WORK CONTRACTS AND REGULATORY STANDARDS

58e00 General.

(a)

(1) 20 CFR 654 and 20 CFR 655 are the ETA regulations, which apply to the labor certification process for the employment of H-2A workers. The policies and procedures for the WHD enforcement of contractual obligations (*see* 20 CFR 655.102) for H-2A workers are found in 29 CFR 501.

(2) WHIs will occasionally encounter H-2A job orders that exempt the employer from certain normal H-2A requirements, such as those concerning hours worked and frequency of pay. Such exemptions are authorized by the ETA per 20 CFR 655.93(b). If such exemptions are not clearly authorized by 20 CFR 655.93(b), the DD and/or ADD should be advised and clarification requested from the ETA RO, which issued the job order.

(3) There is no specific reference to any private rights either in the INA or regulations. Individual workers are free to file a private lawsuit, and they are free to exercise any rights and protections afforded by the INA, regulations, or other law. Section 305 of

NOT FOR PUBLIC DISTRIBUTION

the Immigration Reform and Control Act of 1986 states that a non-immigrant worker admitted under H-2A shall be considered eligible for legal assistance under the Legal Services Corporation Act, but only with respect to wages, housing, transportation, and other employment rights provided in the work contract and/or job order under which the worker was admitted.

(b) Investigative reports regarding violations should contain the evidence needed to support the imposition of regulatory sanctions. (b) (7)(E) [redacted]

(c) H-2A investigation case files, which show violations and for which any of the available sanctions are being recommended or considered, are potential litigation files, and should be prepared with the level of proof and evidence required by FOH 81. The development of this level of proof must be kept clearly in mind from start to finish of an H-2A investigation. [redacted] (b) (7) (E)

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

58e01 **<u>Failed to provide copy of work contract and/or job order (*see* 20 CFR 655.102(b)(14)).</u>**

(a) An employer may have an individual work contract with the worker setting forth the job offer of the employment. Absent such a contract, the job order will be the contract. A copy of the job order must be obtained by the WHI prior to beginning the investigation, and may be obtained from the ETA RA.

(b) The work contract as defined in 29 CFR 501.10(d) includes all material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including at a minimum, those terms and conditions required by the applicable regulation in subpart B of 20 CFR 655, and those contained in the "Application for Worker Employment Certification" and job offer under subpart B.

(c) The work contract shall be provided to the worker no later than on the day the work commences, and shall include the employment benefits that must be stated in the job order as prescribed in 20 CFR 655.102. A general summary of the benefits follows in FOH 58e02 - 25. The contract between the employer and the worker may be in the form of a separate written document, but in the absence of such, the work contract shall be the job order included in the application for temporary labor certification. *See* FOH 58a02.

NOT FOR PUBLIC DISTRIBUTION

(d) (b) (7)(E) [redacted]

(e) There is no requirement under the INA or under the implementing regulations that the work contract or job order must be in a language common to the H-2A worker. However, the provisions of section 201(g) of the MSPA may apply to certain of the workers who are engaged in corresponding employment. This means that the terms and conditions of employment of those workers must be provided to them in a language with which they are familiar.

58e02 **Failed to make and/or keep employer records (*see* 20 CFR 655.102(b)(7)).**

(a) An employer is required to keep accurate and adequate records with respect to the workers' earnings including:

(1) field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed (*see* FOH 58e02(d) -(e) below);

(2) the number of hours of work offered each day by the employer (*see* FOH 58e02(c) below);

(3) the hours actually worked each day by the worker;

(4) the time the worker began and ended each workday;

(5) the rate of pay, both piece rate and hourly, where applicable;

(6) the worker's earnings per pay period;

(7) the worker's home address;

(8) the amount of and reasons for any and all deductions made from the worker's wages; and

(9) if the hours worked by the employee is less than the number of hours called for in the contract as a workday, the records must show the reason or reasons.

(b) Records shall be retained for 3 years after the completion of the work contract and/or job order.

(c) (b) (7)(E) [redacted]

(d) The records kept, which show the nature and amount of work performed, must be descriptive enough that a determination may be made from the records regarding the compliance status of the employer. It is not necessary in any circumstance for the employer to prepare a

NOT FOR PUBLIC DISTRIBUTION

detailed narrative description of the work performed. Simple, descriptive key words, such as "moving irrigation pipe, fence mending, clearing rocks, spot picking," or "strip picking," will suffice. It also is not required that the employer show the percentage of worktime spent on different activities where the contract does not specify the percentage of time spent in various duties and a single rate of pay is effective. The investigation will determine whether the H-2A workers were employed in activities for which the labor certification was granted, and whether the required wages were paid.

(e) Since some H-2A contracts may require different wage rates for different duties performed and/or specify certain percentages of time that must be spent on certain work activities, the following examples are provided to illustrate the above principle:

(1) There are H-2A contracts that specify that 60 percent of total duties must be in irrigation or irrigation-related duties, while allowing 40 percent in general agricultural duties. In this example, the records must describe the nature of work for the hours worked in different activities so that the WHI can determine compliance with the percentages of work distinction stipulated in the contract. (b) (7)(E) [redacted]

(2) An H-2A contract may require a rate of $5.63 for one distinct activity and a rate of $4.75 for another activity. In this example, the records must reflect enough detail so that it can be determined which hours are worked in each activity. (b) (7)(E) [redacted] If the H-2A contract requires one rate for all general agricultural duties, little nature of work duty delineation would be required (assuming all work duties were performed in agriculture).

(f) (b) (7)(E) [redacted]

58e03 **<u>Failed to provide wage statements (*see* 20 CFR 655.102(b)(8)).</u>**

(a) The employer must furnish the workers on or before each payday written statements containing the following information:

(1) Worker's total earnings for the pay period

(2) Worker's hourly rate and/or piece rate

(3) Hours of employment offered to the worker

(4) Hours actually worked

(5) Itemized deductions made from worker's wages

NOT FOR PUBLIC DISTRIBUTION

(6) The units produced daily, if piece rates are used

(b) (b) (7)(E) [redacted]

58e04 **Failed to pay wages when due (*see* 20 CFR 655.102(b)(10)).**

(a) An employer must pay each worker his and/or her wages at least semi-monthly, or in accordance with the prevailing practice in the area of intended employment, if more frequent, as specified in the job order.

(b) (b) (7)(E) [redacted]

(c) When a work contract requires that a worker be paid benefits (*e.g.*, vacation pay) that exceed those required by the job order, (b) (7)(E) [redacted] This type of contract provision is not to be construed as allowing fringe benefits to be paid in lieu of the wage requirements required in the job order.

58e05 **Failed to pay proper rate (*see* 20 CFR 655.102(b)(9)).**

(a)

(1) The required minimum rate of pay that must be enforced by the WHD is prescribed in the job order (ETA Form 790) issued by the ETA.

(2) The employer must pay the worker, if paid by the hour, at least the AEWR in effect at the time the work is performed, the prevailing hourly wage rate, the federal minimum wage, or the state minimum wage rate, whichever is highest, for every hour or portion worked during a pay period. Any applicable prevailing wage rate will be so specified in the job order.

(3) If paid on a piece rate basis and the piece rate does not result, at the end of the pay period, in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate, the worker's pay must be supplemented so that the earnings are at least as much as he or she would have earned during the pay period if the worker had been paid at the appropriate hourly wage rate. The piece rate must not be less than prevailing piece rate for the activity in the area of intended employment. Any applicable prevailing wage or piece rate will be so specified in the job order.

(4) One of the wage rates that WHIs will look to in determining an employer's compliance with this provision is the AEWR. It is important to note that the employer is bound by the AEWR at the time the work is performed. If the AEWR is increased by the ETA, an H-2A employer becomes bound by the new rate. If an H-2A employer was certified in January on a job order calling for an AEWR of $4.07, and the ETA published new AEWRs in February that listed a new AEWR for the employer's state of $4.51, the employer would be bound to pay no less than the $4.51 on or after the date the new AEWRs were published. The ETA RO contract specialist can advise the WHI of the applicable rate(s).

NOT FOR PUBLIC DISTRIBUTION

(5) Sometimes, a job order or work contract may contain more than one applicable wage rate. For example, a prevailing rate set forth in the job order may apply to the picking or harvesting of a crop, but a separate rate, often a catch-all rate, may apply to other, miscellaneous activities that may be required to be performed. The employee must be paid at least the AEWR or the applicable federal or state minimum wage, whichever is higher, for any miscellaneous duties not encompassed by the prevailing rate, whether or not a separate rate is expressly specified in the job order.

(6) A higher than required rate paid for one activity may not be offset against the wages that are required for another activity that has been paid at a rate lower than required. For example, an employee is hired to harvest a crop, and the applicable prevailing rate is $5.00 per row. The employee is also a mechanic, and from time to time, works on the employer's buses. The employee is paid $8.00 per hour for the mechanic work. The required catch-all rate is the AEWR, which is $7.00 per hour. The employee works in a week 40 hours in harvesting the crop, for which he or she is paid $240.00 or the equivalent of $6.00 per hour, and 10 hours as a mechanic. The additional $1.00 per hour paid above the catch-all rate for the mechanic work may not be offset against the employer's obligation to pay at least $7.00 per hour for the time spent harvesting the crop.

(b) Where there is a work contract between the employer and worker, specifying rate(s) higher than the prescribed minimums discussed in the preceding subparagraphs, the higher rate(s) set by the contract must be paid. (b) (7)(E) [redacted]

(c) Neither H-2A workers, nor U.S. workers in corresponding employment may be paid less than the wage rate specified in the job order and/or work contract. When the wage rate in the job order for H-2A workers is higher, the higher rate prevails, since it is also a violation of the H-2A requirements for H-2A workers to be paid more than U.S. workers in corresponding employment.

(d) (b) (7)(E) [redacted] Employees must be paid the required rate for each hour worked. A higher rate paid for one activity may not be offset against a lower rate paid for another activity (*see* FOH 58e05(a)(5)).

(e) (b) (7)(E) [redacted]

58e06 **<u>Failed to pay three-fourths guarantee (*see* 20 CFR 655.102(b)(6) and 20 CFR 655.102(b)(11)).</u>**

(a) An employer shall guarantee each worker payment for three-fourths of the workdays of the total period during which the work contract and/or job order, and all extensions thereof, are in effect. If the worker is employed on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the AEWR, whichever is higher, to calculate any payment due under the guarantee. The computation for determining compliance cannot be done until the contract has been completed.

NOT FOR PUBLIC DISTRIBUTION

(b) If an employer offers a workday with less hours than required (*e.g.*, the contract says a workday is 8 hours and employer only offers 4 hours), the workday does not count. However, for enforcement purposes, if by the end of the contract, the worker has been paid for three-quarters of the required hours, the employer will be considered to be in compliance.

(c) The following examples will illustrate the application of the three-fourths guarantee:

(1) An employer is certified for H-2A workers for a 4-week contract period calling for 8 hours per day, Monday through Friday (*i.e.*, 20 workdays or 160 hours). If all the workers are paid at least the required rate for at least 120 hours (160 multiplied by three-quarters), the employer is considered in compliance with the three-quarter guarantee provision.

(2) If, in the above example, the workers were found to have been paid only for 110 hours, additional investigation would be required. The records of the employer must be reviewed to determine the number of days worked, how many hours of work the employer offered each day, and number of hours the employees actually worked. In this example, the employer offered work on a total of 14 days: 9 days at 8 hours per day and 1 day each at 4, 6, 7, 10 and 11 hours. The workers worked the full number of hours offered. The AEWR called for in the contract is $5.25. Days in which the employer offered less than the full 8 hours of work called for by the contract do count towards the guarantee. Days in which the employer offered more hours than the guarantee and the employee actually worked more hours than the guarantee do count. Note that while an employer may offer more hours than the number called for in the contract, for purposes of meeting the three-fourths guarantee, the worker may not be required to work more than the number of hours called for per day in the contract, or on his or her Sabbath or federal holidays. In this case, the employer may count all 110 hours toward the guarantee. Since the employer in this example was required by the three-fourths guarantee to offer 120 hours of work, the employer owes the workers 10 hours at $5.25 or a total of $52.50 to each worker.

(d) Employers are obligated to comply with the three-fourths guarantee for the entire period of the contract in all instances *except*:

(1) where the employee voluntarily leaves employment early. The employer must notify the local state employment service office when an employee (either H-2A or U.S. worker in corresponding employment) abandons employment;

(2) where the employee is terminated for cause, provided that the employer notifies the local state employment service office when an employee (either H-2A or U.S. worker in corresponding employment) is so terminated; and

(3) where fulfillment of the contract is impossible due to an act of God, under the provisions of 20 CFR 655.102(b)(12).

a. If, before the expiration date specified in the work contract and/or job order, the services of the worker are no longer required due to fire, hurricane, or another act of God, the employer may terminate the work contract and/or job order.

NOT FOR PUBLIC DISTRIBUTION

b. In the event of such termination, the employer shall fulfill the three-fourths guarantee for the time that elapsed from the start of the work contract and/or job order to the time the act of God occurred; failure to do so is a violation of this provision.

(e) If an employer closes down an operation 1 month before the expiration date specified in the work contract and/or job order because of a light crop, the act of God provision is not applicable, and the employer continues to be responsible for the three-fourths guarantee for the whole period, including that month.

(f) A U.S. worker who is employed in a job specified in the job order must receive the protection of the three-fourths guarantee. For example, assume the employer had a year-round employee, who is paid a $300.00 per week salary and engaged in corresponding employment during the 4 weeks of the contract period. In each week, this employee works in a job described in the job order when certification is in effect for 10 hours. The employee also worked an additional 50 hours at other jobs not subject to the H-2A protection. The AEWR in this example is $5.25 per hour. If the year-round employee's total earnings for the labor certification period were less than the earnings derived from multiplying the AEWR by the total hours for three-fourths of the workdays, a back wage payment representing the difference would be due. The year-round employee's total pay for the contract period was $1,200.00 ($300.00 per week multiplied by 4 weeks). The pay required for the three-fourths guarantee in this example is $630.00 (120 hours multiplied by $5.25 per hour AEWR). The year-round employee is, therefore, due no additional wages for the three-fourths guarantee.

(g) (b) (7)(E) [redacted]

58e07 **<u>Illegal deductions (*see* 20 CFR 655.102(b)(13)).</u>**

(a) The employer may make deductions from the worker's paycheck, which are reasonable, and specified in the job order, or required by law. Any deduction, such as savings or insurance, which is not required by law, must be reasonable (normally voluntary), specified in the job order, and be available to all workers (*i.e.*, both H-2A and U.S. employed in corresponding employment), or such deduction will be an illegal deduction. The term "reasonable" ordinarily requires, at the very least, that the deduction be voluntary.

(b) Worker's transportation costs and daily subsistence expenses to the place of employment, which were advanced to the worker may be deducted if the job order so provides. In such instance, the job order shall state that the worker will be reimbursed the full amount of the deduction for such transportation and subsistence upon the worker's completion of 50 percent of the contract period.

(c) Wage statements provided to employees shall state what deductions are being made from the employees' wages. (b) (7)(E) [redacted]

NOT FOR DISTRIBUTION

(b) (7)(E)

[redacted]

(d) Employers subject to the FLSA may not make deductions, considered under the FLSA as a part of the employer's cost of doing business which will result in payments to workers of less than the applicable federal minimum wage rate, even if such deductions are authorized by the job contract. *See* FOH 30c07.

58e08 **Failed to ensure housing safety and health (*see* 20 CFR 655.102(b)(1), 20 CFR 655.102(b)(1)(i) -(iv), and 20 CFR 655.102(b)(1)(vi)).**

(a)

(1) An employer must provide housing without charge to those workers who are not reasonably able to return to their permanent residence in the same day.

(2) The term "permanent residence" shall be applied consistent with its use in the MSPA. Workers who have no permanent residence must be offered housing under this provision. Such workers include any H-2A (*i.e.*, non-domestic) worker, any worker residing outside the normal commuting area or metropolitan statistical area (MSA), or any worker outside the MSA but who acquired temporary housing within the MSA.

(3) Such housing may be at the employer's option, rental, or public accommodation housing.

(4) If an employer makes a *bona fide* offer of approved housing, and the workers decline to occupy the housing and find other housing on their own, the employer shall be considered to have met this H-2A obligation, and shall have no responsibility for the housing the workers found, unless the employer owns, or controls, that housing. However, should such workers decide to exercise their entitlement to housing later in the contract period, the employer would still be required to provide them with approved housing, without charge.

(b) Employer-provided housing must meet the following standards. *See* CFR 655.102(b)(1).

(1) The Occupational Safety and Health Administration (OSHA) standards (*see* 29 CFR 1910.142) will apply to housing whose construction was begun on or after 04/03/1980, and was not under a contract for construction as of 04/04/1980.

(2) The employer has the option of using the OSHA standards or the ETA standards (*see* 20 CFR 654.404) for housing which was completed or under construction prior to 04/03/1980, or was under a contract for construction prior to 03/04/1980.

(3) Housing for workers principally engaged in the range production of livestock must meet the OSHA standards for such housing. In the absence of the OSHA standards, such range housing must meet guidelines issued by the ETA.

NOT FOR PUBLIC DISTRIBUTION

(4) Rental, public accommodation, or other similar class of habitation must meet local standards. In the absence of applicable local standards, state standards shall apply. In the absence of both applicable local or state standards, the OSHA standards shall apply.

(c) If public housing is provided for migrant agricultural workers under the auspices of a local, county, or state government, and charges are required, such charges must be paid by the employer directly to the appropriate individual or entity affiliated with the housing management.

(d) Family housing must be provided to workers with families who request it, when it is the prevailing practice in the area of intended employment and occupation to provide family housing. Such prevailing practice will be determined by the ETA RA and reflected in the job order.

[redacted]

- [redacted] (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

58e09 **Illegal charges for housing (*see* 20 CFR 655.102(b)(1)(v)).**

(a) Charges for bedding or other similar incidentals related to the housing must not be levied upon workers by employers who provide housing for their workers. However, employers may require workers to reimburse them for damage caused to housing by the individual workers responsible for damage, which is not the result of normal wear and tear related to habitation.

(b) Illegal charges for housing are often encountered with U.S. workers in corresponding employment. No housing-related charge (*i.e.*, rents, utilities, deposits, etc.) may be levied by the employer on such workers, employed within the terms of the contract during the contract period, who are not able to return to their permanent place of residence at the end of each workday.

(c)

(b) (7)(E)

(d) If the employer has not provided free, appropriate housing to workers who are away from their permanent residence, the employer is still responsible for any charges made to them for housing, even if those charges are not paid to the employer. If the employer made a *bona fide* offer of approved housing that the workers declined, the employer would not be liable for any charges to the workers for the housing they subsequently found for themselves. As stated in Item 08, if the workers decided to avail themselves of the free housing they are entitled to later in the contract period, the employer is still required to provide it consistent with these provisions.

58e10 **Failed to provide transportation and/or subsistence (*see* 20 CFR 655.102(b)(5)(i) -(ii)).**

NOT FOR PUBLIC DISTRIBUTION

(a) An employer shall advance or provide transportation and subsistence costs to all workers when it is the prevailing practice of non-H-2A agricultural employers in the area to do so, or when such benefits are extended to H-2A workers.

(b) The amount of the transportation payment shall be no less than the most economical or reasonable similar common carrier transportation charges for the distances involved.

(c) If the employer has not advanced or provided such transportation and subsistence costs to the worker, and the worker has completed 50 percent of the work contract and/or job order period, the employer shall pay the worker for transportation and daily subsistence from the place where the worker was hired to work for the employer to the place of employment. This payment shall be made promptly after 50 percent of the contract has been completed. The following examples will illustrate the application of this provision:

(1) A group of U.S. workers in Miami, Florida contact an H-2A employer in the state of New York by phone. The workers are hired by the employer but are not advanced transportation and subsistence. When the workers complete 50 percent of the contract period, the employer must reimburse the workers for transportation and subsistence for the trip from Miami.

(2) Three U.S. workers who are residents of Lubbock, Texas travel on their own to Boise, Idaho. In Boise, they visit the JS office and are referred to an H-2A employer in Hamer, Idaho. The employer is not obligated by the job order to advance transportation and subsistence. When the workers complete 50 percent of the contract period, they must be reimbursed for the transportation and subsistence costs from Boise to Hamer.

(d) The amount of the daily subsistence payment shall be at least as much as the employer will charge the worker for providing three meals a day during employment. If the employer does not charge for meals, the workers must be paid $5.26 per day, or as provided in 20 CFR 655.102(b)(4) for subsistence.

(e) Where an H-2A worker, or U.S. worker engaged in corresponding employment only works a short period of time (*e.g.*, one week), in addition to complying with the H-2A requirements, the employer must pay the worker at least the FLSA minimum wage for the hours worked, after taking into consideration any amount the employee paid for transportation. The employer may not recover the transportation and subsistence payments made if the result is to cut into the FLSA minimum wage. *See* FOH 30c07.

(f)

(1) If the worker completes the work contract and/or job order period, the employer shall provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker came to work for the employer. The employer is not required to pay such expenses if the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation from the employer's worksite to the subsequent employer's worksite.

(2) When the workers complete the contract in the state of New York, the employer must provide or pay for their transportation and subsistence for return to Miami. The

NOT FOR PUBLIC DISTRIBUTION

employer is required to pay the reimbursement to Miami, Florida even if the workers have decided to stop in South Carolina, rather than return immediately to Miami. However, if the workers had contracted with an H-2A employer in South Carolina, and that employer had agreed to provide or pay for the worker's transportation and subsistence from New York, the New York employer is not required to pay any travel or subsistence. If the H-2A employer in South Carolina did not agree to provide or pay for the worker's transportation and subsistence, the New York employer would be required to reimburse the workers only as far as the location in South Carolina and not Miami.

(3) When the three workers complete the full contract period in Hamer, the employer is obligated only to pay their transportation and subsistence to Boise, Idaho, regardless of where the workers are going after that. For example, if the workers have contracted with an H-2A employer in California, and that employer has not advanced or paid for the workers transportation to California, the employer in Hamer, Idaho would still only be obligated for the transportation and the like to Boise.

(g)

(1) If, before the expiration date specified in the work contract and/or job order, the services of the worker are no longer required due to fire, hurricane, or another act of God, which makes the fulfillment of the contract impossible, the employer may terminate the work contract and/or job order.

(2) The employer will make efforts to transfer the worker to other acceptable comparable employment. If such transfer is not affected, the employer shall return the worker, as discussed in FOH 58e10(f) above, to the place from which the worker came to work for the employer.

(3) The employer shall reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment (*i.e.*, inbound costs), regardless of whether or not 50 percent of the original contract period has expired.

(h) If the worker quits or is discharged for cause, and the employer notifies the local JS office of that fact, the employer is not obligated to pay transportation and/or subsistence to the worker.

58e11 **<u>Failed to provide safe transportation vehicles (*see* 20 CFR 655.102(b)(5)(iii)).</u>**

(a) An H-2A employer must furnish transportation between the worker's living quarters and the worksite, and the DOL regulations require that "such transportation will be in accordance with applicable laws and regulations." Thus, an employer of H-2A workers must always comply with applicable state law. In addition, the regulations of the Federal Motor Carrier Safety Administration in 49 CFR 398 apply to the transportation of agricultural workers for trips that are greater than a distance of 75 miles *and* across the boundary line of a state or of the U.S. A determination as to the applicable laws must be made based on the facts disclosed in the investigation. The following examples will illustrate this provision:

(1) The information obtained during the investigation and the observations by the WHI of the vehicles reveal nothing in the manner of transporting the workers or in the condition of the vehicles used to transport the workers that presents a hazard or

NOT FOR PUBLIC DISTRIBUTION

danger to the workers. No further efforts are required by the WHI to seek to apply such other federal, state, or local laws or regulations.

(2) WHIs are conducting an investigation of an employer who is subject to the MSPA and certified to hire H-2A workers. The WHIs determine that 5 H-2A workers are employed according to the job order, and 10 U.S. workers are employed on a different crop and are *not* corresponding workers. The employer uses a bus to transport the U.S. workers, which is found in compliance with the MSPA. The employer transports the H-2A workers over the public highways in the back of an open pickup truck and never transports them in any other vehicle, and never transports any of the U.S. workers with the H-2A workers. Prior to the investigation, the WHIs were advised by the DD and/or ADD that the state law prohibits any person from carrying passengers in the back of an open pickup truck over the public highways.

(3) (b) (7)(E) [redacted]

(b) If the employer of H-2A workers is also subject to the MSPA, the vehicles used to transport H-2A workers *and* other agricultural workers (who need not be employed in corresponding employment) are subject to the MSPA safety requirements. (b) (7)(E) [redacted] Since H-2A workers are not covered employees under the MSPA, vehicles used by a MSPA-covered employer to carry only H-2A workers are not covered under the MSPA.

(c) The requirement to provide workers with transportation between their living quarters and the work site (*see* 20 CFR 655.102(b)(5)) is not applicable to workers who are local residents (*i.e.*, are returning to their permanent place of residence at the end of the workday).

(d) (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

58e12 **Failed to provide meals at reasonable cost (*see* 20 CFR 655.102(b)(4)).**

(a) The employer shall provide each worker with three meals a day where the employer has centralized cooking and eating facilities designed to feed workers. Where these facilities are not available, the employer shall furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals.

(b) Where the employer provides the meals, the job offer shall state the charge, if any, to the worker for the meals.

(c) The charge shall not be more than $5.26, including tax, a day unless the RA of the ETA has approved a higher charge pursuant to 20 CFR 655.111 of the ETA regulations. The charge will change each year by the same percentage as the 12 month percent change in the Consumer Price Index for All Urban Consumers for Food between December of the year just concluded and December of the year prior to that.

(d) An employer who provides free meals to H-2A workers is obliged to provide free meals to U.S. workers engaged in corresponding employment. However, there is no requirement that any employee be given meal pay. If an employer delivers a meal to the H-2A workers in the field, the employer must make the meal available to the U.S. workers in corresponding employment at the same charge made to the H-2A workers. If an employer discharges the obligations for meals by a variety of methods (*i.e.*, cater one meal and provide facilities for the workers to cook the other two meals for themselves), the employer may charge for the meals, prorated on a ⅓ basis per day for each meal provided.

(e) When the employer actually provides the meal, thereby incurring the cost of the meal, and the worker elects not to eat the meal for health or other personal reasons, the employer may deduct the charge specified in the contract provided there is no separate agreement to the contrary.

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

58e13 **Failed to provide necessary supplies at no charge (*see* 20 CFR 655.102(b)(3)).**

(a) The employer shall provide to the employee, without charge including deposit charge, all tools, supplies, and equipment required to perform assigned duties; however, the employer may charge the worker for reasonable costs related to the worker's refusal or negligent failure to return any property furnished by the employer or due to such worker's willful damage or destruction of such property.

(b) Where it is a common practice in the particular area, crop activity, and occupation for workers to provide tools and equipment, with or without the employer reimbursing the workers for the cost of providing them, such an arrangement is permissible if approved in advance by the RA of the ETA, and set forth in the job order.

[redacted] (b) (7)(E) [redacted]

58e14 **Failed to provide worker's compensation (*see* 20 CFR 655.102(2)).**

(a) The employer shall provide, at no cost to the worker, insurance under a state worker's compensation law or otherwise. The insurance shall cover injury and disease arising out of and in the course of the worker's employment, and shall provide benefits at least equal to those provided under state worker's compensation law, if any, for comparable employment.

(b) The employer shall furnish the name of the insurance carrier and the insurance policy number, or, if appropriate, proof of state law coverage to the RA of the ETA prior to the issuance of a labor certification.

(c) An employer may violate this provision of H-2A in the following ways:

(1) Fail to provide worker's compensation coverage to any worker employed under the job order

(2) Cancel compensation insurance coverage on any worker during the period of the worker's employment

(3) Transfer to the employee any portion of the cost of providing worker's compensation insurance. Note that where this is encountered, it almost certainly will result in a violation of FOH 58e07 as well.

(d)

(1) (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

58e15 **Illegal dismissal of workers engaged in corresponding employment (*see* 20 CFR 655.103(c)).**

(a) No worker engaged in corresponding employment may be rejected for or terminated from employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the local JS office.

(b) There are two potential violations of this provision:

(1) Failure to notify local JS office of all terminations and rejections. (b) (7)(E) [redacted]

(2) Rejection or termination of a corresponding worker for other than a lawful job-related reason. The following is an example of this type of violation:

(b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) A WHD violation of this section may also be a violation under the ETA rules. Forward the findings to the appropriate ETA RO for its appropriate disposition.

NOT FOR PUBLIC DISTRIBUTION

58e16 **Preferential treatment given to H-2A workers (*see* 20 CFR 655.102(a)).**

(a) The employer's job offer to workers engaged in corresponding employment shall offer such workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers.

(b) Additionally, no job offer may impose on workers engaged in corresponding employment any restrictions or obligations that will not be imposed on the employer's H-2A workers.

(c) No changes can be made in the benefits, wages, or working conditions of the job order unless approved by the ETA RA.

(d) (b) (7)(E) [redacted]

58e17 **Discrimination against worker testifying, etc. (*see* 29 CFR 501.3).**

(a) No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has taken the following actions under section 216 of the INA or 29 CFR 501:

(1) Filed a complaint

(2) Instituted or caused to be instituted H-2A proceedings

(3) Testified, or is about to testify, in any H-2A proceedings

(4) Exercised or asserted on behalf of himself, herself or others any right or protection afforded by the INA or the regulations

(5) Consulted with an employee of a legal assistance program or an attorney on matters related to section 216 of the INA (*see* 8 USC 1186) or to this subpart, or any other DOL regulation promulgated pursuant to section 216 of the INA

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

58e18 **Procure waiver of rights (*see* 29 CFR 501.4).**

(a) No person shall seek to have an H-2A worker, or other worker employed in corresponding employment by an H-2A employer, waive rights conferred under section 216 of the INA or under 29 CFR 501.

(b) (b) (7)(E) [redacted]

58e19 **Failed to permit investigation (*see* 29 CFR 501.5).**

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

58e20 **Interfered with DOL official (*see* 29 CFR 501.6).**

(a) No person shall interfere with any official of the DOL assigned to perform an investigation, inspection, or law enforcement function pursuant to the INA or 29 CFR 501.

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

58e21 **Knowingly provided false information to the DOL (*see* 29 CFR 501.7)**

(a) Any person who knowingly and willfully provides false information to the DOL is subject to 18 USC 1001, which allows for a fine of not more than $10,000.00 or imprisonment of not more than 5 years, or both. Section 1001 says in part, "... knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements, or representations, or makes or uses any false writing or

document knowing the same to contain any false, fictitious or fraudulent statement or entry..."

(b) (b) (7)(E) [redacted]

58e22 **Failed to provide records (*see* 20 CFR 655.102(b)(7)(iii)).**

(a) Upon reasonable notice, an H-2A employer must make available the records, including field tally records and supporting summary payroll records, for inspection and copying:

(1) by representatives of the Secretary, and

(2) by the worker and representatives designated by the worker.

(b) (b) (7)(E) [redacted]

58e23 **Failed to comply with employment-related laws (*see* 20 CFR 655.103(b)).**

(a) During the period for which a certification is granted, an employer must comply with all applicable federal, state, and local employment-related laws and regulations, including employment-related health and safety laws. Violations of this provision include violations of the FLSA, the MSPA, OSHA standards, state wage laws, and local health department housing standards.

(b) (b) (7)(E) [redacted]

58e24 **Unlawful cost-shifting (prohibited fees) (20 CFR 655.135(j)).**

(a) **Overview**

Under the H-2A program, deductions that shift the costs for any activity related to obtaining the H-2A labor certification (*e.g.*, employer's attorneys' fees, application fees, or recruitment costs) are prohibited. Deductions also cannot be made for wage concessions, kickbacks, bribes, tributes, in kind payments, and free labor. Field Assistance Bulletin No. 2011-2, "H-2A Prohibited Fees and Employer's Obligation to Prohibit Fees," issued 05/06/2011 enumerates the prohibited fees under the H-2A program.

(b) **General**

NOT FOR PUBLIC DISTRIBUTION

The H-2A regulatory prohibition against the unlawful cost-shifting of prohibited fees applies to *any activity* related to obtaining H-2A labor certification and applies equally to both foreign and corresponding workers. In every H-2A investigation, the WHI should inquire about and thoroughly document whether any prohibited fees were charged to covered workers.

The WHI should also examine, through interviews of workers and others such as recruiters, low-tier recruiters, agents, and others engaged in activities on an employer's or agent's behalf, and any other relevant documentation that can be obtained, if a worker has paid a fee or other such cost that should have been borne by the employer, whether to the employer or a person acting on the employer's behalf.

Particular attention should be paid to the agent when the agent represents multiple employers found in violation of this provision. Note: an agent may be debarred from program participation when WHD finds that the agent participated in an employer's substantial violation. *See* 29 CFR 501.20(b).

The employer is responsible for the acts of its agent based on the employer's delegation of authority to the agent. This delegation can be directly stated either orally or in writing or may be an implied authority. If the agent is acting within the scope of the delegated authority, the employer is responsible for violations of the agent and/or recruiter, including the deduction of prohibited fees.

(c) Guidance for determining which costs should be borne by the employer

The recruitment, legal, and other costs associated with filing a temporary labor certification application are business expenses necessary for, or in the case of legal fees, desired by, the employer to complete the labor market test and to prepare and submit the labor certification application. The employer's responsibility to pay the costs of preparing an application exists separate and apart from any potential benefit that may accrue to the foreign worker as a result of the employer filing the application. Prohibited fees include:

(1) *Recruitment fees*

Employers are prohibited from passing on fees associated with the recruitment of workers, such as referral fees, retention fees, transfer fees, or similar charges. Any fee that facilitates an employee obtaining the visa in order to be able to work for that employer will be considered a recruitment fee.

a. <u>Exceptions</u>

If the fee is for an item or service that may be used outside the recruitment process, the employee may bear that cost. For example, a passport can be used for personal purposes and not just for travel in connection with the H-2A visa, and therefore, the employee can bear the cost.

Employees may also be charged some fees by independent facilitators for services voluntarily requested by the H-2A employee. For example, if a prospective employee voluntarily seeks assistance from an independent third party in preparing his or her own visa application, the employee who would otherwise have the option to prepare his or her own application may pay a

NOT FOR PUBLIC DISTRIBUTION

fee for that service. An independent, third party does not include anyone engaged directly or indirectly by the employer in international recruitment of H-2A workers.

b. Fees as a condition of employment

Certain fees may be paid by employees only if they are not made a condition of access to the job opportunity. In other words, employees cannot be required to bear such costs if they are *de facto* recruitment fees charged for access to the H-2A job. If an employee lacks a meaningful opportunity and an independent choice to refuse or decline the service that requires the payment of the fee, the fee is a condition of employment. An example would be an employer-required background check or medical exam. Whether a fee is a condition of employment will depend on the totality of the circumstances, including but not limited to:

1. The number of H-2A workers who have opted out of the payment of the fee

2. Whether an H-2A worker has been given sufficient time and information to understand the offer of the service for which the fee was paid

3. The level of the worker's education and/or experience and the relative bargaining power of the worker compared to the recruiter, facilitator, or employment service.

c. Authorization forms

The signing of a document by a prospective worker stating that he/she has agreed to pay a fee does not, in and of itself, establish that the fee is voluntary. Such documents and the circumstances surrounding the signing of the document will be closely scrutinized in order to ascertain the bona fides (the evidence or proof) of the assertion that it was voluntarily signed and that the party receiving or accepting the fee was truly an independent third party.

(2) *Government-imposed costs*

Government-mandated fees such as visa application, border crossing, and visa fees (including those imposed by the U.S. Department of State (DOS) or other government contractors) are integral to the employer's choice to use the H-2A program to bring foreign workers into the country. Such expenses provide no benefit to the employee other than for that particular limited employment situation. A visa fee for an H-2A visa is one directly attributable to the employer's need for the worker to enter the U.S. to work for the employer. As such it is not reimbursable from the employee to the employer. Requiring employers to bear the full cost of their decision to import foreign workers is a necessary step toward preventing the exploitation of foreign workers, with its associated adverse effect on U.S. workers.

Government-required fees associated with obtaining a visa include the following:

NOT FOR PUBLIC DISTRIBUTION

a. Visa application fee (for example, $190.00 as of April 13, 2012 to Banamex in Mexico)

b. Consulate interview fee ($26.00 to a third-party contracted by DOS in Mexico)

c. Random fingerprinting at the consulate ($85.00)

d. Visa issuance fee (formerly $100.00, but eliminated as of February 2, 2010 in Mexico)

The amounts of such fees may differ depending on the country of origin and whether the U.S. has a reciprocity agreement with the country to not charge the visa issuance fee. In addition, the visa application fees change periodically, so the costs reflected here may not be the same as the amount paid when the worker applied for the visa. As these fees may also vary by worker, the WHI should gather thorough interview statements about the actual costs incurred for these types of fees. When the evidence for some workers indicates a different payment than that made by other workers, the evidence should be carefully weighed when computing monies due for workers not interviewed.

(d) Remedies and sanctions

(1) *Citing the violation*

If a determination is made that a worker has paid a fee or other cost that should have been borne by the employer and such monies have not been fully reimbursed in the worker's first paycheck, the failure to comply is a violation of 20 CFR 655.135(j). Restitution of the unpaid monies shall be sought and potential CMPs computed consistent with current policies and procedures.

If the shifted costs *have been fully reimbursed* in the first paycheck, then there is no violation. *See* 75 FR 6884 and 75 FR 6925 (February 12, 2010). If the reimbursement is made over several pay periods but the worker has been fully reimbursed by the time of the investigation, then although no back wages are due, a violation of 20 CFR 655.135(j) should still be cited and a CMP computed. The fact that the monies have been fully reimbursed should be considered in mitigating the CMP amount. Note: a violation exists for this item whenever costs that should be borne by the employer are shifted to the worker and full reimbursement has not been made in the first paycheck, even if the lack of reimbursement does not reduce the wages below the H-2A required wage rate (because the worker is paid a higher amount).

If the employer cannot document that the employer's agent (or other persons acting on the employer's behalf to recruit the H-2A worker(s)) were contractually forbidden to charge workers fees (or other monies) for obtaining the employment, the employer may be cited for failing to comply with 20 CFR 655.135(k) (*see* FOH 58e25 below).

a. <u>Violations of other federal regulations</u>

NOT FOR PUBLIC DISTRIBUTION

Note: assurances and obligations required under DOL regulations are both independent of and complimentary to those of other federal agencies with responsibilities under the H-2A program (*i.e.*, the U.S. Department of Homeland Security (DHS) and DOS). The DHS regulations (*see* 8 CFR 214.2(h)(5)(xi)(A)) prohibit the payment of job placement fees or other compensation as a "condition of H-2A employment." DHS also references 20 CFR 655.104(h), stating that the actual costs of transportation, government-mandated passport, visa, or inspection fees are not prohibited under DHS regulations to the extent that the payment of such costs and fees is not prohibited by DOL regulations.

If the WHI encounters an employer or agent for the employer seeking or receiving a fee that is not prohibited under DOL's regulations, but is prohibited under a regulation enforced by DHS or DOS, fully document the violation and assert it as a violation of 20 CFR 655.135(e) (failure to comply with employment-related law). If appropriate, the WHI should make a recommendation for referral to the ADD/DD who will then determine if the recommendation should be made to the RO.

b. Debarment

Violations of 20 CFR 655.135(j) and (k) may be grounds for debarment, and the WHI should, therefore, consider debarment in every case.

If the employer conferred agency authority on an agent and/or recruiter who received a prohibited fee and the WHI can prove through case documentation that the agent and/or recruiter participated in the substantive violation, a recommendation for debarment for both the agent and employer may be appropriate. If an agent appears to have a pattern or history of violations, the WHI should consult their DD/ADD, who will then discuss the matter with the regional agriculture coordinator.

[12/12/2016]

58e25 Failed to contractually forbid cost-shifting (20 CFR 655.135(k)).

(a) Employer's obligation

Whether verbally or in writing, the employer is required to inform those who recruit prospective employees, whether directly or indirectly, on its behalf that they may not seek or receive payment from prospective employees for any cost which is to be borne by the employer.

(b) Enforcement guidance

(1) *Determining whether a violation exists*

To make such an assurance necessitates that the employer (either directly or through its agent) has taken affirmative, specific action to contractually prohibit such parties from seeking or from receiving such payments. The fact that no prohibited fees were

NOT FOR PUBLIC DISTRIBUTION

sought or received from workers does not mean the employer has fulfilled this obligation.

In the initial conference, the WHI should explore how the employer handles costs associated with obtaining the H-2A certification. This includes the information the employer posts online or in other advertisements. The WHI should also inquire about how the employer ensures these and other costs are not shifted to the employee during the recruitment process and even after the work commences. It is particularly important to obtain information about the employer's role in the recruitment process, and what, if any, good faith steps the employer has taken to ensure that workers are not charged fees for access to the job.

(2) *Written contract*

The existence of a properly executed, legally binding written contract that meets the above stated criteria will be considered *prima facie* evidence of compliance with the regulation (i.e., accepted as compliance unless proven otherwise). However, the regulations do not specifically or explicitly require the existence of a written contract. Even in the absence of a written contract, there must be mutual agreement between the parties as to the terms of the contract/agreement and mutual acceptance of the terms. The terms of the contract/agreement must be sufficiently specific so as to not be vague or uncertain.

In the absence of a legally binding written contract, assertions that purport to contractually forbid an agent, foreign labor contractor, or recruiter from charging fees to workers for obtaining the job may not shield the employer from potential liability. If it is determined that the employer knew or reasonably should have known that the H-2A worker paid or agreed to pay a prohibited fee to a foreign contractor or recruiter, the employer can still be in violation of 20 CFR 655.135(j). An example of how the employer reasonably should have known would be if the employer knew that the agent and/or recruiter was soliciting payments from workers in the past and, in spite of this knowledge, continued to use the same agent and/or recruiter. Another example would be if a worker, upon arriving at the worksite, informed the employer that the agent and/or recruiter required the payment of a fee, and the employer took no action to remedy this prohibited payment.

(3) *Good faith efforts to comply*

Should the circumstances demonstrate that the employer made a good faith effort to ensure that prohibited fees are not required of its workers, the WHI will take the circumstances into consideration in determining whether a violation occurred.

(4) *Sanctions and remedies*

Violations of the regulation are to be sanctioned and remedied in accordance with established policies and procedures. Note: this includes recovery of recruitment fees paid in the absence of contract clauses required by 20 CFR 655.135(k). Violations of 20 CFR 655.135(j) and (k) are both enumerated as debarable violations, and the WHI should consider debarment.

(5) *Subsequent investigations*

NOT FOR PUBLIC DISTRIBUTION

If the WHI finds that the regulatory provisions for contractually forbidding cost-shifting were not met, the WHI must inform the employer of the requirement. In any subsequent investigation, when it can be demonstrated based on documentation in the case file that the requirement was previously explained to the employer, the violation is to be treated as willful.

[12/12/2016]

58e26 Failed to comply with notification requirements for abandonment or termination for cause at 20 CFR 655.122(n).

(a) Requirement

(1) *Important functions of the notification requirement*

a. Notification to DOL provides a means by which ETA, Office of Foreign Labor Certification (OFLC) can provide information to the State Workforce Agencies (SWAs) to share with potential employees about the newly available employment opportunity.

b. Notification to DHS of the abandonment of employment or termination for cause of an H-2A visa worker better enables DHS to carry out its important homeland security functions.

c. Finally, and important to the WHD in discharging its enforcement responsibilities for the H-2A program, such notice allows for timely inquiry about the facts underlying the claimed abandonment or termination for cause.

(2) *Change over time in the notification requirement*

How notification is to take place has changed over time and care must be taken to ensure that failure to properly notify violations are appropriately investigated and documented. Field Assistance Bulletin No. 2012-1, "H-2A 'Abandonment or Termination for Cause' Enforcement of 20 CFR 655.122(n)," issued February 28, 2012, provides the notification requirements for abandonment or termination for cause under the 1987, 2008, and 2010 Rules and is publicly available at http://www.dol.gov/whd/FieldBulletins/fab2012_1.pdf.

The 2010 Rule requires that written notification be made no later than 2 working days after the abandonment or termination occurs. Such notification may be made by one of the following means:

a. e-mail to H2A.abandonment&termination.chicago@dol.gov,

b. written notification by facsimile to (312) 353-6666, or

c. U.S. mail to:

U.S. Department of Labor

Employment and Training Administration

NOT FOR PUBLIC DISTRIBUTION

Office of Foreign Labor Certification

Chicago National Processing Center

536 South Clark Street, 9th Floor

Chicago, Illinois 60605-1509

(b) Enforcement considerations

(1) *Claims of abandonment or termination for cause*

The WHI must appropriately investigate any claims that workers have abandoned employment or have been terminated for cause because of the potential for abuse in an effort to evade transportation, subsistence, and three-quarter guarantee obligations. The underlying facts of any such assertion must be explored through interviews and any other relevant documentation that can be obtained.

(2) *Fraud or misrepresentation*

Fraud or misrepresentation must be fully documented and appropriate sanctions, including debarment or referral for criminal prosecution, should be discussed with the RO and National Office Division of Enforcement Policy and Procedures (DEPP), Immigration and Farm Labor Branch (IMM & FL). Referral to ETA/OFLC and DHS for the violation of their respective notice requirements is to be made via appropriate channels through the regional agriculture coordinator or the director of enforcement, depending on RO communication protocols. A copy of any such referral to ETA/OFLC or DHS should also be sent to DEPP, IMM & FL.

Even where notification has been made, it is important to address the reasons associated with the worker's departure from employment. The factual basis underlying any notification is subject to review during an investigation and if the investigation finds that fraud, misrepresentation, or other violations are present, the employer would not be relieved from the three-fourths guarantee requirement nor from the obligation to provide outbound transportation.

If, for example, it is determined that the employer told the workers to leave before the end of the contract period (when there may be little or no work left to perform) and then provided notification, the employer would not be relieved of the three-fourths guarantee and outbound transportation obligations. Similarly, if the worker is found to have been constructively discharged due to the types of working conditions described below in FOH 58e26(b)(3)b., this is not abandonment and the employer is not relieved of these obligations.

(3) *Circumstances of failure to notify*

Determining the appropriate sanctions and remedies when an employer fails to qualify for relief from transportation, subsistence, and three-fourths guarantee requirements because it has not satisfied the notification provisions is dependent upon the circumstances of the failure to notify and the circumstances of the worker's departure:

NOT FOR PUBLIC DISTRIBUTION

a. Voluntary abandonment

In many cases, abandonment is apparent to the employer (*e.g.*, a worker tells the employer his last day will be next Friday; or a worker tells the employer he quits and walks off the job). However, in some instances the worker simply does not return to work. In such cases, the regulation provides that abandonment of employment "will be deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer."

The mere fact that a worker departed the place of employment prior to the end of the contract period should not be accepted as conclusive evidence that the departure was voluntary or that the worker intended to abandon employment. Reasonable efforts (documented in the case file) need to be made to obtain interview statements in order to determine whether a worker's departure was in fact voluntary. Interviews of current workers about the conditions earlier in the season may provide evidence of whether other workers had a basis to leave for reasons that were not truly voluntary.

b. Constructive discharge

Enforcement experience has shown that some employers seek to influence workers to leave a job prior to the end of the contract period. This may occur at any point during the contract period and can manifest itself in various ways. Further, if a worker departs employment because working conditions have become so intolerable that a reasonable person in the worker's position would not stay, the worker's departure may constitute a constructive discharge and not abandonment. *See* examples below.

In order to determine if the departure was constructive discharge, the WHI must conduct a fact-specific inquiry into the events leading up to the worker's departure from the job. Constructive discharge exists when the terms and conditions of the worker's employment were effectively altered by the employer's conduct so as to make the working conditions so difficult that a reasonable person would have felt compelled to leave the job. This needs to be substantiated by the WHI. RSOL must be consulted early on in the investigation whenever the facts indicate that constructive discharge may be involved.

Constructive discharge may occur in a wide variety of situations in the H-2A context. Constructive discharge may exist:

1. when a worker leaves the job because the housing conditions are intolerable and violate in a significant manner substantive safety and health standards, such as those that provide fire prevention, an adequate and sanitary supply of water, structurally sound construction of buildings and effective maintenance thereof, adequate heat as weather conditions require, and reasonable protections from insects and rodents. The WHI must substantiate such claims through safety and health inspections by WHD, OSHA or the state. If some workers leave the housing but others stay, the

NOT FOR PUBLIC DISTRIBUTION

WHI should interview workers from both groups to make a determination about whether other factors influenced the decision to leave. This determination should be based on the specific facts of each investigation.

2. where a worker departs work because, even after raising concerns to the employer, the worker is required to labor in a field that has been recently sprayed with a pesticide before the required re-entry interval has elapsed. The WHI should document these claims through interviews.

3. when a worker departs the job because he or she has received no work assignments for an extended period of time, despite being available and willing to take on new work. An extended period of time extends beyond a few days without work. This situation is distinguishable from several days of rainy weather when work is not available to all workers in contrast to when work is being offered to a number of other workers, but not available to one worker.

c. Termination for cause

Generally, "termination for cause" refers to termination based on specific act(s) of omission or commission by the employee and the WHI needs to inquire into the circumstances surrounding the termination of the worker's employment.

Examples of termination for cause include: insubordination, deliberately violating company policies or rules, lying, stealing, breaching the employment contract, and other job-related misconduct.

It is also necessary to remember that the regulations specifically prohibit any person from intimidating, threatening, restraining, coercing, blacklisting, discharging, or in any manner discriminating against any person who has in connection with H-2A filed a complaint, instituted or caused to be instituted any proceedings, testified or is about to testify in any proceeding, consulted with an employee of a legal assistance program or an attorney, or exercised or asserted on behalf of himself/herself or others any right or protection afforded under H-2A (*see* 29 CFR 501.4(a)).

The WHI should examine the job order or work contract to determine if the termination comports with the specific productivity and other job-related requirements that were approved by ETA during the H-2A application process. However, the fact that a worker is terminated for failing to comply with a company policy that was not included on the job order or in the work contract is not necessarily indicative that the termination was not for cause. Note: some company policies, such as a rule that failure to show up on time after three notices results in termination, may fall outside the scope of the H-2A program. In such an instance, the WHI should examine whether the policy was applied equally to both U.S. and H-2A workers and was therefore a bona-fide termination for cause, or whether it was used arbitrarily to terminate specific workers.

NOT FOR PUBLIC DISTRIBUTION

(c) Remedies

(1) *Worker voluntarily abandoned employment or was terminated for cause*

a. First investigation

1. Back wages

If the WHI finds that the regulatory provisions for notification were not met but the worker either voluntarily abandoned employment or was terminated for cause, the employer will not be required to pay its former employees for transportation, subsistence or three-fourths guarantee requirements.

2. CMPs

If the employer has not been previously told of the notification requirements, no CMPs will be computed or assessed pursuant to 20 CFR 655.122(h) or 655.122(i) for failing to pay transportation and subsistence, or the three-fourths guarantee, or 20 CFR 655.135(e) for failing to comply with other laws (*i.e.*, the DHS notice requirement).

3. Notice

The WHI must specifically inform the employer and agent (if any): of the notification requirement for relief, that a subsequent failure to meet this requirement may result in WHD seeking other remedies and sanctions including but not limited to CMPs, and that a failure to notify DHS may result in sanctions for violating another law. The WHI must provide the employer and agent (if any) with written information about the notice requirement, and document this in the case file.

The requirement to provide written information about this provision may be met by providing a copy of Field Assistance Bulletin No. 2012-1, "H-2A 'Abandonment or Termination for Cause' Enforcement of 20 CFR 655.122(n)," issued February 28, 2012. This notice is publicly available at http://www.dol.gov/whd/FieldBulletins/fab2012_1.pdf.

b. Subsequent investigations

1. Back wages

If the WHI finds that the regulatory provisions for notification were not met but the worker either voluntarily abandoned employment or was terminated for cause, the employer will not be required to pay its former employees for transportation, subsistence, or three-fourths guarantee requirements.

2. CMPs

NOT FOR PUBLIC DISTRIBUTION

In any subsequent investigation, when abandonment is voluntary or termination is for cause, and it can be demonstrated based on documentation in the case file that the DHS notification requirement and the WHD notice provisions for relief were previously explained to the employer, the violation is to be treated as willful.

CMPs for willful violations of the requirement to comply with other laws and the requirements to pay for transportation, subsistence and the three-fourths guarantee are to be computed using the $5,000.00 base amount, applying the appropriate mitigating factors, and the criteria for debarment are to be considered and fully documented. Similarly, referral to DHS for the violation of its notice requirement should be considered. If no notice to DHS, U.S. Citizenship and Immigration Services (USCIS) is made, the file must contain a note explaining why no notice to USCIS was made. CMPs may also be assessed for a violation (or where appropriate, a willful violation) where the employer has failed to satisfy the requirements relating to transportation, subsistence, and the three-fourths guarantee.

(2) *Worker's abandonment was not voluntary or termination was not for cause*

a. First investigation

1. Back wages

If the WHI determines that the regulatory provisions for notification have not been met, this is the first time such a finding has been made, and the worker's abandonment was *not* voluntary or termination was *not* for cause, computation of the three-fourths guarantee (*see* 20 CFR 655.122(i)), return transportation, and subsistence monies (*see* 20 CFR 655.122(h)(2)) is appropriate.

Reinstatement or other appropriate make-whole relief for any U.S. worker improperly laid off or displaced may also be sought pursuant to 29 CFR 501.16(a)(1). Make whole relief is computed based on the average number of hours worked by workers on the contract. At a minimum, make whole relief is the three-fourths guarantee.

2. CMPs

CMPs for violations of 20 CFR 655.122(i) and .122(h)(2) are computed by multiplying the base amounts (*i.e.*, $1,500.00 under the 2010 Rule, or $1,000.00 under the 2008 Rule) times the number of violations (*i.e.*, the number of notifications not properly made), and the subtotals are then reduced by 10 percent for each mitigating factor, if any.

b. Subsequent investigations

1. Back wages

NOT FOR PUBLIC DISTRIBUTION

The same guidance on computing back wages as provided above in FOH 58e26(c)(2)a. on a first investigation applies in any subsequent investigation.

2. CMPs

In any subsequent investigation, when abandonment is not voluntary or termination is not for cause, and it can be demonstrated based on documentation in the case file that the employer previously violated these requirements, such violations are to be treated as willful, using the $5,000.00 base amount and applying the mitigating factors as appropriate.

[12/12/2016]

58f SANCTIONS

58f00 General.

(a)

(1) 29 CFR 501.16(b) provides for the imposition of penalties, sanctions, or other actions against those found in violation of the contractual obligations. When violations are disclosed in an H-2A investigation, the recommendation of appropriate sanctions or other actions must be considered in order to correct a violative practice and to assure future compliance.

(2) As set forth in 29 CFR 501.16 -.22, the WHD is authorized to take the following actions as a result of an employer's failure to comply with H-2A contractual obligations:

a. Seek injunction from U.S. district court to recover back wages and ensure future compliance. *See* 29 CFR 501.16(c).

b. Request U.S. district court to order compliance with specific contractual requirements. *See* 29 CFR 501.16(d).

c. Take administrative action to recover back wages, enforce contractual obligations, and/or assess CMPs. *See* 29 CFR 501.16(b).

d. Recommend to the ETA that action be taken to initiate denial of labor certification. *See* 29 CFR 501.20.

58f01 Potential litigation.

(a) (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

(e) (b) (7)(E) [redacted]

58f02 **Civil money penalties.**

(a)

(1) Section 216(g)(2) of the INA authorizes the Secretary to impose "appropriate penalties" to assure compliance with contractual obligations. Pursuant to 29 CFR 501.19(c), a CMP of not more than $1,000.00 may be assessed for each violation of the work contract and/or job order committed against each worker, each act of discrimination, or each act of interference with a WHD investigation.

(2) The assessment of H-2A CMPs is to be considered in all cases in which a violation is disclosed.

(3) 29 CFR 501.19(b) states that the amount of any CMP assessment shall be determined by a consideration of the type of violation and other relevant factors that may include:

a. previous history of violation of H-2A;

b. number of workers affected;

c. gravity of the violation;

d. efforts made in good faith to comply with the H-2A requirements;

e. explanation of the person charged with the violation;

f. commitment to future compliance (taking into consideration public health, interest or safety, and any history of previous violation of H-2A); and

g. extent to which the violator achieved financial gain or potential financial loss, or potential injury to the workers.

NOT FOR PUBLIC DISTRIBUTION

(b) Employer's refusal to pay back wages

(b) (7)(E) [redacted] per 29 CFR 501.31, in the event that an employer refuses to pay the back wages found due, the employer shall be advised in writing of the administrative determination that wages are due. (b) (7) (E) [redacted]

(c) Investigator action

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(3) The WHI should follow normal procedures in conducting negotiations for future compliance and payment of back wages. The party in violation shall be fully informed of the violations and the actions required to come into compliance. At the final conference, the employer should be furnished with a copy of 29 CFR 501 and advised that a determination (in writing) concerning assessment of H-2A CMPs, H-2A back wages, or other penalty action, will be provided to the employer as soon as possible.

(4) Copies of WH-588, or the information thereon, shall not be given to the employer, nor shall the WHI inform the employer of the recommendations for penalties.

58f03 <u>DD and/or ADD review of CMP and unpaid wage recommendation.</u>

(a) Upon receipt of the investigation file from the WHI, the DD and/or ADD shall review the file to ensure that the violations have been fully developed and that the amount shown on WH-588 accurately reflects the factors to be considered in recommending a penalty.

(b) The DD and/or ADD shall consult with the RA either concurring with the computed WH-588 amounts or recommending modification. Any modifications shall be explicit as to both the facts upon which they are based and their relevance to the criteria enumerated in 29 CFR 501.19.

58f04 <u>DD and/or ADD issuance of CMP assessment and back wage notice.</u>

(a)

(1) Matters concerning legal or interpretative questions should be reviewed with the RSOL through the JRC process.

NOT FOR PUBLIC DISTRIBUTION

(2) If the determination of any CMP or back wage is modified by the DD and/or ADD after consultation with the RA, the DD and/or ADD shall include in the case file an explanation of the basis for each modification, including a decision not to assess.

(3) The DD and/or ADD shall consider a recommendation to the ETA for denial of further labor certification in all H-2A CMP cases, which involve aggravated, serious, willful, or recurring violations, and shall consult with the RA concerning such recommendation.

(b) All cases that require further guidance in order to complete the investigation will be referred to the NO. The case file (original) shall be transmitted to the NO, OP, Division of Enforcement Policy and Procedures (DEPP), Attention: Immigration/Farm Labor Branch.

(c)

(1) When it is determined that there will be an assessment of CMPs and/or a written determination of back wages issued, the DD and/or ADD shall send the person the "Notice of Determination" (*see* Correspondex Letter F2-21) by certified mail. The certified mail number shall be typed on the letter as well as on the envelope to identify it for evidence. Copies of WH-588 shall not be given to the person assessed.

(2) A dated copy of the Notice of Determination shall be sent to the NO, OP, DEPP, Attention: Immigration/Farm Labor Branch, at the time the letter is mailed.

(3) In the event legal action has already been approved or filed, the DD and/or ADD will consult with RSOL staff concerning the advisability and content of such letter.

(4) If the Notice of Determination is returned to the DO by the U.S. Postal Service (USPS) as "unclaimed" or "undeliverable," the DD and/or ADD shall determine whether or not it is appropriate for WHIs to make personal service. If the Notice of Determination is returned marked "moved, left no address," the DD and/or ADD shall determine to what extent steps should be taken to locate the person assessed.

(5) When a Notice of Determination is returned "unclaimed" or "undeliverable," the ETA RO that issued the certification to the employer should be contacted and asked for any information regarding the employer's present location, address, etc. The ETA RO should also be asked to notify the WHD should such an employer contact the ETA for subsequent certification.

(6) If, during the course of an investigation, the WHI becomes aware that CMPs from a previous investigation have been assessed but not served, the DO should contact the RO for guidance on delivery of the Notice of Determination.

58f05 **<u>CMP post-assessment procedures.</u>**

(a)

(1) When certified checks or money orders are received in the RO as payment for back wages and/or penalties assessed, they will be examined by the certifying officer before they are given to the back wage clerk for entering in the Receipts Control

NOT FOR PUBLIC DISTRIBUTION

Register. A photocopy of the check shall be retained in the file with a copy of the Notice of Determination and WH-588.

(2) As in the procedure for handling back wage checks, the certifying officer should keep a memorandum record of the checks received as to the amount and number in order to ensure that all checks that are examined are properly accounted for in the Receipts Control Register. H-2A CMP checks will be deposited with the Treasury on a certificate of deposit, and processed through the nearest Federal Reserve Bank.

(3) The account symbol that shall apply to the depositing of H-2A CMPs is "16x1030." Particular attention should be given to the requirement that checks be deposited with the Federal Reserve Bank within 24 hours after their receipt in the RO, provided that there is no conflict with the 3-day cutoff period at the end of each month as stated in section 6814 of the ESA Manual. These payments will be identified as H-2A CMPs and posted to the Receipts Control Register.

[redacted]

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

58f06 **Installment payments.**

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

INSTALLMENT PAYMENT AGREEMENT BETWEEN

(NAME)

AND

U.S. DEPARTMENT OF LABOR

It is agreed between_____(Name)____ and the UNITED STATES DEPARTMENT OF LABOR as follows :

_____(Name)____ hereby agrees to pay the civil money penalty of __(amount)___ which was assessed against (him/her) by notice of assessment dated_____, pursuant to 29 CFR Part 501 according to the Schedule of Payments below. He/She acknowledges that he/she received such notice. He/She acknowledges that such assessment has become the final Order of the Secretary and waives any right to appeal or contest such assessment.

Schedule of Payments

By __(Date)__,___(Name)___ will have paid the entire_____ civil money penalty.

Payments must be made as scheduled and must be made by certified check, cashier's check, or money order payable to "Wage and Hour Division, U.S. Department of Labor" and must be mailed or delivered to: (address)

Should ____(Name)_____ fail to make any agreed payment as scheduled, the entire unpaid balance will immediately become due and payable, together with any court costs which may be incurred by the U.S. Department of Labor in pursuing collection thereof.

Should ____(Name)_____ fail to make any agreed payment as scheduled, the U.S. Department of Labor may, per the provisions of 20 CFR 655.110(g)(i)(A), refuse to issue future labor certifications under Section 216 of the Immigration and Nationality Act for temporary worker agricultural workers and, _____Name)_____ hereby waives any right to a hearing on such refusal.

The U.S. Department of Labor agrees to forbear pursuit of collection of the above-mentioned civil money penalty and costs stated above provided that ____(Name)_____ adheres to the terms of this agreement. The Department of Labor reserves the right to pursue collection of the full amount of the penalty mentioned above, with costs as stated in this agreement, should _____(Name)_____ fail to abide by the terms of this agreement.

NOT FOR PUBLIC DISTRIBUTION

The parties to this agreement hereby acknowledge receipt of this agreement, and they agree to its terms by signature below.

Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding, except as specified herein.

_____(Signature)_____

_____
(Name)

(Date)

_____(Signature)_____

_____
Attorney for

(Date)

_____(Signature)_____

_____
United States Department of
(Date)
of Labor by

NOT FOR PUBLIC DISTRIBUTION

58g SERVICE

58g00 Service of administrative determinations.

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

58g01 Service by mail.

- (b) (7)(E) [redacted]
- [redacted]
-
  - [redacted]
  - [redacted]
    [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC DISTRIBUTION

58g02 **Delivery of a copy of the administrative determination.**

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

58h **ENFORCEMENT COORDINATION**

58h00 **General.**

(a) The Secretary has delegated to the ETA the issuance and denial of labor certification under section 216 of the INA, and has delegated to the WHD investigation, inspection, and law enforcement functions to carry out the provisions of section 216 of the INA. Effective discharge of the responsibilities of both the ETA and the WHD and adequate protection of the welfare, rights, and benefits of workers employed under the H-2A regulations cannot be accomplished without a full and timely exchange of enforcement information and referrals between the ETA and the WHD. Referral and coordination by the ETA are discussed in 20 CFR 655.110(b) and 20 CFR 655.113. Referral and coordination by and to the WHD is discussed in 29 CFR 501.2, 29 CFR 501.5, and 29 CFR 501.21.

(b) The exchange of enforcement information and referrals between the ETA and the WHD can take place within the general framework set forth in 29 CFR 42. The regional committee staff level working group (*see* 29 CFR 42.20) are responsible for the coordination of this activity in each region.

58h01 **Notification to the ETA of investigative findings and enforcement actions.**

NOT FOR PUBLIC DISTRIBUTION

(a) One of the primary sanctions available to the DOL to compel employers to comply with the H-2A regulations and to provide to covered workers the wages, benefits, and protection contained in the work contract and/or job order is the denial of certification. Only the ETA is empowered to deny an employer certification, per 20 CFR 655.110. Before the ETA RA may deny certification to an employer, the RA must determine that a *substantial* violation of a material term or condition of employment has occurred. As explained in 20 CFR 655.110(g), a substantial violation exists where, in the absence of any extenuating circumstances beyond the control of the employer, the ETA RA determines that:

(1) an action is significantly injurious to the wages, benefits, or working conditions of 10 percent or more of the U.S. and/or H-2A workforce of an employer; and

a. the employer has failed to comply with one or more penalties imposed by the WHD for violations of contract requirements, or

b. the employer has engaged in a pattern or practice of actions that are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of the U.S. and/or H-2A work force of the employer;

(2) the employer has acted to obstruct an H-2A investigation or enforcement action;

(3) the employer has not timely paid a necessary fee; or

(4) there is evidence of a fraudulent application for H-2A workers in that the employer materially misrepresented the facts during the application process.

(b)

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

[redacted]

(c) Problems will be encountered relating to H-2A workers who perform work that is not within the agricultural occupation or work duties, specified in the job order. An H-2A worker admitted temporarily to the U.S. for employment in agriculture may be employed only in the agricultural occupation for which the labor certification was granted. When such out of status work is encountered in an H-2A investigation, (b) (7)(E) [redacted]

58h02 **Notification to the WHD of complaints and labor certifications.**

(a) When the ETA receives an H-2A complaint, directly or through the JS complaint system, it will immediately refer this information to the DD of the appropriate WHD DO, per 20 CFR 655.113.

(b) The ETA RA will provide the WHD RA with copies of all labor certifications, acceptable amendments to job orders, notices of certification determinations, and any other documentation deemed relevant for enforcement purposes. *See* ETA Handbook No. 398, page I-89. Copies of the certifications, job orders (and their extensions, if any), and the like should be sent by the ETA, as they are issued, to the WHD via the regional committee staff level working group. The WHD members of the staff level working group should coordinate closely with their ETA counterparts to ensure that the job orders and the like are received on a timely basis and forwarded to the appropriate DO.

58h03 **Notification to the INS.**

(a)

(1) The INS regulations found at 8 CFR 214.2(h)(3)(vi)(A) state, "[i]n filing an H-2A petition, a petitioner and each employer consents to allow access to the site where the labor is being performed for the purpose of determining compliance with H-2A requirements."

(2) (b) (7)(E) [redacted]

(b)

NOT FOR PUBLIC DISTRIBUTION

(1) The INS regulations found at 8 CFR 214.2(h)(3)(viii)(A) state, "[a] worker may not be accorded H-2A status who the Service finds to have violated the conditions of H-2A status within the prior five years. H-2A status is violated by remaining beyond the specific period of authorized stay or *by engaging in unauthorized employment*." [emphasis added]

(2) (b) (7)(E) [redacted]

58i SPECIAL PROCEDURES

[01/03/2017]

58i00 <u>(Reserved).</u>

[01/03/2017]

58i01 <u>H-2A workers employed in range sheep herding, goat herding, and production of livestock occupations.</u>

(a) Jobs subject to Herder Rule

The 2015 Herder Final Rule was issued on 10/16/2015 and is effective for applications for certification filed on or after 11/16/2015. Applications filed prior to 11/16/2015 are subject to the Employment and Training Administration's Training and Employment Guidance Letters (TEGL) Special Procedures, No. 32-10 or No. 15-06 depending on whether the occupation requested is for sheep herding and goat herding or the open range production of livestock. Note: regardless of whether the 2015 Herder Rule or the TEGLs apply, the employer is still required to adhere to the offered wage requirements in the 2015 Herder Final Rule as of the Final Rule's effective date. Also note that employers under this Final Rule are permitted to have a period of need for up to 364 days for sheep herding and goat herding occupations.

Jobs subject to the Herder Rule have unique occupational characteristics that require workers to spend extended periods of time in isolated, mountainous, remote areas to be available to attend to the herd's needs on a 24/7 basis, making the tracking of hours worked difficult (*see* 80 FR 62973). Job offers subject to the 2015 Herder Final Rule must meet *all* four of the following criteria as defined in 20 CFR 655.200(b).

(1) *The job must involve the herding or production of livestock*

The terms "herding," "livestock," and "production of livestock" are defined in 20 CFR 655.201.

(2) *The work must be performed on the range for the majority (i.e., more than 50 percent) of the work days in the work contract period*

NOT FOR PUBLIC DISTRIBUTION

The purpose of this provision is to provide a sufficient threshold to confirm the unique, remote characteristics of these occupations, because the herding and range livestock regulations are intended only to apply to workers who attend the herd as it grazes on the range, while also allowing for a realistic and workable amount of time on the ranch (*see* 80 FR 62964).

a. Definition of range:

Any area located away from the ranch headquarters used by the employer. The following factors are indicative of the range: it involves land that is uncultivated; it involves wide expanses of land, such as thousands of acres; it is located in a remote, isolated area; and typically range housing is required so that the herder can be in constant attendance to the herd. No one factor is controlling and the totality of the circumstances is considered in determining what should be considered range (*see* 20 CFR 655.201).

Note: the range does not include feedlots, corrals, or any area where the stock would be near ranch headquarters. It also does not include any place where the herder is not required to be in constant attendance to the herd.

1. "Ranch headquarters" definition

The headquarters is the place where the business of the ranch occurs and is often where the owner resides. The business of the ranch includes not just paying bills, but also includes activities necessary to running a ranch, such as the receipt or delivery of supplies (*e.g.*, feed) and storage of supplies, the storage and maintenance of machinery and other equipment, the shipment of product, and the housing of workers when not performing work on the range, and assignment of their daily tasks. Thus, ranch headquarters is not just the office space where bills are paid, but it also includes the areas where the other business of the ranch occurs.

The term "headquarters" only includes the ranchhouse, barns, sheds, pen, bunkhouse, and other buildings in the vicinity, meaning that anything beyond this immediate area is not considered the headquarters. The term "headquarters" is limited and does not embrace large acreage. Any work performed at or near the headquarters would not qualify as work on the range (*see* 80 FR 62973).

When determining whether a building is in the vicinity of the ranch headquarters and thus not on the range, note that there is no bright line test. However, even if a building is not considered part of the headquarters ranch, it could still fail to be on the range if it does not meet the remaining factors listed in the definition of range.

2. Fencing, or lack thereof, is not an indicator of range

The existence or non-existence of fencing is irrelevant to the determination that land is or is not range. Fencing is prevalent

NOT FOR PUBLIC DISTRIBUTION

throughout the modern landscape in the west, including on federal land managed by the U.S. Forest Service and Bureau of Land Management (BLM). Fences are necessary for a variety of reasons, including to mark boundaries, separate plant or animal species, protect crops or property, keep sheep from eating poisonous plants, manage grazing, and protect animals from predators and keep them safe from traffic on public roads (*see* 80 FR 62970 -62971).

3. Range may sometimes include cultivated land

In certain regions livestock may graze on crop residue in crop circles following a harvest. The grazing of livestock on cultivated land does not immediately disqualify a determination that the area is range; this land may be range depending on an analysis of the other factors.

4. The definition of range under the 2015 Herder Final Rule differs from the definition of range under the FLSA

This definition differs from the FLSA regulatory definition in 29 CFR 780.326, which defines range generally as land that is not cultivated and not suitable for cultivation because it is rocky, thin, semiarid, or otherwise poor, and therefore would be less likely to apply to lands where livestock graze on crop residue. Range as defined in the FLSA is land that produces native forage for animal consumption and also includes land that is revegetated naturally or artificially to provide a forage cover. The range typically involves wide expanses of land, such as thousands of acres, may be on private, federal, or state land, and need not be open. The test established in 20 CFR 655.201 may in certain cases encompass more land as range than under the FLSA (*see* 80 FR 62973).

b. <u>50 percent of the days in the work contract period</u>

1. Definition of work contract period

The H-2A regulations define "work contract" as "all the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits." Therefore, it follows that the term "work contract period" refers to all days beginning with the first workday after the arrival of the worker at the place of work or the advertised contractual first date of need, whichever is later, and ending with the last day during which the work contract and all extensions thereof are in effect.

2. Days worked on the ranch and the range

Occasionally, a workday may include job duties that are performed on the range and job duties that are performed off the range in the same workday. If a majority of hours worked during a workday are spent on the ranch, it is considered to be a day worked at the ranch. If a majority of hours worked during a workday are spent on the

NOT FOR PUBLIC DISTRIBUTION

range, it is considered a day on the range (*see* 80 FR 20306 and 80 FR 62983).

(3) *All work that is performed at a place other than the range must constitute the production of livestock*

Employers may at times require the workers to bring the herd to the ranch for activities such as lambing or calving, shearing, branding, culling livestock for sale, or tending to a sick animal, all of which are job duties that constitute the production of livestock. During such periods on the ranch, the workers may also perform other work that is closely and directly related to herding and/or the production of livestock (*see* 80 FR 62968). These job duties also constitute the production of livestock because they are inextricably linked and essential to herding and/or the production of livestock. This definition does not encompass all ranch duties that arise in the day-to-day ranch operations, only those activities that directly support and are essential to the production of livestock.

a. Job duties performed off the range that are closely and directly related to herding and/or the production of livestock

Repairing fences to contain the herd, assembling lambing jugs, cleaning out lambing jugs, feeding and caring for dogs that the workers use on the range to help with herding or guarding the flock, feeding and caring for horses that the workers use on the range to help with herding or to move the sheep camps and supplies, and loading animals into livestock trucks for movement to the range or to market (*see* 20 CFR 655.201).

b. Job duties performed off the range that *are not* closely and directly related to herding and/or the production of livestock

The phrase "closely and directly related to herding and/or production of livestock" is not intended to encompass all ranch duties that are necessary to meet the day-to-day needs that arise in ranch operations (*see* 80 FR 62968-62969). Duties that are closely and directly related to the production of livestock *do not include* working at feedlots; planting, irrigating, and harvesting crops; operating or repairing heavy equipment; constructing wells or dams; digging irrigation ditches; applying weed control; cutting trees or chopping wood; constructing or repairing the bunkhouse or other ranch buildings; and delivering supplies from the ranch to the herders on the range (*see* 20 CFR 655.201).

c. There is no tolerance for work performed off the range that does not constitute the production of livestock

General ranch work that is not closely and directly related to the production of livestock should be performed by general ranch hands, not by workers employed in herding and range livestock occupations under the Herder Rule.

d. Job duties that are only permissible when performed on the range

NOT FOR PUBLIC DISTRIBUTION

Certain job duties will be acceptable *only* when performed on the range. Work performed on the range is not held to the same standard as work off the range because the range is, by definition, remote and isolated, and workers engaged in herding or range production of livestock are on call 24/7 and thus performing appropriate duties even while they are doing other work that is inherently related to their life on the range. Note, however, that the employer does not have complete freedom to assign duties to workers on the range that are completely outside the scope of herding and the production of livestock or not related to life on the range.

Scenario:

A worker finds and chops his or her own firewood on the range in the winter. The firewood is located close by and is easy to access. The worker uses the firewood to heat the range housing, and the firewood is not used for any other purpose. This job duty is permissible on the range, but not at ranch headquarters.

If it is discovered that the worker is performing job duties at the ranch that do not qualify for the 2015 Herder Final Rule, *see* FOH 58i01(h) for guidelines on determining the appropriate sanctions and remedies and consult with your regional agriculture coordinator as appropriate.

(4) *The work activities generally require that workers be on call 24 hours a day, 7 days a week*

The Herder Rule is intended to cover occupations that require herders and range livestock production workers to be on call at all times while on the range to manage the herd and protect the herd from predation and natural disasters.

The worker is required to constantly be available to attend to the livestock to perform tasks such as ensuring they do not stray off, protecting them from predators, and monitoring their health (*see* 80 FR 62973).

Note: although workers subject to these special procedures generally are on-call on a 24/7 basis, they need not be actually working on a 24/7 basis.

(b) Special situations when applicability of the 2015 Herder Final Rule should be closely explored

(1) *Workers who commute from the range to the ranch headquarters on a daily basis*

The remote, isolated, 24/7 nature of range herding and livestock production means that workers will rarely be located on the ranch headquarters and the range in the same day. If the worker frequently commutes between the range and the ranch in the same workday, this is an indication that the Herder Rule may be inapplicable.

If the worker moves the livestock on a daily basis between the ranch headquarters and a grazing area, it is possible that the grazing area does not meet the test of range. Specifically, the grazing area may not involve wide expanses of land; may not be located in a remote, isolated area; and may not require range housing.

NOT FOR PUBLIC DISTRIBUTION

If the livestock stay on the range on a 24/7 basis but the worker returns to the ranch headquarters on a daily basis to sleep or complete other work, the work activities may not require the worker to be on call 24 hours per day, 7 days per week. If the worker is regularly located so far away from the herd that he or she could not possibly be attentive to the needs of the livestock, then the work activities may not require the worker to be on call on a 24/7 basis.

See FOH 58i01(h) for guidelines on determining the appropriate sanctions and remedies when this situation is encountered.

(2) *Workers who work exclusively on the range but whose work activities are primarily outside of the scope of herding or the production of livestock*

Work performed on the range may include duties that do not constitute herding and the production of livestock, which includes work that is closely and directly related to herding and/or the production of livestock (*see* FOH 58i01(a)(3)). However, employers do not have unlimited freedom to assign duties to workers on the range that are completely outside of the scope of herding and production of livestock. If a worker's job duties on the range only occasionally involve the herd, and mostly involve other job duties, then it should be explored if the worker is genuinely required to be on-call 24 hours a day, 7 days a week.

See FOH 58i01(h) for guidelines on determining the appropriate sanctions and remedies when this situation is encountered.

(c) Contents of job orders

Unless otherwise specified in 20 CFR 655.200 -.235, the employer must satisfy all other H-2A requirements. This section will only refer to the contents of job offers that differ from the standard H-2A procedures.

(1) *Employer-provided items*

The special procedures under this provision mirror the standard H-2A procedures in 20 CFR 655.122(f), with the exceptions listed below. Any violation of this provision should be cited as a failure to comply with employer-provided items requirements, with penalties computed using the special guidance in FOH 54f07(c). Back wages may be sought for costs incurred by the worker(s) for the most economical and reasonable tool, supply, or piece of equipment.

a. <u>Must be specified in the job order</u>

The employer must provide all tools, supplies, and equipment required by law, by the employer, or by the nature of the work to perform the duties in the job offer safely and effectively. The employer must specify in the job offer which specific items it will provide to the worker.

1. The tools, supplies, and equipment required for these occupations may vary between employers based on the terrain, season, and climate. There is no specific list of tools, supplies, and equipment that employers must provide, but it may include horses, shotguns,

NOT FOR PUBLIC DISTRIBUTION

boots, raingear, and all-terrain vehicles. However, under the Herder Rule's range housing standards, certain items are required to be provided to meet those standards, such as bedding and heating equipment, or protective clothing where appropriate. As with all required tools, supplies, and equipment, these items must be provided free of charge and listed in the job order.

2. Some items will be required due to the nature of the work to perform the duties in the job order safely and effectively. When exploring what items are necessary due to the nature of the work, it may be helpful to explore what would happen if the worker did not have the item. How would the worker complete the job duties without the item? Would the worker's or the herd's safety or wellbeing be affected without this item?

3. If items are only required during certain times of the year, the employer is only required to provide those items during those periods (*see* 80 FR 62981).

b. Must include means of communication

This equipment must include effective means of communicating with persons capable of responding in an emergency. Acceptable devices may include satellite phones, cell phones, wireless devices, or radio transmitters. The employer must specify in the job order the type of electronic device and that it will be provided free of charge or deposit charge.

1. The phrase "persons capable of responding in an emergency" includes *both* the employer and first responders such as emergency medical technicians (EMTs).

2. Employers must have the ability to address language barriers in the event of an emergency. Acceptable methods include having on staff, or otherwise making available, such as through a conference call, a person capable of speaking the worker's language, or by using translation technology (*e.g.*, computer software, translation devices, etc.) (*see* 80 FR 62979).

3. The device must be operable at all times, and the employer must provide the worker with an adequate power source for the device (*see* 80 FR 62979).

4. The employer is not required to pay for the worker's personal calls to friends or family or to supply or pay for communication devices beyond what is necessary for emergency contact with the employer and emergency first responders (*see* 80 FR 62979).

c. Must include plan to make contact when the communication device may not operate effectively

NOT FOR PUBLIC DISTRIBUTION

If there are periods of time when the workers are stationed in locations where electronic communication devices may not operate effectively, the employer must specify in the job order the means and frequency with which the employer plans to make contact with the workers to monitor the worker's well-being, which may include: arrangements for workers to be located in geographic areas where communications can operate effectively on a regular basis, or arrangements for regular, pre-scheduled, in-person visits between workers and the employer, including persons designated by the employer.

1. If the employer stations workers in pairs in areas where communication devices do not operate effectively, in-person contact with one member of the working pair is sufficient, but only if in making in-person contact with the first worker, the employer verifies the health and safety of the second worker (*see* 80 FR 62979).

2. The inclusion of this information in the job order serves to inform workers on how to best seek help in the event of an emergency.

d. Only required to provide the most economical and reasonable tool, supply, or piece of equipment

The employer is in compliance with this provision if it provides the most economical and reasonable tool, supply, or piece of equipment that is adequate for the purpose. If the worker chooses to purchase a different item out of personal preference, the employer is not responsible for that cost so long as an adequate alternative has been provided. For example, if the employer provides the worker with adequate boots but the worker chooses to purchase boots of a different brand, the employer is not responsible for the cost of the boots purchased by the worker.

In other situations, an employee may purchase or request the employer to purchase an item that is more expensive than the most economical and reasonable alternative that is adequate. When this happens, the employer is in compliance if he or she pays or reimburses the cost of the most reasonable and economical item that is adequate. For example, if a worker requests a $200.00 phone but a phone costing $50.00 would be adequate, the employer may require that the worker pay the additional $150.00 for the more expensive phone that the worker is opting for. In this situation, the monies paid by the worker, or deducted from his or her pay, constitute a voluntary assignment of wages and the guidelines in Field Assistance Bulletin No. 2012-3 should be followed.

These strategies should not be used to circumvent the employer's obligation to provide all required tools, supplies, and equipment to the worker free of charge or deposit charge. WHIs should use the guidance in Field Assistance Bulletin No. 2012-3 on voluntary assignment of wages to determine whether the deduction is permissible. In summary, deductions must be disclosed in the job offer, be reasonable, provide no profit to the employer or any affiliated person, and be made in accordance with H-2A regulatory requirements, as well as other applicable federal and state law requirements.

NOT FOR PUBLIC DISTRIBUTION

20 CFR 655.210(d)

(2) *Meals*

The employer must specify in the job offer and provide to the worker, without charge or deposit charge, either three sufficient meals a day, or free and convenient cooking facilities and adequate provision of food to enable the worker to prepare his or her own meals.

a. To be sufficient or adequate, the meals or food provided must include a daily source of protein, vitamins, and minerals.

1. Employers are encouraged to consult and may rely on existing federal guidelines for minimum calorie counts, variety requirements, and/or food safety standards when making decisions about food provision, taking into account the physical conditions and the requirements of this work (*see* 80 FR 62983).

2. Acceptable sources of protein include but are not limited to meats, beans, and eggs (*see* 80 FR 62983).

3. Acceptable sources of vitamins and minerals include but are not limited to fruits, vegetables, and oils (*see* 80 FR 62983).

4. Employers should strive to provide range workers with fresh food when possible (*see* 80 FR 62983).

b. This provision also includes adequate potable water, the details for which are discussed in 20 CFR 655.235(e) and FOH 58i01(f)(1).

c. The employer is not required to provide workers with items such as soda and tobacco (*see* 80 FR 62997). If the employer makes deductions from the worker's pay for personal items, the deductions must also be made in accordance with the guidance in Field Assistance Bulletin No. 2012-3.

20 CFR 655.210(e)

(3) *Hours and earnings statements*

The employer must comply with all requirements for earnings records and hours and earnings statements in the standard H-2A regulations in 20 CFR 655.122(j) -(k), with three variances:

a. The employer is exempt from recording the hours actually worked each day, the time the worker begins and ends each workday, as well as the nature and amount of work performed. The practical effect of not requiring the hours actually worked each day to be recorded is that the hours offered will likely also not be recorded, and the lack of a record of hours offered should not be cited as a violation as long as the 2015 Herder Rule is found to be applicable.

NOT FOR PUBLIC DISTRIBUTION

b. The employer must keep daily records indicating whether the site of the employee's work was on the range or off the range.

c. If the employer prorates a worker's wage because of the worker's voluntary absence for personal reasons, it must also keep a record of the reason for the worker's absence.

20 CFR 655.210(f)

(4) *Rate of pay*

As with the standard H-2A procedures, the employer must offer, advertise during recruitment, and pay the highest of the AEWR, the agreed-upon collective bargaining rate, or the applicable minimum wage imposed by federal or state law or judicial action.

a. The AEWR for these occupations is a monthly rate. The Office of Foreign Labor Certification (OFLC) will publish a notice in the Federal Register at least once in each calendar year establishing the monthly AEWR. The monthly AEWR is calculated as $7.25 × 48 hours × 4.33 weeks × Employment Cost Index (ECI) for the preceding October – October period. Note: 20 CFR 655.211(d) establishes a transition schedule through calendar year 2017.

b. When the monthly AEWR is adjusted during a work contract period and is higher than the agreed-upon collective bargaining wage and any applicable minimum wage imposed by federal or state law or judicial action in effect at the time the work is performed, all H-2A employers engaging workers in range herding or livestock production activities must pay that adjusted monthly AEWR upon publication by DOL in the Federal Register for each month, or portion thereof, of the remaining work contract period.

c. Similarly, when a new or adjusted collective bargaining wage or minimum wage imposed by federal or state law or judicial action becomes the highest of the applicable wage sources during a work contract period, the employer must pay that wage rate for each month, or portion thereof, of the remaining work contract period.

d. The employer may prorate the wage for the initial and final pay periods of the job order period if its pay period does not match the beginning or ending dates of the job order. The employer may also prorate the wage if an employee is voluntarily absent for personal reasons.

e. The offered wage shall not be based on commissions, bonuses, or other incentives, unless the employer guarantees a wage that equals or exceeds the highest of the applicable rates. In other words, the employer must guarantee to pay workers at least the AEWR and may pay bonuses on top of the guaranteed AEWR so long as this has been properly disclosed to U.S. workers in the job offer.

NOT FOR PUBLIC DISTRIBUTION

f. The wage must be paid free and clear to each worker without any unauthorized deductions. Wages must be paid in cash or a cash equivalent.

20 CFR 655.210(g) and 20 CFR 655.211

(5) *Frequency of pay*

The employer must pay at least semimonthly and must pay wages when due, which is consistent with the standard H-2A regulations. However, this differs from historical practice, where employers were permitted to pay sheep and goat herders on a monthly basis. *See* 20 CFR 655.210(h).

Payment may only be made through direct deposit with the worker's consent and only if the workers have the alternate option of receiving payment through cash or check. An arrangement under which the worker's pay is deposited into a bank account but the worker does not have the information to access the bank account, such as the account number, suggests that the worker has not consented to receive payment through direct deposit (*see* 80 FR 62986).

The same requirement would apply to the voluntary assignment of wages through wire transfers to a designee of the worker (*see* 80 FR 62986). For example, an employer may only wire money to the worker's family in lieu of paying the worker directly with the worker's consent.

Note: some states may have more stringent requirements on how frequently the worker must be paid, and the employer must comply with the stricter requirement.

(d) Recruitment requirements

The job order will appear in the DOL's national electronic job registry until 50 percent of the work contract period for the job opportunity(ies) has elapsed. The employer must comply with all recruitment requirements in the standard H-2A procedures, with three variances:

(1) The employer is not required to advertise the job offer in the newspaper.

(2) An association, filing as a joint employer on behalf of its employer members, may file a single Form ETA-790 (Job Order) and a master Form ETA-9142 (H-2A Application for Temporary Employment Certification) *even when* the employer-members have different start dates of need and are located in more than two contiguous states.

a. Each of the state workforce agencies (SWAs) to which the Form 790 was transmitted by the WHI or the SWA having jurisdiction over the location of the association must keep the job order on its active file until 50 percent of the period of the work contract has elapsed for all employer members, and must refer to the association each qualified U.S. worker who applies for the job opportunity.

b. The association must make every effort to accommodate a U.S. worker's worksite location preference (*e.g.*, the location with an opening nearest to his or her place or residence).

NOT FOR PUBLIC DISTRIBUTION

c. Per 20 CFR 655.135(d), the 500 man-days exemption from the 50 percent rule does not apply to members of an association when the association has filed as a joint employer or on behalf of its employer members.

(3) An association that completes recruitment on behalf of its members is required to maintain a written recruitment report for each individual employer member mentioned in the application or job order (*see* 20 CFR 655.225).

(e) Range housing

Range housing is defined as housing that is located on the range that meets the standards articulated under 20 CFR 655.235. Housing must be inspected by the SWA at least every 3 years. The housing may be a mobile unit, camper, or other similar mobile housing vehicle; tents; or remotely located stationary structures along herding trails. Note: tents may only be used where the terrain and/or the land use regulations do not permit the use of more substantial housing.

(1) To qualify for the range housing standards in 20 CFR 655.235, the housing must be located on the range, with the exception of the circumstance described below in FOH 58i01(e)(2), *and* the 2015 Herder Final Rule must be applicable to the job offer. The following are examples of when these conditions would not be met and therefore the employer must comply with the housing standards in 20 CFR 655.122(d):

a. <u>If the housing is not mobile and is not located on the range</u>

For example, a fixed-site bunkhouse that is located at the ranch headquarters is not range housing and must meet the housing requirements in 20 CFR 655.122(d).

b. <u>If the housing is mobile but is located permanently off the range</u>

For example, if the employer provides a mobile housing unit that is located at the ranch headquarters and the employee uses a different housing unit for work on the range, the mobile housing unit on the ranch must meet the housing requirements in 20 CFR 655.122(d). A trailer that is not mobile due to mechanical problems falls within this category.

c. <u>If the range housing is used at a place other than the range and employees are engaged in work that does *not* constitute the production of livestock</u>

In this situation, the Herder Rule is inapplicable and therefore the employer must meet the housing requirements in 20 CFR 655.122(d).

(2) The use of range housing off the range is permissible only when both of the following conditions are met:

a. The worker is performing work that constitutes the production of livestock and the Herder Rule applies

b. The worker is granted access to facilities, including but not limited to toilets and showers with hot and cold water under pressure, as well as cooking and

NOT FOR PUBLIC DISTRIBUTION

cleaning facilities, that would meet the requirements contained in 20 CFR 655.122(d)(1)(i)

Scenario:

A worker may live in range housing at the ranch headquarters for 2 months during lambing season. The work contract period is 12 months. The worker has free access to a bathroom and kitchen in the bunkhouse that meet the requirements in 20 CFR 655.122(d)(1)(i). In this situation, the range housing standards would still be applicable.

(f) Range housing standards

Standards for range housing are established in 20 CFR 655.235. This part does not discuss all aspects of range housing, but rather discusses aspects that may require clarification.

(1) *Water supply*

The standards for water supply are set forth in 20 CFR 655.235(b).

a. Potable water for drinking and cooking

The employer must provide a minimum of 4.5 gallons of potable water per day to each employee. The employer must deliver this water on a regular basis. This water may not come from natural sources such as springs, streams, or fresh snow unless a specific variance is approved by ETA (*see* FOH 58i01(f)(1)(c) below). If the employee requires more potable water than this recommended minimum amount, the employer must provide sufficient potable water to meet the needs of the particular worker. This need will vary from individual to individual, and the appropriate amount is affected by many factors, including temperature, humidity, wind, the availability of shade, an individual's weight, and the length and intensity of physical activity (*see* 80 FR 63008).

The employer must also provide individual drinking cups and containers for storing and using the potable water.

There will be some circumstances, such as a fire or severe storm, which may temporarily prevent the employer from providing supplies. In those instances, an employer will not be held non-compliant so long as it has prepared for such an emergency, such as by providing a reserve supply of water for emergencies, having developed a plan for the extrication of their employees in such circumstances, and having available contact information for government and private agencies that are able to provide rescue services (*see* 80 FR 63008).

If the water came from a potable source, such as a municipal water system, but is stored in an insufficient container so as to render it non-potable, the employer has not fulfilled its obligation under this part.

b. Non-potable water for bathing and cleaning

NOT FOR PUBLIC DISTRIBUTION

The employer must also supply sufficient water to meet the worker's laundry and bathing needs. This additional water need not be potable and may come from natural sources such as springs, streams, and fresh snow, but it must be free from anything harmful that could be absorbed by the skin or clothing. If the natural water source is also used to water the herd, dogs, or horses, or may collect run-off from areas in which the herd excretes, the employer must undertake special precautions to protect the worker's health from risk (*see* 80 FR 63008).

c. Variance for workers located in areas that are not accessible by motorized vehicles

The Final Rule provides an exception to the delivery requirement and allows water from natural sources to be used for drinking and cooking water in limited circumstances. However, the employer must meet all criteria listed in 20 CFR 655.235(b)(4) for this variance to be applicable, including providing the worker with the means to test the water and make it potable. These additional protections are necessary given the presence of drought and near-drought conditions in parts of the U.S., as well as the significant health risks posed if water sources become contaminated with harmful pathogens because of the presence of nearby herds (*see* 80 FR 63008).

Employers may choose from various approved methods and devices to render water potable, such as water purification tablets, potable water purification systems, water purification bottles, and filtering. The employer must ensure that the worker is adequately trained in the proper use of the method or device.

(2) *Food storage*

The employer should provide mechanical refrigeration where feasible, or refrigeration using methods such as propane, butane, solar power, or battery power. However, in some areas, refrigeration may not be feasible, such as in campsites where supplies are provided via pack horse, or in campsites controlled by the BLM or Forest Service where regulations require that food be stored in trees. In these situations, the employer may choose among alternative means, such as drying or salting, to eliminate food spoilage.

(g) Investigative procedures

Investigative procedures under the 2015 Herder Final Rule will generally be the same as with standard H-2A cases.

(1) *Interviews*

a. Among other factors affecting compliance, the interview statements should focus on the job duties performed and the location of the work. Job duties will likely be seasonal in nature and interview statements should address all job duties and locations of work at all points of the contract period. Sample questions include:

NOT FOR PUBLIC DISTRIBUTION

1. Do these job duties vary throughout the year? Where are they performed?

2. What job duties are involved in (feeding, watering, branding, lambing, docking, herding, etc.)?

3. Walk me through a typical day when the employee is working (on the range, on the ranch, in lambing, in breeding, etc.).

4. At what point in the day is the job performed? When does it start and stop? Does the worker ever have to get up in the middle of the night to attend to the herd?

5. Is the worker ever away from the herd? If so, what is the worker doing?

b. Employee interviews should also include information about the employee's observations, such as:

1. How often do you see people when you work at this location?

2. How long would it take you to walk (drive, or ride) from the ranch to this location?

3. What are the livestock grazing on (*i.e.*, crops or forage)?

4. How often do you see the employer?

5. What is the terrain like where the sheep are located?

(2) *Other evidence*

The 2015 Herder Rule requires employers to keep daily records indicating whether the worker was on the range or off the range, so the WHI should review these records to determine whether the worker spent the majority (*i.e.*, more than 50 percent) of the work contract period on the range. In addition, touring the ranch headquarters and any surrounding land will help the WHI develop an understanding of what would be considered ranch headquarters and the job duties that would be performed there.

(3) *Other resources*

Reviewing the job order is a key part of preparing for the H-2A investigation, and this information is typically obtained by accessing ETA's iCert Portal at https://icert.doleta.gov/index.cfm?event=ehGeneral.dspLogin. Along with the job order and application, the WHI can also review any notices of deficiency that ETA may have issued to the employer based on unresolved questions during the application process. The responses from the employer may assist in the investigation process as these are representations made to the government about the need, location, and type of work to be performed.

NOT FOR PUBLIC DISTRIBUTION

In addition, OFLC maintains a list of frequently asked questions on its website at https://www.foreignlaborcert.doleta.gov/h-2a_herders.cfm#. Reviewing these questions and answers may be helpful to WHIs, as this webpage serves as a source of guidance for employers applying under the 2015 Herder Final Rule.

(h) Guidelines for determining appropriate sanctions and remedies

The Herder Rule is intended to apply only to jobs that have the unique characteristics as described in 20 CFR 655.200(b). If the special procedures are inapplicable to the job offer, the employer must comply with all standard H-2A procedures and may be in violation. Depending on the precise nature of the violation, the employer may owe back wages or be required to provide other relief.

In some cases the determination of the applicability of the Herder Rule will be a close call. In these cases the citation of violations and computation of back wages is dependent on all the particular facts and circumstances in a case. WHIs, in conjunction with DO management and their regional agricultural coordinator, should examine all pertinent facts to determine applicability of the Herder Rule and reasonable sanctions and remedies, if appropriate.

Factors that merit special consideration are listed here:

(1) *Factors to examine in all cases (80 FR 62966)*

a. Whether the employer has violated the requirements of the Herder Rule or other H-2A requirements in the past

Has there been a previous investigation of the firm under the 2015 Herder Rule or under the previous special procedures laid out in TEGL No. 32-10 or TEGL No. 15-06? Were the special procedures applicable in that case? Why or why not? Did the employer agree to comply? Did the previous WHI provide compliance assistance?

If the employer has violated other H-2A requirements in the past, how grave were the violations? Has the employer been in compliance since the previous investigation?

b. Employer's explanation

What is the employer's explanation as to why the particular circumstances merit the use of the Herder Rule? Obtain as many details as possible. Did the employer misunderstand the definitions? Was there a certain event or circumstance (*e.g.*, unusual rainfall or snowfall, disease in the herd, etc.) that resulted in the situation that calls the applicability of the 2015 Herder Rule into question?

c. Other relevant factors

Whatever other factors are pertinent to the case.

(2) *Factors to examine when fewer than 50 percent of the workdays in the work contract period are worked on the range (80 FR 62966)*

NOT FOR PUBLIC DISTRIBUTION

a. Percentage of days the workers spent at the ranch

Did the employee spend more time off the range by a slim majority or a vast majority?

b. Whether the work was closely and directly related to herding and the production of livestock

Was the employee working in job duties within the scope of herding and production of livestock even when working off the range?

(3) *Factors to examine when work performed off the range does not constitute the production of livestock, which includes work that is closely and directly related to the production of livestock (80 FR 62969)*

a. Whether the activities were within the scope of H-2A agriculture

Did the job duties constitute agriculture as defined in the H-2A regulations?

b. Whether the activities were occasional or sporadic

How often did the worker engage in these job duties? Did the job duties constitute part of the worker's daily routine?

c. Whether the time spent in total is substantial

Each time the worker engaged in this activity, for how long did he or she engage in it?

[01/03/2017]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

Chapter 59

SPECIAL ENFORCEMENT PROCEDURES

Source: FOH Modernization revision 706, published 11/28/2016. Substantive revisions made *after* 11/28/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 11/28/2016 can be found here: http://esa.esa.dol.gov/whd/FOH/revisionchart.htm.

NOT FOR PUBLIC DISTRIBUTION

Table of Contents

59a SCHEDULING LIMITATIONS

59a00 General.
59a01 Adverse decisions.
59a02 Traveling road shows, circuses, and carnivals.
59a03 (Reserved.)
59a04 (Reserved.)
59a05 The Salvation Army.
59a06 Bridgestone Firestone Tire and Rubber Company.
59a07 Orkin Exterminating Company.
59a08 Federal employees and non-appropriated fund employees: OPM enforcement.
59a09 Federal employees: WHD enforcement.
59a10 Domestic service workers employed by foreign nationals.
59a11 Hudson Oil Company, Inc.
59a12 (Reserved.)
59a13 Waffle House, Inc.
59a14 (Reserved.)
59a15 Volunteers of America.
59a16 Electronic Data Systems.

59b SPECIAL HANDLING

59b00 General.
59b01 Lawrence Systems, Inc.
59b02 J.C. Penney Company.
59b03 Edison Brothers Stores, Inc.
59b04 G.C. Murphy Co.
59b05 Kmart Corporation and S.S. Kresge.
59b06 Ford Motor Credit Company.
59b07 B.F. Goodrich Co., General Tire & Rubber Co., and Goodyear Tire & Rubber Co.
59b08 Circle K Corporation.
59b09 Staff Builders, Inc.
59b10 United Consumers Club.
59b11 State Farm Insurance Company.
59b12 (Reserved.)
59b13 ServiceMaster.
59b14 Hardee's Food Systems, Inc.
59b15 Tricon Corporation: Pizza Hut, Kentucky Fried Chicken, and Taco Bell.

59b16 Browning-Ferris Industries.

59c ENFORCEMENT POLICIES

59c00 General.
59c01 Salespersons at condominium resorts or campgrounds.
59c02 International Alliance of Theatrical Stage Employees: motion picture and television industry - section 7(f) wage plan.

59d APPLICATION OF FLSA TO EMPLOYEES OF STATE AND LOCAL GOVERNMENTS

59d00 General.
59d01 Investigation policy.
59d02 Notification of government employers.
59d03 Discrimination against public agency employees under section 8 of the 1985 Fair Labor Standards Amendments.
59d04 Salary basis of payment for public employees otherwise exempt under section 13(a)(1) of the FLSA.
59d05 Convicted offenders in work-release programs.
59d06 Section 7(k) work period.
59d07 Emergency medical technicians.
59d08 Parents as school volunteers.
59d09 Court reporters.

59e EMPLOYMENT RELATIONSHIP

59e00 General.
59e01 An individual worker can be an employee even if he or she has incorporated as a business.
59e02 Economic realities factors: a guide for determining the ultimate question whether the worker is an employee or independent contractor.
59e03 The economic realities factors.
59e04 The economic realities factors should be applied in keeping with the following perspective.
59e05 Investigative process.
59e06 Examples of documents to request.

59f JOINT EMPLOYMENT

59f00 General.
59f01 Investigations that should include a joint employment analysis.
59f02 Horizontal joint employment.
59f03 Vertical joint employment.
59f04 Joint employment economic realities factors from the MSPA regulation.
59f05 Investigative process.

59g -l (RESERVED)

59m SPECIAL PROCEDURES: FLSA SECTION 13(a)(1)

NOT FOR PUBLIC DISTRIBUTION

59m00 Highly compensated executive, administrative, and professional employees not paid on salary basis.
59m01 Airplane and rotorcraft pilots and copilots, and flight engineers.
59m02 (Reserved.)
59m03 Flight instructors.
59m04 Manager in chain-operated convenience food stores, self-service gasoline stations, and other similar establishments.
59m05 Exemption status under 29 CFR 541 must be determined on the basis of the facts in each case.

59n DOMESTIC SERVICE EMPLOYMENT

59n00 Definitions.
59n01 Home care terminology.
59n02 Domestic service employment: statutory provisions, coverage.
59n03 Private homes.
59n04 Domestic service employees: exemptions.
59n05 Companionship services.
59n06 Live-in domestic service employee: section 13(b)(21).
59n07 Live-ins: hours worked and recordkeeping.
59n08 Live-ins: application of section 3(m) of the FLSA to lodging.
59n09 Shared living arrangements.
59n10 Paid family/household members.
59n11 Joint employment in consumer-directed home care programs.
59n12 Hours worked in the home care context.
59n13 Recordkeeping.
59n14 Enforcement actions.
59n15 Initiating investigations.
59n16 Investigation procedures.
59n17 Investigation reporting requirements.
59n18 NAICS code.
59n19 Enforcement issues.

59o -u (RESERVED)

59v ENFORCEMENT OF FLSA SECTION 7(r): BREAK TIME FOR NURSING MOTHERS

59v00 Introduction.
59v01 Complaint intake.
59v02 Management review and assignment of complaints.
59v03 Investigation procedures.
59v04 Final conference.
59v05 Investigation reporting requirements.

59a SCHEDULING LIMITATIONS

59a00 <u>General.</u>

(a) For a variety of reasons, the types of cases identified in this chapter are subject to scheduling limitations or special handling procedures. (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

(b) In order to identify these firms prior to starting an investigation, the following system has been established:

(1) The closed-case card file will be checked prior to the initiation of an investigation of a firm to determine if any investigative history or scheduling limitation exists.

(2) A dummy closed-case card (*see* WH-53-MIS: Case Registration/CO Assignment Form (WH-53-MIS)) will be prepared and filed for each firm identified under the scheduling limitations or special handling procedures in this chapter.

(3) "Item 15" on the card will be used to reference the applicable section of this chapter. Additional information may be placed on the cards at the discretion of the DD.

(4) Dummy cards will be added and/or removed from the closed-case card file to conform with changes in this chapter.

59a01 **<u>Adverse decisions.</u>**

(a) (b) (7)(E) [redacted]

[redacted]

[redacted]

(b) Some adverse decisions are substantive; others involve minor points or a mix of fact and law that would have little or no effect on the scheduling and disposition of the investigation.

(1) Each regional administrator (RA), in conjunction with the regional solicitor of Labor (RSOL) and any other RA whose region may also be affected by a particular court of appeals, shall develop a listing and explanation of substantive adverse decisions.

(2) The listing of adverse decisions shall be distributed as a regional insert following this section. If negative, the insert should so state.

59a02 **<u>Traveling road shows, circuses, and carnivals.</u>**

(b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

59a03 **(Reserved.)**

59a04 **(Reserved.)**

59a05 **The Salvation Army.**

The Salvation Army takes the position that individuals in its rehabilitation program (*i.e.*, beneficiaries) are not employees for purposes of the Fair Labor Standards Act (FLSA). (b) (7)(E) [redacted]

59a06 **Bridgestone Firestone Tire and Rubber Company.**

(a) The main office-district office (MODO) of Bridgestone Firestone Tire and Rubber Company has moved from Akron, Ohio to Nashville, Tennessee.

(b) In order to provide coordination and uniformity of approach, no compliance actions of any type, including the servicing of complaints, should be initiated with this firm without first contacting the Nashville DO.

59a07 **Orkin Exterminating Company.**

The RSOL in Nashville (Southeast Region) has executed a company-wide compliance agreement with this firm. (b) (7)(E) [redacted] The compliance issues in prior investigations involved certain non-exempt pest control servicemen who were paid on a salary and commission basis without overtime compensation. The company agreed to pay FLSA back wages; to apply the minimum wage standard provided by section 6(a) and the overtime standard provided by section 7(a)(1); and to comply with the recordkeeping requirements.

While section 7(i) may in fact be applicable to some of the firm's employees, the compliance agreement also provides that the firm does not intend to rely on that exemption in its pest control and termite extermination operations. If, notwithstanding the terms of the compliance agreement, local management asserts the 7(i) exemption, (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

59a08 **Federal employees and non-appropriated fund employees: OPM enforcement.**

(a) Section 4(f) of the FLSA authorizes the U.S. Office of Personnel Management (OPM) to administer the act with respect to federal employees *except* employees of the Library of Congress, the U.S. Postal Service (USPS), the Postal Rate Commission, and the Tennessee Valley Authority (TVA) (*see* FOH 59a09).

(b) The OPM, not the WHD, is also authorized to administer section 18(b) of the FLSA, which provides that employees of non-appropriated fund instrumentalities under the jurisdiction of the Armed Forces must be paid in accordance with the minimum wage and overtime standards of the FLSA.

(c) In accordance with section 819 of the 1979 Department of Defense Appropriation Authorization Act, individuals who perform bagger or carryout service for patrons of a military department commissary are not considered employees for FLSA purposes if the sole compensation of these individuals for such service is derived from tips. *See* Pub. L. No. 95-485 and 92 Stat. 1626. Complaints involving unresolved issues with respect to commissary baggers should be referred to the OPM, as explained in FOH 59a08(d) below.

(d) All complaints and inquiries involving federal government employment within the jurisdiction of the OPM shall be referred by the WHD office that receives them directly to the appropriate regional office (RO) or area office of the OPM, Attention: Agency Compliance and Evaluation.

59a09 **Federal employees: WHD enforcement.**

The 1974 Amendments to the FLSA extended the act's coverage to certain federal employees. Pursuant to section 4(f) of the FLSA, the WHD administers the act with respect to employees of the following federal agencies:

(a) **Tennessee Valley Authority**

(1) TVA employs approximately 22,000 employees in the states of Kentucky, Tennessee, Alabama, Mississippi, South Carolina, North Carolina, and Virginia, and has two employees who are attached to land grant colleges in each state. The administrative headquarters for the TVA is in Knoxville, Tennessee.

(2) In addition to enforcing the provisions of the FLSA with respect to the TVA, the WHD has also been delegated enforcement responsibilities under the employee protection (*i.e.*, whistleblower) provisions of the Energy Reorganization Act of 1974 (ERA) and other laws as set forth in 29 CFR 24 that apply to TVA employees.

(3) The TVA and the WHD have an agreement that concerns the agencies' responsibilities under the FLSA, the ERA, and other laws as set forth in 29 CFR 24. The agreement provides that:

a. general inquiries about these laws will be handled by the office receiving the inquiry.

NOT FOR PUBLIC DISTRIBUTION

b. (b) (7)(E) [redacted]

c. final disposition of all investigations will be handled by the Nashville DO. Case files will be forwarded from other DOs for disposition to the Nashville DO.

(b) U.S. Postal Service

(1) (b) (7)(E) [redacted]

(2) *Postmasters: 29 CFR 541*

Postmasters are paid salaries that are in excess of the upset salary test. Therefore, they may be divided into two groups based on their duties for the purpose of applying section 13(a)(1):

a. Salaried postmasters who supervise two or more employees and whose primary duty is management may qualify for FLSA section 13(a)(1) exemption under 29 CFR 541.1. Even where such a postmaster's routine duties are substantial, the postmaster may still qualify for exemption.

b. Salaried postmasters who do *not* supervise two or more employees are not exempt as executive employees under 29 CFR 541.1. In addition, under the usual operation of a small post office, such postmasters generally do not exercise the requisite degree of discretion and independent judgment required to qualify for the 29 CFR 541.2 administrative exemption. These postmasters merely apply their knowledge of the USPS regulations and policies in following prescribed procedures, in determining which procedures to follow, or in deciding whether specified standards are met. Consequently, the postmasters in this group cannot qualify as exempt under section 13(a)(1).

(3) *Postal inspectors: 29 CFR 541*

Postal inspectors who have as their primary duty the performance of work directly related to the general business operations of the USPS qualify for exemption under section 13(a)(1) if they meet all other exemption criteria in 29 CFR 541.2.

(4) *Special investigators: 29 CFR 541 and section 7(k)*

The duties of postal service special investigators do not require the exercise of the requisite degree of discretion and independent judgment and therefore do not qualify for exemption under 29 CFR 541.2. Furthermore, the partial overtime exemption of

NOT FOR PUBLIC DISTRIBUTION

section 7(k) is not applicable to special investigators since, even though their duties are similar to law enforcement activities, they do not have the power to arrest.

(5) *Postal alcoholic recovery (PAR) counselor and 29 CFR 541*

PAR counselors work under the alcoholic program of the USPS. PAR counselor (PTAC-13), and PAR counselor (lead) all earn in excess of the upset salary, have as their primary duty the performance of work described in 29 CFR 541.2(a)(1), and are involved in the regular exercise of discretion and independent judgment. Accordingly, they may qualify as exempt under 29 CFR 541.2.

(6) *Individuals contracting with the USPS*

Individuals who contract with the USPS to clean USPS facilities are, in most instances, not independent contractors for purposes of the FLSA when the employment relationship tests in FOH 10b05 are applied. Such individuals should be treated as employees of the USPS under the FLSA.

(c) Postal Rate Commission complaints and inquiries

Refer all complaints and inquiries to the NO, OP, Division of Enforcement Policy and Procedures (DEPP), Attention: FLSA/Child Labor Branch, for further guidance.

(d) Library of Congress complaints and inquiries

Pursuant to a 1975 agreement with the WHD, the Library of Congress will take such internal actions as are necessary to resolve FLSA compliance problems. Forward all complaints and inquiries that involve employment by the Library of Congress to the NO, OP, DEPP, Attention: FLSA/Child Labor Branch, which will refer these complaints and inquiries to the Library of Congress.

59a10 <u>Domestic service workers employed by foreign nationals.</u>

Complaints by domestic service workers employed by foreign nationals, who are attached to embassies, consulates, the Organization of American States, the World Bank, the United Nations, or other international organizations, shall be forwarded to the NO, OP. That office will contact the U.S. Department of State regarding protocol considerations to determine whether an investigation shall be made. Where it does not become known that the employer is a foreign national until sometime after the investigation has been started, the investigation shall be discontinued and the matter referred to the NO, OP. All such referrals shall include the name of the employer and the organization with which the employer is associated.

59a11 <u>Hudson Oil Company, Inc.</u>

(a) Donovan v. Hudson Oil Company, Inc., et al.

(1) A district court judgment in favor of the Department of Labor (DOL) has been entered in this case. The company is now subject to an injunction under sections 6, 7, 11(c), 15(a)(2), 15(a)(3), and 15(a)(5) of the FLSA.

(2) The judgment applies to all employment from 07/01/1974 through 12/31/1981.

NOT FOR PUBLIC DISTRIBUTION

a. Specific information should be obtained in response to inquiries from individuals affected by the judgment. Former employees should be asked to provide their current address, social security numbers, periods of employment, locations at which they were employed, and the station numbers.

b. Employee information should be forwarded to the WHD RO at P.O. Box 13643, Kansas City, MO 64199, Attention: Hudson Oil Case.

(b) Back wage distribution

Hudson Oil Company, which is currently operating in the Kansas City area under the trade name of Handy Stop, has filed for reorganization under Chapter 11 of the Bankruptcy Act. Therefore, a lengthy delay in the distribution of back wages and liquidated damages in this case is expected.

(c) Enforcement procedure

(b) (7)(E) [redacted]

59a12 <u>(Reserved.)</u>

59a13 <u>Waffle House, Inc.</u>

(a) Donovan v. Waffle House, Inc., & Joe Rogers, Jr.

(1) A judgment by the U.S. District Court for the Northern District of Georgia has been entered in favor of Waffle House, Inc. This case was not appealed.

(2) The court found that, generally, unit managers of this company's fast food restaurants, who are guaranteed a salary of at least $155.00 per week and who meet the requirements of 29 CFR 541.1(b) -(d), have management as their primary duty, and, as such, are exempt as *bona fide* executive employees in sole charge of their establishments.

(b) Enforcement procedure

(b) (7)(E) [redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

[redacted]

59a14 **(Reserved.)**

59a15 **Volunteers of America.**

Investigations of Volunteers of America workshops may be scheduled only after first obtaining approval of the Administrator.

59a16 **Electronic Data Systems.**

(a) The MODO of Electronic Data Systems, Incorporated is located in Plano, Texas (Dallas DO).

(b) In order to provide coordination and uniformity of approach, no compliance actions of any type, including the servicing of complaints, should be initiated with this firm without first contacting the Dallas DO.

59b **SPECIAL HANDLING**

59b00 **General.**

Special arrangements have been made for the handling of specific firms or industries, as listed below.

59b01 **Lawrence Systems, Inc.**

(a) Lawrence Systems, Inc. in San Francisco, California is engaged in the operation of bonded field warehouses. These bonded field warehouses are usually located on the premises of an establishment using this service. Generally, the bonded establishment and Lawrence jointly employ employees who perform work in connection with the bonded warehouse. Lawrence Systems, Inc. has indicated its desire to cooperate fully with the WHD in achieving compliance and payment of back wages for employees jointly employed.

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

59b02 **J.C. Penney Company.**

(a) The national headquarters of the J.C. Penney Company has been moved to Dallas, Texas. A special procedure is added to be followed where WHIs have been denied permission to conduct interviews.

NOT FOR PUBLIC DISTRIBUTION

(b) J.C. Penney has instructed its branch managers to cooperate with representatives of the WHD in collecting data and furnishing appropriate records. (b) (7)(E) [redacted] J.C. Penney indicated that employees being interviewed may request a copy of the interview statement.

(c) (b) (7)(E) [redacted]

59b03 **Edison Brothers Stores, Inc.**

The main office of Edison Brothers (Edison Brothers Stores, Inc. and Edison Brothers Apparel Stores, Inc.) is in St. Louis, Missouri. The company operates shoe stores nationwide under the names of Bakers/Leeds, Burts, Chandlers, The Wild Pair, Sacha London, Qualicraft, Rumors, Fast & Fun, and CODA. It operates accessory stores under the names of Jeans West, JW, Bottom Half, Oak Tree, J. Riggings, Outrigger, Fashion Conspiracy, Inspiration, Innovations, Size 5-7-9 Shops, Petite Street, and Small Stuff. The company has instructed its branch managers to make payroll records available to the WHD and cooperate in investigations. (b) (7)(E) [redacted]

59b04 **G.C. Murphy Co.**

G.C. Murphy Co. of McKeesport, Pennsylvania is a division of Ames Department Stores and also operates under the names of Morgan & Lindsay, Inc., Tom Cobb, Inc., M.C. Cobb, Inc., and Murphy's Mart. The company has instructed its branch managers to notify the main office in McKeesport of any investigation being made by the WHD and to cooperate by making records available and permitting employees to be interviewed. (b) (7)(E) [redacted]

59b05 **Kmart Corporation and S.S. Kresge.**

(a) Kmart does business nationwide under the name of Kmart, S.S. Kresge, Jupiter Stores, and Kmart Discount Foods. The main office of Kmart is located in Troy, Michigan.

(b) At the outset of every investigation of a Kmart establishment, a MODO call should be made to the Grand Rapids DO, Troy field office (FO). Likewise, at the conclusion of every Kmart investigation, a copy of the narrative should be sent to the Troy FO.

(c) Recent investigations of Kmart establishments throughout the country reveal the following:

(1) Branch managers will make time and payroll records available at the local establishment. Accordingly, all factual questions should be resolved at the branch level.

(2) Branch managers and/or the company's district level managers and attorneys are able to negotiate compliance and the payment of back wages at the local or district level.

NOT FOR PUBLIC DISTRIBUTION

(3) Violations, when they occur, typically involve off the clock hours worked that are not properly compensated. Such violations, when they occur, have generally proven to be local in nature.

(4) The company does not claim exemption under section 13(a)(1) of the FLSA for persons employed as manager trainees. If and when employees in this job category work a fluctuating schedule, overtime violations may be encountered. The company does claim exemptions under 29 CFR 541 for persons employed as assistant managers. Investigations that disclose violations for assistant managers should be closely coordinated with the Troy FO.

59b06 **Ford Motor Credit Company.**

Ford Motor Credit Company in Dearborn, Michigan has requested that all branch investigations be referred to the main office for negotiation.

59b07 **B.F. Goodrich Co., General Tire & Rubber Co., and Goodyear Tire & Rubber Co.**

These companies have requested that all branch investigations be referred to the Cleveland DO for negotiation with their main office officials.

59b08 **Circle K Corporation.**

(a) Circle K Corporation operates a chain of convenience stores in the states of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oklahoma, Oregon, Texas, Utah, Washington, and Wyoming. Prior to initiating any compliance action, a MODO call (*see* FOH 61a02) shall be made to the Phoenix DO.

(b) With the exception of failure to pay last check situations, which should be resolved at the local level, a call should be made to the Director of Personnel for Circle K (4500 South 40th Street, Phoenix, AZ 85040, telephone (602) 268-1351) before opening the case *and* subsequent to the completion of the fact-finding. That official is authorized to correct violative situations and approve back wage payments, and will meet with the WHI, if necessary.

59b09 **Staff Builders, Inc.**

(a) Staff Builders, Inc. provides temporary and supplemental healthcare-oriented employees to hospitals, nursing homes, businesses, and private residences. There are both company-owned and franchised offices. The Long Island DO is the MODO. (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b)(7)(E) [redacted]

(c) The MODO has worked closely with the New York RSOL on Staff Builders cases. At the present time, there are no plans for a national litigation case. Court actions may be initiated in the various regions as individual cases are developed.

(d) Following is a list of current Staff Builders locations by RO and DO jurisdiction. For further information, call the MODO.

Locations of Staff Builders, Inc. Offices by Region and Local Jurisdiction

REGION I – BOSTON

Hartford, CT - Bridgeport FS

REGION VI - DALLAS

New Orleans, LA

Albuquerque, NM

Dallas, TX - Ft. Worth FS - 2 establishments

Houston, TX - 4 establishments

Tulsa, OK - 2 establishments

REGION II - NEW YORK

Manhattan, NY

Brooklyn, NY

REGION VII – KANSAS CITY

Kansas City, MO

St. Louis, MO

NOT FOR PUBLIC DISTRIBUTION

Newark, NJ

Long Island, NY

REGION III - PHILADELPHIA

Pittsburgh, PA

Richmond, VA

REGION IV - ATLANTA

Jacksonville, FL - Daytona Beach FS

Miami, FL - 3 establishments

Atlanta, GA

Nashville, TN - 2 establishments

REGION V – CHICAGO

Chicago, IL - 3 establishments

Minneapolis, MN - 2 establishments

Cleveland, OH - 5 establishments

Cincinnati, OH - 5 establishments

REGION VIII - DENVER

Denver, CO - 2 establishments

REGION IX - SAN FRANCISCO

Glendale, CA - 3 establishments

Los Angeles, CA - 3 establishments

Sacramento, CA

Santa Ana, CA - 6 Establishments

San Francisco, CA - 8 establishments

REGION X – SEATTLE

Portland, OR

Seattle, WA - 2 establishments

NOT FOR PUBLIC DISTRIBUTION

Columbus, OH - 2 establishments

59b10 **United Consumers Club.**

(a) United Consumers Club has agreed to future compliance and payment of back wages found due its telephone solicitors paid on a commission basis.

(b) The United Consumer Club main office is located in Merrillville, IN. There are company-operated locations in Colorado, Florida, Georgia, Indiana, Illinois, Missouri, Ohio, and Texas.

(c) The firm has indicated that:

(1) branch managers have no authority to change payroll practices or authorize back wage payments;

(2) prior to attempting a conciliation, the WHD should contact the United Consumer Club comptroller at (219) 736-1100; and

(3) United Consumer Club will not accept responsibility for non-compliance or the back wage liability of *franchise* establishments.

(d) (b) (7)(E) [redacted]

59b11 **State Farm Insurance Company.**

(a) This company is headquartered in Bloomington, Illinois, and has 28 regional offices and nearly 700 claims offices throughout the U.S. As a result of an investigation by the Springfield, Illinois DO, it agreed to lengthen the time its employees spend in the non-exempt claim representative trainee position to 10 months before they are generally reclassified to the exempt claim representative position.

(b) The firm has requested that all contacts with the WHD be handled by the Springfield, Illinois DO regardless of the issues involved. The Springfield DO should be advised of any complaint or directed investigation prior to its scheduling. All further investigative activity should then be handled via BEFA procedures with the Springfield, Illinois DO.

59b12 **(Reserved.)**

59b13 **ServiceMaster.**

(a) ServiceMaster, Consumer Services L.P. has in excess of 600 branches nationwide in over 40 states. The main office is located in Memphis, Tennessee. The firm operates under the following names:

- ServiceMasterTruGreen/ChemLawn (lawn care)
- Terminix International (pest control)

NOT FOR PUBLIC DISTRIBUTION

- American Home Shield (sells residential warranties)
- Merry Maids (residential home cleaning services)
- ServiceMaster Residential Commercial (restoration work)

(b) Branch managers have no authority to resolve any compliance issues or back wage findings arising from WHD investigations. This authority rests in the main office in Memphis.
(b) (7)(E) [redacted]

59b14 **Hardee's Food Systems, Inc.**

(a) The DOL has obtained a stipulation and order for Hardee's Food Systems, Inc. (Hardee's), effective 07/07/1994. Hardee's has agreed to future compliance with the child labor provisions under Reg. 3 and the FLSA recordkeeping provisions. The WHD has agreed *not* to institute any enforcement proceedings, including, but not limited to, assessment of civil money penalties (CMPs), against Hardee's for violations of the above-named provisions occurring prior to the date of the stipulation.

(b) Accordingly, there shall be no enforcement action taken against this employer with respect to allegations of Reg. 3 and/or recordkeeping violations occurring prior to 07/07/1994. However, investigations of alleged violations of the hazardous occupations order (HOs) or any other provision of the FLSA occurring prior to 07/07/1994, or investigations of alleged Reg. 3 and/or recordkeeping violations occurring after 07/07/1994, may be conducted but the Raleigh DO *must* be contacted, *prior to initiating the investigation*. Further, no directed activity shall be scheduled for this employer prior to 07/07/1995.

(c) Since the stipulation carries the same weight as an injunction, all investigation files on this employer that involve violations of Reg. 3 and/or the recordkeeping provisions shall be prepared for potential litigation.

(d) The above policy also applies to all Roy Rogers restaurants owned by Hardee's Food Systems, Inc.

59b15 **Tricon Corporation: Pizza Hut, Kentucky Fried Chicken, and Taco Bell.**

(a) Tricon Corporation, which was formed in 1997, operates establishments throughout the U.S. under the names of Pizza Hut, Kentucky Fried Chicken (KFC), and Taco Bell. Tricon also issues franchises to others to operate establishments under these names. The MODO for Tricon is the Louisville, Kentucky DO. In order to facilitate our interactions with the enterprise, the special instructions below shall be followed until further notice.

(b) **Corporate-owned establishments**

(b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(c) **Franchise-owned establishments**

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

59b16 **Browning-Ferris Industries.**

(a) Browning-Ferris Industries operates the largest refuse collection and disposal facilities in the nation. Browning-Ferris Industries has over 400 locations with more than 12,000 employees.

(b) (b) (7)(E) [redacted]

(c) A formal compliance partnership agreement has been executed and does not expire until the end of June, in the year 2000.

59c **ENFORCEMENT POLICIES**

59c00 **General.**

The WHD has taken special enforcement positions with regard to some pay plans used by certain firms, as explained below.

59c01 **Salespersons at condominium resorts or campgrounds.**

(a) (b) (7)(E) [redacted]

(b) A typical example of the application of this enforcement position would be where a sales employee is assigned to a sales office located on the premises of a condominium resort or campground, and

(1) the sales employee's time inside the sales office is spent in the following activities:

a. Answering the telephone for brief periods

b. Greeting prospective customers and providing them with information

c. Showing films, photographs, and floorplans of the property

d. Making sales presentations

NOT FOR PUBLIC DISTRIBUTION

e. Preparing paperwork (*e.g.*, contracts and applications)

(2) the majority of the sales employee's time is spent performing the following activities outside of the office:

a. Taking prospective customers on tours of the property (*e.g.*, models, tennis courts, swimming pools, and other facilities)

b. Touring the local points of interest in the surrounding community (*e.g.*, theaters, lakes, and beaches)

c. Making sales presentations at the prospective customer's home or place of work, or in a restaurant or hotel lobby.

(c) This special enforcement policy does not apply to employees who sell timeshares or lots in condominium resorts or campground from sites located *elsewhere*. For example, this policy would not apply in a situation where prospective customers are contacted by a representative of a land development firm and invited to attend a presentation at the firm's office located at a site far from the condominium resorts or campground. At such an office, a sales employee will attempt to sell prospective customers timeshares in a condominium resort or campground site located at such a great distance away from the office that the sales employee cannot provide a tour of the premises. Typically, the entire sales process takes place inside the firm's sales office. Sales employees in such situations are clearly engaged in inside sales.

(d) This special enforcement policy does not have any effect on individual employees' rights under section 16(b).

59c02 **<u>International Alliance of Theatrical Stage Employees: motion picture and television industry - section 7(f) wage plan.</u>**

(a) Some locals of the International Alliance of Theatrical Stage Employees have collective bargaining agreements (CBAs) with members of the motion picture and television industry, which provide for certain types of employees to be paid a specified hourly rate plus extra half-time for hours over 40 in a workweek, with a guarantee of a weekly wage based on the specified rate for a 5-day workweek of 54 hours, a 5-day workweek of 48.6 hours, or a 5-day workweek of 43.2 hours. The agreements further provide that the guaranteed weekly pay of employees who absent themselves without the employer's consent may be reduced by one-fifth of the weekly guarantee for each day of absence.

(b) A committee representing the motion picture and television industry and the International Alliance of Theatrical Stage Employees met with the Administrator, and was advised of the WHD position regarding the specified regular rate and deductions from the guarantee set forth in 29 CFR 778.408 and 29 CFR 778.410 -.413. The committee was further advised that while the pay plan could not be administratively approved, the WHD was not prepared to litigate the question.

59d **APPLICATION OF FLSA TO EMPLOYEES OF STATE AND LOCAL GOVERNMENTS**

59d00 **<u>General.</u>**

NOT FOR PUBLIC DISTRIBUTION

(a) On 02/19/1985, the U.S. Supreme Court ruled in *Garcia v. San Antonio Metropolitan Transit Authority et al. (Garcia)* that the minimum wage and overtime pay provisions of the FLSA apply to the public mass transit employees of the San Antonio Metropolitan Transit Authority. On 04/15/1985, the Supreme Court issued its mandate in the case. In deciding *Garcia*, the Supreme Court expressly overruled its earlier decision in *National League of Cities v. Usery (NLOC)* that the minimum wage and overtime pay provisions of the FLSA could not constitutionally be applied to state and local government employees who are engaged in traditional government functions. Thus, the minimum wage and overtime pay provisions of the FLSA apply to all state and local government employees, except those specifically excluded in section 3(e)(2)(c) of the FLSA and those who may otherwise qualify for an exemption. On 11/13/1985, the Fair Labor Standards Amendments of 1985 were signed into law. This legislation addressed the concerns of state and local governments and their employees related to the application of the FLSA to public employment as a result of the *Garcia* decision.

(b) The Amendments permit state and local governments to compensate their employees for overtime hours worked with compensatory time off (comp time) in lieu of overtime pay, at a rate of one and one-half hours for each hour of overtime worked. The Amendments provide that the use of comp time in lieu of overtime pay must be pursuant to some form of CBA or other agreement, or understanding between the employer and employee prior to the performance of work, and that comp time may be accrued up to a maximum of 240 hours for most public employees, except that employees engaged in public safety, emergency response, and seasonal activities may accrue comp time up to 480 hours. For hours worked in excess of the accrued maximum amounts, an employee would receive overtime pay as provided under the existing provisions of section 7 of the FLSA. The Amendments also exclude, from the FLSA definition of employee, individuals who volunteer services to state and local governments without compensation but receive a nominal fee, reasonable benefits, or reimbursement for expenses.

(c) Rules and interpretations implementing the Fair Labor Standards Amendments of 1985 are contained in 29 CFR 553.

59d01 **Investigation policy.**

(b) (7)(E) [redacted]

59d02 **Notification of government employers.**

(a) (b) (7)(E) [redacted]

(b) This policy is not intended to affect any employee's rights under section 16(b) of the FLSA.

NOT FOR PUBLIC DISTRIBUTION

(c) Section 16(b) of the FLSA and section 6 of the Portal-to-Portal Act of 1947 provide that the employees of a public agency may sue for back wages in any federal or state court of competent jurisdiction.

59d03 **Discrimination against public agency employees under section 8 of the 1985 Fair Labor Standards Amendments.**

(a) Any action taken by a public agency *after 02/19/1985* to reduce employees' wages, or otherwise adversely affect the terms or conditions of employment, constitutes an act of discrimination under section 8 of the Amendments, if taken in response to employee assertions of the FLSA overtime coverage after 02/19/1985. Section 8 of the Amendments provides that such an action is deemed a violation of section 15(a)(3) of the FLSA. After 08/01/1986, the protections under section 8 apply only to employees who have taken an action described in section 15(a)(3) of the FLSA.

(b) Any unilateral action taken by public agencies on or after 11/13/1985 (the date of enactment), which nullifies the effect of the FLSA overtime requirements by reducing employees' regular rates of pay or fringe benefits, is also a violation of section 8 whether or not such actions are in response to employee assertions of coverage. The prohibition of such unilateral reductions in wages or fringe benefits does not expire on 08/01/1986.

(c) It is also a violation of section 8 for state and local governments to attempt to comply with the overtime provisions of the FLSA by unilaterally dividing salaries into straight-time and overtime wages, such that the public employees continue to receive the same or approximately the same amounts in pay.

(d) Unilateral reductions in wages or fringe benefits taken in the future in response to fiscal considerations not directly attributable to the extension of the FLSA coverage are not violations of section 8. For example, where a city comes into compliance and pays proper overtime wages beginning 04/15/1986, an across-the-board reduction in pay for all employees as part of the next budget cycle, which is required for budgetary considerations not tied to the FLSA coverage (*e.g.*, a significant decrease in the size of a community), would not be a violation of section 8.

(e) The 1985 Amendments eliminated any potential minimum wage liabilities for the period prior to 04/15/1986, with respect to employees in the U.S. territories and possessions. However, this provision has no effect on back wage liabilities for violations of section 8.

(f) **Section 8 back wage computations**

(1) Public agencies, other than those whose functions are identified as non-traditional in 29 CFR 775, are relieved of overtime pay liabilities prior to 04/15/1986. Thus, back wage computations (except for the non-traditional functions in 29 CFR 775) for regular rate reduction violations of section 8 of the Amendments must not include any additional half-time premium pay for the period prior to 04/15/1986.

(2) For the period *after* 04/15/1986, back wage computations must include any additional half-time premium pay that is due because of the restoration of the proper regular rate.

(3) Scenario:

NOT FOR PUBLIC DISTRIBUTION

On 03/01/1985, a police officer in the continental U.S. who works 50 hours a week requests time and one-half for future overtime hours worked. The employer reduces the regular rate from $10.00 per hour to $9.09 per hour. Thus, with overtime included, the employee continues to earn approximately the same pay, $500.00 per week. On 12/27/1986, the back wages are calculated as follows:

- 03/01/1985 – 04/14/1986:

0.91 x 50 hours = $45.50

$45.50 x 57 weeks = $2,593.50

- 04/15/1986 – 12/27/1986:

0.91 x 50 hours = $45.50

$45.50 x 36 weeks = $1.638.00

0.91 x ½ x 10 hours = $4.55

$4.55 x 36 weeks = $163.80

- Total back wages due = $2,593.50 + $1,638.00 + $163.80 = $4,395.30

(4) The employer is required to restore the prior regular rate even for time in which the employee was on paid vacation, sick leave, or compensatory time, including non-FLSA compensatory time, status, because section 8 precludes any reductions in wages or fringe benefits.

(5) Of course, after 04/15/1986, if the employee was credited with compensatory time for overtime hours worked, no additional half-time premium pay would be due for overtime hours worked.

(6) Where the application of section 8 or the method for proper back wage computations under section 8 is unclear, the file should be sent to the NO, Attention: Assistant Administrator, Office of Policy.

(7) Amounts and employees found due should be recorded on WH-51-MIS: Compliance Action Report (WH-51-MIS) as FLSA minimum wage, except any premium overtime pay amounts due for the period after 04/15/1986, which should be recorded as FLSA overtime.

59d04 **Salary basis of payment for public employees otherwise exempt under section 13(a)(1) of the FLSA.**

(a) Some state and local government jurisdictions have statutory provisions, which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick, or other type of paid leave. Such statutory provisions conflict with the salary basis of payment as discussed in 29 CFR 541.118. For example, where an otherwise exempt public employee is absent from work for personal reasons, or is unable to work because of illness or accident, and the employee has not accrued or exhausted paid leave time, such employee is paid only

NOT FOR PUBLIC DISTRIBUTION

for hours actually worked in accordance with applicable state or local law. This practice is similar to the practice applicable to federal employees. Consequently, a public employer may make deductions from pay for absence(s) on an hourly basis, which is contrary to the position in 29 CFR 541.118 that deductions may be made only for absence(s) of a day or longer.

(b) An enforcement policy has been adopted with regard to the salary basis of payment for otherwise exempt public employees. The WHD will not deny an exemption under section 13(a)(1) of the FLSA to an otherwise exempt public employee, whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have or has exhausted available paid leave for such absence(s). *See* FOH 22b15.

(c) This enforcement policy applies only where the public employer can show that a provision contained in applicable state or local law, in effect prior to 04/15/1986, prohibits payments to an employee for absence(s) of the type described above that are not covered by available paid leave. This policy is not intended to affect any employee's rights under section 16(b) of the FLSA.

59d05 **Convicted offenders in work-release programs.**

Convicted offenders may be enrolled in programs operated by state, county, or local probation departments that provide employment opportunities for individuals whose sentences have been suspended prior to their release. The individuals may be required to live in a pre-release center under the supervision of the center's staff and may work for private employers. Wages earned are paid by the employer to the director of the center, who is responsible for disbursement of the money. The FLSA does not prohibit deductions from the probationers' wages for food, lodging, and other charges, including restitution to victims of an offense committed by the probationer, where required by applicable laws.

59d06 **Section 7(k) work period.**

(a) The work period established by a public employer, under the provisions of section 7(k) of the FLSA, may begin on any calendar day and at any hour of the day. Once this work period is established, the beginning time and duration may not be changed unless the change is intended to be permanent.

(b) Where employees perform both fire protection and law enforcement activities, the applicable standard is the one that applies to the activity in which the employee spends the majority of work time during the work period.

59d07 **Emergency medical technicians.**

(a) Emergency medical technicians (EMTs) who are employed by a public fire protection or law enforcement agency, and whose work is an integral part of that agency's fire protection or law enforcement activities, may be paid pursuant to the exemption provided by section 7(k) of the FLSA. This is explained in 29 CFR 553.210(a) and 29 CFR 553.211(b).

(b) EMTs who are employed by a public agency other than a fire protection or law enforcement agency, and who are stationed at a fire station or a police station in order to respond to calls, may be paid pursuant to the exemption provided by section 7(k) of the FLSA where they are an integral part of fire protection or law enforcement activities. However, the provisions of

NOT FOR PUBLIC DISTRIBUTION

section 7(k) do not apply to ambulance and rescue service employees of a public agency, such as a hospital, which was subject to the FLSA prior to the Amendments of 1974. Additionally, the exemption is not available to EMTs employed by private emergency medical service units.

(c) EMTs who are not employed by a fire protection or law enforcement agency, and who are not stationed at a fire station or a police station, may also be paid pursuant to the exemption provided by section 7(k) under certain conditions, except for those whose employment would have been subject to the FLSA prior to the 1974 Amendments. As explained in 29 CFR 553.215, ambulance workers and rescue service employees of a public agency, other than a fire protection or law enforcement agency, may be treated as employees engaged in fire protection or law enforcement activities if their services are substantially related to fire protection or law enforcement. 29 CFR 553.215 contains two tests for determining if employees of a public agency, other than a fire protection or law enforcement agency, are providing services that are substantially related to fire protection or law enforcement:

(1) The first test requires that, in order for individuals to qualify as fire protection employees, they must be trained to rescue fire victims, accident victims, or firefighters who are injured in the performance of their firefighting duties. Similarly, in order for individuals to qualify as law enforcement employees, they must be trained to rescue crime victims or law enforcement personnel who are injured in the performance of their law enforcement duties.

(2) The second test requires that individuals be regularly dispatched to fires, riots, natural disasters, or accidents in order for individuals to qualify as fire protection employees. Similarly, in order for individuals to qualify as law enforcement employees, they must be regularly dispatched to crime scenes, riots, natural disasters, or accidents. Where employees perform both fire protection and law enforcement activities, the applicable standard is the one that applies to the activity in which the employee spends the majority of work time during the work period.

59d08 **Parents as school volunteers.**

(a) As a matter of enforcement policy, the WHD will not assert FLSA violations for time spent by a *public* school employee, who is also the parent, or who stands *in loco parentis*, of a child in that school system, volunteering in his or her own child's classroom or in activities directly related to his or her own child's education without expectation of compensation. This enforcement policy applies with respect to such volunteer activities by the parent provided that the employee was not coerced or pressured to so volunteer.

(b) This policy is being adopted notwithstanding the provisions of section 3(e)(4) of the FLSA. Public employers should be advised that this enforcement policy does not waive or otherwise have any effect on an individual employee's rights under section 16(b) of the FLSA to, at some future date, maintain a claim for appropriate FLSA compensation for volunteer hours.

59d09 **Court reporters.**

(a) On 09/06/1995, section 7(o) of the FLSA was amended by Pub. L. No. 104-26 by re-designating paragraph (6) as paragraph (7) and inserting after paragraph (5) the following new paragraph:

NOT FOR PUBLIC DISTRIBUTION

"(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if –

"(A) such employee is paid at a per-page rate which is not less than –

"(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

"(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

"(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

"(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee, in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed."

(b) This amendment to section 7(o) applies after 09/06/1995, and with respect to actions brought in a court after that date.

(c) This amendment to the FLSA was the result of efforts by the National Court Reporters Association to remove, in effect, its members from the purview of the FLSA with respect to time spent outside of normal working hours preparing transcripts requested by parties other than their employers. Work time directed by their employers as a part of the normal employment relationship (*e.g.*, night or weekend court sessions) is not affected by this amendment. Accordingly, the WHD does not anticipate any enforcement activity involving court reporters' activities outside of the hours worked for their employers. (b) (7)(E) [redacted]

59e EMPLOYMENT RELATIONSHIP

[01/03/2017]

59e00 <u>General.</u>

(a) To properly enforce the FLSA and Migrant and Seasonal Worker Protection Act (MSPA), it is essential that the WHI evaluate all available facts to determine whether the worker is an employee of the employer. Most workers are employees under the law. The FLSA and MSPA define "employ" as including "to suffer or permit to work." This definition is very broad and relies on more than the control factor when determining whether an employment

NOT FOR PUBLIC DISTRIBUTION

relationship exists. Under the FLSA and MSPA, a worker is an employee if, as a matter of economic reality, he or she is economically dependent on the employer. An independent contractor, on the other hand, is in business for himself or herself and depends on his or her business for work.

(b) This section discusses the analysis for determining whether a worker is an independent contractor as opposed to an employee and provides supplemental guidance regarding internal procedures. Policy guidance on the employment relationship as it relates to the potential misclassification of employees as independent contractors is contained in FOH 10b05 -07.

(c) If an employer asserts that a worker is not an employee for another reason (*e.g.*, because the worker is a volunteer or trainee), a different analysis may apply. *See* FOH 10b.

(d) FOH 59e05 provides guidance on when and how to engage our RSOL partners and on useful practices, investigative tools, and fact-finding strategies to use during employment relationship investigations, especially when potentially complicated issues arise.

[01/03/2017]

59e01 **<u>An individual worker can be an employee even if he or she has incorporated as a business.</u>**

An individual worker who has incorporated as a business and is treated as an independent contractor may nonetheless be an employee under the FLSA and MSPA (and thus be misclassified). Examples include subcontractors, labor brokers, and farm labor contractors (FLCs) who are incorporated as a business but simply consist of an individual worker (and possibly others working for him or her). The individual worker may not in reality be in business for himself or herself and may have incorporated as a business at the request of an employer or for other reasons. If there is a question about whether the worker is in business for himself or herself, apply the economic realities analysis discussed in FOH 10b06 without regard to the worker's incorporation as a business.

[01/03/2017]

59e02 **<u>Economic realities factors: a guide for determining the ultimate question whether the worker is an employee or independent contractor.</u>**

In cases where the employer asserts that the worker is an independent contractor and therefore not covered by the FLSA or MSPA, or when the nature of the relationship makes it unclear whether the worker is an employee or independent contractor, the WHI will determine whether the worker is an employee or an independent contractor by applying the economic realities factors.

[01/03/2017]

59e03 **<u>The economic realities factors.</u>**

(a) Although the economic realities factors are not exclusive and may differ some depending on applicable court decisions, the factors set forth in this section are generally considered when determining if a worker is an employee or independent contractor. The examples and

NOT FOR PUBLIC DISTRIBUTION

questions below are intended to help the WHI in gathering relevant evidence to assess the economic reality of the working relationship.

(b) Is the work an integral part of the employer's business?

(1) *Nature of the employer's business*

The WHI should seek evidence that reveals the type of business the employer is engaged in and the type of work that the worker is performing. The evidence should focus on business purposes, practice, and organization.

(2) *Type of work that the worker performs for the employer's business*

Integral does not mean important or unique. Integral work is work that is part of producing the good or providing the service that the employer is in business to produce or provide. It does not matter how many other employees may perform the same work. Work can be integral to an employer's business even if the work is just one component of the business and/or is performed by hundreds or thousands of other workers.

(3) *The practicalities of the work performed by employees as opposed to independent contractors*

The closer that the service provided by the worker is to the type (or one of the types) of work that the employer performs for its customers and clients, the greater the likelihood that the worker is an employee. By contrast, the work performed by an independent contractor is generally outside the scope of goods and/or services that the employer is in business to provide.

For example, for a construction company that frames residential homes, carpenters are *integral* to the employer's business because the company is in business to frame homes, and carpentry is an integral part of providing that service.

In contrast, the same construction company may contract with a software developer to create software that, among other things, assists the company in tracking its bids, scheduling projects and crews, and tracking material orders. The software developer is performing work that is *not integral* to the construction company's business, which suggests that the worker is an independent contractor.

(4) *Possible questions for WHI to explore*

a. What is/are the employer's business(es)?

b. What services does the employer provide, and what products does it produce?

c. What type(s) of work are performed?

d. What type of work is performed by the workers classified as employees by the employer?

NOT FOR PUBLIC DISTRIBUTION

e. What type of work is performed by the workers classified as independent contractors by the employer?

f. Do the workers classified as independent contractors work alongside the employer's employees? Do they perform the same type of work?

g. Does the employer have employees who perform the same type of work as the worker?

h. How does the work performed by the worker fit into the various types of work that is performed by the employer?

i. If the employer produces goods, are the workers part of the production process?

j. If the employer provides services, do the workers provide any of the services?

(5) Evaluating this factor will require an understanding of the employer's business, which the workers may not be able to provide. As discussed in FOH 59e04, investigative approaches beyond employee interviews may be necessary.

(c) Does the worker exercise managerial skill that affects the worker's opportunity for profit or loss?

(1) *Evidence of worker's use of managerial skills toward impacting his or her opportunity for profit and loss*

If the worker classified as an independent contractor is in fact in business for himself or herself, the WHI should be able to uncover evidence indicating that the worker applies managerial skills to make independent business decisions that will affect his or her opportunity for profit or loss, such as decisions about products, services, pricing, and other business strategy.

(2) *Decisions made by the worker regarding his or her own business as an independent contractor*

The WHI should inquire about the types of decisions that the worker makes. The ability to determine his or her workforce size (such as by hiring his or her own helpers) may demonstrate the exercise of managerial skill because the number of workers engaged in work can affect the opportunity for profit or loss. On the other hand, a worker's decision to work more hours or work more jobs to earn more is not a managerial skill and does not suggest that the worker is in business for himself or herself; employees make the same decisions.

The WHI should explore the reasons behind the worker's business decisions. For example, did the employer require each worker to buy particular equipment in order to perform the required work? Or, did the worker decide on his or her own initiative to buy equipment to perform the work and obtain other work? Generally, the less business risk that the worker carries in the relationship with the employer, the greater likelihood that an employment relationship exists.

NOT FOR PUBLIC DISTRIBUTION

Scenario 1:

A worker provides cleaning services for corporate clients. The worker performs assignments only as determined by a cleaning company; he or she does not independently schedule assignments, solicit additional work from other clients, advertise his or her services, or endeavor to reduce costs. The worker regularly agrees to work additional hours at any time in order to earn more. In this scenario, the worker *does not exercise managerial skill* that affects his or her profit or loss. Rather, his or her earnings may fluctuate based on the work available and his or her willingness to work more. This lack of managerial skill is indicative of an employment relationship between the worker and the cleaning company.

Scenario 2:

In contrast, a worker provides cleaning services for corporate clients, advertises, negotiates contracts, decides which jobs to perform and when to perform them, decides to hire helpers to assist with the work, and recruits new clients. This worker exercises managerial skill that affects his or her opportunity for profit and loss, which suggests that the worker is an independent contractor. In other words, this worker is able to make decisions about his or her business strategy, including the products and services that his business provides, pricing, and how to expand the business through new clients and/or services.

(3) *Possible questions for the WHI to consider*

a. Who sets the worker's pay rate? How are the wages paid? Can the worker negotiate the pay rate?

b. Is the worker's pay directly linked to the profit and/or loss of the employer's business?

c. Does the worker make decisions affecting the expansion or contraction of the business or does the worker make decisions about the purchase or sale of equipment or resources and how they should be used and allocated? For example, can the worker offer a new service or decline to offer a service?

d. If the worker provides labor or services to a customer, who sets the price paid by the customer?

e. Can the worker make a profit beyond earnings for his or her labor?

f. Is there a bidding process between the employer and the worker? What type of process?

g. Can the terms and conditions of the contract between the employer and worker be negotiated (*i.e.*, wage rates, work schedules, schedule of completion of work)?

h. Does the worker pay for work-related expenses such as transportation, helpers' pay, insurance, bonding, licensures, and certifications? Is the worker reimbursed?

NOT FOR PUBLIC DISTRIBUTION

i. Who is responsible for supplying equipment, tools, and materials? Who pays for them? If the worker pays for them, does he or she purchase or lease them from the employer? Who retains the equipment, tools, and materials after the job is completed?

j. Does the worker advertise his or her services in the marketplace?

k. Is the worker its own legal entity? Did the worker establish the legal entity on his or her own initiative or at the insistence of an employer?

l. Does the worker hire his or her own employees or helpers to complete the work?

m. What responsibility does the employer have for any helpers hired by the worker?

n. Does the employer perform any payroll functions for the helpers hired by the worker?

o. Does the employer cover any of the helpers hired by the worker on a workers' compensation policy?

p. Can the worker suffer a loss? How?

q. Does the worker accept or reject work?

(d) How does the worker's relative investment compare to the employer's investment?

(1) *Consider the worker's investment compared to the employer's investment*

If the worker truly is an independent business, the amount of the worker's investment should compare favorably with that of the employer and there should be some risk that the worker will suffer a loss.

The worker's investment will generally be smaller in scope and value than the employer's investment. Nonetheless, the worker's investment compares favorably with the employer's when the investment is relatively substantial and when the investment is used for the purpose of sustaining an independent business beyond the job or project that the worker is performing. A favorable investment by the worker indicates that he or she is on the same footing as the employer.

The fact that a worker has made any investment is not enough to indicate that the worker is in business for himself or herself. The worker should make a capital investment that indicates a sustainable business. For example, the purchase and/or leasing of real estate; the purchase of inventory and supplies; the purchase, leasing, or construction of any processing facilities are types of business investments that may indicate that the worker is in business for himself or herself.

If the worker risks suffering a monetary loss, the circumstances of the risk should be examined to determine if the risk is indicative of independent contractor status. If the worker exercises business judgment to decide the amount and type(s) of

NOT FOR PUBLIC DISTRIBUTION

investment(s) and risks losing that investment, then that fact may indicate that the worker is in business for himself or herself. On the other hand, to the extent that the risk of loss results in part from fees, charges, or costs imposed by the employer (*e.g.*, a franchise fee that must be paid to the employer before the worker can perform janitorial work, or a leasing fee that must be paid to the employer so that the worker can lease the truck required by the employer), the loss may not be indicative of independent contractor status because the loss stems more from the employer's control of the working relationship rather than the worker's exercise of business judgment.

It is important for the WHI to consider the employer's total investment in its business. Comparing the worker's investment only to the employer's investment in the job performed by the worker disregards the ultimate determination whether the worker is truly an independent business operator or is economically dependent on the employer.

Scenario 1:

A worker providing cleaning services for a cleaning company is issued an IRS Form 1099-MISC (Form 1099-MISC) each year. The company provides insurance, a vehicle to use, and all equipment and supplies for the worker. The company invests in advertising and finding clients. The worker occasionally brings his or her own preferred cleaning supplies to certain jobs. In this scenario, the relative investment of the worker as compared to the employer's investment is indicative of an employment relationship between the worker and the cleaning company. The worker's investment in cleaning supplies does little to further a business beyond that particular job.

Scenario 2:

A worker providing cleaning services receives referrals and sometimes works for a local cleaning company. The worker invests in a vehicle that is not suitable for personal use and uses it to travel to various worksites. The worker rents his or her own space to store the vehicle and materials. The worker also advertises and markets his or her services and hires a helper for larger jobs. He or she regularly (as opposed to on a job-by-job basis) purchases material and equipment to provide cleaning services and brings his or her own equipment (*e.g.*, vacuum, mop, broom, etc.) and cleaning supplies to each worksite. His or her investments are the types of investments also made by the local cleaning company for whom he or she sometimes works. The worker's investments may suggest that the worker is an independent contractor.

Note: a worker's investment in tools and equipment, even when substantial, is not necessarily indicative that the worker is an independent contractor. Instead, these tools and equipment may be necessary to perform the specific work of the employer as opposed to sustaining a business.

(2) *Possible questions for the WHI to explore*

a. What equipment, tools, supplies, and/or materials are used to perform this job?

NOT FOR PUBLIC DISTRIBUTION

b. What equipment, tools, supplies and material are provided by the employer? By the worker?

c. Who is responsible for purchasing, maintaining, storing, and/or replacing the equipment, tools, supplies, and/or materials? Where are they stored?

d. How and by whom, are the equipment, tools, supplies, and/or materials transported to and from the worksite?

e. Does the employer finance any equipment, supplies or materials for the worker or lease them to the worker? If so, what are the terms? How was the rate set? How are payments made?

f. Does the employer invest in a phone application or some other digital platform to monitor or track the workers?

g. Who claims the depreciation of the equipment, tools, supplies, and materials that are used for this job?

h. Are licenses, certifications, permits, and/or insurance required for the work performed? Who purchases and/or secures the licenses, certifications, permits, and/or insurance?

i. Who performs the work? Does the worker hire helpers to perform the work? Does the worker lease space from the employer?

j. Does the worker advertise his or her services? What type of advertising does he or she engage in? How much does the advertising cost? Does the employer advertise its services? What type of advertising campaign? How much does it cost?

k. Does the worker make other investments in the business? What is the scope of the employer's investments? How do the overall investments compare?

l. What is the purpose of each of the worker's investments? How does the investment help the worker sustain a business?

(3) Evaluating this factor will require an understanding of the employer's investment in its business, which the workers may not be able to provide. Again, as discussed in FOH 59e04 below, investigative approaches beyond employee interviews may be necessary.

(e) Does the work performed require special skill and initiative?

(1) *Market value and marketability of the worker's skill*

There is a reasonable correlation between the worker's degree of skill and the marketability and value of his or her services. An unskilled task which may be easily learned and performed by almost any worker is a task for which many workers (both trained and untrained) can realistically compete and is also a task for which the competing workers would not be able to demand or expect higher wages. The lower

NOT FOR PUBLIC DISTRIBUTION

the worker's skill level, the lower the value and marketability of his or her services, and the greater the likelihood of his economic dependence on the employer using those services.

(2) *Mere possession of specialized or technical skills does not necessarily correlate with independent contractor status*

Although a worker's lack of specialized skill generally suggests that he or she is an employee, the fact that a worker is skilled or in possession of specialized skill is not itself indicative of independent contractor status. Specialized skills alone do not suggest that the worker is an independent business, especially if those skills are technical and used to perform the work. Many employees possess very specialized skills. For skills to be indicative of independent contractor status, they should demonstrate that the worker exercises independent business judgment.

The WHI should consider whether the worker acquired technical skills from on-the-job training or other training provided by the employer.

Scenario 1:

A highly skilled carpenter provides carpentry services for a construction firm. However, such skills are not exercised in an independent manner: the carpenter does not make any independent judgments at the job site beyond the work that he or she is doing for that job; he or she does not determine the sequence of work, order additional materials, or think about bidding the next job; rather, he or she is told what work to perform where. In this scenario, the carpenter, although highly-skilled technically, is not demonstrating the skill and initiative of an independent contractor (such as managerial and business skills). He or she is simply providing his or her skilled labor.

Scenario 2:

In contrast, a highly skilled carpenter who provides a specialized service for a variety of area construction companies (*e.g.*, custom, handcrafted cabinets that are made-to-order) may be demonstrating the skill and initiative of an independent contractor if the carpenter markets his or her services, determines when to order materials and the quantity of materials to order, and determines which orders to fill.

(3) *Possible questions for WHIs to explore*

a. What are the requirements, if any, that the workers must have in order to perform work for this business?

b. Does the worker hold licenses or certifications?

c. Does the worker need to have a certain level of education in order to perform the work?

d. What type of training, if any, must the workers complete? Who provides the training? Who pays for it? How long does it take to teach someone to do the work?

NOT FOR PUBLIC DISTRIBUTION

e. Does the worker teach anyone else to do the work?

f. Did the worker use any skills, other than technical skills, to obtain the work?

g. Who determines how the work is performed? Who determines the schedule for the performance of the work?

h. What decisions does the worker make concerning the performance of the work?

i. What decisions does the employer make concerning the performance of the work?

j. Who supervises the workers and his or her helpers?

k. Who determines what equipment, tools, and/or materials are used in the performance of the job?

(f) Is the relationship between the worker and the employer permanent or indefinite?

(1) *Indefinite timeframe for the relationship between the worker and employer*

The greater the length of the relationship or the more frequent the work, then the greater the likelihood that an employment relationship exists between the parties. Ongoing or indefinite relationships that do not have a stated termination date suggest that the worker is an employee.

(2) *Lack of permanence or indefiniteness does not automatically suggest that the worker is an independent contractor*

The reason for the lack of permanence or indefiniteness should be carefully reviewed to determine if it is due to operational characteristics intrinsic to the industry (*e.g.*, employers hire part-time workers and/or use staffing agencies, or in agriculture, hire workers only for the growing and/or harvest season) or the worker's own business initiative.

The WHI should seek evidence that reveals whether projects are to be completed within certain time frames or if the work is expected to continue over a long period of time. The more the worker markets and sells his or her services to a variety of users, the more likely he or she is an independent contractor.

<u>Scenario 1:</u>

An editor has worked for an established publishing house for several years. His or her edits are completed in accordance with the publishing house's specifications, using its software. He or she only edits books provided by the publishing house. This scenario indicates a permanence to the relationship between the editor and the publishing house that suggests an employment relationship.

<u>Scenario 2:</u>

NOT FOR PUBLIC DISTRIBUTION

Another editor has worked intermittently for many different publishing houses over the past several years. He or she markets his or her services to numerous publishing houses. He or she negotiates rates for each editing job and turns down work for any reason, including because he or she is too busy with other editing jobs. This lack of permanence with one publishing house suggests an independent contractor relationship.

(3) *Possible questions for WHIs to explore*

a. How long and/or often has the worker worked for the business? How long and/or often have other workers worked for the business?

b. Are the workers full-time or part-time? How many hours per week?

c. Do the workers have a regular working relationship with the business (*i.e.*, daily, monthly, seasonally, project basis)?

d. Does the duration of work correspond to a particular project? Is the work by the project or by the job?

e. Are the workers hired directly? Through a referral agency?

f. Do the workers have signed contracts or verbal agreements with the business?

g. How long are the contracts?

h. How is the contract canceled? Who can cancel the contact? Under what circumstances can the contract be canceled? (Note that the actual nature of the working relationship is more important than any contractual provisions. If the worker has been working for a while, any provisions in the contract about working for a specific period or cancelation are irrelevant.)

i. Do the workers work for any other businesses? How often is work performed for other businesses? How long has the worker been performing work for other businesses? For whom is the work performed? What type of work is performed? When is the work performed?

j. Has the worker received any awards, commendations or monetary bonuses for his or her work performance from the employer?

(g) What is the nature and degree of the employer's control?

(1) In applying this factor, it is critical that the WHI not overemphasize the employer's control (or lack of control) or apply any more weight to this factor than other factors. Each factor should be considered. It is not necessary for each factor to point toward an employment relationship for the worker to be an employee if the overall evidence shows that the worker is an employee.

(2) *Control by the employer may be direct or indirect*

NOT FOR PUBLIC DISTRIBUTION

Control may be direct, such as when the employer directly tells the worker what tasks to do and how to do them.

Control may also be indirect. For example, the employer may not continuously observe and direct the workers doing their jobs, but may exert control through the quality control process or by a pricing or piece-rate structure. Any assertion by the employer that its control over the worker is limited to quality control should be carefully examined. If the employer retains control over how the work is performed or the progress of the work, that control suggests an employment relationship with the worker.

On the other hand, if an employer's quality control is more limited and focuses on reviewing the final product of the work, then the worker may be working independently. It is also important to note that the employer can exercise control over the worker even if the worker works off-site, such as at home or on the premises of the employer's customers.

(3) *Apparent lack of control by the employer does not automatically indicate that the worker is an independent contractor*

Low-skilled work may require only minimal instruction to the worker that does not need to be repeated multiple times each day or even every day. Moreover, the worker's work may be subject to control by the employer's customer. If the employer exercises limited control, but the employer's customer exercises control in place of the employer, the worker is not working independently and is more likely to be economically dependent on the employer.

The WHI should ask questions that reveal who has the authority to control the work and when and how that authority is exercised. Although an employer may indicate that the worker is free to make his or her own decisions on how the work is performed, the investigation may reveal that the employer is actually directing how the work is performed. This would weigh in favor of employee status.

The WHI should seek evidence that reveals which party is making decisions on when, where, and how the job is performed. Documents and interviews should show who sets the hours of work, who determines the worksite, the equipment, tools, and materials to be used, and how the work is to be performed. Additionally, evidence should also show who determines the economic terms of the relationship, including which party has the authority to hire and fire workers, determine the rate of pay, and determine the hours worked.

<u>Scenario 1:</u>

A registered nurse who provides skilled nursing care in nursing homes is listed with Beta Nurse Registry in order to be matched with clients. The registry interviewed the nurse prior to joining, and also required the nurse to undergo a multi-day training presented by Beta. Beta sends the nurse a listing each week with potential clients and requires the nurse to fill out a form with Beta prior to contacting any clients. Beta also requires that the nurse adhere to a certain wage range and the nurse cannot provide care during any weekend hours. The nurse must inform Beta if he or she is hired by a client and must contact Beta if he or she will miss scheduled work with

NOT FOR PUBLIC DISTRIBUTION

any client. In this scenario, the degree of control exercised by the registry suggests an employment relationship.

Scenario 2:

Another registered nurse who provides skilled nursing care in nursing homes is listed with Jones Nurse Registry in order to be matched with clients. The registry sends the nurse a listing each week with potential clients. The nurse is free to call as many or as few potential clients as he or she wishes and to work for as many or as few as he or she wishes; the nurse also negotiates his or her own wage rate and schedule with the client. In this scenario, the degree of control exercised by the registry is not indicative of an employment relationship.

(4) *Possible questions for WHIs to explore*

a. How is the worker's pay determined? How much control does the worker have when setting or negotiating the rate of pay?

b. Who pays the worker? How are the wages paid? How often is payment made?

c. Who determines if the worker or his or her helpers, receive a raise? A bonus? A pay reduction?

d. What records of compensation are maintained?

e. What production records are maintained?

f. Are job tickets, forms, invoices or similar paperwork prepared for the worker?

g. Who prepares the worker's payroll or taxes?

h. Who handles billing and other accounting functions for the worker?

i. Who determines the timeline for the work and/or project?

j. Who establishes the work hours and schedules?

k. Is the worker required to report for work at a specific time? What happens if the worker is late?

l. Is permission needed for the worker to take leave? Who is responsible for approving time off?

m. Does the employer require the worker to check in using an application on a phone or other digital platform to track hours worked?

n. Who determines how the work is to be performed?

o. Who directs the work?

NOT FOR PUBLIC DISTRIBUTION

p. Who assigns the tasks?

q. Is there a manual, handbook, or other document that specifies how the work is be performed by the worker?

r. Who determines if the worker will hire his or her own helpers to help complete the work? What role, if any, does the employer have in that hiring process? For example, does the employer need to approve any helpers hired by the worker?

s. How are the worker(s) (and/or the worker's helpers) supervised? By whom?

t. Who may terminate the worker's helpers? Does the employer have any input in their termination?

u. Who determines the type of equipment, tools, and materials that are to be used in performing the work?

v. Is the worker subject to performance requirements? How are these requirements monitored and enforced?

w. Is the worker subject to any discipline, any penalties for poor performance? If so, describe.

x. What training is required of the workers? Who pays for the training? Who provides the training? When does the training occur? How long does the training last? Is training continuous?

y. How often does the employer or a representative visit the worksite? What is the purpose of the visits?

z. Are uniforms, or other special clothing, required for the performance of the work?

aa. Is the worker, and/or any of his or her helpers, required to attend meetings? Who organizes and leads the meetings? What happens if meetings are not attended?

bb. May the worker work for other businesses (or is he or she prohibited from doing so or is the reality that he or she has no time or reason to do so)?

cc. Has the employer ever treated the worker as an employee?

[01/03/2017]

59e04 **<u>The economic realities factors should be applied in keeping with the following perspective.</u>**

(a) The ultimate question is whether the worker is economically dependent on the employer or actually in business for himself or herself

NOT FOR PUBLIC DISTRIBUTION

The ultimate determination is whether, as a matter of economic reality, the worker is economically dependent on the employer or in business for himself or herself. The economic realities factors focus on useful identifiers of the worker's economic dependence or independence in relation to the employer and thus serve as a guide to make this ultimate determination. The WHI will use the economic realities factors to determine whether a worker is an employee or an independent contractor.

(b) The factors should be considered in their totality and illustrate the whole picture in determining the true nature of the relationship between the employer and the worker

The evidence obtained relating to each factor should be examined thoroughly, while keeping in mind that all evidence should eventually merge as a whole to reinforce the WHI's finding on the worker's status as either an employee or an independent contractor.

(c) How each factor will bear weight in the full analysis will vary in each case

No one factor is determinative of employee or independent contractor status. The factors are not intended to be used as a checklist or scorecard for arriving at a conclusion. Each factor is an area that a WHI should consider, mindful that in a given situation strong economic dependence revealed by one or two factors (despite negative findings on the others) can be sufficient to show that the worker is an employee. As the facts of each case vary widely, the impact of each factor applied on the final outcome will also change on a case by case basis.

(d) Titles and labels do not determine true nature of the relationship

Labels, titles, and job names that may be applied by the employer to a given position or job function through a contract or otherwise (such as an agreement stating that the worker is an independent contractor), or legal designations under other statutes or government regulations, do not indicate whether a worker is an employee or an independent contractor under the FLSA or MSPA. Although WHIs should gather such information (*see* FOH 59e05(a) below), they should not be considered in the economic realities analysis. For example, receiving a Form 1099-MISC does not make a worker an independent contractor.

(e) Some of the facts may overlap factors

Each of the factors helps to determine whether the worker is economically dependent on the employer. Certain facts may influence the analysis of more than one of the factors. This is to be expected.

(f) Other factors may be considered

The six economic realities factors identified above may not be the exclusive factors to consider when determining whether a worker is an employee or independent contractor. Some courts may apply a variation of the above factors, and other factors that are relevant to the economic realities of the working relationship may be considered. However, only evidence that is probative of whether the worker is, as a matter of economic reality, economically dependent on the employer or in business for himself or herself should be considered.

[01/03/2017]

NOT FOR PUBLIC DISTRIBUTION

59e05 **Investigative process.**

(a) When conducting an investigation that involves an employment relationship analysis, the framework of the investigative process is the same as other investigations in that the WHI will have an initial conference, take interviews, and gather documents. However, because of the potential complexity of these investigations, there are useful practices, investigative tools, and fact-finding strategies that are important to keep in mind. Engaging RSOL partners early and often should be considered in these investigations.

(b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

(e) The WHD should involve the RSOL early

When facing potentially complicated employment relationship issues, consult with the RSOL early and often during the investigative process according to regional protocols. The RSOL will assist with strategies for fact-finding (*e.g.*, subpoenas, interviewing third parties, administrative depositions) and when and how to use employee interviews and other traditional investigative tools in conjunction with these strategies. The RSOL should be consulted in investigations where the employer disputes the existence of an employment relationship, and the RSOL should provide guidance on obtaining information relevant to the economic realities factors.

(f) Narrative writing

The coverage section of the narrative report will contain a discussion of employment relationship issues addressed during the investigation. *See* FOH 54b01(c).

[01/03/2017]

59e06 <u>Examples of documents to request.</u>

(a) Examples of documents that may contain information concerning the nature of the relationship between the worker and the employer are listed below:

- Advertising materials
- Annual financial reports
- Authorization for use forms
- Awards or other commendations
- Bank statements
- Bids
- Business cards or letterhead
- Business invoices
- Business plan
- Cash receipts (services, mileage, expenses, equipment, supplies)
- Certifications
- Company handbooks

NOT FOR PUBLIC DISTRIBUTION

- Company publications (*e.g.*, brochures)
- Contracts (including subcontracts, letters of agreement, scopes of work – including handwritten)
- Degrees
- Disciplinary records
- Employment agreements
- Employment applications
- Expense reports
- Incorporation documents
- Insurance certificates
- Job evaluations
- Leases
- Licenses
- Liens
- New employee orientation documents
- Organizational chart
- Other employment records
- Payroll records
- Performance standards
- Permits
- Policies and work rules
- Production monitoring records
- Purchase, rental, or lease agreements
- Receipts
- Solicitation for bids
- State determinations

NOT FOR PUBLIC DISTRIBUTION

- Tax records (from employer and worker)
- Time records
- Training records and materials
- Unemployment claims
- Workers' compensation claims

[01/03/2017]

59f JOINT EMPLOYMENT

[01/03/2017]

59f00 General.

Joint employment exists when an employee is employed by two or more employers such that the employers are responsible, both individually and jointly, for compliance with a law. Policy guidance on joint employment is contained in FOH 10f.

The purpose of this section is to provide supplemental guidance specific to internal procedures related to two types of joint employment under the FLSA and MSPA: horizontal joint employment and vertical joint employment.

Both the FLSA (*see* 29 CFR 791.2) and MSPA (*see* 29 CFR 500.20(h)) have regulations providing guidance regarding joint employment. As discussed below, the FLSA and MSPA define the scope of employment and joint employment in the same manner. Guidance in the FLSA joint employment regulation may be useful in MSPA investigations, and guidance in the MSPA joint employment regulation may be useful in FLSA investigations.

Although this chapter focuses on horizontal and vertical joint employment, the scope of employment under the FLSA and MSPA is very broad. Both statutes define "employ" as including "to suffer or permit to work." *See* FOH 10b05(a). Although it does not appear in the regulations, the "horizontal" and "vertical" terminology is frequently used by courts and may be helpful in identifying potential joint employment scenarios. It is not critical, however, to use this terminology or classify every factual scenario as vertical or horizontal. Some cases will not fit neatly into either category and may exhibit characteristics common to both.

[01/03/2017]

59f01 Investigations that should include a joint employment analysis.

(a) The WHD continues to encounter new staffing models in many different industries, including the sharing of employees and the use of third-party management companies, subcontractors, independent contractors, staffing agencies, or labor providers. This growing variety and number of business models and labor arrangements have resulted in more fissured workplaces and made joint employment more common.

NOT FOR PUBLIC DISTRIBUTION

FOH 59f05 provides guidance on when and how to engage RSOL partners and on useful practices, investigative tools, and fact-finding strategies to use during joint employment investigations, especially when potentially complicated issues arise.

(b) Joint employment is employment

Joint employment is a means to establish an employment relationship between an employee and additional employers; thus, joint employment is employment under the FLSA and MSPA. Each joint employer has all of the obligations and responsibilities of an employer. When there is joint employment, one employer's obligations and responsibilities are not primary or secondary to any other employers' obligations and responsibilities under the FLSA and MSPA.

(c) Different types of joint employment may be present in a single case

Employment relationships, particularly where the workplace is fissured, can be complex, and aspects of both horizontal and vertical joint employment may be present in a single case. For example, both horizontal and vertical joint employment can exist where two warehouses share employees and use a staffing agency to provide them with labor.

(d) When to examine the potential for joint employment

Determining whether joint employment exists between two or more employers is crucial in an investigation because if joint employment can be established, the work performed by the employee(s) for each employer in each workweek is combined for overtime purposes and each employer is responsible, both individually and jointly, for complying with the law. WHIs should explore the possibility of joint employment in all cases to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations, particularly where:

(1) the employee works for two employers who are associated in some way, and the employee was not paid at least the minimum wage or the employee's combined hours worked for the employers would exceed 40 per week; or

(2) the employee's employer is a staffing agency, FLC, or otherwise provides labor to or for the benefit of another employer or other employers.

(e) When the analysis indicates joint employment

(1) *Future compliance, back wages, and liquidated damages*

When the facts of the case indicate joint employment, each employer is responsible, both individually and jointly, for compliance with the FLSA and MSPA, including paying at least the minimum wage for all hours worked and paying overtime for all hours worked over 40 during a workweek as required under the FLSA. Furthermore, all of the employers are responsible for back wages and liquidated damages that may be owed in an investigation.

(2) *CMPs*

NOT FOR PUBLIC DISTRIBUTION

CMPs are assessed on an individual employer basis. When there is more than one employer, CMPs may be assessed against one, all, or none of the employers depending on the act under which violations were cited and each employer's conduct. Assessing CMPs against one joint employer is not a basis for assessing CMPs against another joint employer, and a joint employer is not liable for CMPs assessed against another joint employer. Refer to the relevant CMP guidance for each act in order to properly assess CMPs. *See* FOH 52f and FOH 57c.

[01/03/2017]

59f02 **Horizontal joint employment.**

(a) Focus on the degree of association between the possible joint employers to establish horizontal joint employment

The FLSA joint employment regulation provides useful guidance in horizontal joint employment investigations. It focuses the analysis on the relationship and/or arrangement (and often the degree of association) between the employers with respect to the employee. The employee is employed by two or more employers, and the issue is whether these employers, because of their association with each other, jointly employ the employee. A critical part of determining the degree of association is analyzing if and how those employment relationships overlap.

(b) Situations when horizontal joint employment may be present

WHIs should look for horizontal joint employment in cases in the following situations:

(1) There is an arrangement between the employers to share the employee's services (*i.e.*, to interchange employees)

(2) One employer is acting directly or indirectly in the interest of the other employer in relation to the employee

(3) The employers are not completely disassociated with respect to the employment of a particular employee and share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer

(c) Facts to consider when assessing the relationship or degree of association between the possible joint employers

The facts below have been considered by the DOL and courts in horizontal joint employment cases, but they do not comprise an all-inclusive list of evidence that is relevant to the analysis. Moreover, not all or even most of these facts need to be present for joint employment to exist. Instead, joint employment may exist when there is sufficient evidence that the two or more employers benefit from the work of the employee and are associated with one another in relation to the employee.

When analyzing the relationship, arrangement, or degree of association between the possible joint employers, WHIs should gather evidence and seek appropriate documentation regarding the following facts, among others:

NOT FOR PUBLIC DISTRIBUTION

(1) Whether or not the possible joint employers share some common ownership (*e.g.*, one owns the other or they have the same owner)

(2) Who operates the possible joint employers

(3) Whether or not the possible joint employers share control over operations (*e.g.*, hiring, firing, payroll, advertising, overhead costs)

(4) Whether or not the possible joint employers' operations are inter-mingled (*e.g.*, is there one administrative operation for both employers, or the same person schedules and pays the employees regardless for which employer they work)

(5) Whether or not the possible joint employers share officers, directors, executives, or managers

(6) Whether or not one possible joint employer supervise the work of the other

(7) Whether or not the possible joint employers share supervisory authority for the employee

(8) Whether or not the possible joint employers treat the employees as a pool of employees available to both of them

(9) Whether or not the possible joint employers share clients or customers

(10) Whether or not there are any agreements between the possible joint employers

(d) Horizontal joint employment may be found in MSPA cases

The FLSA joint employment regulation's guidance may be useful in a MSPA case where, for instance, two growers employ the same workers and there is evidence that one grower is controlled by the other. In this case, the joint employment analysis would rely on the FLSA regulation's guidance to determine if the two growers are associated and share control of the workers because of their association.

[01/03/2017]

59f03 <u>Vertical joint employment.</u>

(a) Vertical joint employment focuses on whether an employee of an intermediary employer is also employed by another employer (the possible joint employer). The other employer typically has contracted or arranged with the intermediary employer to provide it with labor, perform for it some employer functions, such as hiring and payroll, or to do both. There may be an established or admitted employment relationship between the employee and the intermediary employer. That employee's work, however, is typically also for the benefit of the other employer. The vertical joint employment analysis thus focuses on the economic realities of the employee's working relationship with the other employer. If there is vertical joint employment, both the intermediary employer and the possible joint employer are the employee's employers, and each employer is responsible, individually and jointly, for compliance with the FLSA and MSPA.

NOT FOR PUBLIC DISTRIBUTION

(b) Intermediary employer

The term "intermediary employer" refers to an employer, such as a staffing agency, a subcontractor, or FLC, who provides labor services to another employer.

(c) Possible joint employer

The term "possible joint employer" refers generally to the other entity that contracts with the intermediary to obtain labor, such as the end-employer, higher-tier contractor, client of the staffing agency, grower, or agricultural association (AGAS).

(d) Consider first whether an employment relationship exists between the intermediary employer and the possible joint employer

(1) In most cases before engaging in a vertical joint employment analysis, the WHI must first consider if there is an employment relationship between the intermediary employer and the possible joint employer. The WHI may not need to consider this and may proceed directly to the vertical joint employment analysis if it is readily apparent that the intermediary employer is in business for itself, such as an established staffing agency. However, if the intermediary employer (who may be just an individual responsible for finding a crew of workers) is itself or himself or herself an employee of the possible joint employer, then all of the intermediary employer's employees are employees of the possible joint employer too and it is possible that no vertical joint employment analysis is necessary. *See* 29 CFR 500.20(h)(4). Consultation with the RSOL will be helpful on this issue. Where the intermediary employer is not an employee (but is an independent contractor) of the possible joint employer or the question is a close one, it is necessary to perform a vertical joint employment analysis.

(2) In order to decide whether the intermediary employer is an employee or independent contractor of the potential joint employer, the WHI must determine whether the intermediary employer is, as a matter of economic reality, economically dependent on the possible joint employer. Factors to consider in this economic reality analysis are the same factors that the WHI uses to determine if an employment relationship exists between an employer and a worker. *See* FOH 59e.

(3) If the intermediary employer is a bona fide independent contractor of the possible joint employer, then:

a. the possible joint employer likely has no association with the intermediary employer other than a contract or arrangement for the intermediary employer to provide the labor; and

b. the WHI should engage in a vertical joint employment analysis to determine whether, as a matter of economic reality, the employee is economically dependent on the possible joint employer and is therefore jointly employed by it with the intermediary employer.

(e) Focus on the nature of the relationship between the worker and the possible joint employer(s)

NOT FOR PUBLIC DISTRIBUTION

When assessing a possible vertical joint employment relationship, the focus is on whether the employee of the intermediary employer is also employed by the possible joint employer. This analysis is an employment relationship analysis, and under the FLSA and MSPA, the analysis must examine, as matter of economic reality, the degree of the employee's economic dependence on the possible joint employer. As discussed below, the MSPA joint employment regulation provides seven economic realities factors to guide the analysis in vertical joint employment cases.

(f) Situations where vertical joint employment may be present

WHIs should look for vertical joint employment in cases where an intermediary employer provides workers to another employer.

(1) In MSPA investigations, joint employment will most likely involve an intermediary who is an FLC who provides workers for another employer, such as a grower or AGAS.

(2) In FLSA investigations, joint employment could be found in cases involving a number of different structures, including a subcontractor-contractor relationship and any other situation where a staffing company or other labor provider is providing workers to work for the benefit of another employer. Even though guidance on the economic realities factors to consider may come from a MSPA regulation, vertical joint employment may be prevalent in FLSA cases, and WHIs should consider it in all FLSA cases where appropriate.

[01/03/2017]

59f04 <u>Joint employment economic realities factors from the MSPA regulation.</u>

(a) The MSPA joint employment regulation provides seven economic realities factors to guide the analysis whether the worker is economically dependent on the possible joint employer in vertical joint employment cases. *See* 29 CFR 500.20(h). These factors should not to be applied as a checklist, and no single factor is determinative. Additional evidence relevant to economic realities may be considered. The weight given to each factor individually and in total depends on all of the facts and circumstances of the case. The factors themselves are not the analysis; instead, they are guides to answering the ultimate question of economic dependency. The factors should also be applied with the understanding that the MSPA defines the scope of the employment relationship very broadly. The seven factors are:

(1) *Directing, controlling, or supervising the work performed*

This factor examines whether the possible joint employer has the power, either alone or through control of the intermediary employer, to direct, control, or supervise the employee or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties).

To the extent that the work performed by the employee is controlled or supervised by the possible joint employer beyond reasonable oversight to ensure contract performance, such control suggests that the employee is economically dependent on the possible joint employer.

NOT FOR PUBLIC DISTRIBUTION

The possible joint employer's control can be indirect (*e.g.*, exercised through the intermediary) and still be sufficient to indicate economic dependence by the employee. Additionally, the possible joint employer need not exercise more control than, or the same control as, the intermediary to exercise sufficient control to indicate economic dependence by the employee.

Where the possible joint employer's control or supervision is less because the employee's work is routine or occurs off-site, the lack of control or supervision may not be indicative of a lack of economic dependency on the possible joint employer.

Questions to consider:

a. Who controls when the work will be performed?

b. Who determines what work the employee will perform?

c. Who determines how the work will be done?

d. Who assigns the day-to-day tasks or jobs to the employee?

e. Who monitors the performance of the employee's work?

f. Who does the employee consider to be his or her supervisor or boss? Why?

g. Who rates and/or evaluates the employee's work?

h. Who disciplines the employee?

i. How many hours does the employee work each week? Is the employee working primarily (or only) for the possible joint employer or the intermediary employer?

j. Is there an arrangement between the intermediary and possible joint employer to share the employees?

(2) *Controlling employment conditions*

This factor explores whether the possible joint employer has the power, either alone or in addition to the intermediary employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rate or method of payment for the employee.

To the extent that the possible joint employer has the power to hire or fire the employee, modify employment conditions, or determine the rate or method of pay, such control suggests that the employee is economically dependent on the possible joint employer. Again, the possible joint employer may exercise such control indirectly and need not exclusively exercise such control for there to be an indication of joint employment.

Questions to consider:

a. Who has the authority to set the employee's wages?

NOT FOR PUBLIC DISTRIBUTION

b. Who has the authority to increase or decrease the employee's wage?

c. What is the employee's rate of pay?

d. What factors go into determining the employee's rate of pay?

e. Who hired the employee? Do any of the other potential joint employers have input into the hiring of the employee?

f. Who has the authority to terminate the employee? Do any of the other potential joint employers have input into the termination of the employee?

g. Who does the employee believe can fire him or her?

h. Who has the authority to set the employee's work schedule? Do any of the other potential joint employers have input into the employee's work schedule?

i. Are there any verbal or written agreements concerning the employee's employment conditions? Rate of pay?

j. When is the employee paid?

k. How is the employee paid (*e.g.*, cash, check, direct deposit)?

l. Who determined how the employee would be paid?

m. What company name is on the check?

n. Who signs the check?

o. To whom does the employee submit his or her sick or vacation leave requests?

p. Who handles sick or vacation leave requests?

(3) *Permanency and duration of relationship*

This factor looks at the degree of permanency and duration of the relationship of the parties, in the context of the particular work performed.

An indefinite, permanent, full-time, or long-term relationship by the employee with the possible joint employer suggests economic dependence. This factor should be considered in the context of the particular industry at issue. For example, if the work in the industry is by its nature seasonal, intermittent, or part-time, such industry practice should be considered when analyzing the permanency and duration of the employee's relationship with the possible joint employer.

Questions to consider:

a. How long has the employee been at this job?

NOT FOR PUBLIC DISTRIBUTION

b. How long has the employee been on site for a particular possible joint employer (*i.e.*, client firm)?

c. How many hours a week does the employee work?

d. If the business is agriculture, how many seasons has the employee been working for the grower and/or AGAS? For the FLC? How many weeks are in the season? How many working hours?

e. Does the employee work for any other employers?

(4) *Repetitive and rote nature of work*

This factor examines the extent to which the services rendered by the employee are repetitive, rote tasks requiring skills which are acquired with relatively little training.

To the extent that the employee's work for the possible joint employer is repetitive and rote or involves skills requiring little training, that evidence indicates that the employee is economically dependent on the possible joint employer.

Questions to consider:

a. What skills are necessary to perform the job?

b. How is the work performed?

c. What training did the employee receive to perform the job?

d. Who provided the training to the employee?

e. Where was the training?

f. How many hours was the training?

g. What did the employee learn in the training?

h. Who paid for the training?

(5) *Integral to business*

This factor explores whether the activities performed by the employee are an integral part of the possible joint employer's overall business operation. If the employee's work is an integral part of the possible joint employer's business, that evidence suggests that the employee is economically dependent on the possible joint employer. An employee's work does not have to be important to be integral to the business, and the employee's work can be integral even if there are many others who do the same work. An employee's work can be integral if the employee plays a role in producing a good or providing a service that the potential joint employer is in business to produce or provide. Whether the work is integral to the grower's business has long been a hallmark of determining whether an employment relationship exists.

Questions to consider:

NOT FOR PUBLIC DISTRIBUTION

a. What are the possible joint employer's business or businesses? What services does the employer provide, and what products does it produce?

b. What are the employee's job responsibilities?

c. How does the work performed by the employee fit into the various types of work that are performed by the possible joint employer?

d. If the possible joint employer produces goods, is the employee part of the production process?

e. If the possible joint employer provides services, does the employee provide any of the services?

(6) *Work performed on premises*

This factor looks at whether the work is performed on the possible joint employer's premises.

The employee's performance of the work on premises owned or controlled by the possible joint employer indicates that the employee is economically dependent on the possible joint employer. The possible joint employer's leasing as opposed to owning the premises where the work is performed is immaterial because the possible joint employer, as the lessor, controls the premises. Also, if the employee works on the premises of customers or clients of the possible joint employer, that evidence suggests that the possible joint employer controls where the work is performed and that the employee is economically dependent on the possible joint employer.

Questions to consider:

a. Where is the employee's work performed?

b. Who owns the land, factory, warehouse, office, and/or other place where the work is performed?

c. If the possible joint employer does not own the premises where the work is performed, does it lease or otherwise control the premises?

d. Are tools necessary for the performance of the employee's work? Who provides the tools? Who owns the tools? Where are they stored?

(7) *Performing administrative functions commonly performed by employers*

This factor explores whether the possible joint employer undertakes any responsibilities in relation to the employee which are commonly performed by employers, such as preparing or making payroll records, preparing or issuing pay checks, paying Federal Insurance Contributions Act (FICA) taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools, equipment, or materials required for the job (taking into account the amount of investment).

NOT FOR PUBLIC DISTRIBUTION

To the extent that the possible joint employer performs any of the above or similar administrative functions for the employee, that evidence suggests economic dependence by the employee on the possible joint employer.

Questions to consider:

a. Who is responsible for each of these functions?

b. Is there an agreement between the possible joint employers concerning which employer is responsible for these functions?

c. Who is responsible for other tax and employment records? How was this determined?

d. Who pays the employees?

e. Who handles payroll?

f. Who provides benefits, insurance coverage?

As mentioned above, not all of the factors need to be met for there to be vertical joint employment. In fact, there may be little evidence in a case that the possible joint employer undertakes responsibilities in relation to the employees that are commonly performed by employers. After all, the possible joint employer engages the intermediary employer to perform those responsibilities for it. Any lack of evidence on this factor should not preclude a finding of joint employment where the facts taken as a whole indicate that the employee is economically dependent on the possible joint employer.

[01/03/2017]

59f05 **Investigative process.**

(a) When conducting an investigation that involves a joint employment analysis, the framework of the investigative process is the same as other investigations in that the WHI will have an initial conference, take interviews, and gather documents. However, because of the potential complexity of these investigations, there are useful practices, investigative tools, and fact-finding strategies that are important to keep in mind. Engaging RSOL partners early and often should be considered in these investigations.

(b) **Conduct thorough interview statements**

Carefully consider the facts that must be examined when determining whether a joint employment relationship exists. Although not exhaustive, examples of questions that can assist in this determination are found in FOH 59f02 (horizontal joint employment) and FOH 59f04 (vertical joint employment).

(c) (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

(d) The WHD should involve the RSOL early in the process of analyzing joint employment relationships

When facing potentially complicated joint employment issues, consult with the RSOL early and often during the investigative process according to regional protocols. The RSOL will assist with strategies for fact-finding (*e.g.*, subpoenas, interviewing third parties, administrative depositions) and when and how to use employee interviews and other traditional investigative tools in conjunction with these strategies. The RSOL should be consulted in investigations where the employer disputes the existence of joint employment, and the RSOL should provide guidance on obtaining information relevant to the economic realities factors.

(e) (b) (7)(E) [redacted]

(f) Narrative writing

The coverage section of the narrative report will contain a discussion of any joint employment issues addressed during the investigation.

[01/03/2017]

59g -l (RESERVED)

59m SPECIAL PROCEDURES: FLSA SECTION 13(a)(1)

59m00 <u>Highly compensated executive, administrative, and professional employees not paid on a salary basis.</u>

(a) Some highly compensated executive, administrative, and professional employees (*see* 29 CFR 541.601 and FOH 22g01) may fail to qualify for the exemption *solely* because they are not paid, as part of their total annual $100,000.00 compensation, at least $455.00 per week on a salary or fee basis (*see* 29 CFR 541.601(b)). (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (b) (7)(E) [redacted]

(c) If the employee is found not to be paid on a salary basis due to an improper deduction, in addition to the guidance set out above, consideration must be given to the possible application of the provision in 29 CFR 541.603(c) regarding reimbursement of inadvertent deductions.

59m01 **<u>Airplane and rotorcraft pilots and copilots, and flight engineers.</u>**

(a) The Federal Aviation Administration (FAA) requires airplane and rotorcraft (*e.g.*, gyroplane or helicopter) pilots who fly for hire to hold either an airline transport certificate or a commercial certificate. The certificate authorizes such a pilot to fly for hire and specifies the type of aircraft the pilot is authorized to fly, such as multi-engine land, single-engine sea, helicopter, and in the case of heavy aircraft, the name of each type of aircraft (*e.g.*, DC-8 or Boeing 707). FAA certificates are also required for certain other flight personnel, including flight engineers. Such certificates are issued by the FAA after specific standards are met (*e.g.*, proficiency, experience, examinations, etc.), and the performance of flight duties by such personnel requires a high degree of skill. However, the fact that an employee performs such flight duties pursuant to an appropriate FAA certificate does not of itself qualify the employee for exemption under section 13(a)(1) of the FLSA.

(b) After careful review of all the circumstances and duties involved, it has been found that certain flight personnel are within the spirit of the provisions of section 13(a)(1) that exempts any employee employed in a *bona fide* executive, administrative, or professional capacity even though all the requirements of 29 CFR 541 are not met. (b) (7)(E) [redacted]

(1) (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

(d) Although the policy stated above does not apply to *flying school instructors*, these employees may qualify for exemption as teachers under 29 CFR 541.303 if the tests are met (*see* FOH 14f02, FOH 15j01, FOH 22d12, and FOH 59m03).

(e) The policy stated above is applicable only under the FLSA and is extended only to pilots, copilots, and flight engineers engaged in the activities enumerated in FOH 59m01(b) above. This policy does not apply to employees, including pilots and copilots, subject to the provisions of the McNamara-O'Hara Service Contract Act (SCA), Davis-Bacon and Related Acts (DBRA), or Contract Work Hours and Safety Standards Act (CWHSSA) (*see* FOH 14f00 and FOH 15e12), and does not relieve any employer from any obligation incurred under a CBA.

59m02 **(Reserved.)**

59m03 **Flight instructors.**

(a) Flight instructors may qualify for exemption as teachers under 29 CFR 541.303 if all requirements are met (*see* FOH 14f02, FOH 15j01, and FOH 22d12).

(b) (b) (7)(E)

59m04 **Manager in chain-operated convenience food stores, self-service gasoline stations, and other similar establishments.**

NOT FOR PUBLIC DISTRIBUTION

(a) Questions have arisen involving the exempt status of managers of establishments, such as chain-operated convenience food stores, self-service gasoline stations, and other similar operations. Such establishments are usually open from 8 to 24 hours per day. They are staffed by one or more employees per shift. The full-time employees work 8 or more hours per shift. One of these employees is designated as a manager but usually works the shift alone, performing the same work as the other employees for major periods of time (*i.e.*, in excess of 50 percent of the time). Higher-level managers, such as district managers, visit the establishment weekly and sometimes daily. Company policy manuals strictly regulate every aspect of the business down to items such as how to stock the shelves and how to mop the floor.

(b) The exempt status of these managers as executives may be questionable in the following areas:

(1) Does their primary duty consist of the management of the establishment? *See* 29 CFR 541.100(a)(2) and 29 CFR 541.700.

(2) Do they customarily and regularly direct the work of at least two or more other full-time employees or their equivalent? *See* 29 CFR 541.100(a)(3) and 29 CFR 541.104.

(3) Do they have authority to hire or fire other employees, or have their suggestions and recommendations as to hiring, firing, advancement, promotion, or any other change in status of other employees given particular weight? *See* 29 CFR 541.100(a)(4) and 29 CFR 541.105.

(c) In determining what constitutes the primary duty (*see* 29 CFR 541.700), time alone is not the sole test. Persons may have management as their primary duty even though they spend less than 50 percent of their time in managerial duties, if other pertinent factors support such a conclusion. Factors to consider include, but are not limited to:

(1) the relative importance of the exempt managerial duties compared with other duties,

(2) the amount of time spent performing exempt work,

(3) the employee's relative freedom from direct supervision, and

(4) the relationship between the manager's salary and the wages paid other employees for the kind of non-exempt work performed.

(d) Concurrently or simultaneously performing both exempt and non-exempt duties will not automatically disqualify an otherwise exempt employee from the executive exemption if all the requirements for exemption are met. *See* 29 CFR 541.106 and FOH 22b04.

59m05 **<u>Exemption status under 29 CFR 541 must be determined on the basis of the facts in each case.</u>**

Questions have arisen over the extent to which WHIs are developing cases prior to denying exemptions under 29 CFR 541. It is mandatory that the facts concerning employee duties and responsibilities be fully developed as to each individual on a case-by-case basis in determining an employee's exemption status. (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

59n DOMESTIC SERVICE EMPLOYMENT

This chapter provides relevant enforcement application, guidance, and investigative protocols and procedures for home care complaints and case assignments. Although some of the material in this chapter applies broadly, please refer to FOH 11 (coverage and exemption), 30c (section 3(m) credits), and 31b12 (hours worked) for enforcement procedures pertaining to other aspects of domestic service employment for nannies, butlers, and gardeners outside of the home care industry.

[01/13/2017]

59n00 <u>Definitions.</u>

(a) Domestic service employees are covered under the FLSA because "employment of persons in domestic service in households affects commerce" (29 USC 202(a)). A domestic service employee is an employee whose duties are of a household nature and whose work is performed in or about a private home (permanent or temporary). *See* 29 CFR 552.3, 29 CFR 552.99, FOH 11d00(b), and 78 FR 60460.

(b) Domestic service employees are entitled to minimum wage protections under the FLSA if:

(1) their cash wages from one employer in calendar year 2016 are at least $2,000.00 (the calendar year threshold is adjusted by the Social Security Administration each year; 2015: $1,900.00, 2014: $1,900.00, 2013: $1,800.00, etc. (http://www.ssa.gov/OACT/COLA/CovThresh.html)), or

(2) they work a total of more than 8 hours in a workweek in one or more households.

See 29 USC 206(f) and 29 CFR 552.2(b).

(c) Domestic service employees are entitled to overtime protections under the FLSA if they work more than 40 hours in a workweek. *See* 29 USC 207(l) and 29 CFR 552.2(b).

(d) Domestic service workers may include, but are not limited to, companions, babysitters, cooks, waiters, maids, housekeepers, nannies, nurses, janitors, caretakers, handymen, gardeners, home health aides, personal care aides, and family chauffeurs.

(e) A private home may be a fixed place of abode or a temporary dwelling under certain circumstances. *See* 29 CFR 552.101(a). In determining whether a residence is a private home, courts have described six factors to consider when making a determination. *See* FOH 11d01 and FOH 59n03. Services that are not performed in or about a private home (*e.g.*, a nursing home facility) are not considered "domestic service employment" under the FLSA. *See* 29 CFR 552.3 and FOH 11d00-01.

[01/13/2017]

59n01 <u>Home care terminology.</u>

NOT FOR PUBLIC DISTRIBUTION

(a) Common terms

The 2013 Home Care Final Rule modified and introduced new terms, and there are also additional terms common in the home care context with which enforcement staff should make themselves familiar. Some such common terms are as follows:

(1) *Home care*

This term is used to reflect the broader industry, rather than "home health care," which specifically covers medical assistance performed by certified personnel. *See* 78 FR 60455.

(2) *Home care worker or direct care worker*

These are individuals who are employed in certain occupational categories of domestic service work, such as home health aides, personal care aides, attendants, direct support professionals, and family caregivers. *See* 78 FR 60455.

(3) *Third party employer*

This is any entity other than the consumer or the consumer's family or household that employs a home care worker. *See* Administrator Interpretations Letter FLSA 2014-2, 78 FR 60454, and 78 FR 60480.

(4) *Consumer*

This is an individual who receives home care services. *See* 78 FR 60460.

(5) *Provider*

This term is used to refer to home care workers (*i.e.*, an individual who is a provider of home care services). This term is also sometimes used to refer to an entity that arranges home care services (*i.e.*, an agency that is a provider of home care services). *See* Wage and Hour Memorandum No. 2014-3 and 78 FR 60455.

(6) *Companionship services*

This is the provision of fellowship and protection for an elderly person or a person with an illness, injury, or disability who requires assistance in caring for himself or herself. This term also includes the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek. It does not include medically related tasks or tasks performed primarily for the benefit of individuals other than the consumer. *See* 29 CFR 552.6(a) and 78 FR 60455.

(7) *Fellowship*

This means to engage a person in social, physical, and mental activities, such as conversation, reading, games, crafts, and accompanying a person on walks, on errands, to appointments, or to social events. *See* 29 CFR 552.6(a) and 78 FR 60455.

(8) *Protection*

NOT FOR PUBLIC DISTRIBUTION

This means to be present with a person in his or her home or to accompany a person when outside of the home, and to monitor that person's safety and well-being. *See* 29 CFR 552.6(a) and 78 FR 60455.

(9) *Care*

The provision of care means assisting a person with activities of daily living (ADLs), such as dressing, grooming, feeding, bathing, toileting, and transferring, and instrumental activities of daily living (IADLs), which are tasks that enable a person to live independently at home, such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care. Any additional care services not named in the regulation but that fit easily within the spirit of the enumerated duties also qualify as ADLs or IADLs. *See* FOH 25k02.

In order for services to meet the definition of companionship services, care must be provided attendant to and in conjunction with the provision of fellowship and protection and must not exceed 20 percent of the total hours worked per consumer and per workweek. *See* 29 CFR 552.6(b) and 78 FR 60455.

(10) *Medically related services*

These are services that typically require training by medical personnel such as registered nurses, licensed practical nurses, or certified nursing assistants, which include invasive or sterile procedures or that otherwise require the exercise of medical judgment. *See* 29 CFR 552.6(d) and 78 FR 60469.

(b) Definitions of additional terms regarding the application of the FLSA to domestic service employment are located throughout this chapter. In addition, a glossary of terms is located at http://esa.esa.dol.gov/whd/OTD/Homecare-glossary.docx.

[01/13/2017]

59n02 **Domestic service employment: statutory provisions, coverage.**

(a) Coverage extended to domestic service workers

In 1974 Congress extended FLSA coverage to domestic service workers: those workers engaged in work of a household nature in or about a private home. Domestic service employees are automatically covered under the FLSA because "employment of persons in domestic service in households affects commerce" (29 USC 202(a) and 29 CFR 552.99). There is no enterprise coverage requirement for domestic service workers. However, statutory requirements do apply: in order for minimum wage and overtime to apply, either cash wages must be over the amount per calendar year listed at https://www.ssa.gov/oact/cola/CovThresh.html or employees must work more than 8 hours in the workweek. *See* FOH 11d00(c).

(b) The FLSA exempts certain domestic service workers from the FLSA's minimum wage and overtime provisions

NOT FOR PUBLIC DISTRIBUTION

Section 13(a)(15) of the FLSA exempts from minimum wage and overtime pay "any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." These exemptions are only applicable to employees employed solely by a consumer (*i.e.*, not a third party).

Note: the WHD has made an effort to modify its use of language except when quoting the statute, legislative history, or case law. Where possible, the WHD should use the terms "consumers," "elderly persons," or "people with illnesses, injuries, or disabilities" when discussing those who receive home care services, including companionship services.

In addition, section 13(b)(21) of the FLSA provides an exemption from the overtime pay requirement for any employee who is employed in domestic service in a household and resides in such household. *See* FOH 59n04, introductory text, and FOH 59n04(a). This exemption is only applicable to employees employed solely by a consumer.

[01/13/2017]

59n03 **Private homes.**

Domestic service employment exists when employees are providing services in or about a private home. Determining whether services are provided in a private home is critical, as such a determination is necessary to properly assess whether there is FLSA coverage, and because the exemptions described below can only apply to domestic service employees.

(a) Determining whether a particular living unit is a private home

Determining whether a particular living unit is a private home requires a fact-specific analysis. In the home care context, there is a spectrum of living options available to individuals with disabilities and seniors. On one end of the spectrum, for example, there are full-service nursing homes, which are not private homes; on the other end, for example, is the family-owned home the consumer has lived in for years, which clearly is a private home. No specific factor controls and the overall situation must be fully analyzed. The relevant factors, referenced in FOH 11d01(c), are:

(1) Whether the client lived in the living unit before he or she received any services:

a. If the client lived in the living unit before receiving any services, this indicates that the living unit may be a private home.

b. If the client did not live in the living unit before becoming a client, and if the client would not live in the living unit if he or she were not receiving services, then this indicates that the living unit would not be considered a private home.

(2) Who owns the living unit:

a. If the living unit is owned or leased by the client or the client's family, this indicates that the living unit is likely a private home.

NOT FOR PUBLIC DISTRIBUTION

b. If the living unit is owned or leased by a service provider, this indicates that the living unit is likely not a private home.

(3) Who manages and maintains the residence (*i.e.*, who pays for the mortgage, rent, utilities, and food):

a. If many of the essentials of daily living are provided by the client or the client's family, then this factor weighs in favor of the living unit being a private home.

b. If a service provider provides essentials of daily living, then this factor weighs in favor of it not being a private home.

(4) Whether the client would be allowed to live in the unit if the client were not receiving services from the service provider:

a. If the client would be allowed to live in the unit without contracting for services, then this factor would weigh in favor of it being a private home.

b. If the client would not be allowed to live in the unit without contracting for services, then this factor would weigh in favor of it not being a private home.

(5) Relative difference in the cost/value of the services provided and the total cost of maintaining the living unit:

a. If the cost/value of the services is incidental to the other living expenses, then this factor weighs in favor of it being a private home.

b. If the cost/value of the services is a substantial portion of the total cost of maintaining the living unit, then this factor weighs in favor of it not being a private home.

(6) Whether the service provider uses any part of the residence for the provider's own business purposes:

a. If the service provider does not use any part of the residence for its own business purpose, then this factor weighs in favor of it being a private home.

b. If the service provider uses any part of the residence for its own business purpose, for example using part of the residence as a business office, then this factor weighs in favor of it not being a private home.

Welding v. Bios Corp., 353 F.3d 1214 (10th Cir. 2004)

Other factors to consider include: whether significant public funding is involved, who determines who lives together in the home, whether residents live together for treatment purposes as part of an overall care program, the number of residents, whether the clients can come and go freely, whether the employer or the client acquires the furniture, who controls access to the living unit, and whether the provider is a for-profit or not-for-profit entity. *See* FOH 11d01(c) and 78 FR 60461 -60462.

NOT FOR PUBLIC DISTRIBUTION

(b) Common living arrangements

(1) *Group homes (i.e., congregate community settings)*

Several courts have addressed the question whether particular group residences of individuals in need of care are private homes. Two significant examples follow:

a. *Johnston v. Volunteers of America, Inc.*

The Tenth Circuit Court of Appeals held that a business that provides care services to individuals with developmental disabilities in a "supported living program" did not meet its burden of proof to show that services were provided in a private home. Under this program, the clients were placed in a residence outside the family home and without the full-time, live-in care of a relative. Instead, they shared a residence with strangers who were also developmentally disabled. The clients' diets and daily activities were controlled by employees of the firm and not by the clients' family members. Although the clients signed a lease, the business entity managed the residences and held the right to appropriate a room to use as an office for its employees.

Johnston v. Volunteers of America, Inc., 213 F.3d 559 (10th Cir. 2000)

b. *Madison v. Resources for Human Development, Inc.*

The Third Circuit held that a non-profit corporation that provides supported living arrangements for adults with disabilities was not providing services in a private home. In support of this holding, the court noted that the clients did not have a possessory interest in the homes by owning them outright or leasing them directly from independent third parties and, instead, the clients subleased the property from the corporation and could only remain in the residence to the extent they maintained a continued relationship with the corporation. The court also relied on the fact that the clients did not have full control over who may access the home, in many cases the clients did not even have keys to the home, and that the clients did not have unfettered freedom in their day-to-day conduct. The court further noted that the clients did not live in the homes before they became clients of the corporation, and they would not have lived in the homes but for their association with the corporation.

Madison v. Resources for Human Development, Inc., 233 F.3d 175 (3rd Cir. 2000)

c. Senior communities

The WHD holds that senior communities in which residents enter into an occupancy agreement with a facility owner are not private homes. The fact that such facilities are privately funded does not preclude the fact that the facilities in which the services are provided are more analogous to a boarding or lodging house operated for a business or commercial purpose.

NOT FOR PUBLIC DISTRIBUTION

Furthermore, the WHD holds that the fact that a home is the sole residence of a client is not enough to make it a private home under the FLSA.

Under this senior community model, residents live in facilities akin to apartment houses, condominiums or hotels. For a monthly fee, residents receive services including meal preparation, apartment maintenance, security, utilities, weekly housekeeping, and social activities. These facilities are privately owned and operated with no government funding, and residents are personally responsible for all costs associated with living at the facilities. *See* WHD Opinion Letter FLSA 2001-14.

d. Supported living homes

Similarly, supported living homes for individuals with developmental disabilities are not private homes despite the fact that a supported living home is the sole residence of a client. For example, in a 2006 WHD opinion letter concerning supported living homes, the WHD explained that in the particular scenario presented, financial support for the residents comes from sources such as Medicare payments, federal and state Medicaid payments, and Supplemental Security Income payments; up to three individuals with developmental disabilities lived in the homes; and residents were often placed into these homes after leaving a state institution. Although in the scenario presented residents had some choice in selecting housemates, their choices were limited. Furthermore, at least one staff member was present in the homes at all times to assist in services such as meal preparation, upkeep of the home, general maintenance, and to monitor the residents. The service providers generally owned the homes and leased rooms to the residents, and the provider held overall responsibility for the maintenance and upkeep of the homes. Given these facts, the WHD concluded that the homes at issue were not private homes. *See* WHD Opinion Letter FLSA 2006-13NA.

(2) *Shared living arrangements*

There are many home care programs in which people with disabilities or older adults and the people who provide home care services to them live together in order to allow the consumers to live in their own homes or with families in their communities rather than living in congregate community settings (*e.g.*, group homes) or in institutions. These home care programs are often funded through Medicaid, other public programs, private pay, or other sources. Shared living arrangements are to be distinguished from group homes that are designed to offer services to multiple consumers, have shifts of workers, and do not offer the same level of community integration or autonomy as shared living.

a. Name and nomenclature of home care programs

The innovative home care programs referenced above include shared living, adult foster care, host home, paid roommate, supported living, and life sharing models. This list is not exhaustive and many states use these and other terms to refer to home care programs with a variety of structures. For purposes of the FLSA, what a program is called or how it is categorized by Medicaid or a state is not significant.

NOT FOR PUBLIC DISTRIBUTION

b. Private home analysis in shared living arrangements

The particular facts of the arrangement between a consumer, provider, and public and/or private agency administering the program control whether and how the FLSA applies. In determining whether a shared living arrangement constitutes a private home, the same factors referenced in FOH 11d01(c) must be analyzed. A comprehensive analysis of employment relationships and applicable exemptions in home care services provided through shared living arrangements can be found in FOH 59n09 and Administrator Interpretations Letter FLSA 2014-01.

[01/13/2017]

59n04 Domestic service employees: exemptions.

Under the revised regulations, the sections 13(a)(15) and 13(b)(21) exemptions under the FLSA are only available to the individual, family, or household solely or jointly employing the worker, and only if the employee is a casual babysitter, the companionship services duties test is met, or the residency requirement for live-in domestic service workers is met. *See* 29 CFR 552.4, 29 CFR 552.6, 29 CFR 552.102, and 29 CFR 552.109.

(a) Companionship service exemption

Section 13(a)(15) provides an exemption from both the minimum wage and overtime compensation for any employee employed in domestic service employment to provide companionship services. *See* 29 CFR 552.6. Only individuals, families, or household members may claim this exemption. Third party employers such as home care agencies, non-profit organizations, or public entities may no longer claim this exemption under any circumstances.

(b) Casual babysitting exemption

Domestic service employees who are casual babysitters are not subject to the minimum wage and/or overtime pay provisions. *See* 29 CFR 552.4, FOH 11d02, and FOH 25k. The term "casual basis," when applied to babysitting services, means employment that is irregular or intermittent, and is not performed by an individual whose vocation is babysitting. Casual babysitting services may include the performance of some household work not related to caring for the children if such work is incidental (*i.e.*, does not exceed 20 percent of the total hours worked on the particular babysitting assignment). *See* 29 CFR 552.5.

(c) Live-in domestic service worker exemption

Section 13(b)(21) provides an exemption from only the overtime pay requirement for any employee who is employed in domestic service in a household and who resides in such household. *See* 29 CFR 552.102 and FOH 59n06. Only individuals, families, or household members may claim this exemption. Third party employers, such as home care agencies, non-profit organizations, or public entities, may no longer claim this exemption under any circumstances.

(d) Third party employers

NOT FOR PUBLIC DISTRIBUTION

Third party employers of home care workers (*i.e.*, any employer who is not the consumer or a member of the consumer's family or household, such as a private or non-profit home care agency or a public entity administering home care programs) are not permitted to claim either the exemption for companionship services or the exemption for live-in domestic service employees. Third party employers may not claim these exemptions even when they jointly employ a worker with an individual, family, or household who may claim either exemption. Thus, any third party employer of a domestic service worker is obligated to pay not less than the minimum wage for all hours worked and overtime compensation for all hours worked over 40 in a workweek. *See* FOH 25k, 29 CFR 552.109(a), and 78 FR 60468.

[01/13/2017]

59n05 **Companionship services.**

Section 13(a)(15) exempts from minimum wage and overtime pay "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor])." Only individuals, families, or household members may claim this exemption. Third party employers such as home care agencies, non-profit organizations, or public entities may no longer claim this exemption under any circumstances. Thus, if the case under investigation involves a third party employer, it is not necessary to evaluate whether the definition of companionship services is met.

(a) Definition of companionship services

The term "companionship services" means the provision of fellowship and protection for an elderly person or a person with an illness, injury, or disability who requires assistance in caring for himself or herself. The term "companionship services" also includes the provision of care, when the care is provided attendant to and in conjunction with the provision of fellowship and protection, and does not exceed 20 percent of the total hours worked per consumer and per workweek.

Note: *if the employee is employed by a third party employer* (*i.e.*, anyone other than the consumer, their family or their household) *this exemption would not be applicable*. Third party employers cannot claim either the companionship services exemption or the live-in domestic service employee exemption.

(1) *The provision of fellowship*

To provide fellowship means to engage a person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying a person on walks, on errands, to appointments, or to social events. Fellowship and protection also include watching TV with a person, visiting with friends and neighbors, playing cards, and engaging a person in his or her hobbies.

(2) *The provision of protection*

To provide protection means to be present with a person in his or her home or to accompany a person when outside of the home, and to monitor that person's safety and well-being.

NOT FOR PUBLIC DISTRIBUTION

(3) *The provision of care*

Companionship services "also includes the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection, and if it does not exceed 20 percent of the total hours worked per person and per workweek" (29 CFR 552.6(b)). Providing care means assisting the person with ADLs, such as dressing, grooming, feeding, bathing, toileting, and transferring, and IADLs, which are tasks that enable a person to live independently at home, such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care. Any additional care services not named in these examples but that fit easily within the spirit of the enumerated duties also qualify as ADLs or IADLs. *See* FOH 25k02.

a. <u>20 percent tolerance for care</u>

The regulation, 29 CFR 552.6(b), states that companionship services may include providing care so long as it is performed attendant to and in conjunction with providing fellowship and protection. Under this regulation, "care" includes assistance with ADLs (*e.g.*,, dressing, grooming, feeding, bathing, toileting, and transferring) and IADLs, which enable a person to live independently at home (*e.g.*, meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care). *See* FOH 25k02. The companionship services exemption is not applicable when the employee spends more than 20 percent of the total hours worked per person and per workweek performing care services; in such workweeks, the employee is entitled to minimum wage and overtime pay. Remember, only individuals, families, or household members may claim this exemption. Third party employers such as home care agencies, non-profit organizations, or public entities may no longer claim this exemption under any circumstances, and thus there is no need to evaluate whether the 20 percent threshold has been met.

<u>Scenario:</u>

In the typical case, an employee performing companionship services for a consumer 40 hours per week would be allowed, under the 20 percent limitation, not more than 8 hours of care services for the person per workweek (40 hours × .20 = 8 hours) in order to still be eligible for the exemption. If the employee exceeded 8 hours of care during a 40-hour workweek, that employee would not be an exempt companion and would thus be entitled to at least the federal minimum wage for all hours worked.

(b) Services performed primarily for the benefit of other members of the household are not companionship services

The term "companionship services" "does not include domestic services performed primarily for the benefit of other members of the household" (29 CFR 552.6(c)). If in any week an employee performs work that primarily benefits other household members, such as making dinner for the entire family or doing laundry for another member of the household, this results in a loss of the exemption *for that workweek*. In other words, that employee is no longer performing companionship services for that workweek and must be paid at least the

NOT FOR PUBLIC DISTRIBUTION

minimum wage and any applicable overtime for the workweek. Again, only individuals, families, or household members may claim this exemption. Third party employers such as home care agencies, non-profit organizations, or public entities may no longer claim this exemption under any circumstances; thus, any assessment whether the services were performed for the benefit of other members of the household is not needed.

(1) *Household work vs. tasks constituting care*

Determining whether a particular task constitutes providing care or is instead a service performed primarily for the benefit of other household members is based on a common sense assessment of the facts at issue. For example, vacuuming a whole house or doing laundry for the whole household could constitute services that primarily benefit other household members, but vacuuming up food that the person drops or washing a soiled shirt for a consumer are not services primarily for the benefit of other household members, but rather constitute "care" as defined in 29 CFR 552.6(b). Also, light housework that may slightly benefit other members of the household, such as dusting a bedroom a consumer shares with another person, may constitute care if performed attendant to and in conjunction with providing fellowship and protection and within the 20 percent limitation.

Scenario:

Maria is employed 5 days a week to provide services to Regina, who lives with her daughter, Julia. Monday through Friday, Maria works from 9:00 a.m. to 6:00 p.m., including a 1-hour lunch that is free and clear of duties. Maria arrives at work promptly at 9:00 a.m., and upon her arrival, she reminds Regina to take her medication and begins preparing her breakfast. While Regina eats her breakfast, Maria washes the breakfast dishes and tidies up Regina's bedroom. Maria then assists Regina with putting on her clothes and combing her hair before going on a short walk and running errands. Upon their return, Maria sorts Regina's clothes to be laundered, starts the washer, and then prepares Regina's lunch. While Regina eats lunch, Maria washes the lunch dishes and cleans Regina's bathroom. Around 1:00 p.m. they watch their daily television shows and Regina takes a nap. On Wednesday, Julia told Maria to include Julia's clothes when she washed her mother's clothes and to also clean Julia's bedroom and bathroom.

When doing the laundry of other household members or cleaning rooms for an entire family, the exemption is lost for the workweek, because the provider cannot perform household services primarily for the benefits of others in the household and still maintain the companionship exemption during that week. Therefore, Maria is due the minimum wage and overtime for the workweek. *See* 78 FR 60469.

(c) The performance of medically related services

(1) *Medically related services are not companionship services*

The definition of companionship services does not include the performance of medical services that typically require training and are performed by medical personnel such as registered nurses, licensed practical nurses, or certified nursing assistants. Medically related services that typically require training by medical personnel include invasive or sterile procedures, or procedures that otherwise require

NOT FOR PUBLIC DISTRIBUTION

the exercise of medical judgment; examples include but are not limited to catheter care, turning and repositioning, ostomy care, tube feeding, treating bruising or bedsores, and physical therapy. *See* FOH 25k02(d), 29 CFR 552.6(d), and 78 FR 60469.

The determination of whether services are medically related is based on whether the services typically require and are performed by trained personnel, and is not based on a worker's actual training or occupational title. The performance of medically related services by the home care worker typically results in the loss of the companionship services exemption during the workweek in which the medically related services are performed. Again, only individuals, families, or household members may claim this exemption. Third party employers such as home care agencies, non-profit organizations, or public entities may no longer claim this exemption under any circumstances; thus, an assessment of whether a task is medically related is not necessary for these employers.

[01/13/2017]

59n06 **Live-in domestic service employee: section 13(b)(21).**

(a) Domestic service employees such as live-in workers are automatically covered under the FLSA because "employment of persons in domestic service in households affects commerce" (29 USC 202(a)). Section 13(b)(21) provides an overtime, but not minimum wage, exemption for "any employee employed in domestic service employment in a household and who resides in such household." This includes all types of domestic service workers, such as live-in home care workers and live-in nannies. *See* 29 USC 207 and 29 CFR 552.102.

(b) Live-in domestic service employees employed by a third party, whether solely or jointly, are not eligible for the live-in exemption and are entitled to at least the minimum wage and overtime compensation. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to claim the live-in domestic service employee exemption under section 13(b)(21). However, third party employers such as a home care agency or nanny agency may not claim the live-in domestic service worker exemption from overtime under any circumstances. *See* 29 CFR 552.109(c).

(c) In order for an employee to be considered a live-in domestic service worker, the worker must reside on the employer's premises either permanently or for an extended period of time and meet the definition of domestic service employment under 29 CFR 552.3 (*i.e.*, provide services in a private home). The live-in domestic service worker would therefore be exempt from overtime requirements if there is no third party employer. However, a consumer, family, or household may claim the domestic service exemption. *See* FOH 25n, 29 CFR 552.6, and 29 CFR 552.102. Consider the following to determine if a scenario qualifies as residing in a household "permanently" or for "extended periods of time."

(1) *Permanently reside*

Employees who work and sleep at the worksite 7 days per week and therefore have no home of their own other than the one provided by the employer are considered to permanently reside on the employer's premises. WHD Opinion Letter FLSA 2004-7.

(2) *Extended period of time*

NOT FOR PUBLIC DISTRIBUTION

Employees who work and sleep at the worksite for 5 days a week (for 120 hours or more) are considered to reside on the employer's premises for an extended period of time. *See* 29 CFR 785.23 and FOH 31b20. If an employee spends less than 120 hours per week working and sleeping at the employer's premises, but works 5 consecutive days or nights, this situation would also qualify as residing on the employer's premises for extended periods of time. For example, employees who are on duty from 9:00 a.m. Monday until 5:00 p.m. Friday would also be considered to reside on the employer's premises for an extended period of time. *See* FOH 31b20.

a. Temporarily reside

Employees working on the employer's premises only temporarily (*e.g.*, for only 2 weeks) are not considered live-in domestic service workers because residing on the premises implies more than temporary activity. *See* 78 FR 60474.

b. 24-hour shifts

Employees working shifts of 24 hours or more but not residing on the employer's premises permanently or for extended periods of time as defined above are not considered live-in domestic service workers and, thus, are not exempt from overtime pay under section 13(b)(21).

c. Respite workers

"Respite worker" is a common term for an employee hired to provide assistance when the live-in provider is unavailable or otherwise needs relief from his or her responsibilities. Respite workers in private homes should not automatically be treated as live-in domestic service workers simply because they replace live-in workers. Note: while respite workers are likely to be entitled to the minimum wage and overtime pay protections, that determination requires an assessment of the circumstances of the individual's work arrangement.

[01/13/2017]

59n07 Live-ins: special considerations.

(a) Regardless of whether an employer may claim the live-in domestic service employee exemption (*i.e.*, whether the employer is the person receiving services or that person's family or household or whether the employer is a third party), certain special rules apply to such employees.

(b) For a live-in domestic service employee, the employer and employee may voluntarily agree to exclude the amount of time spent during a bona fide meal period, sleep period, and off-duty time. *See* FOH 25n04, FOH 59n12, 29 CFR 552.102, 29 CFR 785.16, 29 CFR 785.19, and 29 CFR 785.23. The WHD will accept any reasonable agreement of the parties taking into consideration all of the pertinent facts. However, if the meal periods, sleep time, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked. *See* 29 CFR 785.22 -.23. For on-call employees *see* FOH 31b14.

NOT FOR PUBLIC DISTRIBUTION

(c) Not all of the time spent on the premises by a live-in domestic service worker is considered working time. The employer must track and record all hours worked by domestic service employees, including live-in employees, and the employee must be compensated for all hours actually worked notwithstanding the existence of an agreement. *See* 29 CFR 516.2(a), 29 CFR 552.102, and 29 CFR 552.110.

[01/13/2017]

59n08 **Live-ins: application of section 3(m) of the FLSA to lodging.**

(a) Requirements for taking a credit toward wages

Section 3(m) of the FLSA allows an employer to count as part of wages the reasonable cost or fair value of furnishing an employee with "board, lodging, or other facilities" if such board, lodging, or facilities is customarily furnished by similarly situated employers to their employees. However, the cost of furnishing the board, lodging, or other facilities will not be counted as part of wages if excluded under a bona fide CBA. *See* FOH 30c01 and Field Assistance Bulletin No. 2015-1.

Employers who wish to claim a wage credit towards their minimum wage obligation for lodging provided to live-in domestic service employees must ensure that the following five factors are met (*see* Field Assistance Bulletin No. 2015-1 and FOH 25n06):

(1) The lodging must be "furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employers engaged in the same or similar trade, business, or occupation in the same or similar communities" (29 CFR 531.31). *See* FOH 30c02(a).

(2) Employees must voluntarily accept the lodging prior to the employer taking the credit. *See* 29 CFR 531.30; WHD Opinion Letter FLSA (February 24, 1982); and FOH 25n06.

(3) Lodging must not be furnished in violation of any applicable federal, state, or local law. *See* 29 CFR 531.31, FOH 25n06, and FOH 30c02(b).

(4) Lodging must be deemed primarily for the benefit of the employee and not the employer. *See* 29 CFR 531.3(d)(1), FOH 25n06, FOH 30c01(c), FOH 30c03(a)(2).

(5) Employers must maintain accurate records of the costs incurred in furnishing the lodging. *See* 29 CFR 516.27; 29 CFR 552.100; WHD Opinion Letter FLSA (June 1, 1994); FOH 25n06; and FOH 30c05(a).

(b) Lodging regularly provided by the employer

Employers may take advantage of section 3(m) only if the lodging is "furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employers engaged in the same or similar trade, business, or occupation in the same or similar communities" (29 CFR 531.31). *See* FOH 25n06 and FOH 30c02(a). Note: much of the information in this chapter is based on guidance found in Field Assistance Bulletin No. 2015-1. Please consult the Field Assistance Bulletin for additional, detailed information.

NOT FOR PUBLIC DISTRIBUTION

Because live-in domestic service employees often reside at their employers' private homes without paying rent, this requirement is met for those workers.

(c) Voluntary acceptance

Employees must accept lodging voluntarily and without coercion in order for an employer to take advantage of section 3(m). *See* 29 CFR 531.30; 29 CFR 552.100(b); and WHD Opinion Letter FLSA (February 24, 1982). The WHD will normally consider the lodging as voluntarily accepted by the employee when living at or near the site of the work is necessary to performing the job. This requirement is typically met when a live-in domestic service employee and the employer have an understanding that the employee will live on the premises as a condition of employment. This presumption of voluntariness can be overcome, such as in cases involving coercion. Although such circumstances are not the norm, WHIs are advised to be attentive to any signs that the presumption of voluntariness is not applicable in a particular case.

(d) Compliance with federal, state, and local laws

Employers may not include the cost of lodging as part of employees' wages if the lodging is "in violation of any [f]ederal, [s]tate, or local laws, ordinance or prohibition" (*see* 29 CFR 531.31 and FOH 30c02(b). The WHD will not allow a section 3(m) credit if the lodging provided does not have or has been denied a required occupancy permit, is not zoned for residential use, is substandard, or has been deemed substandard by local jurisdictions. *See* FOH 25n06 and FOH 30c02(b). Note: WHIs should be aware of and look into any suggestions that employer-provided lodging is substandard such that its condition violates law.

(e) Lodging must be deemed primarily for the benefit of the employee and not the employer

An employer may not include the cost of lodging in an employee's wages unless the employee receives the primary benefit of the lodging. Lodging is ordinarily presumed to be for the primary benefit and convenience of the employee. But this presumption is rebutted in circumstances in which lodging is of little benefit to employees, such as where an employer requires an employee to live on the employer's premises to meet some need of the employer. In particular, an employer may not claim the section 3(m) credit if the employer requires the employee to leave an existing home and live on the employer's premises to be on call to meet the needs of the employer.

WHIs must consider the nature of the employment relationship and review the specific circumstances of each case to determine whether the lodging provided is primarily for the benefit of the employee. There are scenarios in the home care context in which an employee lives with a recipient of home care services in order to provide assistance throughout the day and/or night. Although the acuity level of the recipient of services does not determine whether the lodging is for the benefit of the employer or the employee, the employer's demands on an employee's time is relevant to a determination of who primarily benefits from the employee's living at the residence.

Whether the employer has provided a live-in domestic service employee with specific time periods during which the employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for his or her own purposes (*i.e.*,

NOT FOR PUBLIC DISTRIBUTION

has provided bona fide off-duty time) is one factor that may help determine who primarily benefits from the living arrangement and the lodging provided.

Where the employer's demands on an employee's time are so great or constant that the employee is working or is engaged to wait while occupying the lodging, these factors would support a finding that the lodging is primarily for the employer's benefit. Thus, where a live-in domestic employee's sleep or off-duty time is regularly interrupted to perform work for the employer, not only will this time be considered as hours worked, but the lodging typically will be deemed primarily for the employer's benefit, and the cost of the lodging will not be allowed to count as part of wages.

Adequate lodging is another factor that may help determine who primarily benefits from the living arrangement. For example, if an employer provides an employee with private living quarterssuch as a separate bedroom that is furnished with a bed, night table, and dresser, where the employee is able to leave his or her belongings and spend his or her off-duty time, this factor weighs in favor of a finding that the primary beneficiary of the lodging is the live-in domestic service employee. Similarly, if the employer provides the live-in domestic service employee with access to a kitchen and a private bathroom, such facilities support a finding that the lodging is primarily for the benefit of the employee, although such facilities are not a prerequisite for taking the section 3(m) credit. Such private quarters typically ensure that the live-in employee is able to engage in normal private pursuits as he or she would in his or her own home. Even when the employee is provided private living quarters, however, lodging will typically be deemed primarily for the employer's benefit if the live-in employee is on-call 24 hours a day or his or her sleep and off-duty time is regularly interrupted. If a live-in domestic service employee is only provided a cot or couch to sleep on in a living space shared with the employer, this fact would suggest that the live-in employee is not provided adequate off-duty time or is unable to use such time as he or she chooses and therefore that the lodging is primarily for the benefit of the employer.

(f) Accurate recordkeeping

In order to take a wage credit under section 3(m), an employer must maintain accurate records of the costs incurred in furnishing lodging to the employee. *See* 29 CFR 516.27(a); 29 CFR 552.100(d); WHD Opinion Letter FLSA (June 1, 1994); and FOH 30c05(a). Such records shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost or fair value and the data required to compute the amount of depreciated investment, if any. For example, records could include proof of mortgage or rental payments and utility bills.

If an employer does not provide records to support its claim of a section 3(m) lodging credit, the employer has not met this prerequisite for including lodging costs in employees' wages. Nevertheless, an employer of a live-in domestic service employee that does not provide such records may claim a certain amount toward wages rather than the reasonable cost or fair value of the housing provided. The amount such an employer may claim is up to seven and one-half times the statutory, hourly minimum wage for each week lodging is furnished. In other words, at a minimum wage of $7.25 per hour, an employer could claim up to $54.38 (7.5 × $7.25) per workweek lodging is furnished. *See* 29 CFR 552.100(d) and Field Assistance Bulletin No. 2015-1.

(g) Collective bargaining agreements

NOT FOR PUBLIC DISTRIBUTION

An employer may not include in an employee's wage the cost of lodging "to the extent it is excluded under the terms of a bona fide collective bargaining agreement applicable to the particular employee" (29 CFR 531.6(a)). The determination of whether a CBA contains an exclusion of the cost of lodging that would otherwise qualify for a section 3(m) credit will be based upon the written provisions of the CBA. *See* 29 USC 203(m), FOH 30c01(b), and Field Assistance Bulletin No. 2015-1.

(h) Determining reasonable cost or fair value

The section 3(m) credit may not exceed the reasonable cost or fair value of the facilities furnished, whichever is less.

(1) *Reasonable cost*

In this context, the "reasonable cost" is "not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees" (29 CFR 531.3(a)). In other words, reasonable cost *does not* include a profit to the employer. For example, the actual cost to an employer of providing lodging to such a worker could be a portion of the monthly mortgage or rental payment, as well as utility payments. *See* FOH 30c05(a) and FOH 30c06(d)(2). There is no precise formula for determining the appropriate fraction of the mortgage or rental cost; instead, the employer or WHI must take into account the particular circumstances. The cost of furnishing lodging must be established based upon available records.

Scenario:

If a person receiving services owns the home in which he or she and his or her employee live, and therefore makes no mortgage or rental payment, the section 3(m) credit could be for the cost of paying property taxes, utilities, and other necessary costs of maintaining the home.

a. Source of funds

The source of the funds the employer uses to provide the property is not relevant. The actual cost an employer pays may include money from the employer's savings or income and/or other funds provided to the employer, such as public assistance provided to certain individuals who employ home care workers. For purposes of calculating a section 3(m) credit, it is significant only that an employer, rather than the employee or another party that is not an employer, pays for the housing, not how the employer obtained the funds for such payments.

b. Reasonable approximation

The portion of the cost of the residence in which an employee lives that may be counted as part of wages must be a reasonable approximation of the worker's share of the housing. There is no formula for determining the appropriate fraction of the mortgage, rental, or other costs of the lodging that applies to a particular employee; instead, the employer or WHI must take into account the specific circumstances. *See* FOH 30c06(d)(3).

NOT FOR PUBLIC DISTRIBUTION

Scenario 1:

In a large house in which a family of five and a home care worker reside, the amount might most appropriately be determined based on the ratio of the square footage of the employee's bedroom to the square footage of the entire house.

Scenario 2:

In an apartment shared by a recipient of home care services and a paid roommate, where the two individuals have equal use of the kitchen and common living spaces, the appropriate amount of a section 3(m) credit might be half of the rental cost of the unit.

1. The reasonable cost is to be calculated on a workweek-by-workweek basis so it can be added to cash wages for purposes of assessing whether the employer's minimum wage obligation has been met and determining the regular rate of pay upon which any overtime compensation due must be calculated. The weekly reasonable cost can be calculated based on a monthly mortgage or rental amount by multiplying the monthly amount by 12 and dividing by 52. *See* FOH 30c06(d)(3).

Note: WHIs should consider the specific costs for the time period covered in an investigation based on the employer's records, although the WHI may in his or her discretion use, or accept an employer's use of, average amounts, if the approximation is reasonable.

2. The employer bears the burden of establishing the reasonable cost of lodging. Records of mortgage payments, a rental agreement and records of rent checks, or utility bills, for example, can suffice as bases for actual cost calculations. In addition, records regarding sources of public assistance the employer used to pay for housing, such as records regarding Housing Choice Vouchers, may be among the records used to fulfill this requirement.

Note: in the absence of records, an employer of a live-in domestic service employee is subject to an exception: the employer may credit seven and one-half times the minimum wage per workweek to the wages if the employee is a live-in domestic service employee. In other words, at a minimum wage of $7.25 per hour, an employer could claim up to $54.38 (7.5 × $7.25) per workweek lodging is furnished. *See* 29 CFR 552.100(d).

(2) *Fair value*

Section 3(m) of the FLSA also gives the Secretary of Labor (Secretary) authority "to determine the 'fair value' of such facilities on the basis of average cost to the employer or to groups of employers similarly situated, or average value to groups of

NOT FOR PUBLIC DISTRIBUTION

employees, or other appropriate measures of 'fair value.'" *See* 29 CFR 531.2(a) and FOH 30c01(a).

If the actual cost to the employer exceeds the rental value of the lodging (*see* 29 CFR 531.3(c) and FOH 30c06(c)) or the employer otherwise establishes a reasonable cost that appears to be excessive in relation to the facilities furnished (*see* FOH 30c01(a)), the employer may only count the lower fair value of the lodging toward wages. *See* 29 USC 203(m), FOH 30c01(a), FOH 30c06(c), 29 CFR 531.2(a), and 29 CFR 531.3(c). *See* Field Assistance Bulletin No. 2015-1. As with assessments of reasonable cost, there is no specific formula for determining fair value. The WHD may approximate the fair value of lodging by considering average rental prices in the area for similar homes.

WHIs may estimate these amounts by, for example, using fair market rent data for a particular locality as published by the U.S. Department of Housing and Urban Development, available at http://www.huduser.org/portal/datasets/fmr.html; searching for comparable rental units online; or requesting information from local real estate brokers or other experts. WHIs may also consider the reasonable cost of lodging claimed by similarly situated employers if such information is available.

An employer may not profit from the section 3(m) credit, an employer may only use the fair value of housing as the amount credited toward wages if that amount is equal to or lower than the amount the employer actually pays for the housing.

(i) Wage calculations

(1) *Calculating an hourly rate*

To calculate an hourly rate including the section 3(m) credit, the value of the lodging is added to cash wages, excluding overtime compensation, and divided by the hours worked in a given week. The credit goes toward the employer's minimum wage obligation and therefore is included in the determination of the employee's regular rate of pay for purposes of calculating any overtime compensation due. *See* 29 CFR 531.37(b) and Field Assistance Bulletin No. 2015-1.

(2) *Credit as addition to or deduction from wages*

Section 3(m) applies to lodging furnished by the employer as compensation to an employee regardless of whether the employer calculates charges for such lodging as additions to or deductions from wages. *See* 29 CFR 531.29.

a. Where deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made.

b. Where an employer furnishes board, lodging, or other facilities to his employees in addition to cash wages, the weekly reasonable cost or the fair value must be added to the cash wages before the regular rate is determined. *See* FOH 30c01(c) and 29 CFR 778.116.

NOT FOR PUBLIC DISTRIBUTION

(3) *The section 3(m) credit may not be used to evade the overtime compensation requirement*

An employer's claiming the section 3(m) credit only in overtime weeks, or in a greater amount in overtime weeks, is cause for suspicion. *See* 29 CFR 531.37. An employer may not use the section 3(m) credit for the purpose of evading the overtime compensation requirement.

(4) *Calculation examples*

Scenario 1:

Assume a live-in domestic service employee receives $6.00 per hour as well as room and board, for which the reasonable cost is $100.00 per week. If the employee works 30 hours in a workweek, the $180.00 ($6.00 × 30 hours) cash wages is added to the $100.00 in section 3(m) credit for a total of $280.00 received in the week, which amounts to a regular rate of $9.33 ($280.00 ÷ 30 hours) per hour. Assuming the room and board credit is properly taken, and as long as $9.33 is greater than or equal to the current federal minimum wage, this payment structure would comply with the minimum wage requirement.

Scenario 2:

If during the following week, the same live-in domestic service employee worked for 50 hours, the employee, if not exempt from the overtime requirement, would be due overtime compensation of one and one-half times his or her regular rate of pay for each hour worked over 40 (50 hours - 40 hours = 10 hours). Specifically, the employee would receive $300.00 ($6.00 × 50 hours) in cash wages in addition to the $100.00 section 3(m) credit, for a total of $400.00, which amounts to a regular rate of $8.00 ($400.00 ÷ 50 hours) per hour. Assuming the room and board credit is properly taken, and as long as $8.00 is greater than or equal to the current federal minimum wage, the employer's minimum wage obligation would still be met. If this live-in domestic service employee is employed by a third party employer, however, he or she is not exempt from the overtime provisions of the FLSA and he or she would be owed an additional $40.00 ($8.00 × .5 × 10 hours) in overtime compensation.

Scenario 3:

Conversely, if the live-in domestic service employee is solely employed by the consumer, the consumer's family, or the consumer's household, the consumer could claim the section 13(b)(21) exemption, and the $400.00 in compensation would suffice as long as the wage paid for each hour worked is greater than or equal to the federal minimum wage rate.

(5) *Section 3(m) credit as sole payment*

The section 3(m) credit may also be the sole payment an employee receives, provided it is sufficient to cover the employer's minimum wage obligation. Deductions for board, lodging, or other facilities may be made in non-overtime workweeks even if they reduce the cash wage below the minimum wage. *See* 29 CFR 531.36(a).

NOT FOR PUBLIC DISTRIBUTION

Scenario:

A nanny at a private home who works for 15 hours per week could be compensated entirely by not being charged rent. If the reasonable cost of her lodging is $500.00 per month, or $115.38 per week ($500.00 × 12 months ÷ 52 weeks), and the employer has complied with the section 3(m) requirements, this arrangement complies with the FLSA so long as the regular rate, in this case $7.69 ($115.38 ÷ 15 hours), is in excess of the federal minimum wage of $7.25 per hour.

(6) *Reimbursement for incurred expenses*

When an employee is reimbursed for expenses incurred on behalf of his or her employer, such payments are not considered to be compensation for hours worked. Therefore, such payments do not count toward wages under section 3(m) and are excluded from the regular rate for purposes of overtime calculations.

(7) *Joint employment*

Under the FLSA, a worker may be jointly employed by more than one employer. *See* FOH 59f. If it is determined after applying the fact-specific economic realities test that joint employment exists, then both or all employers will be jointly and severally liable for compliance with all of the applicable provisions of the FLSA, including the overtime provisions, with respect to the entire employment for the particular workweek. "In discharging the joint obligation, each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers" (29 CFR 791.2(a)). *See* Field Assistance Bulletin No. 2015-1.

Scenario:

For example, a family and a home care agency might jointly employ a live-in home care worker; the agency might pay cash wages and the family might pay the rent for the residence in which the worker and the person to whom he or she provides services reside. In that case, the amount properly claimed as a section 3(m) credit and the cash wages are combined to determine the total wages received. The credit may be applied toward the agency's wage obligation even though only the agency, and not the family, would be responsible for ensuring the live-in domestic service employee received overtime compensation. *See* Field Assistance Bulletin No. 2015-1.

[01/13/2017]

59n09 Shared living arrangements.

(a) General

This section, derived from Administrator Interpretations Letter FLSA 2014-1, discusses how longstanding FLSA principles apply to a category of home care services referred to as shared living arrangements.

(b) Shared living arrangements

NOT FOR PUBLIC DISTRIBUTION

(1) Shared living arrangements are home care programs in which people with disabilities or seniors and providers of home care services live together.

(2) Some home care programs are administered by a state and funded by Medicaid or other public funding; other programs are private pay. For FLSA purposes a program name or categorization by Medicaid or a state is not significant. The particular facts of the arrangement between a consumer, provider (*i.e.*, the person providing home care services to a consumer), and public and/or private agency administering the program (*i.e.*, third party) control whether and how the FLSA applies.

(3) Some commonly used terms states use to describe these living arrangements are shared living, adult foster care, supported living, paid roommate, or host home. These terms are not exhaustive nor are the structures of the living arrangements.

Below are examples that illustrate the application of the economic realities test to several shared living arrangements.

a. Shared living in a provider's home

In this shared living arrangement, a provider allows a consumer to move into his or her existing home in order to integrate the individual into the shared experiences of a home and family. A home care provider could be an employee of a consumer or third party. This shared living arrangement is common in many state Medicaid systems and is often referred to as "adult foster care" or "host home."

In most shared living arrangements in a provider's home, the provider will not be an employee of the consumer. Adult foster care providers often integrate the consumer into an existing set of circumstances, rather than taking direction from the consumer. The provider makes investments in order to take on the role, whereas the consumer has not. The provider has obtained and maintains the home in which services are provided and may have made modifications to the home, such as making a bathroom accessible or transforming a first floor room into a bedroom to be permitted to become the consumer's provider. Where the provider exercises control over the conditions of the work, rather than taking directions from the consumer, and has invested in the arrangement, the provider is more like an independent business than an employee of the consumer. Therefore, the provider typically is not an employee under the economic realities test.

In most shared living arrangements that occur in the existing home of the provider, the provider will not be an employee of a consumer or third party. However, where a third party is so involved in the provider's relationship with the consumer (*e.g.*, through the activities of a case manager) that the third party's role becomes one of direction and management of the workplace, the provider will be an employee of that third party rather than an independent contractor.

b. Shared living in a consumer's home

NOT FOR PUBLIC DISTRIBUTION

In this shared living arrangement, a provider moves into a consumer's home to perform services, which can include personal and/or medical care, helping integrate the consumer into the community, and/or being present during nights in case of an emergency. These arrangements are sometimes called "paid roommate arrangements." Typically, the provider lives rent-free in the consumer's home and may or may not receive additional payment. These arrangements are often funded by Medicaid, but may also be funded by another public program or privately.

In these circumstances, the provider will typically be the employee of the consumer. The consumer is likely to set the provider's schedule, direct the provider how and when to perform certain tasks, and otherwise control the provider's work. The provider is unlikely to have invested in the arrangement, whereas the consumer has acquired a home in which there is sufficient space for the provider to also reside, and as the owner/lessee, has overall control of the premises where the work is performed.

c. Shared living in a new home created by the consumer and provider

It will not always be the case that either the provider or the consumer previously occupied the residence in which the arrangement occurs. For example, the two may move in together because neither previously lived in a residence that would accommodate them both. Whether these situations are more like those described in FOH 59n09(b)(3)a. or b. above depends upon all of the circumstances that go to who controls the residence and relationship. Factors to consider include who identified the residence, arranged to buy or lease the residence, furnished the common areas, maintains the residence (*e.g.*, by cleaning it and making repairs), and pays the mortgage or rent. No single fact alone is controlling. Where the provider has primary control over the residence and relationship, the consumer likely does not employ the provider. *See* Administrator Interpretations Letter FLSA 2014-1.

(c) Significance of where the arrangement takes place (*i.e.*, provider's home versus consumer's home)

The place where the arrangement takes place in terms of either the provider's home or consumer's home is not always a definitive indicator of an employment relationship among the consumer, provider, and/or third party. In most circumstances, a provider who brings a consumer into his or her existing home will not be an employee of the consumer or the consumer's representative, and if the provider is not the employee of a third party, he or she may be considered an independent contractor. It will often, though not always, be the case that a provider who moves into the home of a consumer is the consumer's employee. No single factor is controlling when determining an employment relationship in a shared living arrangement in a new home created by the consumer and provider.

[01/13/2017]

59n10 Paid family/household care providers.

Important reminder: consult with your ADD/DD regarding investigations where the consumer may be an employer and review Investigation Procedures in FOH 59n16. It is *not*

NOT FOR PUBLIC DISTRIBUTION

the DOL's goal to investigate consumers, their family, or their household members. The focus is on third party employers. Any visit to the home and/or investigation of a consumer, their family, or their household *must* receive prior approval from the DO management before the visit or investigation is initiated. *See* FOH 59n14.

(a) Paid family/household care providers

Certain Medicaid-funded and other publicly funded programs allow for arrangements in which a family or household member of the consumer is paid to provide home care services. These programs allow the consumer or the consumer's representative to select and supervise the care provider, and further permit the consumer to choose a family or household member to be a paid home care worker. Under these programs, the particular services to be provided and the number of hours of paid work are described in a written agreement usually called a "plan of care," developed, and approved by the program after an assessment of the services the consumer requires. Such a plan will also take into account the consumer's existing supports, such as unpaid assistance already provided by family or household members.

(1) In investigations where a family or household member is a paid home care worker, it might be appropriate under limited circumstances to give consideration to the consumer's plan of care. Under the circumstances described below, the WHD will not consider a family or household member with a pre-existing, close, personal relationship with the consumer to be employed beyond the plan of care. Remember that the WHD is not focused on investigations of family or household members as sole employers.

The FLSA does not necessarily require, once a family or household member is paid to provide some home care services, that all care provided by that family or household member is part of the employment relationship. The care outside of the employment relationship is often referred to as "natural supports" or "support." *See* 78 FR 60489.

In circumstances in which a family or household member of the consumer is selected as a paid provider, the employment relationship is limited to the paid hours contemplated in the plan of care or other written agreement developed with the consumer and approved by certain Medicaid funded or other publicly funded home care programs only if the agreement is reasonable.

<u>Scenario:</u>

A familial relationship, but not an employment relationship, would exist where a father assists his adult son with a physical disability with ADLs in the evenings. If the son enrolled in a Medicaid-funded or other publicly funded program, and the father decides to become his son's paid care provider under a program-approved plan of care that funds 8 hours per day of services that consists of assistance with ADLs and IADLs, the father would then be in an employment relationship with his son, and perhaps the publicly funded entity as well, for purposes of the FLSA for those hours. The father's employment relationship extends only to the 8 hours per day of paid work contemplated in the plan of care; the assistance he provides at other times (*i.e.*, the natural supports), is not part of that employment relationship and therefore need not be counted as hours worked.

NOT FOR PUBLIC DISTRIBUTION

(2) For purposes of an FLSA analysis, "reasonable" does not mean whether the amount or types of services or paid hours to be provided are appropriate for the consumer. Instead, a determination of reasonableness for FLSA purposes will take into account whether the plan of care would have included the same number of paid hours if the care provider had not been a family or household member of the consumer. In other words, for FLSA purposes, a plan of care that reflects unequal treatment of a care provider because of his or her familial or household relationship with the consumer is not reasonable.

a. If the program reduces the number of paid hours in a plan of care because the selected care provider is a family or household member, the WHD will not consider the employment relationship limited to the hours in the plan of care.

b. If a program requires an increase in the hours of unpaid services performed by the family or household care provider in order to reduce the number of hours of paid services because the selected care provider is a family or household member, the WHD will not consider the employment relationship limited to the hours in the plan of care.

Scenario:

A 90-year-old woman who requires home care services enrolls in a Medicaid-funded program administered by the county in which she lives. She is assessed to be in need of paid services for 30 hours per week beyond the existing unpaid assistance she receives from her daughter and other relatives. Had the consumer chosen a neighbor to become her paid care provider, her plan of care would have included those 30 paid hours each week. However, the consumer elects her daughter to become her paid care provider, and the county in turn reduces the paid hours in the plan of care to 15 hours per week. In this example, the plan of care is not reasonable for FLSA purposes, as it treats the family care provider unequally. For that reason, the paid hours in the plan of care will not determine the scope of the FLSA employment relationship.

(3) This unique interpretation only applies in the home care services context, and it does not generally apply to relationships that do not involve preexisting family ties or a preexisting shared household. For additional discussion on plan of care, see 78 FR 60487.

(4) Note: *important reminder*: consult with your ADD/DD regarding investigations where the consumer, their family, or their household may be investigated as an employer. Any visit to the home and/or investigation of a consumer, their family, or their household, *must* receive prior approval from the DO management before the visit or investigation is initiated. *See* FOH 59n14.

A plan of care contains private and personal information of a consumer, who is likely an employer and is in any case not an employee. Therefore, even if DO management determines that it is appropriate to conduct an investigation of a consumer or their family or household, WHIs should not generally ask for the plan of care during the course of an investigation. Only under rare circumstances, such as when the equal treatment of family or household care providers is at issue, will DO management determine during the fact-finding stage of an investigation that it is appropriate to

NOT FOR PUBLIC DISTRIBUTION

obtain a copy of a plan of care. In such cases, WHIs may obtain documentation that describes the services and number of paid hours worked contemplated by the plan of care. For example, an analysis of the consumer's past and current plans of care might provide evidence of unequal treatment of a family or household care provider (*e.g.*, the home care program paid for 30 hours a week of services for a prior home care worker who was not a relative, but a new plan of care provides for only 15 hours per week of paid services when a family member becomes the paid caregiver). Interviews of former and current providers and/or analysis of a past and current plan of care may also assist in assessing whether the paid time was modified because a family or household member is a paid provider. Consultation with the Branch Chief, FLSA and Child Labor Branch in the NO through normal channels may be appropriate.

[01/13/2017]

59n11 Joint employment in the home care industry.

(a) General

Consistent with the DOL's general joint employment guidance, a single individual may be simultaneously considered an employee of more than one employer under the FLSA. The employee's work for the joint employers is considered as one employment for purposes of the FLSA. Joint employers are individually and jointly responsible for paying not less than the minimum wage for all hours worked during the workweek and, if applicable, overtime compensation for all hours worked over 40 in the workweek. A determination of whether joint employment exists must be based upon all the facts of the particular case. *See* 29 CFR 791.2(a), FOH 30a09, FOH 32j12, FOH 59f, and Administrator Interpretations Letter FLSA 2014-2.

The scope of employment under the FLSA is very broad given that the statute defines "employ" as including "to suffer or permit to work" (29 USC 203(g)). *See* FOH 10b05(a). In any situation where two or more employers satisfy that broad definition of employment with respect to an employee's work, they jointly employ the employee.

[07/07/2017]

(b) Guidance for analyzing potential joint employment in the home care industry

The DOL has two administrator interpretations specifically pertaining to joint employment: Administrator Interpretations Letter FLSA 2014-2, which explicitly discusses joint employment in consumer-directed, Medicaid funded programs; and Administrator Interpretations Letter FLSA 2016-1, which discusses joint employment generally. Both of these guidance documents should be used to help guide the analysis when there is potentially more than one employer in a home care-related investigation.

FOH 59f provides detailed guidance for cases concerning joint employment generally under the FLSA and Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and should be consulted for guidance. *See* FOH 59f.

[07/07/2017]

NOT FOR PUBLIC DISTRIBUTION

(c) Which third parties may be employers

The fact-specific economic realities test should be applied to all situations and all potential employers to assess whether there is an employment relationship. Depending on the structure of a home care program, different entities may be potential employers. For example, a state itself, a statewide agency that oversees Medicaid programs, or a county department of aging could all be potential employers of home care workers providing services through a consumer-directed program. Additionally, private agencies or non-profit organizations may be employers of domestic service employees, and in particular home care workers, under the FLSA. 29 USC 201 *et seq*. The same analysis will be utilized for any potential employer. Indeed, all general FLSA joint employment principles and analyses apply in the home care context. What is unique, however, is that in joint employment situations involving a consumer, or their family or household member, and third party employer(s), the consumer, family member, or household member will be able to claim the companionship services or live-in domestic service worker employee exemptions, while the third party employer will not, providing all conditions of each exemption are met. *See* 29 CFR 552.109 and FOH 59n04.

(1) *Employers to which special protocols apply: public entities, franchises, and large employers*

Note: until further notice, there are special protocols and procedures for home care cases involving public entities, large third party employers, and franchises. *See* FOH 59n15 for additional information.

(d) Economic realities test

Employer status under the FLSA is determined by applying the economic realities test, which examines a number of factors to determine whether a worker is economically dependent on an employer, thus creating an employment relationship. There is no set list of factors or formulae to be applied; courts may apply any factor deemed relevant to the ultimate question of economic dependency. Additionally, the control factor should not be overemphasized in the analysis.

The MSPA joint employment regulation, for example, provides seven economic realities factors to guide the analysis of whether the worker is economically dependent on the possible joint employer in vertical joint employment cases. *See* 29 CFR 500.20(h). These factors should not to be applied as a checklist, and no single factor is determinative. Additional evidence relevant to economic realities may be considered. The weight given to each factor individually and in total depends on all of the facts and circumstances of the case. The factors themselves are not the analysis; instead, they are guides to answering the ultimate question of economic dependency. *See* FOH 59n.

Administrator Interpretations Letter FLSA 2014-2 also discusses several economic realities factors that may be highly relevant in cases concerning home care. These factors include, among other things:

(1) Which entity has the power to hire or fire

(2) Who controls the wage or other employment benefits

NOT FOR PUBLIC DISTRIBUTION

(3) Who sets hours and scheduling

(4) Who supervises, directs, or controls the work

(5) Who performs payroll and other administrative functions

This list is meant to be illustrative. As noted, there are multiple other factors a court may consider to be relevant in evaluating whether an employment relationship exists. All of the facts relevant to whether a worker is economically dependent upon a purported employer should be assessed. *See* Administrator Interpretations Letter FLSA 2014-2.

[07/07/2017]

(e) Implications of joint employment in the home care industry

While cases arising in the home care industry are subject to the same regulations and policies concerning all joint employment cases, there are some frequently occurring implications of which to be aware that arise in the home care context due to the structure of the industry and nature of the work:

(1) *Travel time*

Employees who travel to more than one worksite for a single joint employer during the workday must be paid for travel time between each worksite. *See* 29 CFR 785.38. If a home care worker travels to a consumer's home directly from his or her home and returns home from a consumer's home, this commuting travel time generally does not need to be paid.

(2) *Aggregate all hours worked for the same employer*

An employee who works for multiple consumers of a single joint employer must receive compensation at time and one-half the employee's regular rate of pay for any hours worked over 40, aggregating the time worked across consumers for the joint employer.

Scenario:

If a worker spends 30 hours per week providing home care services to Consumer A and 20 hours per week providing home care services to Consumer B (30 hours + 20 hours = 50 total weekly hours), any entity that is a joint employer with both consumers, whether a private agency, a state, or both, is responsible for ensuring that the worker receives overtime compensation for the 10 hours of overtime worked that week.

(f) Application of joint employment principles in consumer-directed programs

The consumer-directed service delivery model is an alternative to the traditionally delivered and managed services models, which typically include little or no consumer control. In consumer-directed Medicaid-funded programs, consumers, or their representatives if applicable, have decision-making authority over some services and take direct responsibility for managing their services with the assistance of a system of available supports. There are a

NOT FOR PUBLIC DISTRIBUTION

wide range of such programs around the country and even within states. A determination of whether any particular entity will be considered an employer under the FLSA will involve an application of the economic realities test to all of the facts and circumstances of a particular program. Note: in investigations involving consumer-directed programs, the focus of the investigation should be on any third party employer, not the individual, family member, or household member employing the home care worker.

(g) Examples of joint employment in the home care industry

(1) *Scenarios*

Below are several scenarios of common home care models and how joint employment principles would apply to each. Note: all of the relevant facts and circumstances must be considered to make a determination about employment status, and courts may consider other factors. These are simple examples for illustrative purposes only; most actual employment scenarios will include other relevant facts that could change the analysis.

In these scenarios, the term "consumer" may also include an individual's family member, household member, or representative.

<u>Scenario 1 - private-pay registry with consumer as sole employer:</u>

A private home care agency advertises as a registry that provides potential home care workers. The registry conducts a background screening, verifies credentials of potential workers, and assists consumers by locating home care workers who may be able to meet a client's needs. The registry informs a home care worker of the opportunity to work for a potential client. If interested in the opportunity, the worker is responsible for contacting the client for more information. The worker is not obligated to pursue this or any other opportunity presented, and is not prohibited from registering with other referral services or from working directly with clients independent of this private registry. The registry does not provide its workers any equipment, does not supervise or monitor any work they perform, and has no power to terminate a worker's employment with a client. The registry processes the worker's payroll checks according to information provided by clients, but does not set the pay rate.

In this scenario the home care worker is likely not an employee of the registry and the consumer is the sole employer. There is no permanency in the relationship between the registry and provider. The registry does not provide any equipment or facilities, exercises no control over daily activities, and has no power to hire or fire. The worker is able to accept as many or as few clients as he or she wishes. The client sets the rate of pay and negotiates directly with the worker about which services will be provided.

This conclusion, however, does not mean that every registry will not be an employer; any change in the specific facts may change the outcome. For example, a home care registry that maintains a log of assignments showing the shifts worked, establishes the rate that will be charged, and exercises control over the home care workers' duties and the work schedules would be an employer.

NOT FOR PUBLIC DISTRIBUTION

Scenario 2 - private agency and consumer as joint employers:

A private home care agency offers a variety of services to older adults who require assistance in order to live at home. The agency recruits and hires providers, and ensures they are properly trained to assist with ADLs or IADLs, or to provide companionship services such as watching over a consumer while he or she sleeps. Consumers contract with the agency to receive services and are billed at a set hourly rate. The agency determines each worker's rate of pay based on factors such as the services performed and the worker's qualifications and tenure at the agency. The agency performs typical payroll functions and provides the workers with some other job-related benefits.

The consumer decides what services he or she requires, how the worker will perform the services, the number of work hours he or she requires, and the schedule for the workers. Together, the agency and consumer agree on how many workers will be assigned to provide assistance. Although the agency retains the ultimate decision of whether to terminate the worker's employment with the agency, a consumer who is not satisfied with the performance of a particular worker may request a different worker at any time.

In this scenario, the agency and the consumer are joint employers. The agency, among other factors, sets the rate of pay, hires and trains the worker, and has the ability to terminate employment, while the consumer sets the schedule and solely controls and supervises the actual work performed.

Scenario 3 - consumer-directed program, with public entity and consumer as joint employers:

In this consumer-directed program, the public entity collectively bargains with a union representing home care providers. The public entity exercises control by providing required training, offering paid time off, furnishing equipment, creating a procedure for redress of grievances, setting a wage rate, and offering a benefits package. The public entity also retains some control over hiring and firing by completing performance evaluations and reserving the right to terminate a worker for poor performance. A fiscal intermediary processes payroll and tax withholding.

The DOL believes that in such programs, the public entity administering the program is a joint employer of the provider along with the consumer. The fiscal intermediary, performing purely ministerial functions, would not be an employer.

Other public programs in which the home care providers are not parties to a CBA, but in which the public entity nonetheless demonstrates similar levels of control over the providers' working conditions, will also be considered joint employers. For example, some programs are structured such that a case manager is involved in determining the worker's schedule or directing the method of work, or the public entity sets a wage rate for providers. In programs such as these, with similar levels of control as described above, the public entity will be considered a joint employer with the consumer.

Scenario 4 - consumer-directed program, with consumer as sole employer:

NOT FOR PUBLIC DISTRIBUTION

In this consumer-directed program, the public entity sets forth basic hiring requirements, such as a criminal background check or cardiopulmonary resuscitation (CPR)/First Aid certification, and retains the limited right to remove a provider from the program after an investigation if it is determined that there has been fraud or abuse. The public entity also sets a wage rate range for services that is approved by the Centers for Medicare and Medicaid Services. The wage rate range for home care workers is from $10.00 to $24.00 per hour. A consumer can hire anyone who meets minimal qualifications, and the consumer retains the ability to fire for any reason. A budget is developed annually by the consumer with the help of a case manager. It is the responsibility of the consumer to keep up with financial statements to determine whether monthly spending should be adjusted. The consumer sets the worker's schedule, determines the tasks to be performed, and supervises how the work is performed. The consumer reviews and approves the worker's payroll, and the provider's tax withholdings are deducted from the individual consumer's budget—not any general state fund. The consumer has a choice between three fiscal intermediaries that perform payroll and other administrative functions. The public entity does not provide any paid time off, equipment, mandatory training, or contributions to health insurance premiums.

In this scenario, the consumer is likely the sole employer of the worker. Any slight change in the specific facts of this scenario may change the analysis.

<u>Scenario 5 - intermediary agency consumer-directed model, with consumer and agency as joint employers:</u>

The public entity administers an intermediary agency model. The state sets reimbursement rates for all Medicaid services within the public entity, including home care services. The minimum qualifications for home care workers are set by state regulation. The public entity does not supervise the work, set schedules, or control conditions of employment. The public entity contracts with agencies to provide home care services, and provides a bundled reimbursement rate from which the agency is free to set a wage rate and retain a portion for administrative costs. The public entity reserves the right to conduct certain functions, including visiting the agency to assess performance, conduct fiscal and quality audits, and review personnel files on a random basis.

Consumers may recruit and select a provider, and the agencies participating in the program then screen and hire the worker; the agencies may also recruit potential providers. Both consumers and agencies retain the right to fire workers, and agencies generally handle any disciplinary issues involving workers. Agencies also conduct the administrative functions and supervision of workers required by regulation, train workers, and evaluate job performance. The agencies maintain all employment records, although copies of such records are also sent to the public entity administering the program. Consumers provide daily supervision, set the worker's schedule, and decide how and when certain tasks will be performed.

In this scenario, the agencies and consumers are employers, and it is likely that the public entity is not an employer. The public entity performs minimal functions required by regulation, while the agencies set the wage rate, hire and train workers, and supervise much of the work.

NOT FOR PUBLIC DISTRIBUTION

Scenario 6 - cash and counseling consumer-directed program with a wage cap, with a consumer as sole employer:

In this cash and counseling consumer-directed program, consumers are given the option to manage a flexible budget and decide what mix of Medicaid-allowable goods and services best meet their personal care needs. Consumers may use their budgets to hire personal care workers, purchase other services, purchase items, or make home modifications that help them live independently. The consumer retains authority over hiring and firing, negotiates the wage rate paid to the employee within a cap, and sets the terms and conditions of employment.

The public entity sets minimal qualifications for providers (*i.e.*, by requiring a criminal background check and CPR/First Aid certification), determines eligibility and assesses need under the program, and then performs only ministerial payroll and tax functions through a fiscal intermediary, similar to those that commercial payroll agents perform for businesses, such as maintaining records, issuing payments, and addressing tax withholdings. The public entity also sets a cap on wages for all workers participating in the program so that consumers will have enough resources in their budget for the entire month, to help ensure fiscal accountability, and to guard against exploitation. The cap for home care workers is at the agency reimbursement rate of, for example, $26.00 per hour. Thus, the consumer may pay anywhere from minimum wage to $26.00 per hour, and if the consumer elects to pay less than the cap, the remaining funds remain in the consumer's individual budget.

In this scenario, the consumer is likely the sole employer of workers hired through such a program.

Scenario 7 - public entity, managed care organization, and intermediary agency consumer-directed program, with consumer and agency as joint employers:

This public entity contracts with a managed care organization (MCO) to provide health care services, including home care services, to Medicaid recipients. The public entity pays the MCO a per consumer monthly rate, and from that total budget the MCO contracts with various providers in its network, including home care agencies. Within this network are several agencies participating in a consumer-directed intermediary agency program. The MCO pays the agencies a bundled rate. The agency then sets the wage rate; authorizes a certain number of hours based upon an assessment; pays health insurance, workers' compensation, and unemployment insurance premiums; and may choose to authorize overtime. The participating agencies permit consumers to hire and fire their own workers, and consumers set the provider's schedule and provide all day-to-day supervision.

In this scenario, it is likely that the agencies and the consumers are joint employers, and that the MCO and public entity are likely not joint employers. The MCO merely pays the bundled rate to the agencies, and the agencies perform all other indicia of employment. However, any slight change in the particular facts could change the analysis.

Scenario 8 - public entity, managed care organization, and intermediary agency program, with consumer, managed care organization, and agency as joint employers:

NOT FOR PUBLIC DISTRIBUTION

This public entity contracts with an MCO to provide health care services, including home care services, to Medicaid recipients. The public entity pays the MCO a per consumer monthly rate, and from that total budget the MCO contracts with various providers in its network, including home care agencies. Within this network are several agencies participating in a consumer-directed intermediary agency program. The MCO pays the agencies a bundled rate, but requires the agencies to pay workers a particular hourly wage. The MCO also sets comprehensive provider qualifications and requires providers to attend training provided by the MCO on a regular basis. The agencies authorize a certain number of hours based upon an assessment; pay health insurance, workers' compensation, and unemployment insurance premiums; assist the consumer if disciplinary matters regarding the provider arise; provide back-up workers when needed; and may choose to authorize overtime. The participating agencies permit consumers to hire and fire their own workers, set the providers' schedules, and provide all day-to-day supervision.

Based on these specific facts, it is likely that the MCO, the agencies, and the consumers are joint employers, and the public entity is likely not a joint employer. In this scenario, the MCO does far more than simply pay the bundled rate, as the MCO did in FOH 59n11(g), Scenario 7, and indicators of employment are spread among the MCO, agencies, and consumers. However, any slight change in the particular facts could change the analysis.

See Administrator Interpretations Letter FLSA 2014-2 and Fact Sheet 79E.

[01/13/2017]

59n12 **Hours worked in the home care context.**

This section provides general guidance for hours worked scenarios applicable to domestic service employment in the home care context. General guidance and information on hours worked under the FLSA can be found in 29 CFR 785 and FOH 31.

(a) Sleep time

The regulations concerning sleep time are found in 29 CFR 785.21 -.23. The sleep time rules apply to all employees, including home care workers. Please consult Field Assistance Bulletin No. 2016-1 for additional information.

(1) *Requirements for excluding sleep time from hours worked*

The exclusion of sleep time from an employee's hours worked is only appropriate in certain circumstances. The relevant sleep time regulations place employees in three categories. The categories apply broadly to all employees and makes a distinction between those who reside at the worksite (*i.e.*, live-in employees); those who work shifts of 24 hours or more; and those who work shifts of less than 24 hours. *See* 29 CFR 552.102(a) and 29 CFR 785.21 -.23.

a. Live-in employees

Certain sleep time rules apply to live-in employees (*i.e.*, employees who reside at their worksites) and, in particular, live-in *domestic service*

NOT FOR PUBLIC DISTRIBUTION

employees, (*i.e.*, employees who reside at the private homes in or about which they provide household services). Employers of live-in employees, including live-in domestic service employees, may exclude sleep time from those employees' hours worked provided the following conditions are met:

1. The employer and employee must have a reasonable agreement to exclude sleep time. *See* 29 CFR 552.102, 29 CFR 785.23, and Field Assistance Bulletin No. 2016-1. The reasonable agreement "must be an employer-employee agreement and not a unilateral decision by the employer," and it "should normally be in writing in order to preclude any possible misunderstanding of the terms and conditions of an individual's employment" (FOH 31b18(b)).

2. The employer of a live-in employee must provide private quarters (*i.e.*, living and sleeping space that is separate from the person receiving services) in a homelike environment (*i.e.*, space that includes facilities for cooking and eating, a bathroom, and a space for recreation). At a minimum, this space must be furnished with a bed, lighting, and a dresser and/or closet in which to store clothing and other belongings. The employee must be able to leave his or her belongings in this room during on-duty and off-duty periods. *See* Wage and Hour Memorandum No. – 88.48 (June 30, 1988) and Field Assistance Bulletin No. 2016-1.

<u>Scenario 1:</u>

An employee who provides home care services (*e.g.*, a home health aide or personal care attendant) who has no other home and a consumer live together in a two bedroom apartment with a living room, kitchen with dining space, and bathroom. The consumer uses one of the bedrooms, and the provider uses the other, meaning he or she sleeps there and stores some of his or her personal possessions there. The provider's bedroom contains a bed, night table, dresser, two lamps, desk, and chair. Both the consumer and provider use the living room, kitchen, and bathroom. The provider, consumer, and a third party home care agency, which paired the two individuals and supervises the provider's work, all signed a written agreement that, among other things, provides that the employee's hours worked will not include the hours between 11:00 p.m. and 7:00 a.m., when he or she sleeps, except when on rare occasions the consumer needs assistance during the night. In these circumstances, because the employee has private quarters in a homelike environment and a reasonable agreement with his or her employers regarding the exclusion of sleep time, the consumer and the agency may exclude from the home worker's hours worked the 8 hours per night between 11:00 p.m. and 7:00 a.m.

<u>Scenario 2:</u>

An employee who provides home care services could spend 5 nights a week at the consumer's home, which is a one bedroom apartment

NOT FOR PUBLIC DISTRIBUTION

with a living room, kitchen and dining area, and bathroom. The provider and consumer did not know each other before the provider began providing services to the consumer. The provider, consumer, and a third party home care agency, which paired the two individuals and supervises the provider's work, all signed a written agreement that, among other things, provides that the employer's hours worked will not include the hours between 11:00 p.m. and 7:00 a.m., when he or she sleeps, except when on rare occasions the consumer needs assistance during the night. If the employee sleeps on a pull-out couch in the living room while the consumer sleeps in his or her bedroom, keeps his or her bedding and belongings in a set of drawers that the consumer does not use, and has joint use of the kitchen, dining space, and bathroom, the arrangement would likely qualify as providing the employee with private quarters in a homelike environment, and exclusion of sleep time therefore would be permissible.

Scenario 3:

The consumer asks that the employee be close by to assist with toileting or medical tasks during the night. For that reason, instead of sleeping in a separate space in the living room, the provider sleeps in a second bed in the consumer's bedroom. In this case, the provider would not have private quarters and, depending on how frequently the consumer needed the provider's assistance during the night, the agreement might not be reasonable, meaning the requirements for excluding sleep time would not be met, and the overnight hours would be compensable hours worked despite the parties' agreement.

b. Shifts of 24 hours or more

Some employees who do not qualify as live-in employees may work shifts of 24 hours or more. As to those employees, including domestic service employees who work at private homes for shifts of 24 hours or more, an employer may exclude the employee's sleep time from hours worked, if certain requirements—similar to but distinct from those for live-in employees—are met. These requirements are that: the employee be provided adequate sleeping facilities, he or she "can usually enjoy an uninterrupted night's sleep," (29 CFR 785.22(a)) and the parties have an "expressed or implied agreement" (29 CFR 785.22(a)) to exclude the sleep time. *See* FOH 31b12(c) and Field Assistance Bulletin No. 2016-1.

1. Adequate sleeping facilities

The first requirement for excluding sleep time for an employee on duty for 24 hours or more is that they have adequate sleeping facilities. What constitutes "adequate sleeping facilities" depends on the facts and circumstances of a particular living arrangement. An employer must provide adequate sleeping facilities to a domestic service employee and ensure that the employee has access to basic

NOT FOR PUBLIC DISTRIBUTION

sleeping amenities, such as a bed and linens, reasonable standards of comfort, and basic bathroom and kitchen facilities, which may be shared.

Note: a domestic service worker employee who lives in the home of his or her employer must be afforded private quarters if the employer wishes to exclude his or her sleep time from his or her hours worked. However, the employer of a domestic service employee who works two 24-hour shifts at the home weekly need not provide the employee with private quarters in order to exclude his or her sleep time from hours worked. In addition, unlike for live-in domestic service employees, the sleeping area need not be private to meet the requirements for sleep time exclusion from hours worked.

2. "Usually" enjoy an uninterrupted night's sleep

The second requirement is whether an employee can usually enjoy an uninterrupted night's sleep. An uninterrupted night's sleep means 5 consecutive hours of uninterrupted sleep. An employee can "usually" get an uninterrupted night's sleep if an employer's interruptions that prevent the employee from getting 5 consecutive uninterrupted hours of sleep occur less than half the time. However, interruptions to an employee's 5 consecutive hours of sleep that occur during half or more than half of an employee's shift are too frequent to meet the requirement.

Scenario:

If a home health aide is hired to work three 24-hour shifts each week for a consumer who needs regular monitoring at all times, including overnight, then it would not be appropriate for the employer to exclude any sleep the employee manages to get from his or her compensable hours worked. On the other hand, if a home health aide works three 24-hour shifts for a particular consumer each week, and the consumer wakes the aide for assistance on average during only one out of every three shifts, this requirement would be met.

3. Expressed or implied agreement

The third requirement is that the employer and employee have an expressed or implied agreement regarding the exclusion of sleep time. This requirement is not burdensome, because an agreement can be implied by the employer's and employee's conduct. If the employee has objected to the exclusion of sleep time from his or her hours worked, that would indicate that there was no such agreement.

Note: WHIs should take into account any evidence that the employee has objected to the exclusion of sleep time from hours worked. The requirement that the employer and employee have an expressed or implied agreement regarding the exclusion of sleep time is not

NOT FOR PUBLIC DISTRIBUTION

burdensome, because an agreement can be implied by the parties' conduct.

Scenario:

A personal care attendant could be assigned by a home care agency to provide home care services to a consumer in the consumer's home from 7:00 p.m. on Fridays until 9:00 p.m. on Sundays. The employee sleeps in a second bed in the consumer's bedroom, and he or she has use of the rest of the apartment, including the kitchen and bathroom. During the last 6 months in which this employee has worked for this consumer, the consumer has woken the employee up on both nights every weekend for assistance going to the bathroom, usually once around 1:00 a.m. and again around 3:00 a.m. Based on the agency's usual practice, the employee is not paid for the hours between 11:00 p.m. and 6:00 a.m., which are considered sleep time, and the employee has never objected to the exclusion of sleep time.

In these circumstances, sleep time is not properly excluded from the provider's hours worked. The employee does not qualify as a live-in domestic service employee because he or she is only at the home for 50 hours per week over the course of 3 days and 2 nights. Instead, he or she is a worker who is on duty for a shift of more than 24 hours. Although this worker's situation meets some of the threshold requirements for the exclusion of sleep time (*i.e.*, he or she has adequate sleeping facilities and the employer and employee have an implied agreement to exclude sleep time), because the employee is woken up every work night such that he or she does not get 5 consecutive hours of sleep, the worker does not usually get an uninterrupted night's sleep. Therefore, the agency and consumer may not exclude the worker's sleep time from his or her hours worked despite their agreement to do so. Because the circumstances do not meet the requirements for the exclusion of sleep time, none of the employee's time spent sleeping may be excluded from his or her hours worked, even on nights when the employee's sleep is not interrupted.

If, instead, the personal care attendant's job is as described, but over the 6 months of employment, the consumer has woken the provider up for assistance going to the bathroom *every other night* around midnight, which usually takes about 15 minutes, the result would be different. In that case, the provider would "usually enjoy an uninterrupted night's sleep" (29 CFR 785.22(a)) because she gets at least 5 consecutive hours of sleep (*i.e.*, at least 1:00 a.m. to 6:00 a.m.) during each shift.

c. Shifts of fewer than 24 hours

An employer may not exclude any sleep time from hours worked for an employee who does not live at the worksite and works shifts of fewer than 24

NOT FOR PUBLIC DISTRIBUTION

hours, even if the employee is permitted to sleep while on duty. *See* 29 CFR 785.21 and Field Assistance Bulletin No. 2016-1.

Scenario:

If a personal care attendant provides services to a consumer 2 nights a week from 7:00 p.m. to 7:00 a.m. (*i.e.*, two 12-hour shifts, totaling 24 hours per workweek), even if the employee sleeps for some or most of that time, all of the time must be treated as compensable hours worked.

(2) *Sleep time exclusions, maximum number of hours*

a. Live-in employees, permanent

An employer of a live-in home care worker who meets the definition of a "live-in" employee and the additional requirements for the exclusion of sleep time may exclude up to 8 hours of sleep time each night as long as the employee is paid for some other hours during the workweek. *See* Administrator Interpretations Letter FLSA 2014-1, Field Assistance Bulletin No. 2016-1, and WHD Opinion Letter FLSA 2004-7.

Scenario 1:

If a shared living provider and his or her employer agree to exclude 8 hours of sleep time per night, and the provider is paid an hourly rate for services he or she performs between the hours of 8:00 p.m. and 10:00 p.m. each evening and 6:00 a.m. and 8:00 a.m. each morning, that agreement would typically be reasonable.

Scenario 2:

If a provider's sole responsibility is to be at the residence 5 nights per week from 10:00 p.m. to 8:00 a.m., it will likely be reasonable to agree to treat 2 of those 10 hours as hours worked and exclude the remaining 8 hours as sleep time.

Scenario 3:

If the provider and employer agree that 4 hours per day spent in the residence on 2 weekdays and each weekend day are hours worked that must be compensated, it will typically be reasonable to exclude sleep time during weeknights.

Scenario 4:

If a provider's sole responsibility is to be at the residence for 8 hours each night, an agreement to exclude all time the provider is required to be on the premises would not be reasonable, nor would an agreement to consider 1 hour per day to be hours worked.

NOT FOR PUBLIC DISTRIBUTION

Note: in contrast to live-in employees who only reside at the worksite for extended periods of time, and in recognition of the differences between employment arrangements of employees who reside permanently and entirely at the worksite and those of employees who spend a significant amount of time at the worksite but who have another home elsewhere, the WHD has not set a specific number of hours that must be compensated for live-in employees who reside at the home permanently. An employee who resides permanently at his or her worksite, and therefore does not have another home, is more likely to spend time at the worksite engaged in purely personal pursuits than an employee who has another home to return to but nonetheless spends significant amounts of time at the worksite.

b. Live-in employees, extended periods of time

An employer of a home care worker who resides at the private home for extended periods of time may exclude from hours worked up to 8 hours per night of sleep time as long as the employee is paid for at least 8 hours during the relevant 24-hour period. *See* Administrator Interpretations Letter FLSA 2014-1 and Wage and Hour Memorandum No. - 88.48 (June 30, 1988). Note: the WHD has long held this position in the residential care context and it applies equally in the domestic service context. The WHD believes that it should not be permissible for employers of domestic service employees who reside at the home for extended periods of time to treat none or only a small amount of time providers spend at the worksite as compensable hours worked. In addition, some principles applicable to live-in employees who do not have another home (*i.e.*, who live at the worksite permanently) are still relevant. *See* Field Assistance Bulletin No. 2016–1.

Scenario 1:

A home care provider works and sleeps at a private home Monday through Friday each week. Because the consumer to whom he or she provides services attends a day program, the provider is off duty between 8:30 a.m. and 3:30 p.m. The provider and the family of the consumer have a written agreement regarding this off duty time and under which the provider's sleep time, from 10:00 p.m. to 6:00 a.m., is excluded from hours worked. The provider's hours worked would therefore be 9 hours per day (*i.e.*, 2.5 hours from 6:00 a.m. to 8:30 a.m. and 6.5 hours from 3:30 p.m. to 10:00 p.m.). Because the provider is paid for more than 8 hours in each 24-hour period, assuming the threshold requirements for excluding sleep time are met, the family can exclude all 8 hours of the provider's sleep time.

Scenario 2:

The provider's schedule could change such that he or she did not begin the evening shift until 5:30 p.m. and his or her sleeping period was for 7 hours, from 11:00 p.m. and 6:00 a.m. In that case, the provider's hours worked would be 8 hours per day (*i.e.*, 2.5 hours from 6:00 a.m. to 8:30 a.m. and 5.5 hours from 5:30 p.m. to 11:00 p.m.). Because the provider is paid for 8 hours in each 24-hour period, the family may exclude the 7 hours of sleep time.

NOT FOR PUBLIC DISTRIBUTION

Note: there could be circumstances in which the provider who lives at the home for extended periods of time is on duty for 8 hours or less in each 24-hour period, the time is overnight, and the employee usually sleeps during the shift. In these circumstances, the employer may not exclude any sleep time hours from hours worked because the employee must have at least eight hours worked before the exclusion of sleep time is permissible. *See* WHD Opinion Letter FLSA (June 25, 1990); Administrator Interpretations Letter FLSA 2014-1; and Field Assistance Bulletin No. 2016-1.

c. Shift 24 hours or more

An employer of an employee who does not reside at the worksite but works shifts of 24 hours or more and meets the additional requirements for the exclusion of sleep time may exclude from the employee's hours worked no more than 8 hours of sleep time in each 24-hour period. *See* 29 CFR 785.22(a). These 8 hours need not be at night, but they must occur during a fixed window. *See* FOH 31b12(c) and WHD Opinion Letter FLSA (September 11, 1987).

Scenario:

If a home health aide provides home care services to a consumer in the consumer's home from 7:00 p.m. on Fridays until 9:00 p.m. on Sundays, assuming the threshold requirements for excluding sleep time are met, the employer could exclude from his or her hours worked a sleeping period from 11:00 p.m. to 5:30 a.m. (*i.e.*, a 6.5-hour sleeping period) or from 10:00 p.m. to 6:00 a.m. (*i.e.*, an 8-hour sleeping period), but not from 10:00 p.m. to 7:00 a.m., because this 9-hour sleeping period exceeds the 8-hour limit or for 8-hour periods that vary each weekend when the single shift is not 24 hours or more.

d. Shifts of fewer than 24 hours

Employees to whom the FLSA applies and who work shifts of less than 24 hours must be paid for all hours worked during such shifts. *See* 29 CFR 785.21. No sleep time may be excluded, even if the worker sleeps during the shift.

(3) *Limitations*

Even when an employer is generally permitted to exclude an employee's sleep time from hours worked, there are certain limitations on an employer's ability to exclude all or part of sleep time during a particular sleeping period. These limitations apply in circumstances involving both live-in employees and employees who work shifts of 24 hours or more.

a. Any interruption

Any interruption of what might otherwise be properly excluded sleep time by a call to duty must be treated as hours worked. *See* 29 CFR 552.102(a); 29

NOT FOR PUBLIC DISTRIBUTION

CFR 785.22(b); Wage and Hour Memorandum No. - 88.48 (June 30, 1988); and Field Assistance Bulletin No. 2016-1.

Scenario 1:

If during a provider's sleeping period a consumer calls out for a home care worker to assist him with going to the bathroom and the employee provides assistance for 20 minutes, those 20 minutes must be treated as paid time.

Scenario 2:

If a consumer is sick and the provider tends to him or her for 2 hours in the middle of the night, those 2 hours are hours worked, even if they are within the provider's usual sleep time.

b. Reasonable periods of sleep totaling 5 hours

1. If an employee does not get reasonable periods of uninterrupted sleep totaling at least 5 hours, no sleep time may be excluded. *See* 29 CFR 785.22(b).

It is not a requirement that the 5 hours be continuous; however, interruptions must not be so frequent as to prevent reasonable periods of sleep that add up to at least 5 hours. *See* WHD Opinion Letter FLSA 2002-6; FOH 31b12(d); WHD Opinion Letter FLSA (September 11, 1987); and Wage and Hour Memorandum No. - 88.48 (June 30, 1988).

Scenario 1:

A live-in home care worker's regular sleep time could be from 11:00 p.m. to 7:00 a.m. If the consumer for whom he or she works wakes him or her up once at 4:30 a.m. for assistance taking medication, an interruption that lasts half an hour, those 30 minutes must be paid. However, the remainder of the time (*i.e.*, the 5.5 hours from 11:00 p.m. to 4:30 a.m. and the 2 hours from 5:00 a.m. to 7:00 a.m.) may be excluded as usual because the employee got reasonable periods of sleep totaling more than 5 hours.

Scenario 2:

In the same circumstances as above, if the consumer wakes the employee up at 2:00 a.m. for assistance going to the bathroom, an interruption that lasts 15 minutes, those 15 minutes must be paid. However, the remainder of the time (*i.e.*, the 3 hours between 11:00 p.m. and 2:00 a.m. and the 4 hours, 45 minutes between 2:15 a.m. and 7:00 a.m.) may be excluded from hours worked as usual because the employee got reasonable periods of sleep totaling more than 5 hours, even though no single period of 5 hours or more was uninterrupted.

NOT FOR PUBLIC DISTRIBUTION

Scenario 3:

In circumstances in which interruptions are more frequent, such as if the consumer needs the employee's services at 12:30 a.m., 2:00 a.m., 4:00 a.m., 5:00 a.m., and 6:00 a.m. for 20 minutes each time, the periods between interruptions are not reasonable periods of sleep, and the 5-hour threshold will not be considered as met.

(b) Travel time

(1) *Home to work*

Under the DOL's longstanding regulations, normal home-to-work travel (*i.e.*, commuting time) is not hours worked, regardless of whether the employee works at a fixed location or at different jobsites. Such travel is a normal incident of employment. Thus, if a home care worker travels to a consumer's private home directly from the worker's own home, and returns directly home from a consumer's private home, this commuting travel time generally does not need to be paid.

See 78 FR 60493, 29 CFR 785.35, and FOH 31c10(b).

(2) *Travel that is all in the day's work*

Employees who travel to more than one worksite for an employer during the workday must be paid for travel time between each worksite. In other words, travel that is "all in the day's work" (29 CFR 785.38) must be compensated.

Scenario:

Sue is a home health provider who is employed by the Hope Health Agency. The agency requires Sue to report to the office each morning at 8:00 a.m. before reporting to her first assignment with Mr. Brown. Sue begins her morning shift at Mr. Brown's home at 9:00 a.m. and completes her shift at 4:30 p.m. Sue is then required to return to the office to perform additional work until 5:30 p.m. In this case, all of the time spent by Sue traveling from the Hope Health Agency to Mr. Brown's home and returning to the agency at the end of the work day is considered travel that is all in the day's work and must be counted as hours worked. Therefore, Sue's hours worked are from 8:00 a.m. to 5:30 p.m.

a. Working for multiple consumers

While an employee working for two different employers need not be compensated for time spent traveling between the two employers during the workday, an employee working for multiple consumers with the same joint employer must be compensated for the time spent traveling between those consumers because such travel is undertaken for the benefit of the employer.

Scenario 1:

A provider is employed by home care agency ABC Home Care Services. The agency assigns him or her to work a morning shift at Consumer A's

NOT FOR PUBLIC DISTRIBUTION

home, followed by an afternoon shift at Consumer B's home. The provider works at Consumer A's home from 8:00 a.m. until 12:00 p.m. Between 12:00 p.m. and 12:30 p.m. the provider travels to Consumer B's home, where he or she works a second shift from 12:30 p.m. until 4:30 p.m. In this case, the home care agency must compensate the provider for the time spent traveling from Consumer A's home to Consumer B's home.

If the travel is not direct because the provider is relieved from duty long enough to engage in purely personal pursuits, only the time necessary to make the trip must be paid. Note: this often occurs in the home care industry when a provider visits multiple consumers per day and is employed by the same third party employer, such as a home care agency or the same state agency.

Scenario 2:

Tiffany is a home care worker who is employed by Handy Home Care Agency. She provides services to two of the agency's clients, Mr. Jackson, from 9:00 a.m. to 11:30 a.m., and Mr. Smith, from 2:00 p.m. to 6:00 p.m. Tiffany drives to the two different worksites, which are 30 minutes apart. She leaves Mr. Jackson's home at 11:30 a.m. and goes to a restaurant for lunch, shops for herself, and then arrives at Mr. Smith's home at 2:00 p.m.

Because Tiffany is completely relieved from duty long enough to use the time effectively for her own purposes (*i.e.*, lunch and shopping), not all of the time is hours worked. The 30 minutes required to travel between the two homes is hours worked and must be paid by the Handy Home Care Agency even though Tiffany did not travel directly between consumers.

For additional discussion, *see* 29 CFR 785.38, FOH 31c05, and 78 FR 60493. The Center for Medicare and Medicaid (CMS) issued an informational bulletin on July 3, 2014 as guidance to assist states with how to allocate Medicaid funds for travel time. If a state should inquire about this guidance, refer them to the Medicaid.gov webpage, under "federal policy guidance downloads," at: http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf. Note: the CMS bulletin is for informational purposes only. The WHD is not responsible for the enforcement of guidance issued by the CMS.

(3) *Travel away from home*

Travel away from the home is work time when it cuts across an employee's workday. An employee is merely substituting travel for other duties. If a domestic service employee drives a consumer to a doctor's appointment or to the grocery store, that time is all in the day's work and must be compensated. Thus, if an employee hired to provide home care services to a consumer accompanies that consumer on travel away from home, the employee must be paid for all time spent traveling during the employee's regular working hours. As an enforcement policy, the WHD will *not* consider the time an employee spends as a passenger on an airplane, train, boat, bus, or automobile when traveling away from home outside of regular working hours as hours worked if the worker is otherwise relieved from duty. However, the employee

NOT FOR PUBLIC DISTRIBUTION

must be paid for all hours engaged in work or engaged to wait while on travel. *See* 29 CFR 785.39 and 29 CFR 785.41.

Thus, an employee who is required to travel as a passenger with a consumer and is expected to perform services as needed is working even though traveling outside of the employee's regular work hours. However, periods where the employee is completely relieved from duty and that are long enough to enable him or her to use the time effectively for his or her own purposes are not hours worked and need not be compensated.

Scenario:

John is a personal attendant for Mrs. Brown, who lives in Atlanta. Mrs. Brown attends a conference in Chicago, and John accompanies her by plane. John normally works 8:00 a.m. to 4:00 p.m. Mrs. Brown's daughter takes her to the airport where they meet John for the flight at 6:00 p.m. If John is completely relieved from duty during the flight, the WHD will not consider the flight time as compensable hours because it is time spent in travel away from home, outside of regular working hours, as a passenger on an airplane. However, if John provides assistance to Mrs. Brown while at the airport or during the flight, or must be available to assist or help as needed, he is working and must be compensated for this time.

Additional discussion on travel away from home can be found at 29 CFR 785.39 -.41.

(c) Live-in employees: reasonable agreement

An employee who resides on his or her employer's premises on a permanent basis or for extended periods of time is not necessarily considered to be working all the time he or she is on the premises. In determining the number of hours worked by a live-in worker, the employee and the employer may exclude, by voluntary agreement between themselves, the amount of sleep time, meal time, and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits. Such an agreement should also clearly and specifically identify the tasks the provider is required to perform.

(1) Any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. However, for periods of free time other than meal and sleep time, to which the general rules for such periods apply, to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time. If the sleep time, meal periods, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked.

(2) If it is found by the parties that there is a significant deviation from the initial agreement, the parties should reach a new agreement that reflects the actual facts of the hours worked by the employee. The employer must maintain a copy of the agreement as well as records showing the actual number of hours worked by the live-in domestic service employee.

(3) While certain provider activities can be clearly categorized as hours worked (*e.g.*, helping a consumer bathe) and others are clearly personal time (*e.g.*, a provider

NOT FOR PUBLIC DISTRIBUTION

attending college classes during a period of time he or she is completely relieved of duties), some activities do not always automatically constitute either on-duty or off-duty time; rather, the specific facts and circumstances of the particular situation must be considered.

Scenario:

Going to a community event together at a time when the provider could choose to spend time apart from the consumer may be considered an unpaid, shared social outing under a reasonable agreement that only requires the provider to assist the consumer at certain times during the day. On the other hand, attending the same event together may be considered hours worked if the reasonable agreement states that the provider's duties include engaging the consumer in these very sorts of community activities.

(4) Determining hours worked in some arrangements may involve a potentially complicated analysis; therefore, reasonable agreements entered into by a live-in provider and employer should accurately reflect the work that is required to be performed and cannot be used to improperly limit the number of hours that are paid. Regardless of what the agreement anticipates, the actual amount of time a provider spends performing work tasks must be compensated.

Scenario:

If the agreement provides for 6 hours of paid assistance each day, but the consumer needs 9 hours of assistance on a particular day, those additional hours must be counted as compensable hours worked.

For additional discussion on reasonable agreements, *see* 29 CFR 552.102, 29 CFR 785.23, and 78 FR 60474. For discussion on recordkeeping requirements for live-in domestic service employees, *see* 29 CFR 516.12, 29 CFR 552.110, FOH 30a02, and FOH 59n13.

[01/13/2017]

59n13 **Recordkeeping.**

(a) Employers subject to the FLSA must make, keep, and preserve records for each domestic service employee who is entitled to minimum wage and/or overtime pay. The law requires no particular form of record, but does require that the records include certain information about the employee and data about the hours worked and wages earned. *See* 29 CFR 516.2 and 29 CFR 552.110(a).

(b) With the exception of live-in domestic service employees where a domestic service employee works on a fixed schedule, the employer may use a schedule of daily and weekly hours that the employee normally works and either the employer or the employee may:

(1) indicate by check marks, statement, or other method that such hours were actually worked; and

(2) when more or less than the scheduled hours are worked, show the exact number of hours worked. *See* 29 CFR 552.110(c).

NOT FOR PUBLIC DISTRIBUTION

(c) The employer may require a domestic service worker to record all hours worked and submit the record to the employer, but the employer is ultimately responsible for ensuring that the records are made and preserved. *See* 29 CFR 516.12, 29 CFR 552.110(d), 78 FR 60479, FOH 25n04, and FOH 30a02.

(d) For a live-in domestic service employee, the employer and employee may voluntarily enter into an agreement regarding the normal schedule of work time, which may exclude bona fide meal periods, sleep periods, and off-duty time (*i.e.*, time for which the employee, if completely free from work, need not be paid). The employer must keep a copy of this agreement. *See* FOH 25n04, FOH 59n13, 29 CFR 552.102, 29 CFR 552.110(b), 29 CFR 785.16, 29 CFR 785.19, and 29 CFR 785.23.

(1) The employer must also make, keep, and preserve a record showing the actual number of hours worked by the live-in domestic service employee. *See* 29 CFR 552.110(b). The provisions of 29 CFR 516.2(c) and 29 CFR 552.110(c), which permit employers of employees who work on fixed schedules to keep records based on those fixed schedules, do not apply to employers of live-in domestic service employees.

[01/13/2017]

59n14 **<u>Enforcement actions.</u>**

(a) **Investigative priority**

The DOL's investigative priority with respect to home care cases is to focus on ensuring that third party employers, which may include home care agencies, registries, non-profit organizations, state and county agencies, or fiscal intermediaries, are in compliance with the FLSA's minimum wage and overtime provisions. ADDs/DDs should contact the NO, Office of Policy, DEPP, Branch Chief for the FLSA and Child Labor Branch through normal channels prior to initiating compliance actions involving consumers, their families, or households as sole employers.

(b) **Twin principles**

Decisions regarding enforcement actions must take into account the twin principles that have guided home care implementation, which are the importance of:

(1) ensuring wage protections for home care workers, and

(2) ensuring that consumers and their families continue to have access to the critical community services on which they rely and support innovative models of care that help consumers live in the community.

Adherence to these principles will require careful attention to enforcement and remedies in the home care context.

(c) **Home visits**

Ordinarily, home care-related investigations will occur outside the home(s) where services are provided, initial and final conferences will be held at the business headquarters of the

NOT FOR PUBLIC DISTRIBUTION

third party employer, and interviews of employees will occur at locations other than the worksite. Home visits are appropriate only if necessary to substantiate an alleged violation(s). For example, a thorough investigation may require an interview of the consumer, who prefers to meet at his or her home, or there may be a question about whether a residence is a private home that would be best resolved by observation of the residence.

(1) WHIs must obtain the approval of DO management before entering a consumer's home. In instances where a home visit is approved, DO management should ensure that the visit comports with established protocols outlined in FOH 52c01.

(2) While conducting home visits, WHIs should schedule visits so that they are not visiting the consumer's homes very early in the morning or late at night, and are avoiding visits on holidays, Sundays, or other days of religious observances. Keep in mind that these visits are to individuals' homes and not to places of business.

[01/13/2017]

59n15 <u>Initiating investigations.</u>

(a) Complaint policy

WHD staff must effectively and efficiently handle contacts made by persons seeking assistance from the WHD. The procedures outlined in FOH 51a01 apply to all FLSA investigations, including home care investigations. FOH 51a01 outlines the initial assessment and intake of information, the suitability for management review of complaints, and effective management prioritization of investigations.

The regulations regarding domestic service were first issued in 1975, and were updated in 2013. The 2013 updates became effective 01/01/2015 but were not enforced until 11/12/2015. The 2013 update, referred to as the Home Care Final Rule, changed both the definition of "companionship services" at 29 CFR 552.6 and the regulation at 29 CFR 552.109 regarding whether third party employers may claim the companionship service and the live-in domestic service employee exemptions. Wage and Hour Memorandum No. 2015-7, "Enforcement of 1975 Domestic Service Regulations," provides guidance regarding the enforcement of complaints under the "*1975 Regulations - Old Rule*" for cases with an investigative period that covers any date that occurs before 11/12/2015. This section provides guidance pursuant to the regulations as amended in 2013.

(b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[01/13/2017]

59n16 Investigation procedures.

(a) Period of investigation

Home care investigations are generally subject to the standard 2-year investigation period. The investigation may be expanded to include periods before this initial 2-year period if WHD management determines, with RSOL concurrence (*see* FOH 51a05(f)), that willful violations have occurred. In such cases, there is a 3-year recovery period for FLSA back wages.

A lawsuit challenged the validity of the Home Care Final Rule. On 08/21/2015, the federal Court of Appeals for the District of Columbia Circuit issued an opinion affirming that the Final Rule was valid. This opinion upholding the Final Rule became effective on 10/13/2015. As the Supreme Court declined to review the case further, the Court of Appeals decision stands.

The following guidance regarding the proper period of investigation for cases that include the following dates is provided on the WHD intranet home care webpage at http://esa/whd/homecare/index.htm:

(1) Prior to 01/01/2015: the DOL's enforcement was based on the 1975 regulations. *See* Wage and Hour Memorandum No. 2015-7, "Enforcement of 1975 Domestic Service Regulations."

(2) From 01/01/2015 through 10/12/2015: "Time-Limited Non-Enforcement Policy" and lawsuit, no enforcement of the Home Care Final Rule.

(3) From 10/31/2015 through 11/11/2015: the DOL had announced a 30-day non-enforcement policy after the issuance of the mandate. *See* "Home Care Enforcement Timeline – Period of Investigation Chart."

Note: from 01/01/2015 through 11/11/2015, the DOL enforced the FLSA in cases related to home care only in circumstances arising from work that occurred in locations that are *not* private homes (*e.g.*, group homes or nursing homes), including

NOT FOR PUBLIC DISTRIBUTION

when employees worked in and outside of private homes in the same workweek, and in circumstances in which the companionship services exemption was claimed to avoid paying minimum wage and overtime to registered nurses (RNs) and/or licensed practical nurses (LPNs). *See* Wage and Hour Memorandum No. 2015-8, "Period of Investigation."

(4) From 11/12/2015 through 12/31/2015: the DOL accepted home care complaints, but used its prosecutorial discretion in determining which cases to pursue. *See* 29 CFR 552 and "Home Care Enforcement Timeline – Period of Investigation Chart."

(5) From 01/01/2016 and onward: the DOL is enforcing the Home Care Final Rule pursuant to FOH 51a01 but subject to special protocols and procedures, in particular with respect to cases involving public entities, misclassification of employees as independent contractors, and large third party employers. *See* 29 CFR 552, "Home Care Enforcement Timeline – Period of Investigation Chart" and "Home Care Final Rule Protocols," and "Procedures for Flagged Investigations for Enforcement." These documents are on the Home Care webpage at: http://esa.esa.dol.gov/whd/homecare/index.htm.

a. Back wage computations

The DO/WHI should not compute back wages for any third party employer who was in violation of the 2013 Home Care Final Rule (*e.g.*, by inappropriately claiming the exemptions under sections 13(a)(15) and 13(b)(21)) prior to 11/12/2015. Even in a single workweek where an employee worked hours both prior to 11/12/2015 and after 11/12/2015, the WHD's enforcement position would be to only compute back wages under the Home Care Final Rule for hours worked on or after 11/12/2015.

Scenario:

If an employer's workweek ended 11/17/2015, and an employee worked 8 hours on 11/11/2015 and 42 hours from 11/12/2015 to 11/17/2015, back wages calculated based on any FLSA violations by the third party employer would only include the 42 hours beginning 11/12/2015. The WHD would not include the 8 hours worked on 11/11/2015, as those hours were worked prior to 11/12/2015.

b. Plan of care

As the WHD is not focusing on family members as employers, the WHD will be cautious in seeking back wages from consumers or their families or households, especially when the employee is a family care provider. *See* FOH 52f12 for guidance handling back wages for family members.

c. Travel time

Many home care workers provide services to multiple consumers during the same workday, often with the same third party employer. Additionally, employees do not always travel directly from one home to the next. As with any employee, travel time that occurs during the continuous workday for the

NOT FOR PUBLIC DISTRIBUTION

same employer is compensable hours worked, while commuting time from home to work, and work to home, is not compensable time. The time between consumer visits can vary widely. If the employee has additional time between consumers during which he or she is completely relieved from duty, that time is not compensable hours worked, and only the actual travel time between consumers is compensable hours worked.

Because of the nature of scheduling in the home care industry, the WHD has received questions regarding whether there is a point at which the gap in the time between departing the home of Consumer A and arriving at the home of Consumer B is so long that the employee's travel time would not be compensable. The DO/WHI should not establish a bright line test for addressing such circumstances; rather, WHIs should rely upon the Travel Time - FAQ #42, located at the WHD intranet, home care, frequently asked questions (FAQs) webpage, for guidance and should individually assess the facts and circumstances of each particular scenario.

Scenario:

Tiffany is a home care worker who is employed by Handy Home Care Agency. She provides services to two of the agency's clients, Mr. Jackson, from 9:00 a.m. to 11:30 a.m., and Mr. Smith, from 2:00 p.m. to 6:00 p.m. Tiffany drives to the two different worksites, which are 30 minutes apart. She leaves Mr. Jackson's home at 11:30 a.m. and goes to a restaurant for lunch, shops for herself, and then arrives at Mr. Smith's home at 2:00 p.m.

Because Tiffany is completely relieved from duty long enough to use the time effectively for her own purposes (*i.e.*, lunch and shopping) not all of the time is hours worked. The 30 minutes required to travel between the two homes is hours worked and, as of 01/01/2015, must be paid by the Handy Home Care Agency even though Tiffany did not travel directly between consumers. *See* FOH 59n12(b)(2)(a), Scenario 2.

Home Care Enforcement Timeline –Period of Investigation:

Violations	1975 regulations (Old Rule) before 01/01/2015	New final rule* 01/01/2015 - 11/11/2015: no enforcement	New final rule* 11/12/2015-forward: enforcement

NOT FOR PUBLIC DISTRIBUTION

Violations	1975 regulations (Old Rule) before 01/01/2015	New final rule* 01/01/2015 - 11/11/2015: no enforcement	New final rule* 11/12/2015-forward: enforcement
Services provided at a residence that is not a private home	Enforce: not domestic service employment. Companionship services and live-in domestic service employee exemptions cannot apply. Minimum wage and overtime apply.	Enforce: not domestic service employment. Companionship services and live-in domestic service employee exemptions cannot apply. Minimum wage and overtime apply.	Enforce: not domestic service employment. Companionship services and live-in domestic service employee exemptions cannot apply. Minimum wage and overtime apply.
Provider worked in and outside of a private home in the same workweek (co-mingling workweeks)	Enforce: employer cannot claim the companionship services exemption. Minimum wage and overtime apply.	Enforce: employer cannot claim the companionship services exemption. Minimum wage and overtime apply.	Enforce: employer cannot claim the companionship services exemption. Minimum wage and overtime apply.
Provider is an RN or LPN in a private home	Enforce: consumer/family /household cannot claim the companionship services exemption. Third party employers may not claim the exemption regardless of an employee's duties. Minimum wage and overtime apply.	Enforce: consumer/family/ household cannot claim the companionship services exemption. Third party employers may not claim the exemption regardless of an employee's duties. Minimum wage and overtime apply.	Enforce: consumer/family/ household cannot claim the companionship services exemption. Third party employers may not claim the exemption regardless of an employee's duties. Minimum wage and overtime apply.

NOT FOR PUBLIC DISTRIBUTION

Violations	1975 regulations (Old Rule) before 01/01/2015	New final rule* 01/01/2015 - 11/11/2015: no enforcement	New final rule* 11/12/2015-forward: enforcement
Provider is a certified nursing assistant (CNA)	Do not enforce: on basis of certification and medical duties.	Do not enforce: on basis of certification and medical duties.	Enforce: consumer/family/ household cannot claim the companionship services exemption if the home care worker provides medically related services. Third party employers may not claim the exemption regardless of an employee's duties. Minimum wage and overtime apply.
Provider is employed by a third party employer (*e.g.*, home care agency, non-profit organization, or public agency)	Do not enforce on this basis.	Do not enforce on this basis.	Enforce: third party employers may not claim the companionship services or live-in worker exemption. Minimum wage and overtime apply.

NOT FOR PUBLIC DISTRIBUTION

Violations	1975 regulations (Old Rule) before 01/01/2015	New final rule* 01/01/2015 - 11/11/2015: no enforcement	New final rule* 11/12/2015-forward: enforcement
Provider exceeded 20 percent limitation on services related to care (*i.e.*, assisting with ADLs or IADLs)	Do not enforce on this basis.	Do not enforce on this basis.	Enforce: consumer/family/ household cannot claim the companionship services exemption. Third party employers may not claim the exemption regardless of an employee's duties. Minimum wage and overtime apply.
Failure to keep accurate records	Enforce: employer of live-in domestic permitted to keep a copy of agreement instead of actual hours worked.	Enforce: employer of live-in domestic permitted to keep a copy of agreement instead of actual hours worked.	Enforce: employer of live-in domestic must maintain a copy of reasonable agreement and accurate record of hours worked.
Provider exceeded 20 percent limitation on services related to general household work	Enforce: employer cannot properly claim the companionship services exemption under the 1975 regulations. Minimum wage and overtime apply.	Do not enforce on this basis.	Do not enforce on this basis.
Provider performed services primarily for the benefit of other members of the household	Do not enforce on this basis.	Do not enforce on this basis.	Enforce: employer cannot claim the companionship services exemption: services are specifically for an individual requiring assistance. Minimum wage and overtime apply.

NOT FOR PUBLIC DISTRIBUTION

Violations	1975 regulations (Old Rule) before 01/01/2015	New final rule* 01/01/2015 - 11/11/2015: no enforcement	New final rule* 11/12/2015-forward: enforcement
Provider performed medically related services	Do not enforce on this basis.	Do not enforce on this basis.	Enforce: employer cannot claim the companionship services exemption. Minimum wage and overtime apply.

*Note: from 01/01/2015 through 10/12/2015: due to the Time-Limited Non-Enforcement Policy and lawsuit, no enforcement of the Home Care Final Rule.

From 10/13/2015 through 11/11/2015: the DOL announced a 30-day non-enforcement policy of the Home Care Final Rule after the issuance of mandate on 10/13/2015.

From 11/12/2015 through 12/31/2015: Time-Limited Enforcement Policy (Prosecutorial Discretion)

Additional information regarding the background of the Home Care U.S. District Court orders, including the Time-Limited Enforcement Policy, is located on the Home Care webpage at: http://esa.esa.dol.gov/whd/homecare/index.htm.

(b) Complainant interview

It is the policy of the WHD to interview complainants during the course of an investigation. However, this is not necessary if the complaint was taken by a WHD representative and the information furnished at that time is in sufficient detail. *See* FOH 52c04(a) for additional information.

(c) (b) (7)(E) [redacted]

[redacted]

[redacted]

(d) Type of compliance actions

NOT FOR PUBLIC DISTRIBUTION

Pursuant to FOH 50h00 -01, WHD staff may use any of the following types of compliance actions in enforcing the FLSA: full investigation, limited investigation, office audit, self-audit, and conciliation. *See* FOH 51a03.

(e) (b) (7)(E) [redacted]

[redacted]

(f) **Records review**

(1) *Live-in workers*

a. The general recordkeeping requirements set forth in 29 CFR 516 require every employer with covered domestic service employees to keep records showing all of the following for each employee:

1. Name in full

2. Social security number

3. Address in full, including zip code

4. Total hours worked each workweek by the employee for the employer

5. Total cash wages paid each workweek to the employee by the employer

6. Weekly sums claimed by the employer for board, lodging, or other facilities

7. Extra pay for weekly hours worked in excess of 40 by the employee for the employer

Note: if the sole employer is a consumer, no overtime premium pay is required.

b. For a live-in domestic service employee, the employer and employee may enter into an agreement to exclude sleep time, meal time, and other periods of complete freedom from all duties. This agreement must be in writing and is required to be kept by the employer. *See* FOH 25n04, 29 CFR 516, 29

NOT FOR PUBLIC DISTRIBUTION

CFR 552.102, 29 CFR 552.110, 29 CFR 785.16, 29 CFR 785.19, and 29 CFR 785.23.

c. The employer of a live-in domestic service employee shall make and preserve records of all hours actually worked by that employee. *See* 29 CFR 516.2(a), 29 CFR 552.102, and 29 CFR 552.110. Note: the employer can assign the employee the task of recording his or her hours, but it is the employer's responsibility to ensure that the records are created and maintained.

(2) *Section 3(m) credit*

The FLSA recordkeeping regulations require an employer who furnishes lodging to an employee as part of wages to keep and maintain accurate records. *See* 29 CFR 516.27, 29 CFR 531.2(a), and FOH 30c05(a). Such records shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost or fair value and the data required to compute the amount of depreciated investment, if any. *See* Field Assistance Bulletin No. 2015-1.

(3) *Plan of care*

The FLSA does not require an employer to keep and maintain a plan of care. However, many consumers, specifically those receiving services through a Medicaid-funded program, will have a plan of care in place that sets out the types of services the consumer needs, and in some cases, the number of service hours they are to receive. Such a document may be helpful in understanding the specific circumstances or relationship between the consumer and the provider.

Note: it is generally *not* recommended that WHIs request a copy of the plan of care because such documents describe the personal needs of the consumer, who is not an employee and will rarely be the subject of an investigation. Please be mindful that such a document may contain highly sensitive medical information that is protected by the Health Insurance Portability and Accountability Act (HIPAA), and as with any personally identifiable information (PII), careful handling must be observed. There may be certain circumstances in which obtaining a copy of one or more plans of care is helpful to an investigation regarding equal treatment of family and household care providers by a third party employer. In addition, WHIs are only obtaining and reviewing the plan of care in order to determine the number of paid hours. The WHD will not approve, adjust, and/or advise any parties regarding any other content of the plan of care during compliance assistance and/or an investigation. *See* FOH 59n10 and FOH 59n15(b) for additional information.

(g) (b) (7)(E) [redacted]

[redacted] h

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

(h) Disposition of findings and final conference

(1) The WHI will arrange a final conference with an official of the firm who has the authority to make decisions and to commit the employer to corrective actions if violations have been found. The WHI will identify the alleged home care and FLSA violations that are substantiated by the investigation findings and explain the corrective actions necessary to achieve and maintain compliance. See FOH 53b01.

(2) Procedural or policy questions that cannot be resolved will be referred through normal channels to FLSA/home care regional enforcement coordinators (RECs) and to the NO, Office of Policy, DEPP, FLSA and Child Labor Branch.

(3) Until further notice, special protocols and procedures apply to home care cases, including a requirement that the DO coordinator contact the NO/National Solicitor of Labor (NSOL) team and RECs and obtain approval before the DO conducts a final conference in order to review the disclosed violations, back wages amounts, potential challenges, and areas of industry sensitivity, as well as to provide enforcement guidance and consistency. The WHD home care intranet page contains updated information regarding to which categories of cases this requirement applies.

(i) (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[01/13/2017]

59n17 Investigation reporting requirements.

(a) (b) (7)(E)

(b) (b) (7)(E)

(c) Case file arrangement

Home care case files shall be arranged the same way as other FLSA case files, which are to follow general case file arrangement guidance at FOH 54b02(b).

(d) Recording findings in WHISARD

Evidence developed through fact-finding in the investigation process may support the conclusion that the rights of one or more employees were violated (*i.e.*, employee violations) and/or that the employer violated recordkeeping or notification policy requirements (*i.e.*, employer violations). Violations determined through fact-finding and supported by the evidence in the case file will be reported in WHISARD, as follows:

- FLSA section 6, failure to pay minimum wage: misapplied 29 USC 13(a)(15)
- FLSA section 7, failure to pay proper overtime: misapplied 29 USC 13(a)(15)
- FLSA section 7, failure to pay proper overtime: misapplied 29 USC 13(b)(21)

Note: the above-mentioned home care violation categories have been added to WHISARD to accurately capture in misapplied exemptions of FLSA sections 13(a)(15) and 13(b)(21). For violations outside of the misapplied exemptions, continue to use the appropriate existing violation codes (*e.g.*, recordkeeping, child labor, etc.) for home care case actions.

[01/13/2017]

59n18 NAICS code.

As explained in FOH 54c01(c)(12), the North American Industry Classification System (NAICS) facilitates the uniform collection, tabulation, presentation, and analysis of data related to establishments. The WHD uses the NAICS system to assess compliance levels in

NOT FOR PUBLIC DISTRIBUTION

certain industries and to plan future compliance action activities. For these reasons it is important that home care investigations, like any other investigations, be properly coded in WHISARD. An NAICS code is required information and must be accurate and at least four digits long, out of a possible six digits. WHD field staff must code home care actions within WHISARD using the following NAICS codes:

(a) Home Health Care Services: 621610

(1) The "621610" NAICS code must be used when any third party entity that is the subject of an enforcement action engages in providing home care services. *See* FOH 59n01 and FOH 59n03(a)(11).

(2) This industry NAICS code comprises establishments primarily engaged in providing skilled nursing services in the home, along with a range of the following: personal care services; homemaker and companion services; physical therapy; medical social services; medications; medical equipment and supplies; counseling; 24-hour home care; occupational and vocational therapy; dietary and nutritional services; speech therapy; audiology; and high-tech care, such as intravenous therapy.

(3) Although other NAICS codes may also be representative of an employer in a home care enforcement action, *the "621610" NAICS code must be used for all third party employers engaged in providing home care services*. For example, a staffing agency which employs respite care workers should be coded with the 621610 (Home Health Care Services) NAICS code rather than the 561320 (Temporary Help Services) or 561311 (Employment Placement Agencies) codes. Similarly, if a fiscal intermediary or MCO is found to be a joint employer for the purposes of a home care investigation, the 621610 NAICS code is to be used rather than the 541612 (Human Resources Consulting Services) or 561330 (Professional Employer Organizations) codes.

(b) (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(c) Establishments other than private homes

The following types of establishments will not meet the definition of a private home. If the following NAICS codes are appropriate, it will not be the case that the companionship services and/or live-in domestic service employee exemptions are applicable.

(1) *Residential establishments*

Residential entities falling under the following NAICS codes will generally not meet the definition of a private home: 623110 (Nursing Care Facilities), 623210 (Residential Intellectual and Developmental Disability Facilities), 623220 (Residential Mental Health and Substance Abuse Facilities), 623311 (Continuing Care Retirement Communities), 623312 (Assisted Living Facilities for the Elderly), and 623990 (Other Residential Care Facilities).

(2) *Service providers*

Non-residential entities, such as adult daycare facilities or community centers, also do not meet the definition of a private home. Such entities may fall under the 624110 (Child and Youth Services) or 624120 (Services for the Elderly and Persons with Disabilities) NAICS codes.

For additional information on private homes, *see* 29 CFR 552.101(b), FOH 11d01, FOH 59n03, 78 FR 60461, WHD Opinion Letter FLSA 2006-13NA and WHD Opinion Letter FLSA 2001-14.

[01/13/2017]

59n19 <u>Enforcement issues.</u>

(a) Investigation authority

(1) *Authority to investigate*

The WHD has the authority to investigate and gather data under section 11(a) of the FLSA, including the authority to enter premises, inspect records, interview employees, and investigate such "facts, conditions, practices, or matters as [the Secretary] may deem necessary or appropriate to determine whether any person has violated any provision" (29 USC 211(a)) of the FLSA. *See* 29 USC 2616(a).

(2) *Subpoena authority*

The WHD has the authority to issue a subpoena under section 9 of the FLSA. The WHD administrator or regional administrator may issue an administrative subpoena in order to obtain information that is required to complete a thorough investigation and is unobtainable through other means. A subpoena may be issued where the WHI can demonstrate and has documented that the typical process for obtaining records and evidence has been exercised to no avail. *See* FOH 86b00.

(b) Private right of action

NOT FOR PUBLIC DISTRIBUTION

All employees, including home care workers, have a right to be informed of the provisions of the FLSA, including their right to bring private action against any employer for violations of the FLSA.

Note: typically private citizens cannot sue a state. However, employees that are employed by another entity, such as a county, may be able to do so. The DOL will not advise in writing if one should or should not pursue a suit against an employer for the recovery of unpaid wages.

(c) (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[01/13/2017]

59o -u **(RESERVED)**

59v **ENFORCEMENT OF FLSA SECTION 7(r): BREAK TIME FOR NURSING MOTHERS**

59v00 **Introduction.**

(a) This section provides an overview of the statutory requirements of section 7(r), and contains procedural instructions for scheduling, conducting, and resolving compliance actions by the WHD under section 7(r) of the FLSA break time for nursing mothers. Because this provision is in the FLSA, unless a topic is specifically addressed, WHIs are to follow the regular procedures for investigating potential violations under the FLSA (*e.g.*, establishing enterprise or individual coverage, establishing an employment relationship, and identifying the employer, etc.), which can be found in FOH 54.

(b) **General requirements under the law**

(1) Because there are no regulations to give specific guidance on enforcing section 7(r), field staff must enforce this section only based on the statutory provision, information contained in Fact Sheet 73, and associated WHD frequently asked questions (FAQs).

The WHD has also issued a request for information (RFI) regarding FLSA break time for nursing mothers, 75 FR 80073 (12/21/2010), and associated FAQs.

NOT FOR PUBLIC DISTRIBUTION

While the RFI provides useful guidance for employers on nursing breaks, the interpretations in the RFI are not a basis for enforcement of section 7(r). WHD staff, where appropriate, may refer the public to the RFI as a resource.

(2) Issues that arise that are not addressed specifically in the statute, FAQs, and Fact Sheet 73 must, through appropriate channels, be brought to the attention of the NO, OP, DEPP, FMLA and Other Labor Standards (FMLA-OLS) Branch.

(3) *Protections of section 7(r)*

a. Who is protected

8. Employees

The provision only applies to employees, as defined by section 3(e) of the FLSA.

9. Employees subject to the provisions of section 7

Only employees who are subject to section 7 are entitled to the protections of section 7(r). Accordingly, employees who are subject to section 13 of the FLSA, and therefore exempt from all provisions of section 7, are not entitled to protection under section 7(r).

However, employees who are subject to exceptions from the section 7(a) overtime requirement *only*, but are otherwise subject to section 7, are entitled to protection under section 7(r). Such employees include those subject to sections 7(i), 7(j), 7(k), and similar exceptions.

10. Within 1 year of the birth of the child

Section 7(r)(1)(A) provides that nursing mothers are entitled to break time to express milk for up to "1 year after the child's birth."

b. Two elements of protection under section 7(r): break time and space

11. Break time

Section 7(r)(1)(A) requires employers to provide "a *reasonable* break time" for an employee to express milk, "*each time* such employee has need to express the milk." The frequency of breaks needed to express milk, as well as the duration of each break, will likely vary.

A. What is reasonable (duration of breaks)

The statute does not define what a "reasonable" break time is, and the WHD has not issued regulations interpreting this term. WHIs will have to make a case-by-case determination

NOT FOR PUBLIC DISTRIBUTION

as to what is reasonable depending upon the facts of a particular situation.

B. "Each time [she] has the need to" (frequency of breaks)

The statute requires employers to provide a break time, "each time such employee has need to express the milk". The frequency and duration of the breaks that a nursing mother needs will vary depending on the individual situation.

12. Space

Section 7(r)(1)(B) requires employers to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."

A. A bathroom, even if private or designated specifically to nursing mothers, is not a permissible location under the statute.

B. The space must be "shielded from view and free from intrusion."

There is no statutory requirement that the space be equipped with a lock in order to be "free from intrusion." Employers may take other steps, such as indicating that the space is in use, in order to prevent coworkers or the public from intruding.

C. The location provided must be one that "may be used by an employee to express breast milk" (*i.e.*, a functional space).

If there is a question as to whether the space is functional, then the WHI should discuss with his or her manager to notify the NO, OP, DEPP, FMLA-OLS Branch, through appropriate channels, immediately.

(4) A space temporarily created or converted into a space for expressing milk, or made available when needed by the nursing mother, is sufficient provided that the space is shielded from view and free from intrusion.

(5) *Limits on the protections of section 7(r)*

a. <u>Unpaid break time</u>

1. Section 7(r) does not require the break time to be paid.

NOT FOR PUBLIC DISTRIBUTION

2. However, if the employer permits paid breaks to all employees, and the employee uses that break to express milk, the employee must be compensated for the break in the same way as other employees.

3. If the employee is not fully relieved from duty while expressing milk, the time must be counted as hours worked and compensated accordingly.

See Fact Sheet 73, Fact Sheet 22, 29 CFR 785.18, and FOH 31a01 for guidance on hours worked.

b. Only leave for an FMLA qualifying condition may be counted against an employee's FMLA entitlement. The need to express breast milk at work will rarely be due to an FMLA serious health condition, and therefore, such breaks should not be counted against the employee's FMLA entitlement. *See* Fact Sheet 28.

c. By its terms, section 7(r) applies only to the expression of milk, and therefore does not require any additional accommodation in order to allow the employee to breastfeed a baby, rather than express milk (*i.e.*, with a pump).

(c) Undue hardship

(1) Section 7(r)(3) provides an undue hardship defense for certain employers. An employer shall not be subject to the requirements of section 7(r) if the two following elements are present:

a. The employer employs "less than 50 employees;" *and*

b. The employer demonstrates that complying with the FLSA section 7(r) would cause the employer "significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."

(2) If the employer has less than 50 employees and there is any indication that complying with section 7(r) would impose an "undue hardship" as defined by section 7(r)(3), the WHI should gather information about the employer's assertion and bring to his or her manager's attention to be raised to the NO, OP, DEPP, FMLA-OLS Branch, through appropriate channels. Claims of undue hardship must be analyzed on a case-by-case basis.

(d) Relationship to state law

Section 7(r)(4) provides that the FLSA break time for nursing mother requirement does not preempt state laws that provide greater protections to employees (*e.g.*, providing compensated break time, providing break time for exempt employees, or providing break time beyond 1 year after the child's birth). *See* Fact Sheet 73. The WHD website provides references to state laws pertaining to break time for nursing mothers; however, the WHD enforces only section 7(r) and cannot enforce more protective state laws.

(e) Remedies

NOT FOR PUBLIC DISTRIBUTION

(1) WHIs should work to resolve complaints under section 7(r) administratively by educating the employer about the law's requirements, and, based upon the facts of the particular case, help the employer and complainant to identify solutions that meet the statutory requirements. Employers can be referred to the "Nursing Mothers" page of the WHD internet for additional resources and useful information.

(2) If WHIs are unable to resolve a complaint or secure an employer's agreement to comply, they should consult their manager to raise with the NO, OP, DEPP, FMLA-OLS Branch, through appropriate channels.

(3) If an employer refuses to comply with the requirements of section 7(r), the DOL could seek injunctive relief in federal district court, and could obtain reinstatement and lost wages for the employee pursuant to section 17 of the FLSA.

(4) *Private right of action*

a. Section 7(r) does not specify any penalty if an employer is found to have violated the break time requirement.

b. An employee, in most instances, may only bring a private action for unpaid minimum wages and/or overtime compensation, and an additional equal amount in liquidated damages pursuant to section 16(b). As noted in FOH 59v00(b)(5)(a) above, in most instances, break time to express breast milk will be uncompensated.

(5) *Retaliation*

a. If an employee is "discharged or in any other manner discriminated against" because such employee has "filed a complaint or instituted or caused to be instituted any proceeding" regarding break time for expressing breast milk, the employee may file a retaliation complaint with the DOL, or may file a private cause of action seeking reinstatement, lost wages, and other appropriate remedies pursuant to sections 15(a)(3) and 16(b) of the FLSA.

b. Employees are protected regardless of whether the complaint is made *orally* or *in writing*. Complaints made to the WHD are protected, and *most courts have ruled that internal complaints to an employer are also protected.*

c. In cases in which the WHD has determined that an employer has violated the anti-retaliation provision of section 15(a)(3), or that a complainant may be entitled to reinstatement and/or payment of back wages as a result of the employer's violation of sections 15(a)(2) or 15(a)(3), field staff must, through appropriate channels, consult with the NO, OP, DEPP, FMLA-OLS Branch.

(6) If an employer treats employees who take breaks to express breast milk differently than employees who take breaks for other personal reasons, the nursing employee may have a claim for disparate treatment under Title VII of the Civil Rights Act of 1964. The complainant should be given contact information for the U.S. Equal Employment Opportunity Commission (EEOC) should she need further information about Title VII.

NOT FOR PUBLIC DISTRIBUTION

59v01 **Complaint intake.**

(a) The WHD complaint policy and procedure contained in FOH 51a01 must be followed in processing section 7(r) complaints. The guidance in this section supplements that policy and procedure with regard to aspects of the section 7(r) investigation process that are unique to nursing mother complaints under section 7(r). If the complainant is in a state with a law that provides greater protection to employees than the protections provided for under section 7(r), field staff may consider referring the employee to the appropriate state agency, after proper screening in accordance with FOH 51a01 and this section. At the time of intake, the complainant should be advised about the anti-retaliation provisions of section 15(a)(3).

(b) **Fact gathering**

In order to be a valid complaint, as per FOH 51a01, the following must be established: FLSA coverage, the complainant or subject of the complaint must not be exempt under section 13, her child must be less than 1 year old at the time she needed to express milk, and there must be a valid alleged violation.

(1) *Coverage*

Because break time for nursing mothers is part of the FLSA, enterprise and/or individual coverage must be established the same way as it is in any FLSA investigations as per section 3(s) of the FLSA.

(2) *Eligibility for protection under section 7(r)*

a. The provisions of section 7 do not apply to employees who are subject to section 13, and therefore are not entitled to protection under section 7(r).

b. However, the employees who are exempt from section 7(a), but subject to the other provisions of section 7, are entitled to protection under section 7(r).

(3) *Other considerations*

a. If the complainant's baby is over the age of 1 year old, she is no longer entitled to protection under section 7(r). However, there may have been a violation of section 7(r) when her child was under the age of 1 year old.

b. Inquire as to whether there are other nursing mothers or pregnant women, so as to better understand the context and potentially expand the scope of the investigation.

(4) *Alleged violation*

In order for there to be a valid complaint, there must be an alleged violation of one of the following elements of the provision of the statute:

a. Break time

1. No breaks provided

2. Length of break time provided is not reasonable

NOT FOR PUBLIC DISTRIBUTION

3. Not enough breaks provided (*i.e.*, complainant not able to express "each time [she] has need to")

b. Space

1. None provided

2. The space provided is a bathroom

3. The space is not shielded from view

4. The space is not free from intrusion

5. The space is not functional

6. The space is not available "each time such employee has need to express milk"

Note: in order to meet the requirements of the provision, employers need not create a permanent dedicated space for expressing milk.

c. Retaliation

The employee was discharged or in any other manner discriminated against because she has filed any complaint, or instituted or caused to be instituted any proceeding related to the taking of a break in order to express milk. *See* FOH 59v00(f)(5) and FOH 65f01.

(5) *FMLA*

a. Although section 7(r) and the FMLA are separate for the purposes of assessing violations, a complaint under section 7(r) may lead to the discovery of possible violations under the FMLA.

b. In the complaint intake process, the WHI or technician should inquire as to whether the complainant has taken FMLA leave for the birth of her child.

c. If a potential FMLA violation is identified, a separate FMLA investigation may need to be initiated. *See* FOH 69 for the investigative procedures under the FMLA.

(c) (b) (7)(E) [redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

[redacted]

- [redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

(d) Additional documentation

In many instances, the potential complainant will have copies of documents supporting the alleged violation. WHD staff may need to request copies of such documents to determine if the actions or omissions of the employer have a reasonable probability of violation of section 7(r). *See* FOH 51a01(d)(2). This is a good opportunity to inform the complainant of the anti-retaliation provision of section 16(b). *See* FOH 59v00(f)(5).

Additional documentary evidence the complainant may be able to provide includes:

(1) Copies of employer break policies, particularly any nursing mother break policies

(2) Memos, including email messages, between employer and employee

(3) Letters regarding personnel actions

(4) Disciplinary statements

(5) Any other documents that may substantiate retaliation or interference with the complainant's ability to take reasonable breaks to express milk

(e) Timeliness of complaints

Complaints must be filed with the WHD in a timely manner that affords the WHD the time necessary to review and act on the complaint within the FLSA statute of limitations. *See* FOH 51a01.

The same 2-year, or 3-year for willful violations, statute of limitations applies to section 7(r) investigations as in any other FLSA investigation.

(f) (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

59v02 **Management review and assignment of complaints.**

(a) Per FOH 59v01(f), assign FLSA nursing mothers complaints accordingly.

(b) Managers have discretion in accordance with FOH 51a01 in scheduling FLSA nursing mothers compliance actions that are not classified as Tier I complaints.

(c) **Complaints not accepted for investigation**

Complainants whose complaints are not accepted for investigation will be advised of the reasons why their allegations do not meet the requirements for accepting a complaint pursuant to our complaint intake policy and/or statutory requirements of section 7(r). *See* FOH 51a01.

59v03 **Investigation procedures.**

(a) **General**

The WHD does not act as the complainant's personal or legal representative in discussions with the employer. Rather, the WHD is an objective party in conducting investigations of issues surrounding the allegations contained in the complaint. *See* FOH 69b00. WHD enforcement staff will request that the employer correct violations uncovered during the investigation.

(b) **Complainant interview**

Any information regarding the alleged violation of section 7(r), or the surrounding circumstances that was not obtained during the complaint intake process, must be obtained from the complainant during the complainant interview. *See* FOH 52c04.

(c) **Initial conference**

(1) *General provision of FLSA nursing mothers*

As laid out in FOH 59v00(b)(3), the WHI must advise the employer of the requirements and restrictions of section 7(r) and provide Fact Sheet 73 and associated WHD FAQs, as well as other relevant guidance materials during the initial conference. The WHI must also specifically advise the employer of the FLSA prohibition against retaliation. *See* Fact Sheet 77A.

(2) The general provisions of FOH 51 and FOH 52 apply to FLSA nursing mothers compliance actions, including conciliations and limited investigations. For example, the WHI is required to provide the employer general compliance assistance, share information with the employer on FLSA child labor requirements, and provide the employer a copy of the FLSA Handy Reference Guide and FMLA materials for FMLA-covered employers.

NOT FOR PUBLIC DISTRIBUTION

(d) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

(e) (b) (7)(E) [redacted]

[redacted]

59v04 **Final conference.**

See FOH 52b01.

59v05 **Investigation reporting requirements.**

(a) **Narrative report requirements**

The narrative will include the same four part narrative, as required of all investigations, and laid out in FOH 54b01(b):

(1) *Coverage*

Coverage will be established as it would under any FLSA investigation. *See* FOH 10, FOH 11, and FOH 12.

(2) *Exemption*

Make sure to distinguish between section 13 exemptions and section 7 exemptions. Those who are exempt under section 13 are not entitled to protection under section 7(r), while those who are excepted from the overtime protections of section 7(a) but otherwise subject to section 7 are entitled to protection under section 7(r).

(3) *Status of compliance*

NOT FOR PUBLIC DISTRIBUTION

a. Report that permission to use name was obtained, and if not, how anonymity was achieved.

b. Report all violations disclosed with appropriate references to section 7(r):

1. Insufficient break time (*see* section 7(r)(1)(A))

2. Insufficient space (*see* section 7(r)(1)(B))

3. Retaliation (*see* section 15(a)(3))

c. Provide details of the investigation to substantiate violations, or in the case of a no violation case or where the employer has remedied the violation, explain how. Reference documentation and interviews as appropriate.

d. In cases with agree to remedy, clearly describe the action the employer will take to make the employee whole, and provide the date by which the remedy will be affected.

e. Back wages

Before computing any back wages, WHIs must raise this situation with their manager who will consult with the NO, OP, DEPP, FMLA-OLS Branch, through appropriate channels.

(4) *Disposition*

Per FOH 54b01(f):

a. Identify the location, date, and names and titles of all parties present at the final conference.

b. Identify the issues and/or violations discussed.

c. Identify the remedies that the employer must provide in order to come into compliance, including the payment of back wages, where applicable.

d. Report the employer's explanation for the violations, and state how he or she intend to comply in the future.

e. Report the employer's response to the investigation findings, and the stated course of action and due date for correction of the violations.

f. Identify all publications provided.

g. Include recommendation for any further action.

(b) Case file arrangement

FLSA nursing mothers case files will be arranged the same way as FLSA investigation case files. WHD enforcement staff will follow guidance at FOH 54b02(b)(1) for general case file arrangement.

NOT FOR PUBLIC DISTRIBUTION

(c) WHISARD instructions

All cases involving complaints and/or violations of section 7(r) *must* be registered in WHISARD under FLSA nursing mothers.

If an employer is found to be in violation of more than one component of section 7(r) (*i.e.*, denial of time and failure to provide space), each violation should be separately entered and identified in WHISARD.

Note: no time should be charged to FLSA nursing mothers unless we are actually investigating an employer's compliance with section 7(r). In other words, time should not be charged in situations where we are only providing compliance materials and the like during the final conference.

NOT FOR PUBLIC DISTRIBUTION

FOH INSERT #1848
FILE: FRONT OF VOL. IV

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 6, 2001

MEMORANDUM FOR ALL WAGE AND HOUR EMPLOYEES

FROM: THOMAS M. MARKEY
Acting Administrator

SUBJECT: Compliance Assistance Procedures

Attached are detailed procedures for the preparation and clearance of compliance assistance materials used by the Wage and Hour Division to provide information to the public. These materials include:

- Regulations
- Interpretative Bulletins
- The Field Operations Handbook (FOH)
- Opinion Letters
- Non-Technical Publications
- E-Laws Advisors
- Internet
- Speeches and Seminars
- Media Activities
- General Correspondence
- Telephone Calls

Please review these procedures carefully and file them at the front of Volume IV (Gold Binder) of the FOH. This memorandum and the procedures will also be posted on the Wage and Hour Intranet. Compliance assistance procedures will be reviewed and updated as needed.

Attachment

COMPLIANCE ASSISTANCE PROCEDURES
U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I. TYPE OF ASSISTANCE

Regulations

II. PURPOSE

To provide the policies and procedures necessary to carry out the purpose of new legislation or amendments to existing law.

III. SCOPE

Most Wage and Hour Regulations are contained in the Code of Federal Regulations (CFR), Title 29, Parts 0-99 and 500-899.

IV. AUTHORITY

Regulations are developed under the general authority to administer Wage and Hour laws. Often the statutory language in new legislation or amendments to existing legislation requires promulgation of regulations within a specified time frame.

V. DEVELOPER

Regulations are developed by a senior analyst or a team of senior analysts in the Wage and Hour National Office in collaboration with legal staff from the Office of the Solicitor.

VI. INTERNAL CLEARANCE (Within DOL)

Senior officials in the Department, including the Wage and Hour Administrator, the Assistant Secretary for the Employment Standards Administration (ESA), the Assistant Secretary for Policy (ASP), the Solicitor and the Secretary must review all proposed and final regulations.

VII. EXTERNAL CLEARANCE

OMB clearance and public notice and comment are required for all significant proposed regulations. Regulations that have an impact on other government agencies, e.g. Interior, INS etc. are cleared with those agencies. The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) provides for Congressional review of all major final rules.

VIII. DISTRIBUTION

Proposed and final regulations are published in the Federal Register; final regulations are published in the Code of Federal Regulations (CFR). Regulations are available on the Internet and are usually reprinted in pamphlet form for distribution upon request.

IX. UPDATES/CANCELLATION

Changes in regulations require the same process as proposed and final rules.

COMPLIANCE ASSISTANCE PROCEDURES
U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I. TYPE OF ASSISTANCE

Interpretative Bulletins

II. PURPOSE

To provide statements of general interpretation setting forth how Wage and Hour construes the law and will enforce the law.

I. SCOPE

Currently there are 16 Interpretative Bulletin Parts in 29 CFR Parts 775-794.

IV. AUTHORITY

Interpretative Bulletins are developed under the general authority to administer Wage and Hour laws.

V. DEVELOPER

Interpretative Bulletins are developed by a senior analyst or a team of senior analysts in the Wage and Hour National Office in conjunction with one or more attorneys from the Office of the Solicitor.

VI. INTERNAL CLEARANCE (Within DOL)

Senior officials in the Department, including the Wage and Hour Administrator, Assistant Secretary for ESA, the Office of the Assistant Secretary for Policy (ASP), the Solicitor and the Secretary must review all proposed and final regulations.

VII. EXTERNAL CLEARANCE

Wage and Hour is not required to follow the notice and comment rulemaking procedures for Interpretative Bulletins, but often does so voluntarily. OMB clearance is not required in most cases. Submission to Congress is required for all interpretative bulletins published as final rules.

VIII. DISTRIBUTION

Interpretative Bulletins are published in the Federal Register and in the Code of Federal Regulations (CFR). Interpretative Bulletins are available on the Internet and are usually reprinted in pamphlet form and distributed upon request.

IX. UPDATES/CANCELLATION

Changes in Interpretative Bulletins require the same process as proposed and final regulations. Wage and Hour has not issued any Interpretative Bulletins for many years.

COMPLIANCE ASSISTANCE PROCEDURES
U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I. TYPE OF ASSISTANCE

Field Operations Handbook (FOH)

II. PURPOSE

The FOH is an operational manual that provides interpretations of statutory provisions, procedures for the conduct of investigations and general administrative guidance.

III. SCOPE

The FOH is contained in five volumes. Volume I, which was a loose-leaf binder with copies of the Acts, Regulations and Interpretative Bulletins was replaced by the bound Code of Federal Regulations (CFR) to reduce reprinting costs. Volume II provides interpretations and Volumes III and IV provide investigative procedures and administrative guidance. Volume V is not distributed to Wage and Hour staff; this volume of internal procedures has not been updated for some time. Volumes II through IV are most widely used.

II. AUTHORITY

The Field Operations Handbook is developed under the general authority to administer the laws enforced by Wage and Hour.

V. DEVELOPER

Analysts in the appropriate office in the Wage and Hour National Office draft FOH revisions, often with the assistance of an attorney from the Office of the Solicitor.

VI. INTERNAL CLEARANCE (Within DOL)

Appropriate senior Wage and Hour and SOL managers clear FOH revisions. All non-routine FOH revisions require clearance by the Administrator or Deputy Administrator.

VII. EXTERNAL CLEARANCE

FOH revisions do not require public comment or review by either OMB or Congress.

VIII. DISTRIBUTION

Bound copies of the applicable CFR Parts and FOH volumes II, III and IV are issued to each new investigator and technician shortly after he or she reports on duty. Staff of the Office of the Solicitor and analysts in the National Office are also issued FOH sets upon request. A redacted version is provided to the public upon request. Public requesters are charged for the cost of duplicating the FOH under FOIA.

IX. UPDATES/CANCELLATION

The FOH is regularly updated through a series of numbered revisions and inserts. Outdated materials are removed through the revision process.

COMPLIANCE ASSISTANCE PROCEDURES
U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I. TYPE OF ASSISTANCE

Opinion Letters

II. PURPOSE

The statute and implementing regulations provide general principles and interpretations, but do not—and, as a practical matter, cannot—answer every possible question on every issue. Opinion letters provide a written response to a written inquiry about application of Wage and Hour laws to a specific factual situation. Although an opinion letter applies to the specific fact situation presented in the incoming inquiry, it may have general application to other similar factual situations. However, further applicability must be determined on a letter-by-letter basis.

III. SCOPE

The Wage and Hour National Office and field offices receive about 2,000 incoming requests for opinions each year. Wage and Hour issues approximately 200 opinion letters each year from the National Office and 800 from field offices. Opinion letters issued by field offices involve existing interpretations or instructions and are signed by a member of the Wage and Hour management staff. (FOH instructions prohibit Wage and Hour investigators from signing any written public communication that expresses an interpretative position or states a general policy or procedure of Wage and Hour or the Department of Labor, except for routine matters pertaining to their assigned investigations)

IV. AUTHORITY

Opinion letters are issued under the general authority to administer the laws enforced by Wage and Hour. In its 1944 decision in *Skidmore V. Swift*, 323 U.S. 134, the Supreme Court explicitly recognized the informal interpretations of the Fair Labor Standards Act (FLSA) issued by the Wage and Hour Division as being made in pursuit of the official duty of enforcing the law. The Court recognized that these interpretations (opinions) provide practical advice and guidance to employers and employees on how the Wage and Hour Division will seek to apply the law, and constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

Subsequently, Congress enacted the Portal-to-Portal Act of 1947 amending the FLSA and also explicitly recognizing informal interpretations. It did so by creating a defense against potential back wage liability for employers who relied, in good faith conformity, on ***any*** written administrative regulation, order, ruling, approval, or ***interpretation*** issued by the Administrator of the Wage and Hour Division. Such a defense, if successfully argued and proved in court, eliminates liabilities ***regardless*** of whether the interpretation is later rescinded or found to be incorrect by the courts.

In the 1949 amendments to the FLSA, Congress ordered that existing Wage and Hour interpretations should remain in effect. The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires Federal agencies to answer specific inquiries by small businesses about how to comply with laws and regulations.

V. DEVELOPER

Analysts in the Wage and Hour National Office draft the opinion letters for signature by appropriate officials in that office. As part of the preparation of an opinion letter, the analyst reviews the Act involved and its implementing regulations and conducts research of relevant source information.

The Field Operations Handbook, Section 50c03, provides guidance for clearance of interpretative material by employees in field locations, which is paraphrased below:

In Regional and District Offices, responses to requests for interpretations of Acts enforced by Wage and Hour shall by signed by the Regional Administrator or District/Assistant District Director. The Regional Administrator shall refer legal questions that cannot be resolved by existing interpretations or instructions to the Regional Solicitor. When a situation involves legal questions as well as novel policy or procedural questions, the Regional Solicitor's opinion on the legal aspect shall be obtained before the RA refers such situations to the National Office.

VI. INTERNAL CLEARANCE (Within DOL)

Employers, employees and other members of the public often submit written requests for advice and interpretations of how the law applies in a particular set of circumstances. These requests are sent for response to the Wage and Hour National Office and field offices. Those inquiries that raise questions that have been answered before in a manner directly on point are usually responded to by simply providing a copy of the earlier opinion, or by paraphrasing or repeating the previous opinion. Most of the inquiries handled by field offices fall into this category. If the inquiry raises a novel question, a response is prepared based on a review of the facts and pertinent provisions of law and regulations, and is reviewed by staff in the Solicitor's Office. Occasionally, such letters may raise questions of broader applicability or significance beyond the specific facts presented, and those are subject to a higher level of review. If the Administrator signs a letter in response to an employer's request for a Portal-to-Portal Act "good faith" defense, it receives higher review.

VII. EXTERNAL CLEARANCE

Opinion letters do not require public comment; no OMB or congressional review is required.

VIII. DISTRIBUTION

Opinion letters are sent to the requester and provided to the public upon request. FLSA and FMLA letters are routinely provided to the trade press pursuant to standing FOIA requests; the trade press publishes some letters. Selected opinion letters are provided to field staff on the Computer Assisted Research System (CARS) which is available on the Intranet. Opinion letters are not posted on the DOL WebPages.

IX. UPDATES/CANCELLATION

Opinion letters that no longer reflect current policy are withdrawn. Members of the trade press (BNA, CCH, etc.) who routinely publish opinion letters are notified of the withdrawal. Obsolete opinion letters are removed from CARS.

COMPLIANCE ASSISTANCE PROCEDURES
U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I. TYPE OF ASSISTANCE

Non-Technical Publications—Handy Reference Guides, Fact Sheets, Pamphlets

III. PURPOSE

Wage and Hour produces and distributes publications to employers, employees and other interested parties in order to provide the general public with information in plain language about our enforcement responsibilities.

III. SCOPE

There are approximately 50 non-technical publications currently available that cover the major provisions of the FLSA and the other Acts enforced by Wage and Hour.

IV. AUTHORITY

Non-technical publications are developed under the general authority to administer Wage and Hour laws. SBREFA requires compliance guides for small businesses when regulations affecting small businesses are promulgated.

V. DEVELOPER

Non-technical publications are developed to address an identified need or to further education and outreach efforts. A senior analyst or a team of senior analysts in the Wage and Hour National Office develops these publications. Some District Offices have developed local compliance guides for local use from existing publications that have been reformatted and edited for the local geographic area.

VI. INTERNAL CLEARANCE (Within DOL)

Non-technical publications are reviewed and cleared by appropriate senior Wage and Hour and SOL staff.

VII. EXTERNAL CLEARANCE

Non-technical publications do not require public comment, OMB review or congressional review.

VIII. DISTRIBUTION

Non-technical publications are mailed or personally distributed by Wage and Hour staff in response to requests, and they are also provided at education and outreach events. A number of non-technical publications are available on the Department of Labor Internet site.

X. UPDATES/CANCELLATION

Non-technical publications are periodically reviewed and updated by National Office staff to reflect changes in the minimum wage, policy changes etc. Non-technical publications that are no longer useful and relevant are not reprinted.

COMPLIANCE ASSISTANCE PROCEDURES
U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I. TYPE OF ASSISTANCE

E-Laws Advisors

II. PURPOSE

Internet interactive programs to answer questions about FLSA and other laws and programs administered by the Wage and Hour Division.

IV. SCOPE

Currently there are 3 E-Laws Advisors on the Internet—FLSA general coverage, FMLA and Child Labor. Others are under development. E-laws advisors receive about 3,000 "hits" a week.

IV. AUTHORITY

E-Laws Advisors are developed under the general authority to administer FLSA and other laws. The Office of the Assistant Secretary for Policy (OASP) requested and received a specific appropriation to develop E-Laws Advisors for the Department of Labor.

V. DEVELOPER

Current and former senior Wage and Hour staff with appropriate subject matter expertise develops E-Laws Advisors.

VI. INTERNAL CLEARANCE (Within DOL)

E-Laws Advisors are reviewed and cleared by senior Wage and Hour, SOL and OASP managers. E-Laws advisors are beta-tested with Wage and Hour field staff and selected stakeholders.

VII. EXTERNAL CLEARANCE

E-Laws advisors do not require public comment, OMB clearance or congressional review.

VIII. DISTRIBUTION

E-Laws advisors are available on the DOL Website on the Internet.

IX. UPDATES/CANCELLATION

E-Laws advisors are periodically reviewed and updated as necessary.

COMPLIANCE ASSISTANCE PROCEDURES
U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I. TYPE OF ASSISTANCE

Internet

II. PURPOSE

Wage and Hour provides information to the public on the DOL, ESA and Wage and Hour Home Pages on the Internet.

III. SCOPE

Materials available on the Internet include the Acts and Regulations, extensive information on the minimum wage and child labor, and information on state labor laws and the location of state labor offices. The Wage and Hour Home Page receives over 6,000 "hits" a week.

IV. AUTHORITY

Materials for the Internet are developed under the general authority to administer FLSA and other laws. All federal agencies are encouraged to establish and maintain user friendly and current information for the public on the Internet.

V. DEVELOPER

Senior Wage and Hour staff with appropriate subject matter expertise develop materials for the Internet. As needed, contract staff provide assistance in developing and placing materials on the Internet

VI. INTERNAL CLEARANCE (Within DOL)

New Internet materials are reviewed and cleared by senior Wage and Hour managers and, when appropriate, by SOL and other DOL officials.

VII. EXTERNAL CLEARANCE

Existing regulations and publications placed on the Internet have been cleared in accordance with existing procedures. As a general rule, other materials placed on the Internet do not require external clearance.

VIII. DISTRIBUTION

All Wage and Hour Internet materials can be accessed through the DOL Home Page

IX. UPDATES/CANCELLATION

Internet materials are periodically reviewed and updated as necessary.

COMPLIANCE ASSISTANCE PROCEDURES
U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I. TYPE OF ASSISTANCE

Speeches and Seminars

II. PURPOSE

All Wage and Hour offices engage in education and outreach activities to inform the public about the agency's enforcement responsibilities and to promote compliance with Wage and Hour laws.

III. SCOPE

All Wage and Hour strategic plan initiatives have an education component. In addition to their planned activities, District and Regional Offices receive requests from professional associations, unions and other stakeholder groups to make presentations at meetings and conferences. The typical Wage and Hour District Office delivers three speeches each month for a total of approximately 2000 annually by the entire agency.

IV. AUTHORITY

Speeches and seminars are given under the general authority to administer the laws enforced by Wage and Hour. Outcome B of the Wage and Hour Strategic Plan is: "Improve employers' knowledge—especially new and small businesses—of Wage and Hour laws and processes in order to promote compliance." Outcomes D through F are to improve customer satisfaction among workers, employers and others seeking our services, including contract agencies.

The selection of the person to make a speech or presentation depends on a number of factors that include subject matter, the nature of the meeting and whether the initiative is local or national, (e.g. poultry, garment, health care). Senior level investigators handle most speeches and presentations since Wage and Hour policy requires investigators below the GS-12 level to obtain supervisory approval to participate in such activities.

In the field, requests for speeches that could result in discussion of highly complex, new or potentially controversial issues, or speeches that could potentially have media coverage or congressional participation are referred to the Regional Office for a decision as to how to respond to the request. When a District or Regional Office receives a request for a presentation to a meeting with national participation or to a major stakeholder group, the Regional Administrator coordinates this request with the Office of External Affairs in the National Office. The Regional Administrator or Deputy Regional Administrator usually handles these presentations. Requests for participation by the Administrator are referred to the National Office for appropriate handling.

V. DEVELOPER

Speeches and seminars are prepared from existing cleared materials. A speech by a high level Wage and Hour official that involves new policy is developed by senior managers with appropriate subject matter experience in consultation with the SOL.

VI. INTERNAL CLEARANCE (Within DOL)

(b) (7)(E)

[redacted]

VII. EXTERNAL CLEARANCE

It is possible that some speeches made by the Administrator or another high level official could require OMB clearance or review by another affected agency, e.g. Department of Interior, Department of Agriculture, INS, etc. depending on the specific content.

VIII. DISTRIBUTION

Speeches and seminars are usually one-time events and are not printed, recorded or videotaped. There could be circumstances in which a speech by the Administrator, Deputy Administrator, or other senior level managers would be videotaped or printed for internal or external distribution.

IX. UPDATES/CANCELLATION

Non-technical publications and other materials that are provided at speeches and seminars are periodically reviewed and updated to reflect changes in the minimum wage, policy changes etc. Non-technical publications that are no longer useful and relevant are not reprinted.

COMPLIANCE ASSISTANCE PROCEDURES
U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I. TYPE OF ASSISTANCE

Media Activities

II. PURPOSE

Wage and Hour uses news releases and other media-related activities to publicize its enforcement efforts and to promote compliance. This enables Wage and Hour to inform a large number of individuals of their rights and responsibilities, which may deter future violations.

III. SCOPE

As part of a proactive media strategy, Wage and Hour Regional Offices and the National Office regularly issue press releases on significant cases, including (1) those with substantial back wages or CMPs; (2) compliance assistance and outreach activities; (3) strike force and task force activities; and (4) settlements, judgments and debarment actions. In addition, Wage and Hour receives hundreds of media inquiries each year concerning the entire range of Wage and Hour activity. The subjects of these inquiries range from broad policy, legislative or regulatory proposals to specific cases and local outreach events.

IV. AUTHORITY

Media activities are conducted under the general authority to administer the laws enforced by Wage and Hour. Outcome B of the Wage and Hour Strategic Plan is to: "Improve employers' knowledge—especially new and small businesses—of Wage and Hour laws and processes in order to promote compliance." Outcomes D through F are to improve customer satisfaction among workers, employers and others seeking our services, including contract agencies.

In the early 1990's a formal written media policy was developed by Wage and Hour senior managers, the ESA Office of Public Affairs (ESA OPA) and the Department of Labor Office of Public Affairs (DOL OPA). The policy, which was last revised in December 1996, has been widely distributed throughout Wage and Hour and is a guide for coordinating with DOL OPA and the Wage and Hour National Office, responding to inquiries from the media, and developing a proactive media strategy.

V. DEVELOPER

Press releases and talking points for interviews are usually prepared from existing cleared materials. The preparation of materials on new policy for a Wage and Hour official's on- or off- camera interview would be developed by senior managers with appropriate subject matter experience in consultation with the SOL.

VI. INTERNAL CLEARANCE (Within DOL)

Pursuant to Department of Labor policy, the Office of Public Affairs (OPA) coordinates the release of all information to the media. The Wage and Hour media policy encourages Regional Administrators to have regular meetings or conference calls with the regional OPA office so both offices can keep each other apprised of upcoming events or alert each other to potential problems. The Wage and Hour Administrator's Office and the regional OPA are to be advised immediately upon receipt of all inquiries by national media, i.e. news services such as Associated Press; major television networks including CNN and C-Span; major radio networks such as CBS and National Public Radio; major newspapers such as the Wall Street Journal, the New York Times, the Washington Post, and the Los Angeles Times; and major news magazines such as Time and Newsweek. Wage and Hour's National Office, in coordination with ESA's Office of Public Affairs, and the National Office of OPA will determine the appropriate further action for responding to such inquiries and, after consultation with National OPA, will notify the regional office of how to handle the inquiry. No further contact should be made by regional or local Wage and Hour offices pending receipt of guidance even if the inquirer's deadline may pass. The Administrator's Office should also be apprised when it becomes known that major or national media is interested in a Wage and Hour issue even though contact has not yet been made by the media outlet with the Department.

As a general rule, Wage and Hour staff should respond to media inquiries that involve technical enforcement questions or that seek specific information about the laws enforced by Wage and Hour. In such instances, regional OPA should be notified of the contact. However, the regional OPA should be consulted and the Administrator's Office should be notified if: (1) multiple inquiries are received from the same reporter, (2) if it appears that a reporter is beginning to target a particular policy or enforcement activity, or (3) there appears to be a developing story on a potentially controversial issue.

Specific media inquiries concerning open investigations should be referred to the Assistant District Director (or the next higher level of management if the Assistant District Director is not available or comfortable responding to the inquiry) for response. While it may be appropriate to acknowledge the existence of an ongoing investigation, information about an open investigation should not be disclosed. The media should simply be made aware that Wage and Hour investigations are intended to determine if violations have occurred—the existence of an investigation does not mean that complaints have been filed or that violations of the law have occurred.

Media inquiries that concern closed investigations should be handled in accordance with Freedom of Information Act (FOIA) guidelines. If adherence to the FOIA guidelines creates negative reactions on the part of the inquirer, regional OPA should be consulted. Also, regional OPA and the Administrator's office should be notified whenever a FOIA request from the media is received.

If a Wage and Hour Investigator is approached by the media at the site of an investigation, the Investigator should advise the media of the agency's policy that no comments may be made. (If continuing the investigation becomes difficult due to the presence of the media, the Investigator should contact the District Office for further instruction, or if this is not possible, leave the site immediately.)

In joint investigations with States or other Federal agencies that invite the media to accompany their investigators, a Wage and Hour Investigator may explain the requirements of the laws Wage and Hour enforces without reference to the specifics of ongoing investigations.

Wage and Hour personnel may accept invitations to appear on radio or television programs when the show's purpose is to discuss laws or regulations administered by the agency, provided that the employee's supervisor has approved such participation. Participation in any media program concerning a specific case requires coordination with regional OPA in order to prepare for the possibly sensitive nature of the event. If the show is syndicated, or the station is an affiliate of a national network in a major media market-- e.g. Washington, New York, Los Angeles—the Administrator's Office is to be notified in advance.

Any media request to accompany an Investigator on an investigation should be promptly and politely declined to ensure due process and safeguard confidentiality. If there is a perceived need to deviate from this policy, the Regional Administrator should contact the Administrator's Office and explain the facts and rational for deviating from the policy.

VII. EXTERNAL CLEARANCE

If certain media contacts made by the Administrator or another high level official involved a controversial or unprecedented issue, OPA might coordinate with the White House or OMB prior to the contact or interview. Similarly if the contact affected another government agency, e.g. Department of Interior, Department of Agriculture, INS, etc. it is likely that ESA and DOL OPA would coordinate with its counterpart in that agency.

VIII. DISTRIBUTION

There could be circumstances in which on camera or printed interviews of the Administrator, Deputy Administrator, or other senior level managers would be distributed throughout Wage and Hour or to other DOL or external agencies. News articles about Wage and Hour are included in OPA's daily news clips that are distributed throughout the Department. Press releases are often posted on the DOL or Wage and Hour Home Page on the Internet.

IX. UPDATES/CANCELLATION

As part of the regular review of Home Page content, obsolete press releases would be removed by OPA.

COMPLIANCE ASSISTANCE PROCEDURES
U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I. TYPE OF ASSISTANCE

General Correspondence

II. PURPOSE

To respond to routine requests related to investigations, requests for forms, publications and posters, to set appointments, and to confirm or request meetings.

III. SCOPE

A typical District Office receives approximately 50 letters each moth; most of these are related to ongoing investigations. Wage and Hour staff often informally respond to these letters either by telephone or in a handwritten note to accompany a mailing of requested materials.

IV. AUTHORITY

General correspondence is prepared under the general authority to administer the laws enforced by Wage and Hour. Regional Office and District Office managers have the authority and discretion to respond to letters as they deem appropriate. The Field Operations Handbook, Section 50c00, defines the authority of investigators concerning correspondence. This section is paraphrased below:

Investigators may correspond with the public in connection with appointments related to their own investigative or public information activities or to handle routine requests for publications. They may also correspond with employers or their representatives in connection with their own investigative activities as necessary to request the status of any matter being negotiated, such as whether back wages will be paid or to secure back wage receipts. Investigators shall not sign any written public communication that expresses an interpretative position or states a general policy or procedure of Wage and Hour or the Department of Labor; the Assistant District Director or higher authority shall sign all such written communications.

V. DEVELOPER

Depending on the subject matter of the incoming letter, the response is handled by a manager, investigator, technician or support staff as appropriate.

VI. INTERNAL CLEARANCE (Within DOL)

Routine letters may require supervisory approval in accordance with the previously mentioned FOH section, but generally no clearance is required.

VII. EXTERNAL CLEARANCE

No external clearance is required for routine letters. The FOH, section 50c01, provides guidance on responses to inquiries regarding laws or programs not administered by the Wage and Hour Division. This guidance is paraphrased below:

Wage and Hour personnel may be asked about the applicability of laws or programs administered by other Federal, State or local Government agencies. Under no circumstances shall WH personnel interpret laws not enforced by Wage and Hour. However, it is the professional duty of WH personnel to have general knowledge of other laws and programs. Inquirers should be referred to the proper agency including the address, telephone number and person to contact, if known. This is a service to both the inquirers and the agencies and thus such referrals should not be made indiscriminately, i.e. on a speculative basis, or where such agencies have requested that no referral be made.

VIII. DISTRIBUTION

There is no distribution of routine letters. They are sent to the requester and file copies are kept in accordance with established records retention schedules.

IX. UPDATES/CANCELLATION

This is not applicable to routine letters.

COMPLIANCE ASSISTANCE PROCEDURES
U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

I. TYPE OF ASSISTANCE

Telephone Calls

II. PURPOSE

In order to maintain prompt and responsive service to the public, Wage and Hour staff routinely handle telephone calls about the laws we enforce and investigative activities. In addition, Wage and Hour offices provide forms, posters and other publications to any interested party upon request.

III. SCOPE

Wage and Hour offices throughout the country receive an estimated 5 million telephone calls each year. About one-third of the calls are about matters outside of Wage and Hour's jurisdiction, for example State or local laws, EEO complaints, or matters handled by another Federal agency. Another one-third of the calls involves routine questions about Wage and Hour laws or requests for publications. The remaining calls are divided among (1) those related to specific investigations, (2) requests from employers and employer representatives (and less frequently from employees), and (3) other government agencies, the media and congressional staff for policy guidance and interpretation of the laws enforced by Wage and Hour.

IV. AUTHORITY

Information is provided to the public by telephone under the general authority to administer the laws enforced by Wage and Hour. With regard to referrals, FOH Section 50c01states: "...it is the professional duty of WH personnel to have general knowledge of other laws and programs. Inquirers should be referred to the proper agency including the address, phone number, and person to contact, if known. This is a service to both the inquirers and the agencies and thus such referrals should not be made indiscriminately, i.e., on a speculative basis, or where such agencies have requested that no referral be made."

V. DEVELOPER

In a Wage and Hour District or Area Office, senior level investigators who have the experience, judgment and in-depth knowledge to respond accurately to requests for information handle the most complex calls. They are expected as part of their job to provide accurate information to the public and to promote education and outreach efforts. If an investigator is unable to answer a call or believes that the question is too complex or may involve new policy, the investigator refers the caller to the District Director (DD) or Assistant District Director (ADD). If the District Office manager is able to answer the call and it does not involve new policy, he or she answers the call. Callers with these types of complex questions are often asked to put the request in writing so that there is a clear understanding of the facts.

Telephone calls with potential national impact or involving new or controversial issues are referred through channels to the Regional or National Office, as are non-routine congressional inquiries. Calls from the media are handled in accordance with Wage and Hour's established written media policy.

VI. INTERNAL CLEARANCE (Within DOL)

None required.

VII. EXTERNAL CLEARANCE

None required.

VIII. DISTRIBUTION

Not applicable

IX. UPDATES/CANCELLATION

Not applicable.

Chapter 60

SAFETY AND HEALTH

Table of Contents

60a	60a00	General.
	60a01	Referral of safety and health questions and complaints to the Occupational Safety and Health Administration.
	60a02	Occupational Safety and Health Administration offices and areas covered.

60a00 General.

On 04/28/1971 the Williams-Steiger Occupational Safety and Health Act of 1970 became effective. Responsibility for the administration and enforcement of this law rests with the Occupational Safety and Health Administration (OSHA) of the United States (U.S.) Department of Labor (DOL).

60a01 Referral of safety and health questions and complaints to the Occupational Safety and Health Administration.

(a) Complaints and questions which involve the OSHA may be received by the Wage and Hour Division (WHD). The WHD shall refer such complaints and questions to the OSHA office in whose jurisdiction the establishment is located (*see* FOH 60a02). Complaints alleging imminent danger shall be referred *immediately*, preferably by telephone, to the appropriate office (*see* MO 3548.16).

(b) If, during an investigation under the laws for which the WHD has enforcement responsibility, an employer (or an employee) asks a Wage and Hour Investigator (WHI) for advice regarding any safety and health problem or question he or she may have, the WHI shall advise him or her to contact the OSHA office serving his or her area (*see* FOH 60a02).

(c) Hazardous and/or unsanitary conditions, which are observed without special investigative effort or the expenditure of extra investigative time, or which are called to the attention of the WHI, shall be reported to the district director (DD) for referral (*see* FOH 52a11) to the proper OSHA office (*see* FOH 60a02).

60a02 Occupational Safety and Health Administration offices and areas covered.

Washington, District of Columbia (DC)	Area covered
Director, Office of Compliance U.S. Department of Labor Washington, DC 20210 Telephone: (202) 961-2362/2482	Washington, DC [1]

Atlanta: Region IV	Area covered
Regional Administrator Occupational Health and Safety Administration U.S. Department of Labor Room 311 1371 Peachtree Street, N.E. Atlanta, Georgia 30309 Telephone: (404) 526-3573	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee

Boston: Region I	Area covered
Regional Administrator Occupational Health and Safety Administration U.S. Department of Labor John F. Kennedy Federal Building Government Center, 17th Floor Boston, Massachusetts 02203 Telephone: (617) 223-6713/6712	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

Chicago: Region V	Area covered
Regional Administrator Occupational Health and Safety Administration U.S. Department of Labor 848 Federal Office Building 219 South Dearborn Street Chicago, Illinois 60604 Telephone: (312) 353-4716/4717	Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin

Dallas: Region VI	Area covered
Regional Administrator Occupational Health and Safety Administration U.S. Department of Labor Room 730-C, Mayflower Building 411 North Akard Street Dallas, Texas 75201 Telephone: (214) 749-2477/2478/2479	Arkansas, Louisiana, New Mexico, Oklahoma, Texas

Denver: Region VIII	Area covered
Regional Administrator Occupational Health and Safety Administration U.S. Department of Labor Denver Federal Center Room 21-S, Bldg. 53 Kipling & 6th Avenue Denver, Colorado 80225 Telephone: (303) 233-6187/6278	Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming

Kansas City: Region VII	Area covered
Regional Administrator Occupational Health and Safety Administration U.S. Department of Labor 1906 Federal Office Building 911 Walnut Street Kansas City, Missouri 64106 Telephone: (816) 374-5249/5240	Iowa, Kansas, Missouri, Nebraska

New York: Region II	Area covered
Regional Administrator Occupational Health and Safety Administration U.S. Department of Labor 341 Ninth Avenue New York New York 10001 Telephone: (212) 971-5754	New Jersey, New York, Puerto Rico, Virgin Islands

Philadelphia: Region III	Area covered
Regional Administrator Occupational Health and Safety Administration U.S. Department of Labor Penn Square Building, Room 410 Juniper and Filbert Street Philadelphia, Pennsylvania 19107 Telephone: (215) 597-4102/4103/4104	Delaware, District of Columbia[1], Maryland, Pennsylvania, Virginia, West Virginia

San Francisco: Region IX	Area covered
Regional Administrator Occupational Health and Safety Administration U.S. Department of Labor 10353 Federal Building 450 Golden Gate Ave., Box 36017 San Francisco, California 94102 Telephone: 415-556-0584	Arizona, California, Guam, Hawaii, Nevada

Seattle: Region X	Area covered
Regional Administrator Occupational Health and Safety Administration U.S. Department of Labor 1804 Smith Tower Building 506 Second Avenue Seattle, Washington 98104 Telephone: (206) 583-7520	Alaska, Idaho, Oregon, Washington

[1] Although DC is included in the jurisdiction of Philadelphia: Region III, referrals of complaints or inquiries received by WHD National Office staff are to be made to the Washington, DC, listing.

Chapter 61

MULTIUNIT EMPLOYER PROCEDURES

Table of Contents

61a COMPLIANCE ACTIONS INVOLVING MULTIUNIT EMPLOYERS

61a00 General.
61a01 Main office-district office (MODO) responsibilities.
61a02 Branch district office (BRADO) responsibilities in the MODO process.
61a03 Contact and coordination with MODO required in all branch establishment investigations.
61a04 Regional office responsibilities in the MODO process.
61a05 National office responsibilities in the MODO process.
61a06 MODO for enterprises with headquarters in Canada or Mexico that do not have a main office in the United States.
61a07 Contact with MODO on conciliations.

61b GUIDELINES FOR RESOLUTION BY BRANCH DISTRICT OFFICE (BRADO) OR MAIN OFFICE-DISTRICT OFFICE (MODO)

61b00 Guidelines for determining whether resolution should be at BRADO or MODO.
61b01 Branch establishment investigations.
61b02 Potential litigation in branch establishment investigations.

61c BRANCH ESTABLISHMENT FURTHER ACTION (BEFA)

61c00 Branch establishment further action (BEFA) defined.
61c01 BEFA case development.
61c02 MODO procedures on BEFA cases.
61c03 BRADO actions upon receipt of file from MODO.
61c04 Special procedures for specific firms.
61c05 Special procedures when main office is in nearby DO area.

61d MULTIUNIT EMPLOYER AND/OR NATIONAL ENTERPRISE COMPLIANCE NEGOTIATIONS

61d00 Compliance negotiations with main or supervisory offices of multiunit employers or national enterprises.

61e INVESTIGATIONS OF FARM LABOR CONTRACTORS (FLCs)

61e00 Reporting investigations of FLCs.

61a COMPLIANCE ACTIONS INVOLVING MULTIUNIT EMPLOYERS

61a00 General.

(a) This FOH chapter provides special instructions that apply to every compliance action involving an establishment of a multiunit employer (MUER). Compliance by MUERs has far-reaching impact on the overall effectiveness of the Wage Hour Division's (WHD's) compliance program. MUERs employ a very substantial portion of the United States (U.S.) workforce, and thus represent a special opportunity for the WHD (*i.e.*, the impact of a compliance issue resolved or not resolved by a MUER is multiplied by the number of establishments and the number of employees that the MUER controls).

(b) The overall purpose of instructions in this FOH chapter is to achieve open communication, full active coordination and positive collaboration, and full documentation of all enforcement issues pertaining to MUERs. Such coordinated activity is critically important to ensure consistent application of the law in widely separated geographic locations and to achieve maximally efficient use of resources by WHD staff.

(c) A "multiunit employer" is defined as:

(1) an employer that has two or more establishments, whether in the same or different district office (DO) jurisdictions; or

(2) an employer that is a farm labor contractor (FLC) (*see* FOH 61e00).

(d) (b) (7)(E) [redacted]

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(e) (b) (7)(E) [redacted] The overarching goal is to achieve maximum compliance with the laws under WHD jurisdiction, while at the same time, ensuring the most efficient use of limited agency resources. Note: the term "manager" as used in this FOH chapter includes both district directors (DD) and assistant district directors (ADD), along with such regional office (RO) or National Office (NO) staff as may be designated in certain circumstances.

(1) *Definition of employer main office*

The term "employer main office" means a headquarters or central administration center for an employer enterprise or a distinct operational component of the enterprise. It is the physical place at which the WHD can deal with company representatives who can authoritatively address compliance issues. Generally, but not always, this is a single location where the top management of the firm is based and where business and payroll records are maintained.

(2) *National enterprises or MUERs having decentralized authority*

Some large national or MUERs, however, operate on a highly decentralized basis, sometimes with different operating components engaged in entirely different lines of business using separate employees and separate administrative offices. Depending on the details and the extent of decentralization, such a large employer may have more than one main office for MODO purposes. The employer's divisional or regional headquarters may in practical effect constitute the employer's main office for that employer component. The WHD DOs must remain cognizant of these business realities and respond to them accordingly. The critical determinant is the availability of key employer management officials and records that can authoritatively address and resolve compliance for employees in the employer enterprise or for a recognized component of the employer enterprise.

(3) *Resolving questions of MODO jurisdictions*

If questions arise concerning which DO is the MODO for a MUER, the WHD DOs and/or ROs involved and NO, Office of Policy (OP), Division of Enforcement Policy and Procedures (DEPP) should communicate as necessary to clarify MODO responsibility (*see* FOH 61a04(b) and FOH 61a05(b) for procedures for transfer of jurisdiction).

(f) WHISARD is the specified agency channel for all initial communications pertaining to MODO issues. All WHD staff shall utilize the MODO functions in WHISARD to the fullest extent possible in accordance with existing WHISARD guidelines. *MODO managers must use WHISARD to broadcast MUER instructions to all WHD managers.* The DDs in the MODO and BRADO are ultimately responsible for adherence to these instructions via the accountability review process.

61a01 **<u>Main office-district office (MODO) responsibilities.</u>**

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

(e) (b) (7)(E) [redacted]

[redacted]

[redacted]

61a02 **Branch district office (BRADO) responsibilities in the MODO process.**

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

61a03 **Contact and coordination with MODO required in all branch establishment investigations.**

(a) **General principles**

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

[redacted]

(b) (7)(E) [redacted]

- [redacted]

- [redacted]

- [redacted]

(b) Initial contact

(b) (7)(E) [redacted]

- [redacted]

- [redacted]

(c) Initial instructions from the MODO

- (b) (7)(E) [redacted]

- [redacted]

(3) (b) (7)(E) [redacted]

(4) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7) (E) [redacted]

- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

[redacted]

[redacted]

- [redacted]
- [redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b)(7)(E) [redacted]

- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
    - [redacted]
    - [redacted]
- [redacted]
- [redacted]

(b) (7)(E)

[redacted]

[redacted]

- [redacted]
  - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

Chapter 62

INDUSTRIAL HOMEWORK

Table of Contents

62a DEFINITIONS AND THEIR APPLICATION

62a00 Industrial homework defined.
62a01 "In or about a home."
62a02 Clerical-type workers.
62a03 Operations considered within hosiery industry.

62b REGULATORY PROVISIONS

62b00 Employment of homeworkers on PCA work.
62b01 Industries in which homework is restricted.
62b02 Women's apparel industry defined.
62b03 Jewelry manufacturing industry defined.
62b04 Knitted outerwear industry defined.
62b05 Gloves and mittens industry defined.
62b06 Button and buckle manufacturing industry defined.
62b07 Handkerchief manufacturing industry defined.
62b08 Embroideries industry defined.

62c INVESTIGATION PROCEDURE

62c00 Check for homework certificates.
62c01 Employer recordkeeping requirements.
62c02 Plant investigation.
62c03 Examination of records.
62c04 Production records.
62c05 Hidden homework.
62c06 Information to be sought in homeworker interviews.
62c07 Home interviews.
62c08 Children who assist homeworker.
62c09 Employer's knowledge of child labor.
62c10 Production time studies.
62c11 Employer asserts work performed by independent contractors.
62c12 Employer asserts distributor is employer.
62c13 Homeworker leads.
62c14 Special instructions for investigations of firms in the knitted outerwear industry.

62d SPECIAL PROCEDURES

62d00 Interview of homeworker concerning certificate application.

62e GARMENT INDUSTRY PRACTICES AND INVESTIGATION CONSIDERATIONS

62e00 General.
62e01 Employer organizations.
62e02 Labor organizations.
62e03 Definitions.
62e04 Industry practices.
62e05 Hours.
62e06 Records.
62e07 Contractor problems.
62e08 Employees or independent contractors.
62e09 Manufacturer's problems.
62e10 Coverage.
62e11 Investigative techniques.
62e12 Production indicator.
62e13 Homework in the garment industry.
62e14 Homework investigations.
62e15 The contractor: employee or independent contractor?

NOT R PU C DIS ION

62a DEFINITIONS AND THEIR APPLICATION

62a00 Industrial homework defined.

"Industrial homework" means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (*i.e.*, whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

62a01 "In or about a home."

The phrase "in or about a home, apartment, tenement, or room in a residential establishment" has been construed broadly to include any home, apartment, or other dwelling place and surrounding premises, such as yards, garages, barns, sheds, shacks, privy shops, basements, or trailers. Thus, if an individual worker or group of workers is performing work "in or about the home" of one of such workers, they are subject to the recordkeeping requirements for industrial homeworkers in 29 CFR 516.31. Likewise, individual homeworkers working in living quarters (*i.e.*, a room or rooms used not only for production purposes but also for living purposes), although under the direct supervision of an employer or of a responsible supervisor, are subject to the requirements in 29 CFR 516.31. However, employees who work in quarters allocated to and regularly operated solely for production purposes, and who work a regular schedule under essentially similar supervision as maintained in the factory and under such conditions that factory-type records of hours worked are maintained or can readily be maintained in a normal manner, are not considered as being subject to the recordkeeping requirements for industrial homeworkers.

62a02 Clerical-type workers.

(a) The homeworker requirements must be observed for clerical-type workers who perform their duties wholly or principally at home even though such work is merely a part of the administration of the business rather than a part of the employer's product or service. The requirements are also applicable to production workers who perform work at home for the employer on a product or service in which the employer deals. For example, an employee of an envelope-addressing business who addresses envelopes at home for his or her employer's customers would be performing work on the product or service in which the employer deals, and would be subject to all industrial homeworker requirements.

(b) For enforcement purposes, the industrial homeworker requirements are not applicable to clerical-type workers whose duties are performed principally at their employer's place of business, and who only occasionally perform a portion of that work at home. A typical example is a bookkeeper who regularly works in an employer's office keeping business records, but occasionally takes the books home to work on them. In such cases, the employer, even in a restricted industry, will not be required to obtain homework certificates for such employees, or maintain homework handbooks or other special records pertaining to the homework. However, the normal records that the employer is required to maintain must show all hours worked, including those worked at home.

62a03 Operations considered within hosiery industry.

The following operations are part of the hosiery industry and not the embroideries industry or any other restricted industry:

(a) Clocking on hosiery, regardless of whether the homeworkers are employees of the manufacturer of the hosiery or employees of an independent contractor.

(b) Crocheting or knitting the tops of slipper socks that are joined to the bottoms, and decorating or performing any other work on slipper socks.

(c) Making slipper socks from purchased tops and bottoms.

NOT R PU C DIS ION

62b REGULATORY PROVISIONS

62b00 Employment of homeworkers on PCA work.

(a) Homework is not permitted on Walsh-Healey Public Contracts Act (PCA) work except for workers with disabilities employed by a *bona fide* sheltered workshop (SWS), as defined in 29 CFR 525.2 (*see* Part V of Rulings and Interpretations Number 3 (R&I No. 3)).

(b) If other persons are found employed at home on PCA work, include a description of their employment (*e.g.*, the rates, hours, and other conditions of employment) and the extent of their involvement in PCA production in the narrative report (*see* FOH 85c03(c)(8)).

62b01 Industries in which homework is restricted.

(a) In seven industries, 29 CFR 530 restricts homework to individuals with disabilities, and those that cannot adjust to factory work or are required to remain at home to care for an individual with a disability. Such individuals must be certified by the regional office (RO), except for the gloves and mittens industry in the state of New York, unless they are employed under the supervision of an SWS, as defined in 29 CFR 525.2, or a state vocational rehabilitation agency.

(b) The seven industries are:

Name	CFR citation
Women's apparel	29 CFR 530.1(d)
Jewelry manufacturing	29 CFR 530.1(e)
Knitted outerwear	29 CFR 530.1(f)
Gloves and mittens	29 CFR 530.1(g)
Button and buckle manufacturing	29 CFR 530.1(h)
Handkerchief manufacturing	29 CFR 530.1(i)
Embroideries	29 CFR 530.1(j)

These industries are defined in FOH 62b02 -08.

(c) (1) An employer in the *knitted outerwear industry* may also be issued a certificate authorizing the employment of homeworkers in general (*see* 29 CFR 530.4(c)). A knitted outerwear employer who does not obtain such a certificate may not legally employ homeworkers, except under individual certificates (*see* 29 CFR 530.4(a)), and remains subject to the restrictions noted in FOH 62b01(a) and 29 CFR 530.2. A certified knitted outerwear employer may not employ homeworkers who produce items in any of the other six restricted industries (*e.g.*, the embroideries industry), unless individual certificates are obtained for such workers.

(2) All knitted outerwear employers who are issued certificates permitting the employment of home knitters must:

a. comply with all the provisions of the Fair Labor Standards Act (FLSA), including the recordkeeping and child labor provisions;

b. maintain WH-75: Homework Handbook (WH-75), for each homeworker employed; and

NOT FOR PUBLIC DISTRIBUTION

c. notify the Administrator of the Wage and Hour Division (WHD) within 30 days of any change in the address or legal name of the firm.

(3) All processing, approval, denial, revocation, and maintenance of knitted outerwear homework certificates will be administered by the National Office (NO), except as provided in FOH 62b01(a) above. All requests for homework handbooks made by employers in the knitted outerwear industry shall be referred to the NO. The name, address, telephone number (including area code), and investigation history of any knitted outerwear employer requesting information from an RO or district office (DO) shall be immediately referred to the NO, Attention: assistant administrator (AA) for the Office of Policy (OP), FLSA/Child Labor Branch.

(4) The sequence of significant FLSA regulatory actions in the knitted outerwear industry is as follows:

a. Prior to 11/07/1981, homework was restricted to individuals with disabilities who could not adjust to factory work, or individuals who were required to remain at home to care for an individual with a disability.

b. From 11/08/1981 through 05/23/1984, restrictions were lifted, and workers could be legally employed in homework.

c. From 05/24/1984 through 12/04/1984, restrictions were reimposed by courts, and homework was limited to individuals with disabilities who could not adjust to factory work, or individuals who were required to remain at home to care for an individual with a disability.

d. After 12/04/1984, restrictions remain in effect, but employers may be certified to employ homeworkers.

62b02 **<u>Women's apparel industry defined.</u>**

(a) (1) The industry is defined as the production of women's, misses', and juniors' dresses, washable service garments, blouses, and neckwear from woven or purchased knit fabric; women's, misses', children's, and infants' underwear, nightwear, and negligees from woven fabric; corsets and other body-supporting garments from any material; other garments similar to the foregoing; and infants' and children's outerwear.

(2) While garments that are made for use solely by men or boys are clearly not in this industry, there are certain garments such as athletic wear (*e.g.*, track shorts, sweatshirts, warmup suits, etc.) that are worn by both men and women. If no distinction can be made between men's and women's garments, and the sex of the ultimate wearer of the garment is not known at the time of manufacture, the production of such garments is subject to the restrictions of homework in the women's apparel industry.

(b) The definition of the women's apparel industry covers all occupations in the industry that are necessary to the production of the articles specified in the definition, including clerical, maintenance, shipping, and selling occupations. However, such clerical, maintenance, shipping, and selling occupations, when carried on in a wholesaling or selling department

NOT FOR PUBLICATION

physically segregated from other departments of a manufacturing establishment, the greater part of the sales of which wholesaling or selling department are sales of articles that have been purchased for resale, shall not be deemed to be covered by this definition.

(c) Included in definition:

The women's apparel industry is composed of products manufactured from purchased woven or knit fabric, included in the following major branches:

(1) Women's, misses', and juniors' outerwear (Standard Industrial Classification (SIC) 233)

(2) Women's, misses', children's, and infants' undergarments (SIC 234)

(3) Girls', children's, and infants' outerwear (SIC 236)

(d) Also considered to be within the definition:

Among articles also considered to be within the definition of the women's apparel industry, but are not listed in the above SIC codes are skirt-and-skirt ensembles, women's burial dresses, evening gowns, sun dresses, dress shields and shoulder pads as parts of dresses, women's costumes (*e.g.*, masquerade) and costume undergarments, dance costumes, pants sarongs, cotton overalls, softball pants and shirts, girl's gym suits, lined and unlined pedal pushers, housecoats, all types of surgical garments (except athletic supporters and elastic stockings), garters, sanitary belts, and orthopedic body-supporting garments. The list is not necessarily all-inclusive of such articles.

(e) Excluded from definition:

(1) Women's, misses', and juniors' suits, skirts, and coats (SIC 2337)

(2) The manufacture of all bathing suits

62b03 **<u>Jewelry manufacturing industry defined.</u>**

(a) (1) The industry is defined as the manufacturing, processing, or assembling, wholly or partially from any material, of jewelry, commonly or commercially so known. Jewelry as used herein includes, without limitation, religious, school, college, and fraternal insignia; articles of ornament or adornment designed to be worn on apparel or carried on or about the person, including, without limitation, cigar and cigarette cases, holders, and lighters; watch cases; metal mesh bags and metal watch bracelets; and chain, mesh, and parts for use in the manufacture of any of the articles included in this definition. Jewelry, as used in this part, does not include pocket knives, cigar cutters, badges, emblems, military and naval insignia, belt buckles, and handbag and pocketbook frames and clasps, or commercial compacts and vanity cases, *except* when made from or embellished with precious metals or precious, semiprecious, synthetic, or imitation stones, or the assaying, refining, and smelting of base or precious metals.

(2) The term "parts," as used in FOH 62b03(a)(1) above, does not include parts that are used predominantly for products other than jewelry, such as springs, blades, and nail

NOT FOR PUBLICATION

files. The term "commercial compacts and vanity cases," as used, means compact and vanity cases that bear the trade name or mark of a cosmetic manufacturer, and are made for the purpose of distributing or advertising said cosmetics.

(b) The manufacturing, cutting, polishing, encrusting, engraving, and setting of precious, semiprecious, synthetic, and imitation stones.

(c) The manufacturing, drilling, and stringing of pearls, imitation pearls, and beads designed for use in the manufacture of jewelry.

(d) The term "hand-fashioned jewelry," as used in 29 CFR 530.12(b), means articles of jewelry commonly known as genuine Navajo, Pueblo, Hopi, or Zuni handmade jewelry, which in all elements of design, fashioning, and ornamentation are handmade by methods and with the help of only such devices that permit the maker to determine the shape and design of each individual product, *provided* that: silver used in the making of such jewelry shall be of at least 900 fineness, and the turquoise and other stones used shall be genuine stones, uncolored and untreated by artificial means; power machinery is permitted in the production of findings, in the cutting and polishing of stones, in the buffing and polishing of completed products, and in incidental functions (equipment specifically prohibited shall include hand presses, foot presses, drop hammers, and similar equipment); solder may be of less silver content than 900; findings may be mechanically made of any metal by Native Americans or others; and turquoise and other stones may be cut and polished by Native Americans or others without restrictions as to methods or equipment used.

(e) The definition of the jewelry manufacturing industry covers all occupations in the industry that are necessary to the production of the products covered in the definition, including clerical, maintenance, shipping, and selling occupations. However, this definition does not cover employees of a manufacturer, assembler, processor, or independent wholesaler who are engaged exclusively in marketing and distributing products of the industry that have been purchased for resale.

(f) Included in definition:

The jewelry manufacturing industry covers those articles or component parts that are normally produced by the jewelry manufacturing industry as it is commonly or commercially recognized, as well as operations in those establishments whose exclusive major function is that of servicing the industry. The following products are considered to be among those coming within the definition of the jewelry manufacturing industry:

(1) Costume jewelry, including those made from metal, plastics, etc.

(2) Compacts and vanity cases other than commercial compacts and vanity cases

(3) Decorative hat pins adorned with beads or spangles

(4) Combs adorned with beads or imitation stones

(5) Earrings

(6) Lapel pins

NOT FOR PUBLIC DISTRIBUTION

(7) Jewel bearings for industrial use, such as in airplane instruments, electrical instruments, commercial meters, etc.

(8) Industrial jewels

(9) Ornamental key rings

(10) Necklaces and bracelets made of macaroni and lima beans, strung on ribbon, cord, or elastic

(11) School awards (pins and medals) made of precious metals or embellished with precious metals

In addition, this industry covers employees of a jobber or wholesaler who are engaged in mounting on cards and boxing items of jewelry that have been purchased in bulk lots.

(g) Excluded from definition:

(1) The production of pocket knives, cigar cutters, badges, emblems, military and naval insignia, belt buckles, and handbag and pocketbook frames and clasps from metals or plastics, except where the use of precious metals or stones identify them as jewelry-establishment products

(2) Silverware, bronze goods and other gift ware, spectacle cases, and lorgnette and optical frames

(3) Wristwatch straps of leather, fabric, or other materials, except metal

(4) Pens and pencils, including gold, silver, embellished, etc.

(5) The production of flat stock, sheet, wire, or tubing used in jewelry manufacturing from any metal

(6) The manufacture of artificial flowers and feathers designed to be worn on apparel

(7) The manufacture of plastic and ribbon headbands and barrettes, except where embellished with precious metals or precious, semiprecious, synthetic, or imitation stones

62b04 <u>Knitted outwear industry defined.</u>

(a) The knitted outerwear industry is defined as the knitting from any yarn or mixture of yarns, and the further manufacturing, dyeing, or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering that are partially or completely manufactured in the same establishment as that where the knitting process is performed (SIC 2253). The definition also includes the manufacture of bathing suits from any purchased fabric (SIC 2339).

(b) The definition of the knitted outerwear industry includes all occupations in the industry that are necessary to the production of the knitted outerwear articles, including clerical, maintenance, shipping, and selling occupations. However, such clerical, maintenance, shipping, and selling occupations, when performed in a wholesaling or selling department

NOT FOR PUBLIC DISTRIBUTION

physically segregated from other departments of a manufacturing firm, are not included in this definition, if the greater part of the sales made in either of the above departments are of articles that have been purchased for resale, rather than produced by the firm.

(c) Included in the definition:

The knitted outerwear industry includes production of the following products:

(1) Knitted sweaters, jackets, vests, and jerkins (short, close fitting jackets, often sleeveless) of all types for adults and children

(2) Bathing suits, trunks, and beachwear (knitted, woven, and other)

(3) Knitted infants' wear, including sweaters, sacques, caps, toques, hoods, booties, leggings, combination sets, afghans, blankets, and other apparel or covering

(4) Knitted dresses and suits

(5) Knitted neckwear, including scarves, mufflers, collars, and neckties

(6) Knitted headwear, such as tam-o'-shanters, ski hats and masks, and balaclava hoods

(7) Knitted athletic apparel, including ski suits, snow suits, etc.

(8) Knitted novelties of various types, such as doll sweaters, dog sweaters, cuffs, shoulderettes, bed jackets, and knitted hairnets

(9) Knitted coats, sport coats, capes, and shawls

(10) Knitted leg warmers, slippers, slipper socks, and other footwear exclusive of hosiery

(11) Knitted models of any of these items whether they are worn or displayed

(d) Excluded from the definition:

(1) Knitted fabric, as distinguished from garment sections or garments, for sale as such

(2) Fulled suitings, coatings, topcoatings and overcoatings

(3) Garments or garment accessories made from purchased fabric, except bathing suits

(4) Gloves or mittens

(5) Hosiery

(6) Knitted garments or garment accessories for use as underwear, sleeping wear, or negligees

(7) Fleece-lined garments made from knitted fabric containing cotton only or containing any mixture of cotton, and not more than 25 percent, by weight, of wool or animal fiber other than silk

NOT FOR PUBLICATION

(8) Knitted shirts of cotton, or any synthetic fiber or any mixture of such fibers, which have been knitted on machinery of 10-cut or finer (not excluded is the manufacturing, dyeing, or other finishing of knitted shirts made in the same establishment where the knitting process is performed, if such shirts are made wholly or in part of fibers other than those specified above, or if such shirts of any fiber are knitted on machinery coarser than 10-cut)

62b05 Gloves and mittens industry defined.

(a) The industry is defined as the production of gloves and mittens from any material or combination of materials, except athletic gloves and mittens.

(b) The definition of the gloves and mittens industry covers all occupations in the industry that are necessary to the production of the articles specified in the definition. This includes clerical, maintenance, shipping, and selling occupations. However, such clerical, maintenance, shipping, and selling occupations, when carried on in a wholesaling or selling department physically segregated from other departments of a manufacturing establishment, the greater part of the sales of which wholesaling or selling department are sales of articles that have been purchased for resale, shall not be deemed to be covered by this definition.

(c) Included in definition:

The gloves and mittens industry includes the following products:

(1) Leather gloves and mittens (SIC 3151)

(2) Dress and work gloves, except knit and all-leather (SIC 2381)

(3) Knitted gloves and mittens, excluded from (SIC 2381)

(4) Plastic (polyethylene) gloves and mittens (SIC 3079)

(d) Excluded from definition:

(1) Athletic gloves and mittens, such as golf gloves, boxing gloves, baseball mitts and gloves, handball gloves, etc. (SIC 3949)

(2) Rubber gloves and rubberizing of gloves (SIC 3069)

62b06 Button and buckle manufacturing industry defined.

(a) The industry is defined as the manufacture of buttons, buckles, slides, and blanks and parts for such articles from any material, except metal, for use on apparel.

(b) The definition of the button and buckle manufacturing industry covers all occupations in the industry that are necessary to the production of the products covered by the definition, including clerical, maintenance, shipping, and selling occupations.

NOT FOR PUBLIC DISTRIBUTION

(c) Included in definition:

This definition is intended to include the manufacture of all buttons, buckles, parts of buttons and buckles, button blanks and molds from any material, except metal, for use on apparel. The chief materials used in the manufacture of buttons and buckles, as defined, are:

(1) Ocean pearl

(2) Fresh water pearl

(3) Vegetable ivory

(4) Galalith or casein

(5) Various synthetic resins

(6) Cellulose compounds

(7) Horn

(8) Bone

(9) Glass

(10) Agate

(11) Paper

(12) Wood

This list is by no means exhaustive inasmuch as buttons have been made from many other materials, including potatoes, seaweed, and blood. The carding of buttons and buckles is covered by this definition, wherever performed.

(d) Excluded from definition:

(1) Buttons or buckles that are not for use on wearing apparel. In this connection, the term "wearing apparel" is not used in a narrow sense but denotes generally things worn on or about the person, including furs, hats, shoes, or other attire.

(2) Buttons and buckles, or parts thereof, which are made of metal. The fact that metal is used as a component of a button or buckle does not, however, operate to remove the manufacture of that button or buckle from the scope of the button and buckle manufacturing industry. In doubtful cases, the underlying intention favors broad rather than limited coverage and insofar as is possible, the coverage of the definition is not limited with respect to buttons made partly of metal, except in cases where the metal components account for all but a negligible proportion of the total components of the button or buckle in question.

NOT FOR PUBLIC DISTRIBUTION

(3) Covered buttons and buckles

(4) Rubber buttons, buckles, or parts

(5) Zippers, grippers, and snap fasteners of metals or plastics, are not to be considered as buttons or buckles.

(6) The manufacture of basic raw materials for plastic buttons, such as the manufacture of molding powders, casting of standard or special phenolic rods and tubes, etc.

(7) Wholesaling or jobbing of buttons or buckles by firms not connected with the manufacture of buttons or buckles. If, however, any employees of so-called wholesalers or jobbers are engaged in carding buttons or buckles, or in any other work necessary or incidental to the production of buttons or buckles, the definition of the button and buckle manufacturing industry is to be construed as applicable.

62b07 <u>Handkerchief manufacturing industry defined.</u>

(a) The industry is defined as the manufacture of men's, women's, and children's handkerchiefs, plain or ornamented, from any materials.

(b) Included in definition:

(1) The industry includes all operations necessary to the production of handkerchiefs, such as cutting, tearing, sewing, hemming, embellishing, pressing, examining, boxing, and packing.

(2) Embroidery operations on handkerchiefs are included only when performed by a handkerchief manufacturer or handkerchief contractor on his or her own products.

(c) Excluded from definition:

(1) Embroidery operations on handkerchiefs when performed by an embroidery establishment on a contract basis, even though the latter may be engaged exclusively in ornamenting handkerchiefs, are within the scope of the embroideries industry (*see* 29 CFR 530.1(c)).

(2) The employees of an independent wholesale establishment engaged exclusively in the marketing and distributing of articles purchased for resale, even though they may perform pressing, folding, boxing, and packaging operations

(3) The manufacture of handkerchiefs containing paper as a basic component

62b08 <u>Embroideries industry defined.</u>

(a) The industry is defined as the production of all kinds of hand and machine-made embroideries and ornamental stitchings, including but not limited to, tucking, shirring, smocking, hemstitching, hand rolling, fagoting, Bonnez embroidery, appliqueing, crochet beading, hand drawing, machine drawing, rhinestone trimming, sequin trimming, spangle trimming, eyelets, passementerie, pleating, the application of rhinestones and nailheads, stamping and perforating of designs, Schifli embroidery and laces, burnt-out laces and

NOT FOR PUBLIC DISTRIBUTION

velvets, Swiss hand machine embroidery, thread splitting, embroidery thread cutting, scallop cutting, making up lace, making up embroidered yard goods, straight cutting of embroidery and cutting out of embroidery, embroidery trimmings, bindings (not made in textile establishments), pipings, and emblems, *provided* that:

(1) the foregoing when produced or performed by a manufacturer of a garment, fabric, or other article; and

(2) the manufacture of covered buttons and buckles;

shall not be included.

(b) The definition of the embroideries industry covers all occupations in the industry that are necessary to the production of the articles specified in the definition, including clerical, maintenance, shipping, and selling occupations.

(c) Included in definition:

This industry is constantly creating new designs and intricacies of embellishment. For this reason, the qualifying descriptions of processes or operations are merely illustrative and are not intended to limit the scope of the definition.

The embroideries industry produces primarily for manufacturers of apparel and apparel accessories, but it also serves producers of shoes, handbags, art linens, upholstered furniture, draperies, curtains, and similar articles. In addition, the following processes and products not specifically mentioned in the definition are among those that have been deemed to be covered by the embroideries industry when not performed or produced by manufacturers of the articles on which the embroidery is utilized:

(1) The application of braid to soldier caps

(2) Chenille letters

(3) Chevrons and emblems

(4) Crocheting of fur coat and fur scarf snappers and fasteners

(5) Crocheting performed on garments or other articles

(6) Embroidering of clocks on hosiery

(7) Flocking of monograms on shirts and other wearing apparel

(8) Lettering on garments, towels, etc.

(9) Military and naval insignia

(10) Motifs or monograms for decoration of military, fraternal, or other apparel, caps, or other articles

(11) Pompons

NOT FOR PUBLICATION

(12) Rosebuds or rosettes

(13) Stenciling of emblems

(14) Tassels

(d) Excluded from definition:

(1) Embroideries produced by a manufacturer of a garment, fabric, or other article for use on such garment, fabric, or other article are *not* covered by the definition of the embroideries industry. If, by way of illustration, a manufacturer of handkerchiefs or of infants' and children's outerwear has embroidery performed on his or her own products, the embroidery work done by his or her employees is not covered by the embroideries industry definition but by the handkerchief industry or women's apparel industry. If, however, the embroidery on these same articles is performed by a manufacturer or contractor of embroideries, the production is included under the embroideries industry definition.

(2) Woven bindings produced by textile establishments

(3) The manufacture of covered buttons and buckles

(4) The manufacture of lace

NOT R PU C DIS

NOT R PU C DIS ION

62c INVESTIGATION PROCEDURE

62c00 Check for homework certificates.

(a) When homeworkers are performing work in a restricted industry, the Wage and Hour Investigator (WHI) shall examine the employer's records to determine if a Special Industrial Homeworker's Certificate is on file for each homeworker, or, in the case of the knitted outerwear industry, whether the employer was issued a certificate to employ homeworkers. The latter certificate is in the form of a letter addressed to the employer. The effective and expiration dates of the Special Industrial Homeworker's Certificate appear on the face of the certificate. Knitted outerwear certificates are effective on the date of the letter and have no expiration date. If the employer has a certificate(s), the WHI shall proceed as in any other homeworker investigation.

(b) If the firm lacks a certificate permitting the employment of homeworkers in a restricted industry, the WHI should immediately inform the employer that this is a violation of the restriction in 29 CFR 530.2. If eligible for certification, the employer should be informed of the requirements and procedures for obtaining a certificate, or be referred to the RO, where necessary. If not, the firm should be advised to cease employing homeworkers in the restricted industry.

(c) When a firm is found to have employed homeworkers in violation of the restrictions in 29 CFR 530.2, the WHI should gather all the facts of the situation, including the employer's reasons for employing homeworkers. All such cases will be developed for potential litigation and handled in accordance with regional joint review committee (JRC) procedures. [redacted]
(b) (7)(E)
[redacted]

62c01 Employer recordkeeping requirements.

(a) In addition to the records required of all employers who have employees subject to the minimum wage requirements, including a record of daily and weekly hours worked (*see* 29 CFR 516.2), an employer of homeworkers must:

(1) maintain homeworker handbooks for each homeworker, as required by 29 CFR 516.31;

(2) distribute such handbooks to each homeworker employed;

(3) assure that the required entries are made in the handbooks by the employer or a representative acting on behalf of the employer;

(4) see that the handbook remains in the possession of the homeworker until such time as the handbook is filled, or the homeworker is no longer employed; and

(5) retain filled handbooks and those of former homeworkers for the required 2-year period.

(b) In addition, the employer of homeworkers in a restricted industry must retain copies of all certificates permitting homework in that industry for a period of 3 years.

NOT RELEASABLE

62c02 Plant investigation.

During the plant investigation, the WHI should note the entire sequence of operations in order to understand the processes involved and basis of the rates paid to the factory employees and homeworkers. He or she shall ascertain whether a separate payroll is maintained for homeworkers, who makes entries in the homeworkers' handbooks and when, what records are maintained of time tests or other measures of the employee's speed, and type of control over the quantity of goods given to, and returned by, the homeworker.

62c03 Examination of records.

(b) (7)(E) [redacted]

62c04 Production records.

(a) The WHI shall check the production records for the same or similar operation performed in the plant, and compare those records with the records of production by the homeworkers to determine:

(1) any difference in piece rates,

(2) differences in the amount produced per hour between plant workers and homeworkers, and

(3) any changes of rates or types of work.

62c05 Hidden homework.

(a) Where the employer is suspected of having hidden homework performed, after the WHI has ascertained the sequence of production within the plant, operations likely to be performed by homeworkers, and seasonality of production that may affect the rise and fall of such operations, he or she should search for the record of payments made to homeworkers. (b) (7) (E) [redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

62c06 Information to be sought in homeworker interviews.

(a) When interviewing homeworkers, special attention should be given to:

(1) the types of work performed;

(2) the time required by each type of work;

(3) travel and waiting time;

(4) expenses of the homeworker, such as carfare to and from the employer's establishment;

(5) charges for delivery of materials, charges for materials, and charges for spoilage;

(6) helpers on the work, especially children;

(7) the amount of the homeworker's experience as an indication of his or her probable skill in the work;

(8) number of units of work completed per hour;

(9) number of hours worked usually each week;

(10) the amount of money usually earned each week; and

(11) time and manner of getting work from the employer.

(b) Often a homeworker is not fully aware of either his or her average hourly rate or his or her average weekly hours. In order to get an accurate reconstruction of the hours, it is necessary to ascertain the operations involved to be sure that all operations are included. For example, a fringer on scarfs may estimate his or her fringing time and omit all of his or her time consumed in folding and sorting the scarfs.

62c07 **Home interviews.**

If there is reason to believe that children, relatives, or neighbors have assisted any of the homeworkers, the homeworkers should be interviewed in their homes. Where practicable, the interviews should be outside of school hours when children are most likely to be found working. By surveying the room in which the homework is performed, it sometimes is possible to tell how many persons in the household do the homework. Information as to the amount of money earned may also give some clue.

62c08 **Children who assist homeworker.**

(a) If children assist the homeworker, ascertain:

(1) the number,

(2) their birth dates,

(3) the work they do, and

(4) the dates or time they have worked.

62c09 **Employer's knowledge of child labor.**

(a) Although an employer is responsible for the conditions under which his or her product is manufactured or processed, it is necessary for the successful prosecution of a child homework case to prove some knowledge on the part of the employer or his or her agent that underage minors were assisting in some way on the industrial homework that he or she is distributing.
(b) (7)(E) [redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]

62c10 **Production time studies.**

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

62c11 **Employer asserts work performed by independent contractors.**

(a) If the employer asserts his or her outside work is performed by independent business men and women who independently contract with him or her to do the work, the WHI shall obtain information concerning the employer-employee relationship. The following are some of the factors that should be considered:

(1) Does the employer have the right to control the manner of the performance of the work, or the time in which the work is to be done?

(2) Is the employer paying taxes for social security, unemployment, or worker's compensation insurance?

(3) Has the homeworker ever collected any benefits, such as unemployment or worker's compensation insurance?

(4) Does the employer furnish the material, or finance directly or indirectly the purchase of the material that the homeworker uses?

(5) When did the practice of buying and selling between the employer and homeworker begin?

(6) Does the homeworker bill the employer for the work done? Are bills of sale prepared? Are sales taxes paid, or are state or local exemptions obtained because of retail purposes? Are payments made in cash or by check?

(7) How does the homeworker's profit under the buying-selling arrangement compare with his or her wages as a homeworker?

(8) Who does the homeworker consider to be the employer?

(9) Does the homeworker have a state certificate to do homework?

62c12 Employer asserts distributor is employer.

(a) If the employer asserts the distributor or agent is the employer of the homeworker, the WHI shall:

(1) examine and copy any written agreement or contract between the employer and distributor or agent; and

(2) if there is no written agreement or contract, obtain independently signed statements from the employer and distributor or agent as to the provisions of any existing oral agreement or contract.

62c13 Homeworker leads.

[redacted] (b) (7)(E) [redacted]

[redacted]

62c14 Special instructions for investigations of firms in the knitted outerwear industry.

[redacted] (b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

  [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) (7)(E)

[redacted]

PUBLIC

N PUB C IS

62d SPECIAL PROCEDURES

62d00 Interview of homeworker concerning certificate application.

(a) Where the region is unable to determine, from the application for a homeworker certificate, and from the facts otherwise available or readily obtained, whether the certificate may be approved, the homeworker shall be interviewed, preferably in his or her home. [redacted]

(b) (7)(E)

[redacted]

[redacted]

PUBLIC

N PUB C IS

62e GARMENT INDUSTRY PRACTICES AND INVESTIGATION CONSIDERATIONS

62e00 General.

The garment industry, as typified by the traditional sweatshop image of the homeworker and his or her shopping bags full of piece goods, continues to be a source of FLSA violations. The industry has a terminology and method of operation all its own. This section incorporates definitions of terms used in the industry, explanations of industry practices, investigative techniques, homework methodology, litigation procedures, and other information pertinent to investigations of employers in the garment industry. Where possible, examples are illustrated with regional reference in order to provide the broadest possible basis for understanding the industry and its problems, and what can be done to affect compliance.

62e01 Employer organizations.

There are various employer organizations in the garment industry who, together with state and federal assistance, are working to eradicate illegal practices within their industry. Their efforts to date consist of producing and distributing educational pamphlets and conducting seminars regarding the application of state and federal labor laws. Such organizations could prove fruitful in helping to eradicate illegal practices, and contacts with them should be made at the local level.

62e02 Labor organizations.

There are various unions and labor organizations throughout the community that deal primarily with employees in the garment industry. Union representatives, such as shop stewards, should be contacted when investigating union shops. Also, these organizations could assist in providing names of known labor law violators within the garment industry.

62e03 Definitions.

(a) Manufacturer or jobber

(1) An individual or company that designs and supplies material, often pre-cut, to a contract shop to be sewn. They set the price of the garments, delivery dates, and quality control standards. They will often distribute the goods to the contractor and/or pick them up after completion. They may send a quality control representative or production manager to the contractor's shop during the production run to check on the garments. Although called manufacturer, usually only a few sample garments are actually sewn in the manufacturer's shop. The actual production work is normally done by contract garment shops.

(2) East coast manufacturers are often known simply as "Seventh Avenue" or "Uptown." These manufacturers generally supply cut goods to independent trucking firms for delivery to the contract shops.

(3) Manufacturers are primarily concerned with the quality of the finished goods and timeliness of delivery to the retailer. Garments are perishable due to the seasonal nature of the fashion industry, especially in the ladies' garment industry. Delivery to a retailer 1 or 2 weeks late can result in the retailer refusing to accept or pay for the entire lot.

N PUB O IS

(b) Contract garment shop

A physical location where garments are sewn together, tagged, labeled, placed on hangers, and/or bagged for return to the manufacturer as finished goods. This can be the so-called "sweatshop." The average lifespan of a contract garment shop is often very short when compared to other types of businesses.

(c) Contractor

(1) The person who owns or runs the contract garment shop. A contractor, however, may have no physical place of business other than his or her home and a vehicle to transport goods from a manufacturer to any number of seamstresses working in their own homes (*i.e.*, homeworkers).

(2) A few contractors sew garments of their own design and are manufacturers as defined above. A contractor may be a sole proprietorship, a partnership, or a corporation, and may have a large factory with many workers, or have only a worn-out automobile and a handful of family members working out of their homes. A contractor can go in and out of business very easily, especially when he or she has few physical assets and little capital invested in the business. The ease of moving in and out of business should be kept in mind during any investigation and especially during negotiations for payment of back wages.

(d) Garment shop employees (common Spanish translations are noted)

(1) *Owner and/or boss (patron or patrona (f), or dueno (m) (Florida))*

The contractor or contract shop owner.

(2) *Floor lady, - man and/or forelady, - man (mayordomo or mayordoma (f) (west coast), or florlady (Florida))*

The person second in charge after the owner. He or she hands out the work, sets the prices and piece rates, supervises, and often hires, fires, and trains employees. He or she is often the only person in the shop who speaks both English and the language of the workers. He or she is usually salaried and has to be at the shop during the entire workweek, so overtime hours and exempt status under 29 CFR 541 should be explored. He or she may be the owner or the spouse of the owner but may not readily admit it.

(3) *Operator, single needle operator, and/or Singer operator (operador, operadora, una aguja (de aguja sola, aguja sencilla))*

The majority of sewers operate single needle machines, which are industrial versions of the standard sewing machine. These employees may have to buy their own needles, bobbin cases and feeders, and/or scissors. Homeworkers will have an industrial machine, usually single needle, in their home. Operators are usually paid on a piece rate, although new employees and trainees may be paid by the hour.

NOT PUBLIC IS

(4) *Merrow (safety-stitch), and/or overlock (lock-stitch) (oberlok (west coast) machine operator)*

A worker who uses these multiple needle and/or thread machines for seam finishing stitches. 10 to 30 percent of the machines in a shop are of this type. These machines run faster than the Singer-type machines. Their operators usually insist on being paid by the piece, and usually earn more than the single needle machine operators.

(5) *Blindstitch (hemming) operator (dobledilladora (f))*

Another special stitch machine operator, usually paid piece rates.

(6) *Buttonholer (ojalera (f)) and/or buttoner (botonera (f))*

These workers use special machines to perform these operations and are often paid an hourly rate, usually not much more than the minimum wage. These workers may do evening or Saturday work since they have to wait for other workers to finish.

(7) *Presser (parensador (m) and/or planchador (m))*

The presser usually operates the larger Hoffman-type pressing machines as seen in dry-cleaning stores. On the east coast, these Hoffman pressers are nearly always men, and are paid on a piece rate. Women pressers usually use hand irons. Pressers often work late or on weekends, but start later in the day so overtime is uncommon, unless the firm is short-handed.

(8) *Sorter, "assorter," and/or bundler (asortador, asortadora (f), and/or bandeador, bandeadora (f))*

He or she sorts and distributes the cut goods from the manufacturers, if this work is not done by the floor lady or foreman. He or she cuts the goods if uncut bolts are delivered to the contractor. They can be paid hourly or on a piece rate.

(9) *Trimmer and/or finisher (triniadora (f))*

An employee who cuts the loose threads off the finished garment with a trimming scissor. These employees can be paid by the piece or hourly. They are often older, slower, or unskilled workers who cannot perform any other operation in the shop.

(10) *Hanger and/or bagger*

This employee hangs up the garments and puts them in plastic bags. These employees can be paid by the piece or hourly.

(11) *Floorworkers (piso)*

The above three jobs, sorter, trimmer, hanger, are sometimes considered as one in the shop, and the employee(s) doing those tasks are called floorworkers. These employees may be paid by the hour.

(e) Garment shop terminology

(1) *Lot or cut*

A shipping unit of garments, usually of the same style, pre-cut by the manufacturer, and shipped to a contractor under a single invoice number or letter. Colors and garment sizes vary within the lot. Lots can be of any size from a few hundred to a few thousand garments.

(2) *Bundle*

A group of garments cut from the same bolt of goods, hence of one color but varying sizes, usually to be sewn by an individual operator.

(3) *Sections, section work*

Often, each operator will sew only one part, or section, of the garment, such as the collar, sleeve, or cuff. These smaller sections may be given to homeworkers to sew. Section work is more common in shops working on staples (*i.e.*, items that don't have many fashion changes, such as T-shirts, underwear, and sportswear).

(4) *Tickets*

These tags are the contractor's identification of garments by size and style number, for pay purposes and inventory control. The sewer normally retains a piece of the ticket for each garment, group of garments, or sections sewn, to be turned in for piece rate payment. The appropriate piece rate may be printed on the ticket.

(5) *Repair work or makeup work*

Re-sewing of garments already worked on by an operator, usually after the garments have already been ticketed and paid for.

62e04 <u>Industry practices.</u>

(a) Pay; piece rate

The amount paid to an employee for a given operation, such as sewing on a sleeve, putting in a zipper, or even sewing a complete garment. Piece rates are generally universal for each operation within a lot. It is possible for certain garments or sections to be subject to percentages or surcharges on top of the regular piece rate.

(b) Deductions

It is common for no deductions to be taken from employees' pay.

(c) Amounts paid on a given payday may be for more than 1 week due to failure of the employee to make the required minimum, or simply due to a pieceworker holding back tickets for 2 or more weeks. Some workers save some of their tickets in order to gain a large payday just before some special date, such as a child's birthday, etc.

PUBLIC IS

(d) Minimum wage or overtime violations may result from repair work on rejected garments. Workers normally correct their own mistakes without receiving additional pay.

(e) (b) (7)(E) [redacted]

(f) Homeworkers may not be paid at regular intervals or even on the same day of the week each time.

(g) (b) (7)(E) [redacted]

(h) Trimmers, hangers, baggers, and the like may be paid as a group in the shop, splitting the total pay equally among the group.

62e05 **Hours.**

(a) Pieceworkers often work through lunch or take less time than hourly employees, especially when the shop is behind schedule.

(b) The floor lady will often punch timecards for all the workers in the shop. These timecards rarely reflect the actual hours worked.

(c) The owner may require new employees to punch out early and keep working if they have not met the minimum wage based on the piece rate.

(d) Workers may be sent to a friend or relative's shop at the end of their shift to avoid overtime.

(e) Pieceworkers may perform preliminary work (*e.g.*, oiling their machines, threading their machines, counting piecework tickets, or setting up their piece goods) prior to actual starting time; this is generally not counted as hours of work.

62e06 **Records.**

(a) Neither the employee nor employer has any incentive to keep accurate time records when employees are paid a piece rate.

(b) Accountants often are unwilling to give up records or spend time with a WHI since garment contractors often pay them on a fixed-fee basis, as opposed to paying by the hour.

(c) (b) (7)(E) [redacted]

NON PUBLIC IS

(d) Illegal aliens may use names that match the SSNs they are using, and then switch to their real names when they succeed in getting their own SSNs. Check the accuracy of their recorded starting date through interviews.

(e) (b) (7)(E) [redacted]

62e07 **Contractor problems.**

(a) Contractors frequently fail to pay illegal alien workers and threaten to report them to Immigration and Naturalization Services (INS) authorities if they complain. This is usually due, in part, to the poor cash flow situation of most contractors. This may give you an indication of their ability to pay a back wage liability.

(b) Contractors are often not paid by the manufacturer due to the poor quality and/or late delivery of their lots. Most contractors cannot absorb labor costs on these lots so the employees will normally receive no pay for their work on them. The initial conference is a good place to find out if the contractor has been left with unpaid work.

(c) Contractors are basically at the mercy of manufacturers who may threaten to send their goods to other ethnic groups or other countries if the contractor will not work for the price set by the manufacturer. This piece price is often artificially low and is often the same or lower than the price paid for the same or similar garments in years past.

(d) Contractors often close their operation only to resurface with a new location a few days or weeks later. The employees of these contractors may move with the business.

(e) The industry is seasonal. There is a 3-week cycle for completion of goods. When the retailer orders late in the season, the pressure increases for the jobber and leaves less lag time for the contractor to finish the lot without working his or her people overtime. No additional pay normally accrues to the contractor for these short-completion orders, so he or she will often be unable or unwilling to pay proper overtime for the work.

62e08 **Employees or independent contractors**

(a) Sometimes manufacturers will set up employees or friends as contractors. Check the independent contractor status very carefully.

(1) *Legal status*

Does the independent contractor have his or her own business license with the city? Does he or she have an IRS and state employment number?

(2) *Business expenses*

Who pays the contractor's building rental, utilities, equipment rental, insurance, materials, and transportation of goods?

(3) *Control*

a. Is there a written or oral contract about working conditions between the contractor and manufacturer?

b. Does the manufacturer control the hours or other employment practices? Does the manufacturer provide employees when the work is not being completed on time?

c. Does the manufacturer's representative teach the contractor's employees how to sew new styles?

d. Who does repair work and where?

e. Do the contractor's employees ever work at the manufacturer's establishment?

62e09 **Manufacturer's problems.**

(a) Contractors rarely have much cash. The biggest area for cost-cutting is labor.

(b) They often have poor and/or falsified records.

(c) Contractors' prices have not increased at a rate near the inflation rate and labor (*i.e.*, minimum wage) increased over the past 5 to 10 years.

62e10 **Coverage.**

(a) **Traditional (individual)**

(1) Production of goods for interstate commerce

(2) *Purchase of raw materials*

a. Suppliers (out-of-state)

b. Receiving goods

1. Invoices

2. Accounts payable

(3) *Sale of goods*

a. Buyers (out-of-state)

b. Distributors (out-of-state)

1. Sales records

2. Contractors

NPUB CIS

3. Accounts receivable

(4) Get the following information from lot or cutting tickets:

a. Name of manufacturer

b. Address

c. Telephone number

Check labels on garments for retailers.

(5) If necessary (and upon concurrence of the DD or instructions from JRC), call or go to manufacturer to document coverage by looking at invoices for a representative period.

(6) Obtain names and addresses of manufacturers that utilize the contractor. This information may be provided by the contractor and/or from information obtained from contractors, labels on garments, etc.

(7) Obtain the name and address of the cutting service, if one is used by the contractor or manufacturer.

(8) Scrutinize the business practices of the contractor and manufacturer(s) to determine status of employment relationship.

(b) Enterprise

(1) Annual dollar volume (ADV) test requirement: two or more employees handling, selling, or otherwise working on goods produced for or moved in interstate commerce.

(2) *Contractor and/or manufacturer with one or more establishment and/or branch*

In most instances, the ADV is not met or is not made available by the contractor, or the contractor may not provide the true ADV of the enterprise.

62e11 <u>Investigative techniques.</u>

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]

- (b) (7)(E) [redacted]

[redacted]

- [redacted]

62e12 **Production indicator.**

(a) One very good investigative technique is to compare the capacity of a factory with its recent production records. The general rule of thumb is that one single needle sewing machine can produce approximately 15 garments in a normal 8-hour day or 75 garments in a normal 40-hour week. For example, a factory with 10 machines that has production records showing 1,200 to 1,500 garments per week would indicate the need for further investigation. There are at least four possible reasons for the high production rate per machine, as follows:

(1) The factory is making very simple garments that can be made at a high rate of speed.

(2) The factory has a workforce of extremely fast operators who have developed an ability to make the particular garment faster than normal (possibly due to making the same garment type for long periods of time). The WHI can use time studies to confirm or deny possibilities in FOH 62e12(a)(1) and FOH 62e12(a)(2).

(3) The factory is working long days and/or weekends to increase production.

(4) The factory is allowing work to be done at home by full-time homeworkers or regular employees who work at home during evenings or weekends.

62e13 **Homework in the garment industry.**

(a) Homeworkers often work at home because:

(1) they have small children to care for,

(2) the contractor has no more room in the factory,

(3) regular employees want to augment their income by taking work home after hours,

(4) regular employees need to be at home for personal reasons at various times,

(5) women of certain ethnic groups are expected to stay at home all day,

(6) there are no travel expenses,

(7) cash wages are paid with no deductions and no record of payment, and/or

(8) the worker can collect unemployment and welfare assistance simultaneously.

(b) Disadvantages of homework to the homeworker are:

(1) Space taken up in the home

(2) Earning potential is not as great due to interruptions

(3) Insufficient earnings to get out and look for another job (*i.e.*, can't wait for 1-week lag)

(4) Lower piece rates than factory workers because the contractor knows the homeworker cannot get out of his or her current situation

(5) Work is not steady (*i.e.*, may depend entirely on factory surplus)

(6) Homeworkers are at a disadvantage when bargaining for price

(7) Employment is irregular since long-term contractors do not use homeworkers because of the disadvantages to their operations

(c) Advantages of homework to the contractor are:

(1) Less overhead with respect to payroll taxes since homeworkers are considered independent contractors

(2) Less overhead with regard to machine rental, building rent, utilities, maintenance, etc.

(3) Contractor can use homeworker for surplus or emergency work

(d) Disadvantages of homework to the contractor are:

(1) No quality control during progress of work

(2) No guarantee that work will be completed timely

(3) No way to switch work to other employees when necessary

(4) Garments get lost, dirty, etc.

(e) **Practices resulting in minimum wage and overtime violations for homeworkers**

(1) Employees may be required to buy or rent their own machine.

(2) Employees may be required to transport goods to and from the factory.

N PUB C IS

(3) Employees may provide needles, scissors, and other items required to produce garments.

(4) Non-payment of hours worked by family members, especially children.

(5) No pay records (*e.g.*, paid in cash or from separate general check register).

(6) Non-payment for work rejected by the contractor.

62e14 **Homework investigations.**

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]

(b) (7)(E) [redacted]

[redacted]

62e15 <u>The contractor: employee or independent contractor?</u>

(a) Sometimes manufacturers will set up employees or friends as contractors. It is wise to check their independent contractor status very carefully.

(b) Legal status

(1) Does the contractor have a business license with the city, county, etc.?

(2) Does the contractor have an IRS employer number?

(3) Does the contractor have a state employer number?

(c) Business expenses

(1) What was the contractor's original capital investment?

(2) Who owns or rents the workplace? Who pays taxes on it?

(3) Who rents or owns the machines?

(4) Who pays for gas, electricity, telephone, water, and/or insurance?

(5) Who pays for thread and needles?

(6) Who pays for transportation of the garments (both directions)?

(7) Does contractor get loans or aid from manufacturer?

(d) Lots of garments

(1) Does the contractor determine the lots he or she will accept?

(2) Does the contractor do work for any other manufacturer?

(3) Does the contractor have to follow special instructions on the sewing?

(4) Does the manufacturer control the time of delivery?

(5) Does the manufacturer inspect garments at contractor's establishment?

(6) Who determines price to be paid for garments?

NON PUBLIC

(7) Does the contractor have to pay kickbacks to the manufacturer if he or she works on other manufacturers' lot? If the manufacturer is the employer, he or she may not want the contractor to work for other manufacturers.

(e) Control

(1) Is there any contract, written or oral, about conditions?

(2) Does the manufacturer restrict or control employee's hours, rate of pay, and/or hire?

(3) When the contractor gets a new style, who teaches the workers how to do it, floor lady or manufacturer's production manager?

(4) Has the manufacturer ever paid contractor's payroll if the contractor could not make it?

(5) Is there any interchange of employees? Does the manufacturer send employees to the contractor?

(6) Who does the repair work and where? Does the contractor do any at the manufacturer's firm?

(7) Is the contractor paid in cash or check? Is the check for him or her, or for the lot? How frequently is he or she paid (*i.e.*, weekly or only after the goods are delivered)?

(f) Is there an opportunity for profit or loss? What determines it? Indicate if solely derived from labor.

N PUB C IS

Chapter 63

LEARNERS

Table of Contents

63a PROCEDURE

63a00 Regular investigation procedure applicable.
63a01 Learner investigations under the FLSA and the PCA.
63a02 Incidental work in occupations closely related to learner occupations.
63a03 Posting and recordkeeping.
63a04 Number of learners.
63a05 Application of certificate percentage.
63a06 Change in operations after a certificate is issued.
63a07 Expiration of certificate.
63a08 Concurrent expansion certificate.
63a09 Excessive number of learners.
63a10 Subminimum wage rate.
63a11 Length of learning period.
63a12 Crediting of experience.
63a13 Availability of experienced workers.
63a14 "Experienced workers available" defined.
63a15 Learner occupation titles.
63a16 Employer subject to more than one industry regulation.
63a17 "Minimum acceptable skill" defined.

63b LEARNER VIOLATIONS

63b00 Periods to be considered in determining violations.
63b01 Establishment of violation.
63b02 Support of information regarding availability of experienced workers.
63b03 Employer to be given benefit of doubt.
63b04 Workers hired as learners before the issuance of a certificate or after its expiration.
63b05 Completion of training period after expiration of certificate.
63b06 Violations not meeting potential litigation criteria.

63c LEARNER POTENTIAL LITIGATION INVESTIGATIONS

63c00 Purpose of criteria for determining potential litigation in learner investigations.
63c01 Fraud in the application for, or procurement of, a learner certificate.
63c02 Prior violations.
63c03 Authorized number of learners exceeded.
63c04 Employment of experienced workers as learners at subminimum wage rates.
63c05 Employment of learners at subminimum wage rates beyond the period permitted by the certificate.
63c06 Employment of learners in occupations not authorized by the certificate.
63c07 Payment at less than authorized rates.
63c08 Hiring of learners when experienced workers are available.

63c09 Combination of learner violations with other FLSA violations.
63c10 Development of violations meeting potential litigation criteria.

63d AUTHORIZED LEARNER OCCUPATIONS

63d00 Apparel industry.
63d0l Knitted wear industry.
63d02 Glove industry.
63d03 Hosiery industry, seamless branch.
63d04 Hosiery industry, full-fashioned branch.
63d05 (Reserved.)
63d06 Cigar industry.

N

63a PROCEDURE

63a00 Regular investigation procedure applicable.

(a) The investigation procedure set forth in FOH 50, FOH 51, FOH 52, and FOH 53 shall be followed in making investigations that involve learners. This means that the Wage and Hour Investigator (WHI) needs to concern himself or herself with only a sufficient and representative number of learners necessary to determine whether the employer is complying with the terms of the learner certificate and the recordkeeping regulations as they apply to learners. Where violations are found, they shall be fully developed and proved.

(b) Learner investigation report, WH-321, shall be prepared in duplicate. The original WH-321 is to be sent under separate cover to the National Office (NO). The copy should be retained in the investigation file.

63a01 Learner investigations under the FLSA and the PCA.

In making concurrent Fair Labor Standards Act (FLSA) and Walsh-Healey Public Contracts Act (PCA) investigations in which learners are employed under both acts, and the terms of learner employment authorized under the two acts are different, compliance with the PCA must be determined on the basis of the wage determinations applicable to the contract being investigated, whereas compliance with the FLSA must be determined on the basis of the terms and conditions set forth in the learner certificate or certificates that authorize subminimum wages during the period covered by the investigation. Compliance with either an applicable wage determination or a learner certificate does not relieve an employer of the obligation to comply with any higher standards that may apply under the other.

63a02 Incidental work in occupations closely related to learner occupations.

(a) Where incidental work is performed in occupations closely related to authorized learner occupations, and the incidental work is only an insubstantial portion of the learner's time (*i.e.*, less than 10 percent), the incidental work may be paid at the learner's authorized subminimum wage rate, provided the hours so worked are charged to the authorized learning period. For example, if a learner is employed in the authorized learning occupation of sewing machine operator and performs incidentally to such work an insubstantial amount of trimming, the hours spent in trimming may be paid at the authorized subminimum wage rate provided they are counted in the 320-hour authorized learning period for sewing machine operating. Where more than 10 percent of the learner's time is spent in trimming, the learner is entitled to receive at least the applicable statutory minimum wage for all hours worked in trimming, and the applicable learner rate for all hours worked in the authorized learner occupation.

(b) Where the closely related incidental work is an integral part of the authorized occupation, as may be found in some team pressing occupations (*see* FOH 63d00(c)), learner rates would be permissible for all hours worked by the learner, provided such hours are charged to the authorized learning period.

63a03 Posting and recordkeeping.

(a) The employer shall have a copy of the learner certificate posted conspicuously in a place in the establishment where the employees can readily see it. If the employer has a pending

application for authority to employ learners, a Notice of Application shall be posted conspicuously in a place in the establishment where the employees can readily see it.

(b) The employer's payroll records shall list learners separately and designate each learner as a learner. If records are kept by departments and learners in each department are designated and segregated on the records, the employer is deemed to have complied with this requirement.

(c) The employer shall have on file for each worker employed as a learner, a signed statement that sets forth the experience the worker has had within the qualifying period for such experience, as determined by the applicable industry regulations.

(d) The employer's files shall contain a duplicate copy of the application for the employment of learners submitted by him or her. Particular note shall be made of the representations of the employer in the application. Annulment proceedings may be based upon his or her knowing misrepresentations of the facts required by the application form (*see* FOH 63c01).

63a04 Number of learners.

(a) The WHI shall count the number of learners whose names appear on the payroll records as having been employed in each workweek. Where the employer has failed to record as a learner the name of any worker so employed, the worker shall be added to those found on the payroll record in making this count. If the number of learners whose names appear on the payroll record in any workweek is less than, or equal to, the number authorized by the certificate, it shall be deemed that the terms of the certificate have been met. If the number on the payroll exceeds the number authorized by the certificate, the total number of man-hours of learner employment in that workweek shall be added. If this number is less than, or equal to, the product of the number of learners authorized multiplied by the number of hours of the regular workweek for the establishment, it likewise shall be deemed that the terms of the certificate have been met. However, in rare instances, such as the employment of a relatively large number of learners for a workweek substantially less than is the case for experienced workers, the WHI may find this test not to be adequate and may proceed to the determination set forth in FOH 63a04(b).

(b) If, after having made both these tests, it still appears that an excessive number of learners has been employed, it will be necessary for the WHI to determine the exact number of learners employed each day and the number authorized.

63a05 Application of certificate percentage.

Learner certificates frequently provide for the employment of a percentage of the total number of productive factory workers employed. Productive factory workers consist of all employees on the payroll, including learners and excluding homeworkers and those employees engaged in clerical, sales, and primarily supervisory capacities. When the percentage is applied, the employer shall be given the benefit of any fractional learner allowance.

63a06 Change in operations after a certificate is issued.

Learner certificates are issued on an establishment basis. Instances may arise in which the name or ownership of an establishment, or the products manufactured, change after issuance

of a learner certificate. The certificate will continue to apply under its original terms and conditions to the successor employer or for the new products, provided the location of the establishment remains the same and the products manufactured continue to be within the scope of the industry for which the certificate was originally issued. Thus, a certificate issued to an employer for the manufacture of separate trousers would continue to be valid for a successor at the same location, even though the establishment's product changed, for example, from separate trousers to dresses.

63a07 **Expiration of certificate.**

Where a certificate expires and another certificate of the same type (*e.g.*, normal labor turnover or expansion) is issued, the learners who are completing their training under the first certificate must be counted in the number of learners that may be employed under the second certificate. For example, if two learners are still completing their training period when the first normal labor turnover certificate expires, and the second normal labor turnover certificate authorizes the employment of five learners, only three additional learners may be employed. However, the employer is not required to count in a normal labor turnover certificate those learners completing their training under a previous expansion certificate nor to count in a plant expansion certificate those learners completing their training under a previous normal labor turnover certificate.

63a08 **Concurrent expansion certificate.**

When an expansion certificate is concurrent with the operation of a turnover certificate, the employer may hire or keep in his or her employ for the authorized learning period, the full number of learners authorized in both certificates.

63a09 **Excessive number of learners.**

(a) An employer is not deemed to have employed an excessive number of learners if the excess number arises solely because he or she has continued in employment at the end of the authorized learning period any learner or learners legally hired. For example, in one workweek, an employer is entitled to employ 49 learners, and in a succeeding workweek, because of a loss of experienced workers, he or she is entitled to employ only 48 learners. The employment of 49 learners in the succeeding weeks is not to be deemed a violation if these learners were legally hired during a preceding workweek.

(b) Where an investigation involves the employment of an excessive number of learners and is settled by restitution, the employer shall be requested to designate for each workweek those learners whom he or she considers to have been employed in excess of the number authorized by the certificate. Inasmuch as this constitutes a violation of the applicable minimum wage provision, these employees shall then be paid the difference between the minimum wage and the subminimum wage paid by the employer.

63a10 **Subminimum wage rate.**

The WHI shall check to see that the employer has paid to his or her learners in each workweek wages at a rate at least equal to that provided by the certificate for the authorized learning period. If, in that establishment, experienced workers are paid at piece rates, the learners' earnings shall be computed at piece rates and at the minimum rate established by the certificate. The employer then must pay to the learners that wage which is larger. In such

establishments, it frequently occurs that learners are paid at piece rates without regard to the subminimum wage rate required by the certificate. In order to establish as a violation that an employer has failed to pay to his or her learners the proper piece rates, the WHI must show that experienced workers who did the same or comparable work were paid at these rates, and that the learners' earnings at the same piece rates in a given workweek exceeded the wage actually paid to them.

63a11 **Length of learning period.**

(a) The WHI shall check carefully to see that a worker employed as a learner is paid the applicable minimum wage immediately after the termination of the authorized learning period. This period is reduced if the worker has had previous experience (*see* FOH 63a12 and FOH 63a14).

(b) The hours of experience acquired while working on rags or scrap shall be deducted from the maximum number of hours a learner may be employed at subminimum wage rates, even though the work on such acquired experience may not involve the production of goods for interstate commerce.

(c) The hours of pertinent training in a vocational training school or similar training facility shall be deducted from the maximum authorized learning period.

63a12 **Crediting of experience.**

(a) In order for the worker's previous experience to be credited against the learning period, such experience must have been within the period specified by the regulations. This period is 3 years for miscellaneous industries and all industries under the supplemental industry regulations, except for hosiery, telephone, and hand occupations in the cigar industry. Prior to 09/03/1961, this period was 2 years for apparel, knitted wear, and machine occupations in the cigar industry.

(b) Applicable experience is credited solely on the basis of the industry and occupation in which it is acquired. Any experience gained outside the continental United States (U.S.) in an equivalent industry and occupation is equally creditable with that acquired within the U.S.

(1) For industries having supplemental regulations, experience must be credited on the basis of the industry definition of the pertinent regulation, unless such regulation provides otherwise, as in the case of the production of men's and boys' woven underwear. For example, machine stitching on gloves is not creditable under an apparel industry certificate despite similarity of occupation; experience on ladies' coats and suits or men's and boys' clothing is not creditable on the various types of garments included in the regulations definition of the apparel industry. However, experience on any one type of garment is creditable on any other type of garment included in the apparel industry regulations definition.

(2) Where it is not clear how prior experience shall be credited for miscellaneous industries under the general learner regulations, the problem shall be referred to the NO.

63a13 Availability of experienced workers.

Employers are required to place, or have on file, an order for experienced workers with the local, state, or territorial public employment service office (except in possessions where there is no such office) before hiring learners. They must also maintain a file of all evidence and records, including any correspondence, pertaining to the filing or cancellation of job orders placed with the public employment service office. WHIs should check these records to determine whether the regulations have been complied with.

63a14 "Experienced workers available" defined.

An "experienced worker" is a person who has had at least the predetermined number of hours of experience within the period established by the regulation or in the certificate for the occupation in which he or she is to be employed (*see* FOH 63a12). An "experienced worker available" is an experienced worker residing within the area from which the employer customarily draws his or her labor supply, or an experienced worker who has made himself or herself available to an employer at his or her establishment or place of employment and has signified readiness to accept employment.

63a15 Learner occupation titles.

The WHI shall not be satisfied with the mere designation on the payroll records of an occupation that is authorized by the regulation for a learner. A representative number of learners shall be interviewed to determine whether the work they do is actually that indicated by the employer's designation.

63a16 Employer subject to more than one industry regulation.

Occasionally, an employer produces articles that are subject to two or more special industry regulations. Administrative expediency here requires that one certificate be issued. Particular care shall be exercised in these cases, because it will sometimes appear that employees have been engaged in occupations or on products other than those authorized by a given industry regulation. Information under which the certificate was issued will be contained in the copy of the application form in the employer's files. If the WHI has any question, he or she should not hesitate to request the necessary information from the OWDR through regular channels.

63a17 "Minimum acceptable skill" defined.

(a) The phrase, "capable of equaling the performance of a worker of minimum acceptable skill," is not susceptible or so precise a definition as to cover all possible situations where questions may arise. In dealing with such questions, it is usually necessary to make a reasonable judgment on the basis of the particular circumstances in each case. As a statement of general principle, however, the quoted phrase is intended to assure that no employer shall be under obligation to employ a worker merely on the basis of length of previous experience where the worker's productivity can be demonstrated to be clearly substandard. On the other hand, the employer's productivity standards must be reasonable and consistent with accepted industry practice, and experienced workers shall not be subject to arbitrary or discriminatory hiring standards.

(b) In interpreting 29 CFR 522.6(f), it should also be recognized that there may be a small number of unemployed, experienced workers who are unable to meet minimum acceptable factory standards because of chronic absenteeism, tardiness, alcoholism, or other such personal deficiencies. Such factors, if clearly demonstrated, would eliminate the requirement that these employees be considered as qualified for employment within the meaning of the learner regulations.

63b LEARNER VIOLATIONS

63b00 Periods to be considered in determining violations.

(a) Where it is alleged that experienced workers are or have been available, two different periods of time shall be considered in determining the existence of violations: first, the time at which application was made for a special certificate; and second, the time at which learners were hired under the certificate. To allege the availability of an adequate supply of experienced workers at the time of application is to charge that the employer obtained the certificate fraudulently. If the charge is substantiated, the employer's certificate may be annulled. Such a charge shall, therefore, be based on very specific information.

(b) If experienced workers are alleged to have been available when learners were hired, the charge is one of violation of the certificate, the penalty for which may be withdrawal of the certificate.

63b01 Establishment of violation.

(a) In order to establish that an employer has hired learners when experienced workers were available, the WHI shall make every effort to obtain statements signed by the workers who are alleged to have been experienced and available for employment at a given time. It is not sufficient to accept a broad statement covering several allegedly available experienced workers, which has been made either by a union or a trade association. The necessary information to support these charges must be obtained in all cases from the workers themselves. These statements should show:

(1) Employment experience within the period during which experience is qualifying under the regulations. The WHI shall obtain from the worker the name and address of each employer during this period, dates of employment, occupation in which the worker was employed, and products on which he or she was engaged.

(2) Availability for employment by the employer against whom the complaint is made. The WHI shall obtain the date the worker applied for employment, name of the management representative who was interviewed, reasons given the employee for denying employment, worker's present availability for employment, and whether he or she was, and is, registered with the local state employment service.

63b02 Support of information regarding availability of experienced workers.

Information regarding availability of experienced workers may be developed, and shall be supported wherever possible by statements of representatives of local labor unions, trade association offices, and local state employment service regarding the supply of experienced workers in the locality at the particular time or times involved in the investigation. The statements of individual workers as to their availability should be checked wherever possible with the local state employment service and local labor union records.

63b03 Employer to be given benefit of doubt.

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

63b04 Workers hired as learners before the issuance of a certificate or after its expiration.

(a) The employment of learners at rates less than the statutory minimum wage during a period when no certificate is in effect, except as provided in FOH 63b05(a) -(b), is a violation of the minimum wage provision of the FLSA, rather than a violation of the learner certificate.

(b) Where a learner is hired before the issuance of a special certificate, his or her employment at a subminimum wage rate between the date of hiring and the date upon which the special certificate is first effective similarly constitutes a minimum wage violation and not of the learner certificate. As soon as the learner certificate becomes effective, the employer may be considered to have been authorized to employ his or her worker as a learner. However, the authorized learner period at subminimum wage rates would be reduced by the number of hours of experience obtained by this employee between the date of hiring and the effective date of the certificate.

63b05 Completion of training period after expiration of certificate.

(a) Learners properly hired prior to the date on which the certificate expires may be employed for the duration of their learning period at learner rates under the terms of the certificate even though the certificate expires before the learning period is completed.

(b) Learners may complete their learning period after a break in service for a valid cause (*e.g.*, illness or pregnancy) even though the break extends beyond the expiration of the certificate. In such cases, there must be evidence that the employer-employee relationship had not been severed and that the employer's intention was to provide continued employment. This continuation of employer-employee relationship may be reflected by the fact that the employee's personnel records or fringe benefits are kept active, or that his or her name is continued on the payrolls. State laws vary as to payment of compensation during periods of temporary disability or pregnancy, but in most cases, the filing of a claim for unemployment compensation or registration for other employment will be sufficient to show severance of the employer-employee relationship.

63b06 Violations not meeting potential litigation criteria.

(b) (7)(E) [redacted]

63c LEARNER POTENTIAL LITIGATION INVESTIGATIONS

63c00 Purpose of criteria for determining potential litigation in learner investigations.

The issuance of learner certificates authorizing a subminimum wage is intended to prevent curtailment of opportunities for employment. The abuse of learner certificates can undermine the entire minimum wage program. The criteria set forth below were established, not only for litigation in the courts, but also for the institution of annulment or withdrawal proceedings (*see* 29 CFR 528 for procedure on annulment or withdrawal). The JRC has no function in these proceedings. These criteria supplement the general criteria set forth in FOH 80a.

63c01 Fraud in the application for, or procurement of, a learner certificate.

Where an investigation discloses the existence of significant variance between the facts stated in the application for a learner certificate and the actual facts as they existed at the time application was made, for which there is no reasonable excuse, the investigation file shall be referred to the JRC.

63c02 Prior violations.

(b) (7)(E) [redacted]

63c03 Authorized number of learners exceeded.

(b) (7)(E) [redacted]

63c04 Employment of experienced workers as learners at subminimum wage rates.

(b) (7)(E) [redacted]

63c05 Employment of learners at subminimum wage rates beyond the period permitted by the certificate.

Where the investigation discloses that the employer employed workers as learners at subminimum wage rates beyond the period permitted by the certificate or regulation, for which there is no reasonable excuse, the investigation file shall be referred to the JRC. (b) (7)(E) [redacted]

63c06 Employment of learners in occupations not authorized by the certificate.

Where the investigation discloses that workers have been employed as learners at subminimum wage rates in occupations not authorized by the certificate, the investigation file shall be referred to the JRC if the violations affect two or more employees and no reasonable excuse is offered by the employer. What constitutes a reasonable excuse depends on the circumstances of each investigation. For example, where the certificate authorizes machine operators and the learner is using a machine but not the particular one comprehended by the certificate, the fact that the employer honestly did not so understand would be a reasonable excuse. However, where the certificate authorizes machine operators, and learners are regularly employed at subminimum wage rates as floor boys, hand trimmers, and the like, there can be no reasonable excuse.

63c07 Payment at less than authorized rates.

Where the investigation discloses the employment of learners at rates below those rates established by the terms of the certificate, for which there is no reasonable excuse, the investigation file shall be referred to the JRC.

63c08 Hiring of learners when experienced workers are available.

Where an investigation discloses the substantial or repeated hiring of learners at subminimum wage rates at a time or times when a supply of qualified experienced workers are available, and the employer has not made reasonable effort to recruit such available experienced workers, the investigation file shall be referred to the JRC.

63c09 Combination of learner violations with other FLSA violations.

Any investigation, wherein other violations of the FLSA meet the criteria for referral to the JRC and there is also evidence of violation of any term of a learner certificate, shall be referred to the JRC, even though the learner certificate violations do not in themselves meet these criteria.

63c10 Development of violations meeting potential litigation criteria.

(a) Where the violations of learner certificate meet the criteria for referral to the JRC, the investigation file shall include sufficient information to establish the nature and extent of the learner violations.

[redacted] (b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

N

N

63d AUTHORIZED LEARNER OCCUPATIONS

63d00 Apparel industry.

(a) Sewing machine operating

The operation of power-driven machines using thread. No distinction is made between different types of sewing machine operations. Therefore, a worker who has had 320 hours of experience within the previous 3 years in operating a power-driven single or double needle sewing machine, or any other type of power-driven sewing machine, in any branch or division of the apparel industry, as defined, would be considered an experienced worker.

(b) Machine operating other than sewing machine operating (except the cutting room operations of the knife or die cutting, spreading, and marking, wherever performed in the plant)

This occupational classification is a generalized term covering all machine operations in the apparel industry other than those excluded above. Because of the large variety of machines used, various skill requirements, and industry practices of interchangeability of workers between machines, beginning workers under the regulation may be employed on all such machine operations, including those requiring only a minimum degree of skill and training. The term “machine operating” does not, however, apply to machines or equipment that would be appropriately characterized as gadgets or tools, such as hand-stapling machines, hand riveters, cutting pliers, and the like.

(c) Final pressing

Final pressing of the fully assembled garment, either by hand or by the operation of any type of pressing machine or iron. The final pressing of a garment, authorized by a learner certificate, may be performed either by a single individual or a pressing team consisting of two or more persons. In the latter case, each of the individual steps may be considered as final pressing if it is found that the job elements involved are so closely identified with the pressing operation that they are an integral part thereof. An example is the operation of machines that both press and form shirt collars and fold the shirts. However, where the non-pressing job elements performed by one member of a pressing team are not so closely identified and integrated with the final pressing, for example, if the employee is found to be engaged exclusively in such duties as folding, the activities of that member would not meet the criteria for final pressing. In such cases, FOH 63a02 may apply.

(d) All other pressing

All intermediate or under pressing operations, either by hand or automatically by the operation of any type of pressing machine or iron, electrically or steam heated.

(e) Hand-sewing

Hand-sewing operations include such work as sewing buttons, labels, trimmings, and the like.

(f) Finishing operations involving hand-sewing

Consists of operations involving considerable hand-sewing, such as basting, shaping, and finishing, as well as embroidery work. Finishers ordinarily perform all necessary work after the operator has stitched the garment together, including sewing of fastenings, loops, and trimmings, tacking of collars and cuffs, and the like.

(g) Final inspection of assembled garments

Performs the final inspection of the fully assembled garment after laundering and pressing. Consists of the final inspection of the completed garment for defects in stitching, fabric, broken buttons, soiled spots, and the like, and involves a judgment factor requiring considerable knowledge of sewing operations. May also include some of the functions of intermediate inspection, such as hand trimming, but only as an operation incidental to the final inspection process. Although the final inspection operation is generally the last one made, in some cases, it has been found that the last inspection is merely superficial and that a prior inspection is actually the more skilled operation contemplated in the regulation.

63d01 <u>Knitted wear industry.</u>

(a) Machine knitter

Operates all types of automatic knitting machines, including circular, flat, and warp knitters, to produce knitted and warp-knitted cloth in flat form and knitted circular or tubular cloth garments; also operates by hand flat knitting machines to produce fashioned cloth.

(b) Machine stitcher

Operates any type of standard industrial sewing machine, either by hand or foot, or electrically propelled.

(c) Presser

Operates by hand or automatically any type of pressing machine or iron, electrically or steam heated, either before or after completion of garments.

(d) Winder

Operates any type of winding machine, including bottle bobbins, cones, and back winders, used in winding thread and yarn.

(e) Dyeing machine operator

Operates any of the types of machines used to dye yarn knitted cloth, garments, and tubing, and includes, among others, the occupations of dyeing machine tender, dye-tubman, dye kettleman, tubman, tub operator, tumbler-dyeing-machine operator, dye reel operator, vatman, and the like.

(f) Drying machine operator

Operates machines consisting of many large cylinders or cans that stretch and dry cloth. Includes such occupations as cloth-spreader, drier-tender, drier-machine operator, and steaming-machine operator.

(g) Brush machine operator

Operates brushing or napping machines that raise nap or fuzz over the surface of knit goods. Includes the operations of starting the machine, feeding the material, and guiding it evenly through the machines.

63d02 <u>Glove industry.</u>

(a) All branches (machine stitching)

Operates all types of industrial sewing machines, employing various types of stitches, in the performance of all stitching operations necessary for glove making. Some of the principal stitching operations are cuffing, thumbing, fingering, closing, and fourchette sewing (dress and semidress gloves only).

(b) Leather glove and knitted glove branches (hand stitching)

Performs all hand stitching operations, including decorative hand stitching, sewing of labels, buttons, trimming, etc.

(c) Knitted gloves branch (finger knitting and finger closing)

Operates knitting machines used on the operations of fingering and finger closing. Fingering is the knitting of the thumb and fingers to the cuff and hand stamp. Finger closing is the drawing together and closing of the loops at the finger tips. The latter operation is sometimes also performed by hand.

63d03 <u>Hosiery industry, seamless branch.</u>

(a) Boarding

Operate boarding machines that shape and dry hosiery. Involves drawing damp hosiery over forms, which are then manually or mechanically inserted into a chamber containing steam, hot air, or hot water adjusted to prescribed temperature and pressure, and removing dried hosiery from forms. Boarding of hosiery in the greige is known as pre-boarding, involves essentially the same skill, and is therefore authorized as boarding under the regulations.

(b) Examining and inspecting

Examine and inspect hosiery for defects in knitting, looping, or seaming. Involves drawing hosiery over revolvable forms, and testing or examining for strength and various defects, such as holes, torn thread, and dropped stitches; cutting loose ends of thread; separating defective hosiery for mending or rejection; may also mend minor defects.

(c) Folding

Fold hosiery in pairs for wrapping or boxing. Prior to folding, may inspect hosiery visually for defects, and measurement for proper hosiery length; may also mate hosiery, attach labels or tags, and insert descriptive literature in boxes or packages. A small amount of boxing is permissible when it is integrated with the folding operation. Berry-pak machine operating, which is essentially a packing operation involving some elements of folding, pairing, and inspection, is not authorized in view of its minimum skill requirement.

(d) Knitting (except transfer top)

Operate any type of automatic power-driven knitting machines that knit the entire stocking from top (ribbed toe or welt) to the toe, except transfer top knitters. Such machines include circular, flatbed, V-type, leggers, footers, rib, and string knitting machines. Hand knitting, such as that involving a manually-operated and manually-controlled knitting frame, is not an authorized occupation.

(e) Knitting (transfer top only)

Operate knitting machines that knit the seamless stocking onto the ribbed top. Includes transfer of stitches or ribbed top from points or quills of transfer ring onto needles of knitting machines; knitting of seamless stocking to ribbed top; removal of knitted material from machine; replacing empty cases with yarn; tying ends of yarn; and replacing or adjusting defective needles.

(f) Looping

Transfer loose stitches at end of toe points of quills on looping machine, and operate looping machine to close toe openings of hosiery. Includes all processes from placing yarn on machines to removing the looped hosiery.

(g) Mending

Includes only hand-mending of hosiery, either in the greige or finished condition, performed as a full-time and continuous process. Excludes snagging or scratching, or the operation of various types of mending machines, such as Vitos, Vanitas, Stelos, or Marvel, except where the operation of such machines is incidental to the hand-mending operation and the use of such machinery is an adjunct to the hand-mending process.

(h) Pairing

Mate hosiery in pairs to correspond in color, size, length, texture, etc.; separate imperfect hosiery for mending.

(i) Seaming

Operate power-driven sewing machines that sew seams in hosiery. Also includes mock seaming, and closing of the toe of seamless hosiery by a seaming process, as well as sewing or seaming of elastic bands at top of such hosiery, leotards, or tights, and other sewing on leotards or tights.

(j) Topping

Involves hanging the stitches on the rib top on the quills or points of a transfer ring from which the stitches are later transferred onto the needles of the transfer top knitting machine (the actual transferring operation is performed by the transfer top knitter). Experience on full-fashioned topping, although no longer authorized, is creditable toward the learning period for seamless topping because of the similarity of skill.

(k) Welting (hemming)

Fold upper part of leg fabric to form a welt, and operate sewing machines to sew folded welt to stocking fabric.

63d04 Hosiery industry, full-fashioned branch.

(a) Boarding

Same as seamless hosiery branch.

(b) Examining and inspecting

Same as seamless hosiery branch.

(c) Folding

Same as seamless hosiery branch.

(d) Mending

Same as seamless hosiery branch.

(e) Pairing

Same as seamless hosiery branch.

(f) Seaming (leg and foot)

Operate power-driven sewing machines to join the sides of full-fashioned fabric from toe to top of welt to form the hosiery.

(g) Seaming (sewing, other than leg and foot)

Operate power-driven sewing machines to sew elastic bands at top of full-fashioned hosiery, leotards, or tights.

63d05 (Reserved.)

63d06 Cigar industry.

(a) Hand stripping

Removal by hand of the central rib or midvein of the tobacco leaf.

(b) Machine stripping

Removal by machine of the central rib or midvein of the tobacco leaf.

(c) Hand bunch making and hand rolling

(1) Hand bunch making involves the hand or tool fashioning of the filler tobacco into the proper form and size, wrapping it in a strip of binder tobacco that completes the bunch, and placing the bunch into molds to which pressure is applied to properly shape the cigar.

(2) Hand rolling involves the fashioning of the bunch and rolling of the bunch into the wrapper leaf, followed by pasting of the wrapper at the head end of the cigar, and trimming the other end to the proper length. A mechanical suction plate has been introduced in this occupation that smooths and keeps the wrapper leaf in place, and cuts the wrapper strip to shape prior to the pasting and trimming process.

(d) Hand making Italian stogies

Includes all operations similar to those described above, which are involved in making the Italian stogie cigars.

(e) Cigar machine operating

Includes all machine operations on any type of automatic cigar-making machine, including feeding, binding, wrapping, and the examination of the cigar at the end of the machine operation for imperfections, and patching of imperfect cigars.

(f) Packing

Shading and sub-shading fashioned cigars. May also place them into pressure shells. The operation of actually cellophaning the cigars and the operation of the banding machines, as well as the hand packing of cigars into small packages and cigar boxes, are not part of the packing operation as contemplated under the regulation.

N

Chapter 64

Employment of Workers with Disabilities at Subminimum Wage under Section 14(c)

Source: FOH Modernization revision 713, published 10/17/2016. Substantive revisions made *after* 10/17/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 10/17/2016 can be found here: http://esa.esa.dol.gov/whd/FOH/revisionchart.htm.

Table of Contents

64a GENERAL

64a00 Introduction.
64a01 Worker with a disability.
64a02 Impact of the Americans with Disabilities Act on section 14(c).

64b COVERAGE

64b00 Introduction.
64b01 Enterprise coverage.
64b02 Individual coverage.
64b03 McNamara-O'Hara Service Contract Act (SCA) coverage.
64b04 Walsh-Healey Public Contracts Act (PCA) coverage.
64b05 Davis-Bacon and Related Acts (DBRA).

64c EMPLOYMENT RELATIONSHIP

64c00 General.
64c01 Patient worker.
64c02 Patients in alcohol and drug abuse treatment programs.
64c03 Prisoners.
64c04 Unpaid volunteers.
64c05 Veterans making artificial poppies.
64c06 The Salvation Army.
64c07 Workers injured in industry who are referred to work centers.
64c08 Students with disabilities and workers with disabilities who are enrolled in individual rehabilitation programs.
64c09 Joint employment.

64d CERTIFICATES

64d00 Introduction.
64d01 Effective dates of subminimum wage certificates.
64d02 Certificates involving workers with disabilities employed as homeworkers.
64d03 Certificate revocation and denial of renewal applications.

64e SECTION 14(c) INVESTIGATION PROCEDURES AND CONSIDERATIONS

64e00 General.

64e01 Hours worked issues in section 14(c) investigations.
64e02 Section 3(m) considerations.

64f INITIAL INVESTIGATIVE ACTIVITIES

64f00 Preparation for investigation.
64f01 Beginning the investigation.
64f02 Visit to the establishment.

64g ISSUES REQUIRING SPECIAL ATTENTION

64g00 Disabled for the work to be performed.
64g01 Proper certification.
64g02 Posting of notices and informing employees of the terms of the certificate.
64g03 Prevailing wages.
64g04 Work measurement.
64g05 Commensurate wages.
64g06 Time studies and jobs paid piece rate.
64g07 Hourly commensurate rates.

64h CONCLUDING ACTIVITIES

64h00 Back wage and civil money penalty (CMP) calculations.
64h01 Disposition of findings and section 14(c)
64h02 Narrative report requirements for section 14(c) investigations.
64h03 WHISARD.
64h04 Advising section 14(c) certification team and regional enforcement coordinator: section 14 of investigation findings.
64h05 Petition for review.

64i ESTABLISHING PIECE RATES AND PERSONAL TIME, FATIGUE, AND UNAVOIDABLE DELAYS (PF&D) ALLOWANCES

64i00 How to determine an accurate commensurate wage based on a piece rate.
64i01 Allowance for non-productive time: PF&D required only for piece rate time studies.
64i02 Use of jigs in time studies.

64j ESTABLISHING OBJECTIVE STANDARDS FOR HOURLY PAY RATES

64j00 General.
64j01 How to determine a single commensurate hourly rate when the work involves dissimilar tasks.
64j02 Quantity and quality when computing hourly commensurate wages.
64j03 Fatigue considerations and hourly commensurate rates.

64k ADDENDUM

64k00 Glossary.
64k01 Application for Authority to Employ Workers with Disabilities at Subminimum Wage (WH-226).

64k02 Sample letters.

64a GENERAL

64a00 Introduction.

(a) Section 14(c) of the Fair Labor Standards Act (FLSA) has contained provisions to employ workers with disabilities at subminimum wages since it was enacted in 1938. A subminimum wage is a wage paid a worker with a disability that is *commensurate* with that worker's individual productivity as compared to the wage and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity where the worker with a disability is employed. The commensurate wage is always a subminimum wage (*i.e.*, a wage below that required by section 6(a) (*see* FOH 64g05) or below the rate required by the McNamara-O'Hara Service Contract Act (SCA) wage determination, where applicable).

(b) Employers with the appropriate certificates may pay workers with disabilities a *commensurate wage* (*see* FOH 64g05). This minimum wage exemption exists because people with disabilities may not be able to compete successfully with workers who do not have disabilities for jobs paying the minimum wage. The main objective of the exemption was, and remains, to encourage employment opportunities for workers whose earning or productive capacities have been diminished by their disability. The payment of subminimum wages to workers with disabilities is codified at section 14(c) of the FLSA. This section was last amended on 10/16/1986. 29 CFR 525 sets forth the conditions and terms governing the employment of workers with disabilities at subminimum wages.

(c) It is the policy of the Wage and Hour Division (WHD) to carry out a vigorous, consistent, and effective enforcement program with respect to employment of workers with disabilities under section 14(c). This policy is essential because many of the workers with disabilities paid at subminimum wages have little knowledge of their rights under the various acts enforced by the WHD or may be unable to exercise them. In addition to WHD activities to protect workers with disabilities, there are also various interested parties that act on behalf of the workers with disabilities and/or the work centers that employ them. Because the Wage and Hour Investigator (WHI) may have contact with these groups, a few of the more prominent ones are listed in the glossary near the end of this chapter. Although some of these groups and consulting agencies have prepared their own compliance manuals and have been provided feedback by the WHD, none of their documents has been approved by the WHD and none provides a good faith defense in case violations are disclosed.

(d) Unless specifically noted, employers who employ workers with disabilities are subject to the same FLSA, SCA, and/or Walsh-Healey Public Contracts Act (PCA) rules of coverage, employment relationship, exemptions, child labor restrictions, and principles regarding such things as hours worked and recordkeeping as those who employ workers who do not have disabilities.

64a01 Worker with a disability.

(a) The term "worker with a disability" is defined in section 14(c)(1) as an individual "whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury." Some examples of disabilities that may affect a worker's earning or productive capacity include blindness, intellectual or developmental disability, mental retardation, cerebral palsy,

alcoholism, drug addiction, and age. Age may be considered an impairment to earning or productive capacity only when the individual is at least 70 years old and age impairs his or her productivity for the work to be performed. The fact that a worker is over 70 years of age does not, in and of itself, constitute a disability under section 14(c).

(b) A subminimum wage may be paid only when an individual has a disability for the work he or she is employed to perform. While a disability may affect a worker's earning or productive capacity for one type of work, the same disability may have no impact on his or her ability to perform another kind of work. Only when a disability impairs the individual for the job to be performed may an employer pay a subminimum wage.

(1) A worker may have a disability for one type of work but not be impaired for other types of employment. Some workers, after acquiring proper training and/or experience, successfully overcome disabilities in the workplace and should no longer be paid a subminimum wage.

(2) The fact that a worker is a client or consumer of a facility specializing in rehabilitation, teaching independent living skills, and/or job training, in and of itself, does not make the worker a *worker with a disability* and eligible to be paid a subminimum wage. The worker must still have a disability for the work he or she is employed to perform.

(c) Vocational, social, cultural, or educational disabilities, standing alone, are not disabilities under section 14(c). Examples include chronic unemployment, receipt of welfare benefits, nonattendance at school, juvenile delinquency, and correctional parole or probation. However, these conditions could meet the section 14(c) definition of a disability if they exist in conjunction with some other physical and/or mental deficiency or injury (*see* 29 CFR 525.3(d)).

(d) Alcoholism and drug addiction can also be disabilities that affect the earning or productive capacity of a worker (*see* 29 CFR 525.3(d)).

(1) When other documentation of alcoholism is not available, the *Michigan Alcoholism Screening Test (MAST)* will be sufficient to determine whether an individual is disabled for the work to be performed due to alcoholism. The MAST is a short survey of 25 "yes" or "no" questions designed to detect alcoholism. A score of 7 or higher, along with the worker's written admission of alcoholism, is considered sufficient substantiation that the individual is disabled due to alcoholism.

(2) Although the MAST can be administered in a short period of time by either a professional or nonprofessional, the WHI should not administer the test. If documentation is needed to prove someone is disabled due to alcoholism, the WHI should recommend that a representative of the employer administer the MAST.

(3) Employers should be advised that information about the MAST and the actual screening device are available on the internet. One such site is www.nau.edu/~fronske/MASTa.htm.

(e) A learning disability, under certain conditions, may be a disability that impairs the earning and/or productive capacity of workers.

(1) Unlike other disabilities, the terms “learning disability” or “learning disabled” do not have precise definitions. Learning disability or learning disabled describes a number of learning or behavioral disabilities, ranging from mild to severe, which may manifest by various combinations of impairments in perception, conceptualization, language, memory, and control of attention, impulse, or motor function.

(2) An individual may be considered learning disabled if either of the following situations exist:

- The disorder has been diagnosed by a physician or a licensed or certified psychologist who is skilled in the diagnosis and treatment of such disorders. The disorder results in a substantial impairment to employment, and there is a reasonable expectation on the part of the physician or psychiatrist that vocational rehabilitation services may enhance the employability of the individual.

- The state vocational rehabilitation agency, or another qualified agency, has determined that the individual in question is substantially disabled for employment, and the individual has been treated as learning disabled or had a history of receiving special education for the learning disability.

(3) If learning disability is listed as an individual’s sole disability but the requirements mentioned in FOH 64a01(e)(2) above are not met, that individual may not be considered to have a disability under 29 CFR 525.3(d).

(4) Some difficulties that are indicative of a learning disability, and may affect the productivity of the individuals include:

a. Needing to work longer hours to produce the same amount as their coworkers

b. Needing to choose between being careless or being slow

c. Making more frequent errors than coworkers

d. Misunderstanding instructions from supervisor or comments from coworkers

e. Failing vocational training

(5) Individuals with a learning disability as the primary disability do not normally require long-term placement at subminimum wage jobs in work centers. Consequently, the WHD recommends that work centers re-evaluate and update the data used to justify employing learning disabled workers at a subminimum wage on an annual basis. The WHI should review this documentation, as necessary, when making a determination that an employee has a disability for the work being performed.

(6) Some states are now automatically labeling as “learning disabled” those Welfare-to-Work participants who do not find private sector employment within a certain period of time, often 6 weeks. Some states are placing these individuals in work centers that pay subminimum wages. WHIs should contact their regional enforcement coordinator: section 14 for guidance when encountering this situation.

(f) **Patient worker**

(1) A "patient worker" is a worker with a disability, as defined in 29 CFR 525.3(e), who is receiving treatment or care from a hospital or institution that also provides residential care, *and* is also employed by that same hospital or institution to do work in the facility. As with all workers with disabilities who are paid subminimum wages, the patient worker must have a disability that impairs the work he or she will actually be performing.

(2) The individual does not have to be a resident of the hospital or institution in order to meet the definition of a patient worker and receive a subminimum wage. The individual may be an outpatient, but he or she must be receiving treatment from the hospital or institution.

64a02 **Impact of the Americans with Disabilities Act on section 14(c).**

(a) The Americans with Disabilities Act (ADA), which took effect 07/26/1992, prohibits employers from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The Office of the Solicitor (SOL) has reviewed the ADA and its legislative history and has concluded that the ADA does *not* nullify the provisions of section 14(c). The ADA affords protection to individuals who, with or without reasonable accommodation, can perform the essential functions of the job. An employer is not required to lower quality or production standards to make an accommodation.

(b) In order to determine the commensurate wage of a worker with a disability for purposes of section 14(c), the employer must, among other things, determine the productivity of a worker who does not have a disability for the work to be performed, by conducting appropriate work measurements or time studies. The production standard, along with the prevailing wage, becomes the basis for paying commensurate wage rates. Thus, the standard for compensation, if not the amount of compensation itself, is the same for the worker who has a disability as for the worker who does not have a disability.

(c) The SOL has advised us that the existence of a certificate under section 14(c) would not protect an employer from charges pursuant to the ADA. Section 14(c) requires commensurate wage rates but does not address the issues of discrimination or reasonable accommodation. Thus, it would be possible for an employer to be in compliance with the provisions of section 14(c) but be in violation of certain provisions of the ADA. Questions regarding possible action under the ADA should be addressed to the appropriate office of the U.S. Equal Employment Opportunity Commission (EEOC).

64b **COVERAGE**

64b00 **Introduction.**

(a) Workers with disabilities may be employed anywhere by a variety of employers. Examples of businesses in which WHIs will most likely encounter section 14(c) subminimum wage certificates include, among others:

(1) Community rehabilitation programs (CRPs) and work centers, formerly known as sheltered workshops (SWSs), which specialize in the employment of workers with disabilities and may also provide rehabilitation

(2) Hospitals and residential care facilities that may also employ their patients

(3) For-profit business establishments (*e.g.*, fast food establishments or grocery stores)

(4) Contractors, including work centers described in FOH 64b00(a)(1) above, who provide services under the SCA, or manufacture or supply goods under the PCA

(5) State-operated vocational rehabilitation centers

(b) As in any other kind of compliance action, the WHI must first ascertain coverage (*i.e.*, enterprise, individual, and/or PCA or SCA). Even when coverage has been established, the WHI should be aware that not all of the activities performed at CRPs and work centers constitute an employment relationship and/or hours worked (*see* FOH 64e01).

(c) Although it is rare for workers who receive subminimum wages to work in excess of 40 hours in a week, their employment is covered under the overtime provisions of the FLSA, the PCA, and/or the Contract Work Hours and Safety Standards Act (CWHSSA), where applicable.

(d) Minors with disabilities who are employed at subminimum wages must be employed in compliance with all child labor provisions.

64b01 **<u>Enterprise coverage.</u>**

(a) FLSA section 3(s)(1)(A) coverage (annual dollar volume (ADV) test)

(1) Work centers operated for-profit will be section 3(s)(1)(A) enterprises, and covered on an enterprise basis, if they meet the required dollar volume test.

(2) Not-for-profit work centers will *not* be considered section 3(s)(1)(A) enterprises, regardless of ADV. Not-for-profit status generally means the employer qualifies under section 501(c)(3) of the Internal Revenue Code as nonprofit. The activities of these not-for-profit work centers are not ordinarily considered to have a business purpose, as required by section 3(r) (*see* 29 CFR 779.214).

a. Despite this absence of enterprise coverage, the employees of many work centers will be covered on an individual basis.

b. Also, if the work center has an SCA contract(s), all employees, whether working on the contract(s) or not, who are not otherwise exempt under FLSA section 13(a)(1) are covered under FLSA section 6(e). If these workers are not covered by an applicable SCA wage determination, they must be paid at least the FLSA section 6(a)(1) minimum wage (see FOH 64b03(d)) or a commensurate wage rate, if they have disabilities for the work performed and the employer is properly certified.

(3) The retail outlets of not-for-profit work centers and/or retail establishments operated by not-for-profit work centers *may be covered* under section 3(s)(1)(A) of the act,

however, if their ADV meets the required amount. These retail operations are considered to have a business purpose. Only sales and business done from the retail operation will be counted toward the ADV. Assertion of such coverage must first be cleared by the WHI with the National Office (NO), Office of Policy (OP), Division of Enforcement Policy and Procedures (DEPP), Family and Medical Leave Act and Other Labor Standards (FMLA/OLS) Branch.

a. The Supreme Court decided in *Alamo Foundation v. Secretary of Labor* that despite the "nonprofit" corporate status of an organization, if it engages in commercial activities in competition with other businesses, its employees "like other employees of the Act… are entitled to its full protection."

b. Even though the work center operates a retail outlet covered under section 3(s)(1)(A), this coverage will not extend to the not-for-profit work center. However, employees who work in covered employment in any part of a week are covered for the entire workweek.

(4) *Competitive employment*

A competitive employment setting refers to a work environment in which workers with disabilities are integrated with the general working population, as opposed to working in a separate facility that primarily employs workers with disabilities (formerly known as an SWS). Coverage for a commercial establishment holding a section 14(c) certificate is determined in the same manner as it is for any other employer (*i.e.*, enterprise coverage if the ADV test is met, and individual coverage if appropriate). In some situations, the worker with a disability may be jointly employed (*i.e.*, employed by both the commercial establishment and the work center that oversees the competitive employment situation (*see* FOH 64c09)).

(b) Section 3(s)(1)(B) named enterprise coverage (hospital, institution, school)

(1) Enterprise coverage is extended without an ADV requirement to work centers that are operated in or as part of a hospital; an institution primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises (*e.g*, a group home for people with intellectual or developmental disabilities); or a school.

(2) Individuals employed by such enterprises are protected by all the provisions of the act whether they are staff or clients of the covered enterprise (*see* FOH 12g00 -02, FOH 12g12, and FOH 12g14 -15).

(3) Enterprise coverage under section 3(s)(1)(B) would *not* apply, however, to a work center operated by a group home or other institution that had totally and completely segregated its work center activities from its residential care functions. Such a degree of segregation would be met when:

a. the work center is not housed in one of the group homes;

b. bookkeeping and payroll records for the work center and the group home are kept separately, and

c. staff and funding are not shared, or intermingled, between the work center and the group home.

(4) If the enterprise has accomplished the degree of segregation discussed above, enterprise coverage shall not be asserted for the work center.

(5) CRPs may operate both work centers and group homes. Enterprise coverage under section 3(s)(1)(B) will not be extended to a work center based *solely* on the fact that a few staff members may be employed in both locations. The work of such employees, however, would be covered based on their work in the residential care enterprise, and the possibility of overtime violations should not be overlooked.

(6) Because a patient worker is one "employed by a hospital or institution providing residential care," his or her employer will be a covered enterprise under section 3(s)(1)(B). The employer must hold a certificate under section 14(c) in order to pay a subminimum wage to patient workers.

(c) Section 3(s)(1)(C) coverage (a public agency)

A work center operated by a state or local government, or another public agency, is covered on an enterprise basis under this section of the act. No ADV test must be met.

(d) Section 6(e)

(1) Many work centers have service contracts with the Federal Government or are subcontractors on such contracts. Section 6(e) of the FLSA requires an employer who is either a prime contractor or a subcontractor on a contract to provide services to the Federal Government to pay all employees, *including staff and employees not working on the service contract*, at least the FLSA minimum wage (*see* FOH 64b03). Employers who have obtained the proper certification under section 14(c) may pay a subminimum wage to SCA service employees and other employees not working on the contract who have disabilities for the work being performed.

(2) Since section 6(e) does not require that the employee be engaged in commerce or the production of goods for commerce, section 6(e) is a useful tool for applying minimum wage coverage to employees and staff who are not otherwise covered on an individual or enterprise basis (*see* FOH 64b03(d)).

64b02 <u>Individual coverage.</u>

(a) Since some facilities are not covered on an enterprise basis, the WHI must frequently determine if employees are covered individually. Workers are covered on an individual basis if they are engaged in commerce, in the production of goods for commerce, or if they are performing work that is closely related and directly essential (CRADE) to the production of goods for commerce (*see* FLSA sections 3(j) and 6(a)).

(b) Typical work activities that result in employees being covered on an individual basis include:

(1) *Subcontract work*

A work center or other employer may obtain contracts requiring the assembling, packaging, or sorting of goods that, after the work is done, move from the work center directly into the stream of interstate commerce or back to the contractor who, in turn, ships them in interstate commerce.

(2) *Primary manufacturing*

A work center or other employer may manufacture or produce goods and then ship them directly or indirectly into interstate commerce.

(3) *Salvage operations*

A work center or other employer may collect used goods that are reprocessed, salvaged, or repaired and then sold to dealers who return them to the flow of interstate commerce.

(c) A worker with a disability engaged in work described in FOH 62b02(b) above would be covered on an individual basis in every workweek when such work occurred. Moreover, any worker who performed work CRADE to the covered activity would also be covered on an individual basis.

(1) Typical CRADE workers include janitors sweeping the floor in areas where goods are produced for interstate commerce; bookkeepers processing payroll for workers producing goods for interstate commerce; and material handlers, warehouse workers, and helpers who box, move, and load goods to be shipped in interstate commerce.

(2) If employees are engaged in both covered and non-covered work in the same workweek, they are covered for all hours worked in that workweek (*see* 29 CFR 776.4 and FOH 11a01).

64b03 **McNamara-O'Hara Service Contract Act (SCA) coverage.**

(a) An employer with a contract entered into by the United States (U.S.), or the District of Columbia (DC), the principle purpose of which is to furnish services through the use of service employees, is covered under the SCA. This includes employers who operate work centers. All contracts in excess of $2,500.00, or for an indefinite dollar amount, require a wage determination specifying the prevailing wage and fringe benefits for different classifications of work. If the award amount on a contract is less than $2,500.00, the FLSA minimum wage is the applicable SCA prevailing wage rate (*see* 29 CFR 4.5 -.6 and FOH 14).

(b) The SCA, like the FLSA, allows an employer to pay service employees who have disabilities for the work to be performed a subminimum wage less than the prevailing wage required by the wage determination. 29 CFR 4.6(o) instructs the contractor to follow the same conditions and procedures required for the employment of workers with disabilities under section 14(c) of the FLSA. However, this exception is from the prevailing wage only. Contractors are still required to pay the full fringe benefits, or the equivalent dollar cash payment in lieu of providing the benefits, to service employees who have disabilities for the work performed.

(c) The overtime requirements of the CWHSSA apply to workers with disabilities performing the duties of laborer, mechanic, guard, or watchman on SCA contracts valued in amounts that exceed $100,000.00 (*see* FOH 15a03).

(d) As mentioned in FOH 64b01(d) above, FLSA section 6(e) applies to employers with contracts to provide services under the SCA. It provides FLSA section 6(a)(1) minimum wage coverage even for those employees who do not work on the contract. Workers with disabilities who are subject to section 6(a) because their employers are SCA contractors, but do not themselves perform covered contract work, may still be paid subminimum wages under section 14(c) provided the employer has a valid certificate.

(1) As an enforcement policy, the WHD will apply the minimum wage standard provided by section 6(e) only within an establishment in which work is performed on a government service contract (*see* FOH 30e01).

(2) The application of section 6(e) depends on the performance of contract services and not on the coverage or exemption status of the establishment under the FLSA. Thus, during any workweek in which the establishment is engaged in the performance of contract services, the wage rate provided in section 6(a) of the FLSA would be applicable to all employees of the establishment, other than those specifically exempt under section 13(a)(1) of the FLSA or those subject to a higher wage rate pursuant to the SCA (*see* FOH 30e02).

64b04 **Walsh-Healey Public Contracts Act (PCA) coverage.**

(a) Workers with disabilities and other employees of a work center engaged in work on a PCA contract are covered under this act.

(b) The subminimum wage paid on a PCA contract is based on at least the minimum wage rate required by section 6(a)(1) of the FLSA. However, if there is FLSA coverage concurrent with PCA coverage, the prevailing wage on which the FLSA section 14(c) commensurate wage rate is based will most likely be higher than the rate required under the PCA, depending on the prevailing wage survey results required by 29 CFR 525.10. When this is the case, the worker with a disability would be due the commensurate rate based on the higher of the two prevailing rates.

(c) PCA overtime provisions would also apply to covered workers with disabilities who are receiving subminimum wages under section 14(c).

64b05 **Davis-Bacon and Related Acts (DBRA).**

(a) There are no provisions in the Davis-Bacon and Related Acts (DBRA) that allow for the payment of subminimum wages for work performed by individuals who have disabilities for the work being performed. Therefore, all laborers and mechanics performing work covered by the DBRA are entitled to receive the full wage determination rate and fringe benefits for the job classification(s) actually performed.

(b) In a like manner, all laborers, mechanics, guards, and watchmen, with or without disabilities, performing on DBRA contracts in excess of $100,000.00 are entitled to overtime payment under the CWHSSA.

64c EMPLOYMENT RELATIONSHIP

64c00 **General.**

The relationship between individuals with disabilities and the facilities that serve their needs often includes general vocational training and training in general life skills, neither of which constitute hours worked. The time spent in these activities varies as the needs of each individual differ. Thus, the WHI may observe the individual with a disability performing many different activities, including some that would not constitute hours worked, and therefore, are not compensable. Since both work and non-work activities may occur during the same day, the WHI must consider the nature of each activity carefully in order to determine when the individual is performing as an employee (*see* FOH 64e01 for more information on hours worked).

64c01 **Patient worker.**

(a) A major factor in determining if an employment relationship exists between a patient and a hospital, or other residential care facility, is whether the work performed is of any consequential economic benefit to the institution. The circumstances resulting in the individual's confinement, whether voluntary or pursuant to a civil court order, are immaterial to the patient worker's employment status.

(1) Generally, work is considered to be of consequential economic benefit if it is the type that workers who do not have disabilities normally perform, in whole or part, in the institution or elsewhere. This is true even though the work has therapeutic value, or the patient's performance level is substandard.

(2) It does not matter whether the patient worker resides on the premises of the hospital and/or institution, or is receiving treatment on an outpatient basis. But the worker must be receiving treatment from the facility to qualify as a patient worker.

(3) Examples of work frequently done by patients that meet the consequential economic benefit test include general building maintenance, landscaping, office work, and janitorial and cleaning work (except for personal cleaning chores such as maintaining one's own quarters) (*see* 29 CFR 525.3(g), 29 CFR 525.4, and FOH 10b34).

(b) If a patient is undergoing evaluation or training, the WHD will not consider the patient to be an employee during his or her first 3 months in work activities, provided the following two criteria are met:

(1) The patient spends no more than 1 hour a day and no more than 5 hours a week in the work activities. The NO, OP, DEPP, FMLA/OLS Branch shall be consulted for possible individual exceptions to this rule.

(2) The patient is provided competent instruction and supervision throughout the 3-month period.

(c) An employment relationship does not exist when the patient volunteers to perform services that the institution would not pay for, if performed by someone other than the patient. Examples of such activities include wheeling another patient around in a wheelchair, or planting and tending a vegetable garden when the produce belongs to the patient.

(d) When an employment relationship is found to exist between the hospital or other institution and the patient, all the requirements of 29 CFR 525 (*i.e.*, proper certification by the employer, documentation that the patient has a disability that impairs his or her performance of the work

in question, payment of the commensurate wage, etc.) must be met before the worker may be paid a subminimum wage.

64c02 **Patients in alcohol and drug abuse treatment programs.**

(a) An alcoholic or drug addict who has been admitted to a work center frequently requires a drying out period before he or she is capable of performing work. This individual may be present in the work center during this period, primarily to be kept away from alcohol or drugs. The individual will not normally be performing significant productive work during the drying out period. Consequently, if an individual has been diagnosed as alcoholic or drug dependent, the WHD will not assert an employment relationship for the first 4 weeks (*i.e.*, 28 consecutive calendar days) of *residence* at the work center. An employment relationship will be asserted during the 28-day period, however, if the individual engages in activities that provide a consequential economic benefit to the work center (*see* FOH 10b34, 64c01(a)(1), and 64c01(a)(3).

(b) An employment relationship will not exist between residents and a residential care facility seeking to establish a family setting, per FOH 10b35, for treatment of individuals with drug or alcohol problems when:

(1) residents perform tasks that are ordinarily done on a daily basis in a private home, and are solely for the mutual benefit of the occupants of the home (institution);

(2) residents do not displace regular full-time employees by performing tasks that would ordinarily be done by full-time workers;

(3) enrollment in the treatment program is of relatively short duration, usually not longer than 1 year, as opposed to the long-term occupancy often associated with institutions caring for the mentally ill, the individuals with intellectual or developmental disabilities, the aged, or the terminally ill; and

(4) the institution is relatively small, houses a limited number of residents, and has no paid staff other than counselors.

64c03 **Prisoners.**

Questions regarding the FLSA employment status of prisoners who have committed criminal offenses, and are ordered to be confined to a mental hospital or other type of institution providing residential care require immediate consultation with the NO and the regional solicitor of Labor (RSOL). Generally, a prisoner and/or patient who performs work for the hospital or institution (*e.g.*, janitorial chores or kitchen duties) is not considered an employee for FLSA purposes. However, where a prisoner and/or patient is employed by the hospital or institution for commercial purposes, such as making products for sale, or is working for an outside commercial contractor that is covered by the act, the prisoner and/or patient may be considered an employee for FLSA purposes. Complaints raising this issue must be cleared by the NO, OP before taking any action.

64c04 **Unpaid volunteers.**

(a) Members of service clubs and other charitable organizations frequently donate their time to help at not-for-profit organizations, such as work centers or hospitals. These individuals

usually volunteer on a part-time basis and have no expectation of remuneration or employment. In these circumstances, no employment relationship would exist between the volunteer and the work center or hospital. The use of volunteers by a work center or hospital does not violate the terms and conditions of its subminimum wage certificate (*see* FOH 10b03(c)). If questions arise about the use of volunteers by for-profit organizations or employers, contact the NO, OP, DEPP, FMLA/OLS Branch.

(b) Individuals who volunteer to help the work center or hospital meet production deadlines required by contract or subcontract work orders are not true volunteers, and an employment relationship exists when they are engaged in such activities.

(c) Employees of a work center or hospital cannot volunteer to perform the same services they are normally employed and paid to perform. For example, a secretary cannot volunteer to respond to correspondence generated by a special fund-raising drive (*see* FOH 10b03(d)).

(d) If workers with disabilities are allowed to volunteer their services, the following criteria must be met to protect them from exploitation:

(1) The worker with a disability must be legally competent to freely volunteer his or her services. A worker with a disability who is over 18 years of age is often his or her own guardian, but if not, the parent or guardian, as appropriate, must have approved such volunteer work. In such cases, the WHI must be certain that he or she is dealing with the actual guardian or custodial parent.

(2) The work performed must be substantially different from the work performed during duty hours.

(3) The work must be of the type that would be normally classified as volunteer work as described in FOH 10b03(c).

(4) The work must be performed outside normal duty hours.

(e) WHIs should ask the employer during the initial conference about any individuals the firm considers to be volunteers rather than employees, and confirm the volunteer status.

64c05 **<u>Veterans making artificial poppies.</u>**

(a) Traditionally, the U.S. Department of Veterans Affairs (VA) hospitals have allowed veterans with disabilities, who reside in its facilities, to make artificial poppies. In return for donations, members of the Veterans of Foreign Wars and the American Legion distribute these poppies to the general public.

(b) The WHD takes no position on whether an employment relationship exists between the veterans and the veterans groups.

(c) Complaints regarding this issue should be referred to the VA (*see* FOH 10b36).

64c06 **<u>The Salvation Army.</u>**

(a) The Salvation Army's position is that individuals in its rehabilitation program, called beneficiaries, are not employees under the FLSA. Although the WHD may not agree with

this position, do not initiate compliance actions until receiving clearance from both the regional administrator (RA) and the NO, OP, DEPP, FLSA/Child Labor Branch. Advise beneficiaries who complain that this WHD policy has no effect on their private action rights under section 16(b) of the FLSA.

(b) Investigations involving complaints filed by individuals, with or without disabilities, who the Salvation Army currently considers employees, and for whom FLSA coverage is not in question, shall be handled in the normal manner (*see* FOH 59a05).

64c07 **Workers injured in industry who are referred to work centers.**

(a) Work centers may be asked to provide vocational rehabilitation, evaluation, or training services for certain workers injured on the job. Such individuals may be referred to the work center by the state agency responsible for the worker's compensation program, or by individual insurance carriers.

(b) If all of the following conditions are met, the WHD will *not* assert an employment relationship between the injured worker and the work center:

(1) The injured individual has been referred to the work center by an insurance carrier or the responsible state agency.

(2) The workshop and the referring party have reached an agreement as to the nature, content, and length of the program to be provided.

(3) The broad objectives of the program are to assess the injured worker's vocational interests and abilities, and return him or her to competitive (*i.e.*, non-sheltered) employment.

(4) The injured worker receives payments from the insurance carrier or state agency during the program that at least equal his or her commensurate wage.

(5) Any wage payments made by the work center would result in a reduction in the compensation payments from the state agency or insurance carrier.

(6) The rehabilitation services provided are clearly in the injured worker's interests, and participation in the services is required in order to receive compensation from the insurance carrier or state agency.

64c08 **Students with disabilities and workers with disabilities who are enrolled in individual rehabilitation programs.**

(a) Youths with disabilities often are especially disadvantaged in the workplace because their relative inexperience further complicates their ability to find and maintain meaningful employment. In recognition of the special needs of this population, the U.S. Departments of Labor and Education in 1992 jointly issued guidance regarding the employment relationship under the FLSA and community-based education programs for students with disabilities. For these youths, community-based employment means placement in a worksite outside of their school setting. For example, the student may be placed in the mailroom of a corporation headquarters. Included in this guidance is the following statement of principle that

summarizes the WHD's enforcement posture and continued commitment to students with disabilities:

"The U.S. Departments of Labor and Education are committed to the continued development and implementation of individual education programs, in accordance with the Individuals with Disabilities Education Act (IDEA), that will facilitate the transition of students with disabilities from school to employment within their communities. This transition must take place under conditions that will not jeopardize the protections afforded by the Fair Labor Standards Act to program participants, employees, employers, or programs providing rehabilitation services to individuals with disabilities."

(b) In 1993, the U.S. Department of Labor (DOL) and the National Rehabilitation Facilities Coalition jointly issued similar guidance regarding the FLSA employment relationship and individuals with disabilities, not students in local public school systems, who are enrolled in individualized community-based rehabilitation programs. Enrollment in individualized community-based rehabilitation programs for these individuals means placement in a worksite away from the rehabilitation facility. This document also included the following statement of principle:

"The U.S. Department of Labor and community-based rehabilitation organizations are committed to the continued development and implementation of individual vocational rehabilitation programs that will facilitate the transition of persons with disabilities into employment within their communities. This transition must take place under conditions that will not jeopardize the protections afforded by the Fair Labor Standards Act to program participants, employees, employers, or other programs providing rehabilitation services to individuals with disabilities."

(c) In an effort to promote vocational training for workers with disabilities, the WHD will *not* assert an employment relationship between the worker with a disability, the rehabilitation facility or school, and/or the business where the worker has been placed when *all* of the seven following criteria are met (note: the criteria are the same for both students and non-students enrolled in vocational rehabilitation programs):

(1) Participants are individuals with physical and/or mental disabilities for whom competitive employment at or above the minimum wage level is not immediately obtainable, and who, because of their disability, will need intensive ongoing support to perform in a work setting.

(2) Participation is for vocational exploration, assessment, or training in a community-based worksite under the general supervision of rehabilitation organization personnel, or in the case of a student with a disability, public school personnel.

(3) Community-based placements must be clearly defined components of individual rehabilitation programs developed and designed for the benefit of each individual.

a. Each student with a disability shall have an Individualized Education Program (IEP) that lists the needed transition services established for the exploration, assessment, training, or cooperative vocational education components.

b. Each participant in a community-based rehabilitation organization program must have an Individual Plan for Employment (IPE) that includes a statement of needed transition services established for exploration, assessment, or training components. In the past, these plans were called Individualized Written Rehabilitation Plans.

(4) Documentation will be provided to the WHD upon request that reflects that the individual is enrolled in the community-based placement program, that this enrollment is voluntary, and that there is no expectation of remuneration. However, the information contained in the IEP or IPE does not have to be disclosed to the WHD. The individual with a disability and, when appropriate, the parent or guardian of each individual must be fully informed of the IEP or IPE and the community-based placement component of the plan.

(5) The activities of the individuals with disabilities (*i.e.*, participants) at the community-based placement site do not result in an immediate advantage to the business. Factors that would indicate the business is advantaged by activities of the individual include:

a. Displacement of regular employees

b. Vacant positions have been filled with participants rather than regular employees

c. Regular employees have been relieved of assigned duties

d. Participants are performing services that, although not ordinarily performed by employees, clearly are of benefit to the business

e. Participants are under continued and direct supervision of employees of the business rather than representatives of the rehabilitation facility or school

f. Placements are made to accommodate the labor needs of the business rather than according to the requirements of the individual's IEP or IPE

g. The IEP or IPE does not specifically limit the time spent by the participant at any one site, or in any clearly distinguishable job classification

(6) While the existence of an employment relationship will not be determined exclusively on the basis of the number of hours spent in each activity, as a general rule, an employment relationship is presumed not to exist when each of the three components does not exceed the following limitations:

a. Vocational explorations: 5 hours per job experienced

b. Vocational assessment: 90 hours per job experienced

c. Vocational training: 120 hours per job experienced

In the case of students, these limitations apply during any one school year.

(7) Individuals are not entitled to employment at the business at the conclusion of the IEP or IPE. However, if an individual becomes an employee, he or she cannot be considered a trainee at that particular community-based placement unless in a different, clearly distinguishable occupation.

(d) An employment relationship will exist unless all of the criteria described in FOH 64c08(c) are met. If an employment relationship is found to exist, the employer will be held responsible for full compliance with the FLSA.

(e) Business and rehabilitation organizations may, at any time, consider participants to be employees and pay them the full minimum wage required by section 6(a) or the SCA. Properly certified employers may also pay subminimum wages to participants who are disabled for the work being performed. Employees under age 20 may be paid the youth opportunity wage as provided by section 6(g) of the FLSA rather than a subminimum wage. The youth opportunity wage may never be the prevailing wage upon which a commensurate wage is based.

64c09 <u>Joint employment.</u>

(a) When a worker with a disability is placed in competitive employment by a rehabilitation facility, and the worker is supervised by a job coach supplied by the rehabilitation facility, the worker is jointly employed by the rehabilitation facility and the establishment where he or she is placed. The two are considered joint employers even if the amount of supervision provided by the facility's job coach is as little as 2 hours per pay period, and the establishment takes responsibility for paying the worker. A joint employment relationship is asserted in this circumstance because, by retaining some degree of control or supervision of the worker, the rehabilitation facility is acting in the interest of the establishment or the other employer (*see* 29 CFR 520.20(h) and 29 CFR 791.2(b)(2)).

(b) As with all joint employment situations, either employer is responsible for FLSA compliance and can be held liable for back wages (*see* FOH 64h00). Requests for payment of back wages and process changes needed to achieve compliance, however, shall be directed first to the rehabilitation facility and/or agency. If this initial request secures the desired results, there is normally no need to contact the business entity jointly employing the worker with a disability.

64d CERTIFICATES

64d00 <u>Introduction.</u>

(a) In order to pay a subminimum wage to a worker with a disability, an employer must first obtain a certificate from the WHD. All section 14(c) certificates are now processed and issued by the Section 14(c) Certification Team (Certification Team) located in the Chicago Regional Office (RO). Employers apply for subminimum wage certificates using WH-226-MIS: Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (WH-226-MIS) and WH-226A: Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (WH-226A). The certificate itself is issued on WH-228-MIS. An example of the certificate (*see* WH-228-MIS) is included at the end of this chapter (*see* FOH 64k01).

(b) These certificates authorize the employment of workers with disabilities in accordance with the requirements of 29 CFR 525. They remain in effect for the period indicated on the certificate or until withdrawn or revoked, *provided* the employer maintains compliance with all applicable provisions of the FLSA.

(c) The certification process is one tool the DOL uses to help employers achieve and maintain compliance with section 14(c). But because the process constitutes a review of only a limited amount of employer-provided information, the certificate is not a statement of compliance. Issuance of a certificate will not convey a good faith defense to employers should violations of the FLSA, the SCA, or the PCA occur, as certificates may be revoked retroactively as of the date of the violation(s). In the past, some employers have mistakenly thought that because the WHD had issued them a certificate, the WHD was acknowledging their compliance. In order to avoid future misunderstandings, certificates are now issued with such a disclaimer.

(d) The regulations permit the WHD to grant employers temporary authority to pay subminimum wages under certain circumstances to workers with disabilities pursuant to vocational rehabilitation programs of the VA or a vocational rehabilitation program administered by a state agency (*see* 29 CFR 525.8).

(e) The certificates are issued on an establishment basis to three kinds of facilities: work centers (certificate will read "Work Center"), hospitals or residential care facilities for the employment of patient workers (certificate will read "Patient Worker"), and business establishments for the employment of workers with disabilities (certificate will read "Business Establishment" or "School Work Experience Program" (SWEP)). The right-hand portion of each certificate will indicate the kind of facility to which it was issued.

(1) *Work center certificates*

Work centers, formerly referred to as SWSs, historically have provided rehabilitation services, day treatment, training, and employment opportunities at their facilities to individuals with disabilities.

a. Although the enterprise need only submit one application, the WHD will issue separate certificates for an employer's main facility and all branch facilities.

b. Separate certificates are not issued for individual worksites where employees with disabilities may perform work but where the work center maintains no other presence (*e.g.*, military commissaries, restrooms at National Parks, lawns that are being maintained, etc.). Work center certificates are portable to these job sites.

c. Work center certificates also cover the employment of workers with disabilities who remain on the payroll and under the supervision of the work center, but are placed at a competitive worksite or at a business establishment. These locations are sometimes referred to as enclave or supported employment (SE) worksites. In these instances, the enclave worksite employer does not have to obtain his or her own certificate.

(2) *Patient worker certificates*

Hospitals and residential care facilities (institutions) frequently use their patients to perform janitorial, grounds maintenance, food service, and other functions that are of consequential economic benefit to the institution. Certificates are issued to these facilities to cover patients who have disabilities that are employed in this manner regardless of whether or not the patient resides at the institution. If the institution also operates a work center, it must apply for an additional certificate for the work center. If the institution places patients at worksites in business establishments in the community, it must either obtain a work center certificate or ensure that the business has a certificate authorizing the payment of subminimum wages to workers with disabilities.

(3) *Business establishment certificates*

Employers in private industry who choose to employ workers with disabilities at subminimum wages must also obtain a certificate.

a. If the employer is a multi-establishment enterprise, the WHD's policy and procedures require that certificates be obtained for *each* establishment in which workers with disabilities will be employed. However, if an individual with a disability is placed at a business by a work center, supervised by the work center, and carried on the work center's payroll, the business need not obtain a certificate. This arrangement is sometimes called an SE or an enclave worksite. In these situations, it is the responsibility of the work center to obtain the certificate.

b. The "Business Establishment" box on WH-226: Application for Authority to Employ Workers with Disabilities at Special Minimum Wages (WH-226) is also the one used by schools with SWEP. These programs place students with disabilities at worksites in the community. Jobs involved and the conditions of employment must comply with the child labor standards when the student is less than 18 years of age.

1. When schools apply for certification, they must list each establishment in which a student will be placed. This listing will be found in item three on WH-226. An attachment may be required if there are numerous locations.

2. The school must also list each student participating in the program on the supplemental information form (*see* WH-226A). The school will be issued a certificate for each establishment listed on the application, and it is the school's responsibility to provide a copy of the certificate to each business establishment and keep the original on file at the school.

c. Employers seeking temporary authority to employ workers with disabilities referred to them by a vocational rehabilitation program of the VA or a state vocational rehabilitation program are also issued Business Establishment (Special Worker) certificates.

(f) The certificates do not establish specific subminimum wage rates. They do, however, require the payment of at least commensurate wage rates (explained in FOH 64g05) to all workers

who have disabilities for the work being performed (*see* FOH 64g00). The certificates apply to all work covered under the FLSA, the SCA, and the PCA.

(g) Applications for subminimum wage certificates (*see* WH-226 and WH-226A) may be obtained from any WHD RO and the NO, OP, DEPP, FMLA/OLS Branch. They may also be viewed on, and downloaded from, the WHD homepage on the internet at www.dol.gov/dol/esa/public/forms/whd/index.htm.

(h) On 04/01/1996, the section 14(c) subminimum wage certification process was centralized in the Certification Team of the Chicago RO. The Certification Team processes all applications for section 14(c) certification and issues or denies certificates under this program. Employers shall mail completed applications to:

U.S. Department of Labor
Wage and Hour Division
230 South Dearborn Street, Room 524
Chicago, Illinois 60604-1591

(1) The Certification Team will process each application and, as appropriate, issue or deny a certificate, in accordance with the regulations and established guidelines.

(2) Employer questions regarding the status of specific applications or renewals should be referred to the Certification Team located in the Chicago RO. The name and telephone number of the Certification Team Compliance Specialist that will be processing the employer's certificate is printed on the renewal application the Certification Team mailed to the employer. This same information is also printed on the certificate when it is issued.

(3) Questions regarding compliance, enforcement, or any other aspect of section 14(c) should be handled locally by the district office (DO) or the regional enforcement coordinator: section 14.

(4) The Certification Team has divided the 50 states into 5 groups. When requesting copies of applications, certificates, or prior history, the WHI should contact the appropriate Compliance Specialist by phone or fax at (312) 596-7207. The appropriate phone numbers are listed below:

a. (312) 596-7199: Arizona, Delaware, Idaho, Indiana, Maine, Montana, Nebraska, North Dakota, Tennessee, Texas, Vermont, Virginia, Washington, and Wyoming.

b. (312) 596-7201: California, Connecticut, Hawaii, Kentucky, Louisiana, Massachusetts, Nevada, Oklahoma, Rhode Island, South Dakota, and West Virginia.

c. (312) 596-7200: Alabama, Arkansas, Maryland, Michigan, Missouri, North Carolina, New Hampshire, South Carolina, Utah, and Wisconsin.

d. (312) 596-7202: Alaska, Georgia, Minnesota, Mississippi, New Mexico, New York, Ohio, and Oregon,

e. (312) 596-7198: Colorado, District of Columbia, Florida, Guam, Illinois, Iowa, Kansas, New Jersey, Pennsylvania, Puerto Rico, and the Virgin Islands.

64d01 **Effective dates of subminimum wage certificates.**

(a) The effective date of the certificate is stated below the employer's name and address. Work Center and Patient Worker certificates are issued for 2-year periods. Business Establishment (Special Worker) certificates, including SE and SWEP certificates, are issued for a 1-year period.

(b) If an application for renewal has been properly and timely filed, the existing special subminimum certificate will remain in effect until the application for renewal has been granted or denied (*see* 29 CFR 525.13(b)).

64d02 **Certificates involving workers with disabilities employed as homeworkers.**

(a) If an employer is an organization or institution carrying out a recognized program of rehabilitation for workers with disabilities and holds a certificate authorizing the payment of subminimum wages under section 14(c), that employer is not required to obtain a certificate under 29 CFR 530 to employ these workers with disabilities as industrial homeworkers (*see* 29 CFR 525.15(a)).

(b) **Handbooks**

(1) Workers with disabilities who are employed by a nonprofit rehabilitation facility and working in or about a home, apartment, tenement, or room in a residential establishment are not required to maintain homeworker handbooks (*see* 29 CFR 525.16(e)).

(2) Homeworker handbooks must be maintained for homeworkers employed by *for-profit* employers under a section 14(c) certificate. These handbooks may be obtained through the Wage and Hour Division, Office of Policy, Division of Enforcement Policy and Procedures, FLSA/Child Labor Branch, Room S3510, 200 Constitution Avenue, NW, Washington, DC 20210.

(c) Employers of industrial homeworkers receiving subminimum wages authorized by a certificate issued under section 14(c) may satisfy the posting requirements by providing the poster directly to the employees or, where appropriate, to the parents or guardians of the homeworkers with disabilities.

64d03 **Certificate revocation and denial of renewal applications.**

(a) A subminimum wage certificate may be revoked, or an application to renew an existing certificate may be denied, for the reasons cited below (*see* 29 CFR 525.17). Should back wages be due workers paid subminimum wages under the provisions of the certificate, those back wages are due from the date of revocation.

(1) It is found that false statements were made or facts were misrepresented in obtaining the certificate or in permitting a worker with a disability to be employed under a

certificate. If this is the case, the certificate may be revoked retroactively to the date of issuance.

(2) It is found that any of the provisions of the FLSA or the terms of the certificate have been violated. In this case, the certificate may be revoked as of the date of the violation (*see* 29 CFR 525.17(a)(2)).

(3) It is found that the certificate is no longer needed to prevent the curtailment of employment opportunities for workers with disabilities. In this case, the certificate may be revoked as of the date of the revocation notice.

(b) Only the Administrator of the WHD (Administrator) or the RA for the Midwest Region may revoke a certificate or deny the issuance of a renewal certificate. The process to revoke a certificate to pay subminimum wages may not begin without the concurrence of the branch chief of the NO's OP, DEPP, FMLA/OLS Branch and must follow the procedures for revoking a certificate found in 29 CFR 525.17(b) and 29 CFR 525.18.

(c) The procedures for the denial of renewal applications may be found in 29 CFR 525.13. The denial of a renewal application may be *initiated* by a member of the Certification Team or a regional enforcement coordinator: section 14. The Certification Team must obtain the input of the appropriate regional enforcement coordinator(s): section 14 and the concurrence of the RA for the Midwest Region before an employer is formally advised that his or her request for renewal has been denied.

64e SECTION 14(c) INVESTIGATION PROCEDURES AND CONSIDERATIONS

64e00 General.

(a) Standard investigative procedures should be followed in all investigations of CRPs, hospitals or institutions, and business establishments employing workers with disabilities, except where modified or superseded by instructions in this chapter. Unless stated otherwise below, the following instructions apply equally to investigations of rehabilitation facilities, hospitals or institutions, and business establishments.

(b) The objective of a section 14(c) investigation is to determine if:

(1) The employer is in compliance with the provisions of the laws enforced by the WHD

(2) The employees paid subminimum wages have disabilities for the work performed

(3) The workers with disabilities are paid commensurate wages

(4) The employer is in compliance with the terms and conditions of the subminimum wage certificate

(5) The employer requires any assistance to ensure continued compliance with the provisions of the FLSA

(c) Experience has demonstrated that the most common violations found during section 14(c) investigations include:

(1) Failure to use proper sources when conducting a prevailing wage survey

(2) Failure to properly document the prevailing wage survey and maintain that documentation

(3) Failure to obtain the *experienced* rate when conducting prevailing wage surveys

(4) Failure to determine prevailing wage rates at a minimum of once a year

(5) Failure to adjust prevailing wage rates after a minimum wage increase

(6) Failure to adjust piece rates and hourly rates as a result of adjustments and/or changes to the prevailing wage

(7) Failure to evaluate hourly paid workers with disabilities on a timely basis and/or failure to timely adjust the hourly rates after the employee is evaluated

(8) Payment of a blanket training wage or training rate rather than basing pay on the commensurate wage (*see* FOH 64g07(a)(2)b.)

(9) Using behavioral standards when conducting quantity and/or quality evaluations of hourly paid workers (*see* FOH 64g05(d))

(10) Rounding errors in time studies and when computing the commensurate wages (*e.g.*, where the piece rate multiplied by the standard units per hour fails to yield at least the prevailing wage rate)

(11) Inadequate time studies, such as failure to include irregular elements (*e.g.*, equipment failure or depletion of needed supplies)

(12) Failure to ensure the worker has a disability for the work being performed, or failure to maintain and/or provide documentation to support that the worker has a disability for the work he or she performs

(13) Failure to count all hours worked

(14) Failure to pay full fringe benefits for work on SCA contracts

64e01 <u>Hours worked issues in section 14(c) investigations.</u>

(a) Rehabilitative services

Time spent by workers with disabilities in rehabilitative services is not hours worked provided the services are not primarily for the purpose of increasing job productivity. This is the DOL's position whether the services are given to a group of workers or individual workers, and whether given at scheduled times or irregular intervals. The burden of identifying and segregating on the time records the time spent in rehabilitative services from hours worked rests with the facility. Some examples of rehabilitative services are counseling, psychological testing, mobility training, medical treatments, personal care, physical therapy, occupational therapy, recreation, and physical exercise.

(b) Downtime

(1) Downtime refers to compensable time when the worker with a disability is on the job but is not producing because of factors not within his or her control, such as lack of work, equipment breakdowns, etc. (*see* 29 CFR 785.14 regarding waiting time and the worker). Workers with disabilities, including those paid piece rates, are required to be paid for downtime at a rate equal to their average hourly earnings during the most representative period, not to exceed a quarter. Employers must be consistent in the method used when computing the employee's average hourly earnings.

(2) As a practical matter, workers with disabilities are often unable to leave the facility because of special transportation arrangements or other reasons unique to their condition. The facility will often provide rehabilitation services to workers with disabilities during periods of extended downtime, and such time need not be considered compensable so long as the services provided are not primarily for the purpose of increasing job productivity; such time is clearly identified, recorded, and segregated on time records; and the services are provided in an area away from the production area.

(c) Work samples and/or simulations

Work samples or simulations are activities that are structured to resemble the work performed in the facility but are performed away from the normal production area. These activities do not yield a product used to fulfill any of the facility's contracts, and the facility does not derive any economic benefit from the product. They are supervised by non-production personnel and are a specific part of a well-defined program of rehabilitation.

(1) In 1985, the Advisory Committee on SWSs asked the DOL to review its position regarding the criteria used in determining whether work simulation constituted hours worked under the FLSA. As a result of this review, the DOL determined that work simulation performed by workers with disabilities in work centers was predominately for the benefit of the workers with disabilities and that employers derived no immediate advantage from this activity.

(2) Accordingly, the DOL's position since 1985 has been that work simulation performed by workers with disabilities receiving subminimum wage under section14(c) in work centers is not hours worked and compensation need not be paid for this activity, *provided* none of the material, goods, or services produced enters into the stream of commerce by being intermingled with the normal production of the employer. Typically, such materials would be discarded or recycled for future use in work simulation. This is the DOL's position even if the purpose of the simulated work is to increase the productivity of the worker with disabilities.

(d) Transportation and/or travel time

The time spent by workers with disabilities being transported to and from the worksite and their homes, including group homes and dormitories, by the employer at the beginning and end of the day is not hours worked. Such transportation retains the characteristic of normal home to work travel. Additionally, employers may treat the transportation as an other facility for the purposes of section 3(m) (*see* 29 CFR 531.32(a) and FOH 64e02).

(1) When workers with disabilities report to a centralized pick-up spot to get a ride in their facility's vehicle to a remote job site that may not be readily accessible by

public transportation, the DOL's position is that this transportation retains the characteristic of normal home to work travel. Hence, it does not constitute hours worked so long as all of the following conditions are met: the workers with disabilities do not perform any work at the pick-up spot, they do not engage in any task that could be considered an integral part of their principal activity, and they retain the option to transport themselves to the job site.

(2) At times, because of their disabilities, the workers' option to transport themselves to the job site may be only theoretical. For example, the worker with a disability may not be eligible for a driver's license or his or her guardian may be unable to provide transportation. The fact that the transportation option is only theoretical does not change the DOL's position that such travel is not hours worked.

(3) Any time spent in transportation provided by the facility between job sites during the course of the workday *is* hours worked (*see* 29 CFR 785.38), and the employee shall be paid a wage rate that is at least equal to his or her average hourly earnings during the most recently completed representative period, not to exceed a quarter. Employers must be consistent in the method used when computing the employee's average hourly earnings.

(e) Volunteers

It is important, during the initial conference, to identify any individuals, including workers with disabilities, that the firm considers to be volunteers during any part of the work day, and verify the volunteer status (*see* FOH 64c04(e)).

64e02 <u>Section 3(m) considerations.</u>

(a) If a facility deducts the cost of board and lodging from the wages of workers with disabilities, the WHI should follow the instructions in 29 CFR 531 and FOH 30c to ensure the deduction represents the fair value or reasonable cost of the board, lodging, or other facility. Note: *see* FOH 64e02(d) for special instructions regarding deductions from the wages earned by patient workers.

(b) Employers may incur costs directly related to providing room and board to workers with disabilities, and these costs *could* be credited toward wage obligations to the extent the costs are incurred to the benefit of the workers with disabilities and would not otherwise be incurred by the employer.

(1) To convert the annual cost of board, lodging, or another facility into the average equivalent weekly cost per worker, divide the reasonable annual cost of items provided by the organization, consistent with the requirements of 29 CFR 531, by 52 weeks and then by the total number of workers with disabilities who received the benefit of these items.

(2) The following are examples of costs a facility might incur that could be directly related to providing room and board and *could* be credited toward wage obligations to the extent the costs are incurred to the benefit of the workers with disabilities and would not otherwise be incurred by the employer:

a. Cost to the facility of renting dormitories, kitchens, and recreational areas

b. Cost of depreciation, including the depreciation of furniture and other equipment used by the worker with a disability, if the buildings comprising the facility are owned by the facility

c. Laundry costs

d. Food costs

e. Cost of fire and similar insurance

f. Utility costs

g. Salaries paid to employees whose jobs are an integral part of providing the room and board (*e.g.*, cooks, janitors, kitchen helpers, and maintenance personnel)

h. Cost to the employer of providing home to work transportation to the client (*see* FOH 64e01(d))

(3) Two examples will illustrate the point that the costs must be incurred for the benefit of the workers with disabilities and not otherwise incurred by the employer:

a. A work center employs a cook to prepare meals for the workers with disabilities. The cook, however, spends 25 percent of his or her time preparing meals for individuals who do not have disabilities that are receiving job training at the facility. The work center may only take 75 percent of the cook's compensation as a credit toward wages due workers with disabilities.

b. A worker center pays mortgage interest on a building in which the workers with disabilities dine. If this space would otherwise be empty or used for other purposes by the work center, no portion of the mortgage interest could be considered a reasonable cost of furnishing board and lodging.

(c) If the worker with a disability or a third party has made a contribution toward the cost of the board, lodging, or another facility, the employer may not take credit for that contribution when determining the fair value or reasonable cost. The following examples are *not wage payments* and may not be credited toward wage obligations:

(1) The value of employees' food stamps that are used to purchase food for the facility when the employer calculates the reasonable cost of board

(2) Donated clothing worn by workers with disabilities unless the employer incurs a cost in making the clothes wearable

(3) Stipends or living allowances paid to a worker with a disability by a third-party rehabilitation organization or a government agency

(4) Reimbursement for transportation to and from home (dormitory or group home) and the job site (*e.g.*, work center) provided by some other organization or governmental agency (*e.g.*, federal, state, or local)

(5) Employer provided transportation between job sites (not normal home to work travel)

(d) Hospitals and institutions may not make deductions from patient workers' commensurate wages to cover the cost of board, lodging, and other services, unless (and to the extent) such deductions are permitted by applicable federal or state law, and the deductions are made on the same basis and collected from non-working patients as well (*see* 29 CFR 525.5(b)).

64f INITIAL INVESTIGATIVE ACTIVITIES

64f00 <u>Preparation for investigation.</u>

(a) Because some WHIs are not assigned section 14(c) investigations on a regular basis, a review of FOH 64 and 29 CFR 525 is recommended before any action is taken. Because the WHI will encounter some terms that are unique to investigations of section 14 employers, a glossary is provided at the back of this chapter.

(b) The regional enforcement coordinator: section 14 may be contacted, following established procedures, for guidance during the conducting of investigations under section 14(c).

(c) Unless the matter was referred to the DO by the Certification Team, the WHI must contact the Certification Team as soon as it becomes apparent that an investigation involves compliance with section 14(c).

(1) These contacts are required for several reasons:

a. Compliance impacts the certification process. Certificates should not be issued or renewed during an open investigation where a formal determination of compliance is being made.

b. The Certification Team conducts its own compliance reviews of the applications for certification and follows up if there are indications of violations. Contact with the Certification Team will reduce duplication of enforcement efforts.

c. Much like the main office-district office (MODO), the Certification Team possesses both certification and compliance history information concerning the firm that may not be available from any other sources (note: this contact does *not* eliminate or replace the MODO contacts required by FOH 61). Request the Certification Team to send the following documents:

1. A copy of the subminimum wage certificate(s) applicable to the 2-year investigative period

2. A copy of the complete section 14(c) application with attachments. The application (*see* WH-226 and WH-226A) requires the employer to submit prevailing wage rate survey data, hourly commensurate wage evaluation forms, information on piece rates paid, piece rate productivity, and a description of the piece work performed. Thus, the application is a useful tool in assessing the employer's status of compliance and should be thoroughly reviewed prior to the opening conference.

3. A copy of all information concerning any prior investigation history that office may hold

(2) The Certification Team shall be used as a resource to provide information about an employer's certification history. The Certification Team is not to be used for general technical assistance regarding the conducting of investigations or the enforcement of section 14(c). The regional enforcement coordinator: section 14 will provide this assistance.

(3) Upon completion of the investigation, copies of the narrative report, WH-51: WHISARD Compliance Action Report (WH-51), and any Letter of Findings will be forwarded to the appropriate regional enforcement coordinator: section 14 and the Certification Team in the Chicago RO (*see* FOH 64h04).

64f01 **Beginning the investigation.**

(a) For investigations involving work centers or patient workers, the WHI shall send an appointment letter to the employer prior to visiting the establishment to ensure the presence of the executive director or his or her representative during the investigation. Unannounced visits prior to the initiation of an investigation should generally occur only in unusual, emergency-type situations, such as after receiving allegations of minors being placed at risk because their employment violates the child labor provisions.

(b) The appointment letter shall specify the documents and records the WHI will need for reviewing and/or copying, and shall advise the employer that the WHI will be requesting a tour of the facility.

(c) Samples of section 14(c) Appointment Letters are included at the end of this FOH chapter. The type of letter the WHI sends will depend on such factors as whether the employer has been investigated before, size of the establishment, etc. Information the WHI will need to review, and in some cases, copy for the investigation file, include:

(1) Names and addresses of the president and board of directors and/or corporate officials

(2) Copies of the financial statements for past 3 years. These documents are useful when determining an establishment's primary revenue source for the purpose of establishing enterprise coverage under section 3(s)(1)(B). This information could also support a facility's request for an installment payment plan should back wages be due. If the documents are bulky, the WHI may wish to retain only the income and expense statements in cases that are closed and/or settled administratively.

(3) Payroll and time records, for both the staff and clients, for the standard investigative period. This will include the most recently completed payroll for both staff and clients to be used as a profile workweek.

(4) A list of all staff members showing the name, hourly rate or salary, and a descriptive job title

(5) Dates of birth of all employees under 19 years of age who worked during the last 24 months

(6) All Form I-9: Employment Eligibility Verification (Form I-9) for current employees hired after 11/01/1986. *WHIs will request this information only in targeted (i.e., non-complaint) compliance actions*.

(7) The employer's federal identification number

(8) Contract information for the standard investigative period to help establish individual coverage and assist in evaluating the accuracy of commensurate wages:

a. For *production* contracts, obtain:

1. Name and address of customer

2. Geographic source of the raw materials or component parts

3. Final geographic destinations of goods produced

b. For SCA contracts, obtain:

1. Name and address of contractor, including name of prime contractor if work is being performed by a subcontractor

2. Contracting agency's name and address

3. Contracting officer's name and phone number

4. Brief description of work

5. Number of workers employed on the contract

6. Contract award date and period of contract performance

7. Dollar amount of contract

8. Copy of any applicable SCA wage determinations

(9) Documents substantiating the type and severity of the workers' disabilities. Acceptable documents would include a physical examination by a medical doctor or doctor of osteopathy, or the results of psychological testing by a Master's level psychologist, *and* staff notes on how the disability affects productivity.

a. The documentation should be sufficiently current to accurately reflect the nature and status of the disability. In some cases, older documentation may not reflect changes in the severity of the disability (*i.e.*, increases or decreases) in those circumstances where this can change.

b. WHIs, following established procedures, should consult the regional enforcement coordinator: section 14 before challenging the documentation solely on the basis of the age of the documentation.

(10) Productivity records and time studies documenting standards used to establish piece rates and hourly commensurate wage rates

(11) Evaluations and documentation used to support rates paid to hourly paid workers with disabilities

(12) Prevailing wage survey data (*see* 29 CFR 525.10(g) for a review of what survey data should include)

(13) For patient worker investigations, the WHI must also ask whether the institution is for-profit or not-for-profit, public or private, primary disability group served, total number of patients in the institution at the time of the investigation, and number of patients who are also employees of the institution.

64f02 **Visit to the establishment.**

(a) Shortly after the initial conference, especially when the employer is a work center, the WHI should tour the facility with the director or other responsible official, in an effort to determine the following:

(1) The apparent functioning level of the workers with disabilities and whether any of them appear not to have disabilities for the work they are doing. Request the names of workers who do not appear to have disabilities for the work being performed at the time of the tour. A review of these workers' disability documentation may be necessary.

(2) The production methods used on major contracts. This will help identify which jobs or job elements are to be time studied. Find answers to the following:

a. Are employees compensated on an hourly or piece rate basis? If paid a piece rate, who sets up the work area, replenishes the supplies, and counts the units produced? If done by the worker, is the time spent in these activities incorporated into the time study used to establish the piece rate? Failure to include all tasks in the time study will result in an artificially high production standard.

b. Are there significant amounts of downtime as the result of changing work assignments, equipment breakage, or other reasons? How is this time recorded and paid for?

c. Is the work of a strenuous nature that would fatigue the workers over the course of the workday, causing a reduction in their productivity and earnings? Do the workers take breaks or rest periods, and if so, how is this time treated?

d. Are minors employed, and if so, are they employed in compliance with the child labor laws? Note: Child Labor Reg. 3 occupations standards prohibit minors under 16 from employment in work rooms where goods are manufactured or processed, activities often performed in work centers.

(b) **Records review**

During the initial conference, ensure that the documents requested in the appointment letter are available. Conduct a detailed review of the records after completing the initial tour.

Copies or transcriptions of time and payroll records should be included in the case file as needed. When reviewing payroll and time records, the WHI should follow standard investigative procedures outlined in FOH 5200(b).

(1) Review documentation of the time studies to identify a sample number of job or job element standards to be verified during the investigation. Request copies of the time studies to be verified and include a sample of them in the case file (see FOH 64g04 for methods of work measurement).

(2) Review disability documentation to ensure that the workers have disabilities for the work performed. Begin with a sample, but expand the review as necessary if problems are found.

(c) Interviews

(1) *Workers with disabilities*

a. Formal interview statements may be taken from workers with disabilities in order to determine compliance. Prior to interviewing workers with intellectual or developmental disabilities as the primary disability, WHIs should obtain permission from the appropriate party, most often the workers' parent or guardian, if there is one. Often the parent or guardian possesses sufficient knowledge of the worker's employment situation to make a determination regarding compliance.

b. When interviewing a worker with a disability who is employed in a competitive industry, the WHI must take special care not to single out that individual from the rest of the employees, or question other employees about the nature of the disability of the worker who is receiving a subminimum wage.

(2) *Staff*

Interviews of staff can also help to determine the adequacy and accuracy of records, substantiate or disprove alleged violations, and discover other violations with respect to both workers who do not have disabilities and workers with disabilities. The WHI should attempt to interview floor supervisors of workers with disabilities.

a. Ask the floor supervisor to describe how worker production is recorded and who records that production.

b. It is recommended that the WHI select at least two workers with disabilities from the profile workweek and *interview the floor supervisor* who oversees their work.

1. Using standard interview techniques, reconstruct these employees' starting and stopping times, average number of hours worked per day and per week, average units produced per hour for piece rate workers, and average earnings per day and per week.

2. Compare the information obtained from the interviews with the information reflected on payroll and time records.

3. Verify the adequacy and accuracy of the prevailing wage survey. If the supervisor conducts the prevailing wage surveys, request a brief explanation of how he or she conducts the surveys to determine if done correctly.

4. If there has been a minimum wage change during the investigative period, ask if the prevailing wage was verified after the minimum wage change and if piece rates and hourly rates were changed accordingly.

5. The supervisor should be questioned about such things as downtime, restocking of supplies, and how workers are paid during these activities.

6. Standard interview questions asked employees during an investigation should also be asked of the supervisor.

(d) Conduct or observe confirming time studies. Follow these steps to conduct a confirming time study:

(1) Obtain from the facility a list of individuals to be studied who are familiar with the work and who perform within an average range.

(2) Study and observe the steps listed on the facility's time study documentation and compare them with those in the confirming time study to ensure that all steps required to do the job were included in the original time study.

(3) Conduct or observe the confirming time study for a length of time long enough to generate a work pace that can be maintained throughout the workday.

(4) Compare the results of the confirming time study with the standards established by the facility's original time study. Generally, if the variance is 10 percent or more, the reason for the difference should be investigated. The WHI will particularly suspect the facility's standards if all the confirming time studies indicate that the employees need additional time to complete a given task.

(5) Check the contracts that were not selected for confirming time studies to ensure that time study documents, prevailing wage data, and commensurate wage rate calculations reflect compliance. If errors or inconsistencies are found in these documents, expand the number of confirming time studies.

(6) Do not require a facility to time study a new contract that involves identical tasks already time studied, or very small jobs in which a time study would consume all the materials required by the contract.

64g ISSUES REQUIRING SPECIAL ATTENTION

64g00 <u>Disabled for the work to be performed.</u>

(a) Before the WHI can determine compliance, it must be determined whether the worker's disability(s) actually renders him or her to be disabled for the work being performed. If the disability does not affect his or her accomplishment of the specific tasks performed, the employee is due the full applicable section 6(a) minimum wage (*see* FOH 64a01). These determinations are made by observing the workers and spot checking the disability records requested during the initial conference. The employer's records should include documentation that supports the nature of each worker's disability. Disabilities that are not visibly obvious must be supported by medical or psychiatric reports, or psychological tests.

(b) In some instances, the employer may not have records documenting a worker's disability because the employee was referred by another agency or facility, and the referral agency or facility, out of a concern for the worker's right to privacy, did not provide the employer with the records. In the case of such a referral, the employer is not required to maintain documents identifying the worker's disability. The referral agency, however, should maintain such documentation and provide it to the WHI for inspection (*see* 29 CFR 525.16(a)).

(1) If the referral agency denies the WHI's access to records identifying a worker's disability, attempt to obtain the release of the documents by assuring the agency that DOL's policy prohibits the disclosure of disability information. Also, explain that third-party attempts to gain access to disability information are exempt from disclosure under the Freedom of Information Act.

(2) If, for any reason, the referral agency still refuses to provide the WHI with documentation identifying a disability, and the disability is not readily apparent, the employer will be given the opportunity to obtain and provide such documentation. If the employer fails to do so within a reasonable amount of time, generally no more than 30 days, the employer shall be advised that the payment of the subminimum wage to those workers for whom documentation of the disabilities is not available constitutes a violation of section 6 of the FLSA. The regional enforcement coordinator: section 14 and the NO, OP, DEPP, FMLA/OLS Branch shall be consulted immediately concerning the computation of back wages and the possible revocation of the employer's certificate.

64g01 **<u>Proper certification.</u>**

(a) The WHI must always check that the employer does in fact have a certificate to employ workers with disabilities at subminimum wages and that the certificate is valid. The Certification Team will assist WHIs in determining if certificates are valid and whether renewal applications were timely filed.

(1) Although section 14(c) certificates are issued with a specific expiration date, there are situations when an employer's authority to pay subminimum wages extends beyond the date on the certificate. For example, an employer's authority to pay subminimum wages would continue if a timely renewal application was filed prior to the certificate expiration date but a new certificate had not yet been issued. The same is true when revocation action has been commenced by the WHD but the firm has been provided an opportunity to demonstrate compliance, and the period to demonstrate that compliance goes beyond the expiration date of the certificate. Revocation of the authority to pay subminimum wages is accomplished by a written notification (see 29 CFR 525.13, 29 CFR 525.17, 29 CFR 525.18, and FOH 64d03(c)).

(2) As mentioned above, if the expiration date on the certificate has passed, but the employer's renewal application was properly and timely filed (*i.e.*, postmarked before the expiration date), the employer's authority to pay the subminimum wages remains in effect until the Certification Team in the Chicago RO either grants or denies the new certificate (*see* 29 CFR 525.13).

(3) WHIs shall check with the regional enforcement coordinator: section 14, through appropriate channels, before computing and requesting payment of back wages due workers with disabilities solely because the employer's certificate has expired.

(b) If a hospital or institution has a certificate authorizing the employment of patient workers, the WHI must verify that the workers with disabilities do, in fact, receive treatment from the facility. Such treatment may be provided on an outpatient basis.

(c) The WHI may encounter a worker with a disability employed at a subminimum wage rate in a competitive industry by an employer who does not have a certificate. In this case, the WHI should advise the employer of the steps required to obtain such a certificate, and must also explain that the certificate cannot be granted retroactively. Prior to the centralization of the certification process, WHIs had the authority to issue temporary certificates when encountering such situations, but this is no longer the case.

(d) WHIs may encounter hospitals or institutions that do not hold a section 14(c) certificate but are employing patients at subminimum wages, and/or work centers that do not hold a section 14(c) certificate but employ workers with disabilities at subminimum wages. Although certificates will not be issued retroactively and back wages are most likely due the workers, the WHI shall advise such employers of the section 14(c) certification process and program.

64g02 Posting of notices and informing employees of the terms of the certificate.

(a) Posting of notices

(1) 29 CFR 525.14 requires that every employer having workers that are employed under subminimum wage certificates shall at all times display and make available to employees a poster as prescribed and supplied by the Administrator. This poster, *WH 1284*, may be downloaded from the WHD homepage on the internet at www.dol.gov/dol/esa/public/regs/compliance/posters/disab.htm.

(2) Where the employer finds it inappropriate to post the poster, he or she may provide the poster directly to all employees who are subject to its terms.

(b) Informing employees of the terms of the certificate

(1) Each worker with a disability and, where appropriate, a parent or guardian of the worker shall be informed, orally and in writing, of the terms of the certificate under which such worker is employed. This requirement may be satisfied by making copies of the certificate available (*see* 29 CFR 525.12(g)).

(2) Where a worker with a disability displays an understanding of the terms of a certificate and requests that other parties not be informed, it is not necessary to inform a parent or guardian.

64g03 **Prevailing wages.**

(a) Determining the prevailing wage is the first step toward establishing the correct commensurate wage. The prevailing wage is the wage paid experienced workers who do not have disabilities in the vicinity performing essentially the same type of work (*see* 29 CFR 525.10(a)). An employer must be able to demonstrate that the prevailing wage rate used to determine a commensurate wage was objectively determined. Normally, prevailing wage rates are based on the results of *surveys* conducted by the employer holding the section 14(c) certificate.

(b) The prevailing wage survey must be conducted prior to paying a subminimum wage. It then must be reviewed and updated at least once a year (more frequently when a change in the prevailing wage has most likely occurred, such as when the FLSA section 6(a)(1) minimum wage has increased). Prevailing wage surveys are conducted in the same manner regardless of the employer's method of payments (*i.e.*, piece rate, hourly wage, salary, etc.).

(1) Prior to the effective dates of the last two increases in the minimum wage, the NO has reminded all certificate holders, by letter, of the requirements of reviewing and adjusting prevailing wage rates.

(2) It is the intention of the NO to continue this notification process for any future increases in the minimum wage.

(c) The prevailing wage is not an entry-level wage or a training wage, but the wage rate paid experienced employees after completion of any training or probationary periods. An experienced worker is one who has learned the basic elements or requirements of the work to be performed, ordinarily by completion of a probationary or training period. Typically, such a worker will have received at least one pay raise after successful completion of the probationary or training period (*see* 29 CFR 525.3(k)).

(d) The prevailing wage may not be lower than the applicable statutory minimum wage as established by section 6(a)(1) of the FLSA, or where applicable, a higher state minimum wage. Employers must ensure that the wage rates they are quoted when conducting the prevailing wage survey meet this criteria.

(e) To conduct a survey, the employer must obtain wage information for each job classification being performed by workers to be paid a subminimum wage. A brief job description should be prepared. This job description will also be important when conducting time studies, and will assist the WHI in determining compliance. The job description should:

(1) define the specific job duties, responsibilities, and tasks;

(2) include types of equipment and supplies used to perform the tasks;

(3) list types of skills, education, or experience levels required; and

(4) indicate the location, and days and times of the week the work is to be performed.

(f) The employer should obtain wage data from comparable firms in the area. The appropriate size of the sample (*i.e.*, the number of firms surveyed) will depend on the number of firms doing similar work, but normally should include no less than three (*see* 29 CFR 525.10(c)).

(1) The information should be solicited from comparable businesses employing primarily workers who do not have disabilities performing similar work in the vicinity where the worker with a disability is employed (*see* 29 CFR 525.10(c)). A *comparable business* is one that either employs a similar number of employees or competes for contracts of a similar size and nature.

(2) If similar work cannot be found in the area defined by the geographic labor market (*i.e.*, the vicinity), the closest comparable community should be used (*see* 29 CFR 525.10(c)). When this is not possible, the employer has two options:

a. The employer may obtain wage information from sources other than comparable businesses as long as the data obtained reflects non-entry-level wage rates. Examples of other sources of wage information might be the Bureau of Labor Statistics, state employment services, temporary help firms, and private employment services.

b. The employer may identify the general characteristics of the job to obtain a generic job description and search for employers whose work has similar characteristics. For example, such job comparisons might be made as follows: skilled, semi-skilled, or unskilled; light duty or heavy duty; and either handwork or machine-assisted. Using these comparisons, a generic job description could, for example, be unskilled, light duty, hand bench assembly, or semi-skilled, machine-assisted packaging.

(g) There are special situations in which an employer is not required to conduct a survey to determine the prevailing wage.

(1) If an employer's workforce consists primarily of workers who do not have disabilities, the employer is not required to do a survey.

a. Instead, the employer may use, as the prevailing wage rate, the rate he or she pays to his or her experienced workers without disabilities who perform similar work. Similarly, if an agency or facility places a worker with a disability on the premises of such an employer, the wage paid to the employer's experienced workers who do not have disabilities may be used as the prevailing wage (*see* 29 CFR 525.10(b)).

b. Should an employer whose workforce consists primarily of workers who do not have disabilities choose to perform a prevailing wage survey (rather than adopt, as prevailing, the established wage rate already being paid his or her experienced workers), the WHD requires that the employer include the wage data from his or her own firm when conducting the survey and computing the prevailing wage. This is because the employer's own wage data would most perfectly comport with the requirement of 29 CFR 525 that the commensurate wage be based upon the wage rate paid to experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity in which the individual earning the subminimum wage is employed. To ignore the employer's own data in such situations would unfairly ignore the employer's impact on the wages being paid in the vicinity.

(2) If the section 14(c) employer has a subcontract to perform a job in essentially the same way and with the same type of equipment as the prime contractor, the section 14(c) employer may use the wage rate the prime contractor pays to his or her experienced workers as the prevailing wage rate.

a. The WHI should compare the job methods and equipment used by employees of the section 14(c) employer with those of the contractor to determine if there is a difference. If a difference is discovered, the WHI must determine whether the difference is great enough to change the characteristics of the work performed. If the characteristics of the work have changed (*e.g.*, changes in the type of product produced or the process used to produce the product), the contractor's wage may no longer be the appropriate prevailing wage.

b. If the prime contractor discontinues the job by subcontracting all the work to the section 14(c) employer, the section 14(c) employer must conduct a prevailing wage rate survey.

(h) The employer must maintain the following documentation regarding prevailing wage surveys (*see* 29 CFR 525.10(g)):

(1) Date of contact with firm or other source

(2) Name, address, and phone number of firm or other source

(3) Name and title of individual contacted within the firm or other source

(4) Wage rate information provided by firm or other source

(5) Brief description of work for which wage information was provided

(6) Basis for the conclusion that the wage rate was not based upon an entry-level position

(i) After obtaining at least three wages rates (*see* 29 CFR 520.10(c)), the employer must average them to determine the prevailing wage for a particular job. The employer may use either a weighted or simple average so long as he or she is consistent. See the following example:

Weighted Average vs. Simple Average			
Employer	Number of employees	Wage rate reported	Gross wages (number of employees times wage)
XYZ, Inc.	99	$5.85	$579.15
ABC, Inc.	17	$5.95	$101.15
RST, Ltd.	25	$6.20	$155.00
3 employers	141 employees	$18.00	$835.30

Weighted average: $835.30 ÷ 141 employees = $5.92411 or $5.93

Simple Average: $18.00 ÷ 3 employers = $6.00

Note: in the weighted average example, the prevailing wage rate is $5.92411, but the employer rounded it up to $5.93 per hour. If the employer rounded to $5.92, he or she would be establishing a prevailing wage rate that is *less* than the true prevailing wage rate (less by $0.0041 per hour). The WHD will not normally question computations that are carried out to the fifth decimal point and then *rounded up* to four decimal places. The employer could, of course, round up (but not merely round off) sooner. For example, 0.04974 should be rounded to 0.0498 or 0.05 (*see* FOH 64g06(f)(1)).

(j) Evaluating employer's prevailing wage rates

(1) The WHI should review the prevailing wage survey data requested during the initial conference, and use his or her knowledge of wage rates in the area to evaluate the wages contained in the survey.

a. If the section 6(a)(1) minimum wage is cited as a prevailing wage, the WHI should verify that the employer has sufficient documentation to prove that the minimum wage was the rate being paid experienced workers, rather than entry-level workers (*see* 29 CFR 525.3(k)).

b. Should the WHI question the accuracy of the employer's prevailing rate, he or she should contact the employer's sources of wage information to verify the validity of the rates listed and accuracy of the work descriptions, and to confirm that the rates are not for entry-level work. When conducting these calls, the WHI must take care that the sources contacted are not left with an impression that the employer with the subminimum wage certificate has violated the FLSA.

(2) The WHI should be aware that there might be more than one correct prevailing wage in the same vicinity. Depending on sources and the methodology (e.g., whether a simple or weighted average was used), two employers in the same vicinity may obtain slightly different rates. The range should be fairly narrow. A prevailing wage rate that differs only slightly from others in the same vicinity should not be challenged, provided the employer supplies documentation to demonstrate that he or she conducted the survey in a thorough and conscientious manner.

(3) Employers sometimes make arbitrary adjustments in the prevailing wage to account for differences in duties, methods, equipment, and responsibilities between the work done by section 14(c) employees and work done by employees who do not have disabilities in a competitive industry. This practice, known as *de-skilling*, is not permitted. If comparable jobs cannot be found, prevailing wage data should be collected on jobs requiring the same general skill levels. The following is an example of de-skilling:

<u>Scenario:</u>

Assume that the properly determined prevailing wage for packaging by hand is $8.00 and that the hand packing job performed in a competitive industry normally includes the following steps: counting bolts, placing a label on the bag the bolts go in, putting 10 bolts into the labeled bag, putting 24 filled bags into a box for packing, and then sealing the box.

De-skilling occurs when the employer lowers the prevailing wage because the workers with disabilities do not perform all components of the job that was surveyed. The workers with disabilities may not perform all components of the job because of the manner in which the work was assigned, because they are unable to or refuse to perform certain of the work components, or the particular contract being performed does not require all of the components. An example of de-skilling would be when the employer, for whatever reason, decided that labeling the bags is not as difficult as counting 10 bolts, and therefore, the subminimum wage of an employee who only performed labeling should be based on a prevailing wage of $7.25 an hour rather than $8.00. The same would be true if the employer decided that the subminimum wage of an employee who only sealed the boxes should be based on a prevailing wage of $7.50 an hour.

De-skilling is an inappropriate adjustment to the prevailing wage that adversely impacts the commensurate wage. Some employers may also attempt to improperly reduce commensurate rates when evaluating the performance of workers with disabilities by penalizing them for not performing all components of a job. This process, known as *factoring*, is discussed in FOH 64j02(b)(2)b.1.B.

(4) If the WHI finds the information obtained by the section 14(c) employer unacceptable, or if the employer failed to conduct a prevailing wage survey, the WHI should request the employer to perform the survey (following the procedures and guidelines found in this section of the FOH). The WHI will then review the results of the new survey. Should the employer decline to conduct a new prevailing wage survey, the WHI will conduct the survey. Documentation of the survey conducted by the WHI must be included in the case file. The WHI shall also determine if the employees with disabilities are due back wages because of the firm's failure to properly determine the prevailing wage.

64g04 Work measurement.

(a) Before an employer can convert the prevailing wage into a commensurate wage, he or she must conduct a work measurement to determine the standard for a worker who does not have a disability.

(b) Work Measurement

Work measurement refers to the process of determining the amount of time it should take a worker who does not have a disability to perform an operation, or element of an operation, using a prescribed method. This amount of time becomes the standard against which the productivity of the worker with a disability is compared to determine the commensurate wage. Three criteria must be met to obtain an accurate determination:

(1) The work being measured must be performed by a qualified, competent worker who *does not have a disability for the work* being performed, and who possesses the necessary skill and training to properly perform the operation

(2) The work must be done at a pace that could be maintained by an employee over an entire work shift

(3) For workers being paid a piece rate, an allowance must be made for the worker's personal time, fatigue, and unavoidable delays (PF&D) time (*see* 29 CFR 525.12(h) and FOH 64i01)

(c) The regulations do not require that employers use any particular method of work measurement, but the method used must be verifiable through the use of established industrial work measurement techniques. The following methods of work measurement have been accepted by the WHD:

(1) Timing the work with a stopwatch (*see* FOH 64i00(c))

(2) *Methods-Time Measurement (MTM)*

This phrase refers to a work measurement system established in 1948 in which a predetermined time value is assigned to every manual motion involved in performing a given task. The time required to complete a unit of work is derived by first adding together the time values for each motion involved, and then adding a PF&D factor. Generally, not less than a 15 percent allowance (*i.e.*, 9 or 10 minutes per hour) is used to allow for PF&D (*see* 29 CFR 525.12(h)(2)(ii)). The original MTM, now referred to as MTM-1, had 450 time values. It has been replaced by a simplified version, known as MTM-2, which has only 30 to 50 time values, and thus, is easier to learn and apply accurately (*see* FOH 64i01 for more information on PF&D).

(3) *MODular Arrangement of Predetermined Time Standards (MODAPTS)*

a. MODAPTS, a work measurement system developed by Australian chemical engineer G.C. Heyde and introduced in 1966, is a predetermined time system that deals with standard time values or units of human physical work, termed "modules" or "MODS." These MODS are related to movements of the human body as work is performed.

b. The following brief description of the development, processes, and application of MODAPTS is provided to assist WHIs in their understanding of this popular work measurement system.

1. Heyde determined that all body movements can be expressed in terms of multiples of a single unit of time. This single unit of time (a MOD that equals 129 milliseconds, 0.129 seconds, or 0.00215 minutes) is the time required to complete a single finger movement. The MODAPTS practitioner determines the number of MODs required to complete a particular motion, and assigns a code to the motion. A general rule of thumb is that one MOD equals $^{1}/_{7}$ of a second.

2. MODAPTS divides body motions into three classes: “Movement,” “Terminal,” and “Auxiliary.” These classes are subdivided further.

A. Movements, for example, are then classified depending on the joint or hinge that must move in order to complete a movement. The greater the movement, the more MODs are required to complete it. For example, moving the hand at the wrist two inches to retrieve an object is coded as “M2.” “M” indicates that it was a movement motion, and “2” indicates that the movement had a MOD value of two. Moving the whole arm is coded as “M4” and movements from the shoulder involving the body trunk are coded “M7,” meaning that it takes 7 MODs, or approximately 1 second, to perform the motion.

B. Movements motions are followed by terminal activities. Terminal activities are divided into activities coded “G” (for “Gets”) or “P” (for “Puts”) with more MODs assigned, as the activity becomes more complicated. For example, picking up a dime from a flat surface (a “Get”) is slightly more difficult that picking up a pencil (another “Get”). The pencil can be picked up with a single grasping motion of the fingers, but picking up the dime requires additional finger manipulation. Therefore, the movement of picking up the dime is given two more MODs than picking up the pencil. Picking up the dime is a “G3,” while picking up the pencil is only a “G1.”

C. Auxiliary activities include all other activities. Two examples include walking (coded “W”) and reading (coded “R”). A single step in an unrestricted area is given 5 MODs (coded “W5”) and reading one word in a group where the purpose is to get only the overall message is given 2 MODs (coded “R2”).

3. The following, based on the sample codes just provided, is the coding for an individual who takes a single step to a table, reads a sign telling him or her to pick up the dime lying on the table in front of him or her, reaches out with his or her whole arm, and picks up the dime: “W5R2M4G3.” This is a total of 14 MODs, or approximately 2 seconds (14 MODs times .129 seconds per MOD equals 1.806 seconds).

4. In this same manner, the MODAPTS practitioner analyzes a job as it is performed by an average experienced worker, codes the motions required to do the job, and tallies the total number of MODs. The total MODs are converted to minutes or hours, and multiplied by an allowance factor, which accounts for PF&D time, to determine the total standard time required to complete the job.

5. Proponents of this system claim that, of all predetermined time standards systems, MODAPTS is the fastest to use, the most accurate, and the easiest to learn. The MODAPTS proponents claim this system is superior to stopwatch time studies since it eliminates performance rating, or the subjective practice of evaluating the speed and effectiveness of the worker being studied.

64g05 **Commensurate wages.**

(a) Section 14(c) permits employers to pay workers who are disabled for the work being performed a commensurate wage (*i.e.*, a subminimum wage based on the worker's individual productivity in proportion to the wage and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity in which the worker with a disability is employed).

(b) In order to determine the commensurate wage, the employer must first examine the work to be performed by the employee with a disability, and through the use of an accepted work measurement technique, develop a standard that accurately measures the quality and quantity of that same work when performed by workers who do not have disabilities. The commensurate rate is determined by comparing the performance of the worker with a disability against that standard for a worker who does not have a disability. Work measurement methods, such as time studies, are used by employers to determine the length of time it should take to perform an operation, or element of an operation.

(c) **Pooling of piece rate earnings**

Each worker with a disability employed on a piece rate basis should be paid the full earnings resulting from his or her own productivity. The WHD discourages the pooling of earnings since an employer may not be fulfilling commensurate wage responsibilities to each individual worker. Employers may pool earnings only when piece rates cannot be established for each individual worker and should make every effort to objectively divide the earnings according to the productivity level of each individual worker (*see* 29 CFR 525.12(i)).

(d) Behavior or general work habits, such as cleanliness, attitude, or attendance, must *not* be considered when establishing commensurate wage rates because they are not objective measures of production. Comments like "accepts criticism," "responds appropriately to visitors," "interacts well with others," and "follows general safety habits" indicate that such behaviors or related factors may have been used when rating the worker with a disability.

(e) **General guidelines for evaluating accuracy of commensurate wage rates**

(1) If the FLSA minimum wage increased during the standard 2-year investigative period, verify that the employer re-examined prevailing wage rate data and recalculated commensurate wage rates. An increase in the minimum wage usually affects the prevailing wage rate because of its ripple effect on wages paid experienced workers, or because the new minimum wage is greater than the old prevailing wage. The employer's re-examination of the prevailing wage data shall take place no more than 60 days after the date of the increase in the minimum wage.

a. If the prevailing wage used by the employer is less than the new minimum wage, the employer should adjust the wage upward. This adjustment and

subsequent recalculation of the initial commensurate wage rate should be completed and effective on the date of the minimum wage increase. After this adjustment has been made, if the prevailing wage is more than the new minimum wage, the employer must still re-examine his or her prevailing wage rate data by contacting the sources of wage information to determine if the information provided earlier has changed.

b. The employer also has the option of making a simple blanket adjustment by increasing the prevailing wage by the same percentage as the increase in the minimum wage.

(2) If the workers are all paid the same wage, or if the range of wages is quite narrow, the accuracy of the commensurate wage rate becomes questionable and requires a closer look. Because individuals demonstrate a wide variety of skill levels, if the employer's commensurate wages are actually based on the employees' quantity and quality of work, wages should also reflect this range of skills.

(3) Be sure to check the employer's rounding practices. Piece rates are always rounded up, even though the digit to be rounded is less than the numeral five. Because this practice differs from usual rounding procedures, employers frequently make an error when computing commensurate wages based on piece rates (*see* FOH 64i01(b)(2)).

64g06 <u>Time studies and jobs paid piece rate.</u>

(a) General

(1) If a prevailing wage survey finds that a piece rate prevails for the kind of work to be performed by the worker with a disability, there would be no need to conduct a time study for that job. The worker with a disability should be paid the same piece rate established by the prevailing wage survey. A piece rate fixes a wage payment on each completed unit of work. When the worker with a disability is to perform a production job, the simplest and most objective method of payment is by piece rate.

(2) If the prevailing wage survey indicates that an hourly rate prevails for the kind of work performed by the worker who does not have a disability, and the section 14(c) employer wishes to pay a piece rate, time studies would be required to convert the hourly rate to a piece rate. *See* FOH 64g07 and FOH 64j for guidance on computing *hourly* commensurate wage rates.

(b) Time studies

(1) In order to compute a commensurate wage rate, employers must determine how long it takes the standard setter (*i.e.*, the average experienced worker who does not have a disability) to perform the job. This is normally done by conducting time studies.

(2) Time studies are normally conducted using staff members of the facility (*i.e.*, individuals without disabilities for the work) who have been given sufficient time to practice and prepare.

(3) The WHD does not require facilities to use one specific work measurement method, nor does the WHD prescribe the format or length of the time study. However, the

facility must demonstrate to the WHD that the method is generally accepted by industrial engineers and that it was done accurately (*see* 29 CFR 525.12(h)(1)). There are several acceptable methods that an employer may use for establishing piece rates. Any time study method used to establish piece rates must be verifiable. This section (FOH 64g06) contains procedures that workshops typically follow in conducting stopwatch time studies. These may be used by a WHI to verify the results of an existing time study or to conduct a confirming time study.

(4) The methods used to establish the average hourly production of the standard setter may range from relatively simple techniques, involving rudimentary counting of job samples over a fixed period of time, to sophisticated industrial engineering techniques like MTM and MODAPTS, discussed above. An example of one method that is acceptable to the WHD is a 25-minute stopwatch time study observing three workers who do not have disabilities.

(5) During investigations, WHIs will normally conduct, or oversee the employer conduct, time studies, either to verify the accuracy of the employer's time studies or because the employer has failed to conduct the necessary studies.

(6) *See* FOH 64i00(c) for a detailed description on how to conduct time studies.

(c) Criteria for accurate time studies

(1) As mentioned, the productivity of workers who do not have disabilities is measured by time studies.

a. The performance of the individual being time studied should represent a normal productivity level. The standard setter should not work, or be encouraged to work, so fast that he or she could not maintain that pace over a work shift. If the standard setter's performance is above or below normal performance levels, adjustments (or leveling) may be done to compensate, but only by someone knowledgeable in this technique, as evidenced by successful completion of training in this area (*see* 29 CFR 525.12(h)(2)(i)).

b. The subject of the time study should be permitted to practice the work until he or she is comfortable and can perform without hesitation. Employers wishing to establish piece rates are required by 29 CFR 525.12(h)(2)(ii) to make an allowance for PF&D. This allowance is discussed in FOH 64i01.

(2) Subjects being time studied should use the same work methods as those used by the majority of workers with disabilities.

a. The WHI may find that job modifications, such as the use of jigs and fixtures, have been made to accommodate the special needs of a worker. If these modifications increase the productivity of the worker with a disability, but would impede a worker without a disability, no additional time studies are required (*see* 29 CFR 525.12(h)(2)(iii)).

b. However, an additional time study will be required when entirely different methods of production are used, as opposed to the modification of the

existing method, or when a worker does not have access to certain equipment.

Scenario:

An employer has 5 production machines and 10 full-time employees who have disabilities that adversely impact the work being performed. If the production standard was established using machines, an additional time study is required because at least five of the workers must perform the job manually at any given time. Producing materials by hand is a completely different production method than producing materials by machine.

(3) The time study should include all operations of the job to be performed by the worker with a disability, such as set-up activities, packaging, counting, boxing, and irregular operations like retrieving supplies.

(4) When employees work on a contract, they must use the same methods and materials that were used during the time study. Any change would require another time study.

(5) If the time study method used by the facility appears to be unsound, the facility should redo the time study with WHI oversight to demonstrate to the WHD that the method was accurate. For example, if a facility used a 10-minute time study and the pace of work maintained during the time study, when contrasted with the pace of workers on the floor, appears unrealistic and unsustainable throughout the workday, the facility must redo the time study. The duration of the new study would have to be long enough to demonstrate that the pace of the 10-minute study could be maintained for an entire work shift.

(d) There are certain distinct differences in the time study procedures depending on whether the employer wishes to pay a piece rate or an hourly rate to the worker with a disability. The procedures to follow for time studies are explained in detail in FOH 64i for piece rates and FOH 64j for hourly wages. Some of the similarities and differences between the two types of time studies are discussed below:

(1) *Similarities*

a. Both require an accurate description of the work to be performed, including a task analysis detailing the method(s) actually used by employees when performing the job, the materials, and any equipment required.

b. Both require the selection of an individual who does not have a disability for the work to be performed (*i.e.*, the standard setter) who is familiar with the work and capable of maintaining a consistent, efficient pace.

c. Both require that a time study be conducted of the individuals who do not have disabilities for the task performing the same tasks that the worker with a disability will be employed to perform.

d. Both require consideration of quantity and quality of production.

(2) *Differences*

a. Who is time studied and who is evaluated:

- Piece rate: time study the worker who does not have a disability to set piece rate for workers with disabilities. The worker with a disability is not observed and/or evaluated.

- Hourly rate: time study the worker who does not have a disability to establish the standard against which the worker with a disability is then observed and/or evaluated.

b. PF&D consideration:

- Piece rate: required when setting piece rate.

- Hourly rate: not required when setting hourly rate, but the WHI may encounter situations where employer includes a PF&D when determining hourly commensurate wages. If PF&D is used in the evaluation of the worker with a disability, it must also be used when conducting the time study of the standard setter(s). It is important to remember that evaluations are not to be conducted if the worker is fatigued or subject to conditions that would lower productivity.

c. Quality of work:

- Piece rate: quality standards (*i.e.*, determining what is an acceptable, non-defective product) are established prior to conducting the time study. The standards setter (during the time study) and the worker with a disability (during actual production) must be held to the same standards of quality and/or product acceptance.

- Hourly rate: employers must hold both the standard setter and the worker with a disability to the same standard of quality. Counting rework time the same for both is one way of doing this provided the same methodology is used for both. Otherwise quality must be considered separately. Methods that employers have used to do this are the inclusion of Rework (*see* FOH 64j02(b)(1)) and the 90/10 Rating (*see* FOH 64j02(b)(2)).

(e) To determine the adequacy of the time study methodology used by a facility under investigation, the WHI should conduct, or observe the employer conduct, confirming time studies on two or three of the facility's larger on-going contracts (see FOH 64i00(d)(4) below).

(f) Indicators of an accurate piece rate commensurate wage rate

(1) One way to test the accuracy of an employer's commensurate wage rate is to multiply the employer's piece rate by the standard setter's expected productivity. This must equal at least the prevailing wage. Note that the WHD will not normally question computations that are carried out to the fifth decimal point and then *rounded up* to four decimal places. The employer could, of course, round up (but not merely round off) sooner. For example, 0.04874 should be rounded to 0.0488 or 0.05. The reason for this practice is demonstrated in the following example:

Scenario:

The prevailing wage rate is $6.65. The standard setter produces 324 units in a 50-minute hour. This takes into account an adequate PF&D allowance as required by 29 CFR 525.12(h)(2)(ii) and FOH 64i01. Note: any partially completed units produced during the time study are not included when computing the standard. Only whole, completed units are counted. $6.65 divided by 324 equals $0.0205246 per piece. This piece rate is rounded up at the fourth decimal to a rate of $0.0206 per piece. The piece rate, $0.0206, is then multiplied by 324 units per hour to obtain the hourly rate of $6.6744, a rate that is not less that the prevailing wage of $6.65.

However, consider the consequence to the worker with a disability if the employer had *not* carried the piece rate to at least five decimals and then rounded up at the fourth decimal. For example, if the above employer had rounded the rate to $0.02 per piece, the resulting hourly rate would have been approximately 17 cents below the prevailing wage of $6.65 ($0.02 per piece times 324 units per hour equals only $6.48 per hour). This means the worker with a disability would have to perform *better* than the worker who does not have a disability in order to earn the same prevailing wage.

Thus, the differences in rounding procedures, which to some employers seem so unimportant, actually have a significant effect on the wages of the worker with a disability. The worker who has a disability for the job being performed may be paid the exact commensurate wage or may be paid more than the commensurate wage, but *may not be paid less* than the commensurate wage. By carrying the piece rate out to the fifth decimal and then rounding up, the employer ensures that the worker being paid the subminimum wage receives at least the required commensurate wage.

Note: numbers displayed on a computer screen may not reflect actual amounts used by the computer in making calculations. Calculations done on spreadsheets should be verified by calculator computations using five decimal places and then rounding up to four decimal places. The employer has the burden of paying not less than the commensurate wage and must demonstrate by obvious calculation that he or she has done so.

(2) Another indicator of an accurate piece rate would be when the number of units the standard-setter has to produce, at the established piece rate, to earn the prevailing wage represents a reasonable amount (*i.e.*, not an unrealistic expectation).

(3) A third indicator of an accurate piece rate would be when piece rates have been increased in the past year on contracts that have been continuously worked and are older than 1 year. This most likely indicates that the annual prevailing wage review has been conducted and proper piece rate adjustments have been made.

(4) Finally, an indicator of an accurate piece rate would be when an adequate PF&D allowance was incorporated into the time study used to establish piece rates.

(g) More detailed information on PF&D allowances and the conducting of time studies when an employer wishes to pay workers with disabilities a piece rate may be found in FOH 64i.

64g07 **Hourly commensurate rates.**

(a) General

(1) If the employer chooses to pay the worker with a disability an hourly rate, a specifically defined, objective production standard for an experienced worker who does not have a disability must be established. This is done through some form of work measurement, frequently time studies. The facility must then evaluate the productivity of each worker with a disability who is to be paid hourly to determine his or her hourly rate in relation to the standard productivity of the worker who does not have a disability for the job being performed.

(2) Workers with disabilities who are paid by the hour must be evaluated, at a minimum, once every 6 months (*see* 29 CFR 525.12(j) for full requirements). In fact, items 13 and 14 of the WH-226-MIS require the employer's written assurance that he or she will evaluate hourly rated workers every 6 months (*see* 29 CFR 525.12(j)(3)). Evaluations must also occur when there is a perceptible change in productivity or when the duties of the job change.

a. The initial evaluation of a worker's productivity to determine his or her commensurate wage rate should be made within the first month of employment (*see* 29 CFR 525.12(j)(2)).

b. Some consulting organizations have advised employers to pay a training rate amounting to a specific percentage, often 50 percent, of the prevailing wage during the initial period before the worker with a disability is evaluated. Paying such a provisional rate is acceptable so long as the employer understands that he or she must make up the difference if the subsequent evaluation indicates that the training rate was below the employee's commensurate rate. Should the provisional training rate actually exceed the appropriate commensurate wage rate, employers may *not* recoup any overpayments in future workweeks because these employee are still being paid below the FLSA section 6(a) minimum wage (*see* 29 CFR 531.36).

c. The results of the initial evaluation must be recorded and the employee's wages adjusted no later than the first complete pay period following the initial evaluation.

d. If the commensurate wage rate, determined by the initial evaluation, is greater than the wage paid prior to the evaluation, the facility must pay the worker the difference, unless it can demonstrate that the initial payments reflected the commensurate wage due at that time (*see* 29 CFR 525.12(j)(2)).

(3) When workers ordinarily paid by piece rate are occasionally called upon to perform an hourly task (*e.g.*, material handling), the facility may pay them for those occasional tasks at their average hourly piece rate based upon their average earnings during the most recently completed representative period, not to exceed a quarter. Employers must be consistent in the method used when computing the employee's average hourly earnings. Note that this principle also applies to downtime as discussed in FOH 64e01(b)(1). However, when these duties are regular and recurring, the facility should evaluate the worker to determine his or her commensurate hourly wage for the task.

(4) It is important to remember that employers must evaluate the productivity of hourly paid workers at least every 6 months and then adjust the workers' wages accordingly no later than the first pay period following each review. This is different from the requirement that the employer perform prevailing wage surveys annually. Changes impacting the subminimum wages paid workers with disabilities must be implemented immediately.

(b) In order to determine an hourly commensurate rate, the employer must first define the job, including clear statements of the acceptable quality and quantity standards, and then establish how long it takes an experienced worker who does not have a disability to perform the job. This establishes the performance standard of the worker who does not have a disability for the work being performed. The regulations do not mandate the methods to be used to do this, but three of the more common methods are Rework, Performance Measurement III (PM III), and 90/10 Rating.

(1) *Rework*

Rework refers to a method of establishing both the standard for the worker who does not have a disability and the level of performance of the worker with a disability by conducting time studies that hold both to the same minimum acceptable levels of quality and quantity. Rework is the time spent by the worker redoing a product or work activity of unacceptable quality (*i.e.*, that does not meet the industry quality standard) in order to bring the work product up to the acceptable level of quality. A detailed description of the Rework methodology is contained in FOH 64j02(b)(1).

(2) *PM III*

One method used to determine hourly commensurate wage rates is known as PM III. The system was developed by Goodwill Industries and is used to measure the performance of workers with disabilities employed in the sorting and salvage work typically found in Goodwill work centers.

a. Goodwill describes PM III as a work measurement that attempts to control all variables that occur at random in the workplace and that could affect the outcome of the measurement. Special workstations are designed for conducting the measurement studies in a controlled environment within the normal flow of the workday. Goodwill describes PM III as a controlled, on-the-job work sample that represents all significant tasks of the job being rated. It requires at least 30 minutes for completion of tasks at a competitive level (i.e., by workers who do not have disabilities for the work to be performed), including allowance for personal time and delay. The time for the client's performance, which also includes allowances for personal time and delay, is completed in the same situation and to the same quality level, and is then compared to the established time standard (i.e., the one performed by the worker who does not have disabilities).

b. PM III was reviewed by the NO and a determination was made that when properly employed, it meets the commensurate wage rate requirements of 29 CFR 525.12(j).

(3) *The 90/10 Rating*

One common and acceptable method to determine an hourly commensurate rate is a technique known as the 90/10 Rating. The 90/10 Form, though not an official DOL form, was developed under the auspices of the former Sheltered Workshop Advisory Committee that was disbanded in the early 1990s. This method assigns a 90 percent weighting factor to the quantity of work performed and a 10 percent weighting factor to the quality of the work performed. The 10 percent value placed on the quality of the work performed by the employee with a disability represents an attempt to minimize subjectivity (*see* FOH 64j02(b)(2) for a detailed discussion of how this method may be applied).

(c) Indicators of an accurate hourly commensurate wage rate

(1) The average hourly earnings for the employees paid subminimum wages who have the least severe disabilities are now higher than they were in the preceding year.

a. It is to be expected that wage rates will increase as workers became more experienced and familiar with a particular job and/or task resulting in increases in their productivity and improvement in the quality of their work.

b. But it is important to remember that workers with the least severe disabilities will often progress to other employment, leaving those workers who have more severe disabilities for the job in the work center. In this case, average hourly earnings may actually decrease over time.

(2) A significant number of hourly rated workers employed longer than 1 year has received a wage rate increase.

(3) Semi-annual employee evaluations indicate that hourly wage rates have increased in proportion to corresponding increases in productivity.

(4) As required by 29 CFR 525.12(j)(3), hourly wage rates have been reviewed and adjusted accordingly within the past 6 months.

(5) The relationship of disability to earnings is important. If the employer primarily employs workers who are not severely disabled for the work to be performed, it would be reasonable to expect that at least some of the employees would be paid the section 6(a)(1) minimum wage on some contracts. The WHI should notice whether there are workers who do not appear to have disabilities for the work to be performed, yet are paid wages significantly below the minimum wage. In some cases, though not all, this could signal improperly calculated commensurate wage rates.

64h CONCLUDING ACTIVITIES

64h00 <u>Back wage and civil money penalty (CMP) calculations.</u>

(a) In addition to the guidance provided below, the back wage procedures in the FOH 53c shall be followed:

(1) If a facility with a section 14(c) certificate fails to pay commensurate wages, back wages are calculated by taking the difference between the rate paid and the correct

commensurate wage. In no case, other than possibly in the SCA, will the enforceable commensurate wage be more than the section 6(a)(1) minimum wage.

a. Note that in *Herman v. Vision Center of Central Ohio, Inc.* (S.D. Ohio, Case No. C2-94-657 (12/16/1997)), the district court held that once the Secretary of Labor (Secretary) issues a certificate approving a subminimum wage, the Secretary must have concluded that the subminimum wage must have complied with the law before the certificate was issued. The court noted that the Secretary has additional authority to investigate and revoke the certificate of a non-complying employer, and that a worker with a disability who is being paid a subminimum wage also may petition the Secretary to review the rate he or she is receiving.

1. As a result of this decision, the SOL has advised us that it will only initiate actions to recover back wages due under section 6 and owed workers paid subminimum wages when the WHD has revoked the employer's certificate retroactively to the date the violations began. Revocation procedures, as set forth in 29 CFR 525.17 -19, should be commenced with the assistance of the RSOL as soon as it is determined that the criteria for revocation have been met and the employer has refused to comply with the provisions of section 14(c) and/or restore the back wages to the affected employees.

2. When the investigation determines that a covered employee paid a subminimum wage does not have a disability for the work being performed and revocation of the certificate is not warranted for any other reasons, that employee may be properly *excised* from the certificate since he or she was improperly classified as having a disability for the work to be performed and is most likely due back wages.

3. WHIs may, of course, continue to request and oversee the payment of back wages due workers paid subminimum wages without the retroactive revocation of the employer's certificate in those instances where the firm both agrees to comply and restore the back wages.

(2) If the facility does not have a certificate but has paid workers who have disabilities wage rates below the minimum wage based on their impaired productivity, the back wage calculations shall bring the rate to the full minimum wage required by section 6(a)(1).

(3) Workers paid subminimum wages seldom work over 40 hours in a week, but remember that the same overtime principles apply to both workers with disabilities and workers without disabilities. In workweeks of less than 40 hours, the WHD will normally enforce commensurate wage rates *up to* the minimum wage required by section 6(a)(1) of the FLSA. In overtime workweeks, the WHD will enforce time and one-half the regular rate, which may be less than the section 6(a)(1) minimum wage but could also be more than the section 6(a)(1) minimum wage in an SCA case.

(b) Joint employment

(1) If it has been established that an employee is jointly employed by two or more employers (*i.e.*, employment by one employer is not completely disassociated from employment by the other employer(s)), all of the employee's work for all of the joint employers during the workweek is considered to be one employment for purposes of the FLSA. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the FLSA with respect to the entire employment for the particular workweek.

(2) Joint employment principles may also apply to School-to-Work programs and community-based rehabilitation agencies. Where the school or agency takes responsibility for wage payments, it will also be primarily responsible for any back wages due. Should the school or agency refuse or fail to pay the back wages, the other joint employer(s) will be held responsible.

(c) Follow the procedures in the FOH 52f11(a)(2) regarding the computation, collection, and recording in WHISARD of back wages of less than $20.00 that are due any worker with a disability who is paid a subminimum wage under section 14(c).

(d) Because many facilities using the section 14(c) exemption operate under tight budgetary constraints, the collection of large back wage amounts may require the use of an installment plan to protect the facility's solvency. Follow instructions in FOH 53c15. Installment plans shall include an acceleration clause requiring the full and immediate payment of all unpaid back wages in the event the employer fails to comply with the plan.

(1) Employers may justifiably request an installment payment plan because of financial hardship, or to preserve certain benefits for their workers with disabilities who would otherwise be ruled ineligible because of the amount of the back wages where they paid in a lump sum.

(2) When installment plans are requested in order to preserve the benefits of workers with disabilities, interest will not be charged on the unpaid balances.

(e) SCA back wages

(1) The prevailing wage for workers with disabilities performing on an SCA contract for the purpose of calculating the commensurate wage rate is the hourly rate reflected on the wage determination for the classification of work performed by the worker with a disability.

(2) Workers with disabilities must be paid the full SCA fringe benefit required by the wage determination. As with service employees without disabilities for the contract work being performed, employers may discharge their fringe benefit obligation to workers with disabilities by providing "any equivalent combinations of 'bona fide' fringe benefits or by making equivalent or differential payments in cash" (see 29 CFR 4.177).

a. The worker with a disability must be paid the stated health and welfare fringe benefit for all hours paid (normally up to 40 per week and 2,080 per year).

b. The amount of holiday and vacation benefits a worker with a disability is paid depends on the hours worked in a typical workweek and the applicable

commensurate wage rate. Since there can be fluctuations in earnings of workers with disabilities over short periods of time, the regular rate for vacation and holiday pay should be determined by averaging the rates paid in the 4-week period preceding the week in which the holiday occurs or the vacation is taken. The facility is not permitted to minimize its fringe benefit obligations by deliberately selecting a 4-week period with unusually low rates of pay. The hours of vacation and holiday pay due workers with disabilities is determined in the same manner as for workers who do not have disabilities (*see* 29 CFR 4.173 -.174 and 29 CFR 4.176).

(3) Section 4(c) of the SCA requires that a contractor succeeding a contractor that was signatory to a collective bargaining agreement (CBA) pay the full wages and fringe benefits contained in the CBA. This does not apply to work centers, however, or to other employers who exclusively employ workers at subminimum wages under section 14(c) certificates. These employers may pay employees who have disabilities for the work being performed subminimum wages commensurate to the SCA wage rates established by section 4(c).

(4) Section 6(e) of the FLSA requires SCA contractors and subcontractors to pay all employees who are not performing SCA-covered work and/or who do not have disabilities for the work being performed at least the full minimum wage required by section 6(a)(1). This is true even when there is no enterprise or individual coverage under the FLSA. If properly certified under section 14(c), the employer may pay workers who have disabilities for the work performed a subminimum wage (*see* FOH 64b03).

(5) The WHI should ensure that subminimum wage back wages due a worker with a disability under the SCA and section 14(c) of the FLSA are properly recorded in WHISARD (*see* FOH 54 for instructions).

(f) CMPs may be assessed against employers possessing subminimum wage certificates when the WHI can establish that the employer's FLSA monetary violations are repeated or willful (*see* FOH 52f14(a)(5)).

(1) As per FOH 52f14(b)(1), a conciliation *shall not* be the basis for a repeated violation and the assessment of CMPs in a subsequent investigation. A self-audit, and this would include a self-audit of a section 14(c) employer overseen by a Certification Team Compliance Specialist, *may* be the basis for a repeated violation and CMP assessment in a subsequent investigation, provided there is adequate proof of prior minimum wage and/or overtime violations in the file for the WHD to sustain a CMP assessment.

(2) When computing CMPs, WHIs shall not include in the count of employees for whom CMPs will be computed those workers paid subminimum wages that were due less than $20.00 in back wages (*see* FOH 52f11(a)(2) -(3)).

(3) Note that because of the principles explained in FOH 64h00(a)(1), an administrative action to collect such CMPs cannot be initiated unless the WHD has retroactively revoked the employer's certificate. As mentioned in FOH 6400(a)(1)a.2., it may be determined that certain workers are outside the coverage of the certificate and an

administrative action to collect back wages due those employees may be initiated without revoking the employer's certificate.

64h01 **<u>Disposition of findings and section 14(c).</u>**

(a) As with all investigations, a final conference will be held with the section 14(c) employer in accordance with current guidelines. WHIs will provide employers found in violation with a copy of 29 CFR 525 and record this in the disposition section of the narrative report.

(b) When a section 14(c) employer agrees to comply and pay the back wages found due, the WHI should complete the case action following standard procedures while keeping in mind the special reporting requirements discussed below.

(c) When a facility refuses to comply and/or refuses to pay the back wages, the district director (DD) or assistant district director (ADD), along with the regional enforcement coordinator: section 14 and the RA, will determine what further action is appropriate in the particular circumstance (*see* FOH 53c). Possible courses of action include a second-level conference, notification under section 16(b) and section 14(c)(5), initiation of hot goods actions, revocation of certificate, and/or referral to the SOL for litigation. The SOL shall be consulted regarding the issuance of any Letter of Findings (*see* FOH 64h01(e)(4)).

(d) If a facility refuses to comply or pay subminimum wage back wages under the SCA, the PCA, and/or the CWHSSA, the DD and/or ADD should consider withholding and/or debarment action and follow the instructions set forth in the appropriate sections of the FOH.

(e) **Notifying employer of investigation findings**

(1) *No violations found*

At the conclusion of each investigation in which *no* violations were disclosed (the FLSA, the SCA, the PCA, and the CWHSSA), the DD or ADD shall send a notification letter to the director of the facility and send a copy to the president and/or chairman of the board of directors. Individual copies of the notification letter shall be placed in the case file, and forwarded to the regional enforcement coordinator: section 14 and the Certification Team in the Chicago RO.

(2) *FLSA violations found*

At the conclusion of each FLSA investigation in which violations *were* disclosed involving workers paid a subminimum wage and future compliance was assured, a notification letter, also known as a Letter of Findings, signed by the DD and/or ADD detailing the investigation findings shall be forwarded to the director of the facility, and a copy will be sent to the president and/or chairman of the board of directors. The letter shall state and explain any violations discussed during the final conference. If additional violations are charged after the final conference, the reasons for these violations and how they were substantiated shall also be stated in the letter. The facility's statements regarding future compliance shall be restated in the letter, and, if appropriate, a request shall be made to the facility to submit to the DO, within 30 days of the date of the notification letter, a written statement reflecting how it has achieved compliance. Individual copies of the notification letter shall be placed in the case file, and forwarded to the regional enforcement coordinator: section 14 and

the Certification Team in the Chicago RO. *See* FOH 64k04(b) for information regarding the format to be used when preparing Letters of Findings and an example.

a. DDs are encouraged to combine this letter with the standard confirmation letter that is sent to the firm to confirm coverage, agreement of compliance and payment of back wages, and date back wage payments are due, and to provide the background for assessing CMPs for any violations of section 6 and/or 7 that may be found in *future* investigations (*see* FOH 52f16(b)).

b. When CMPs will be assessed for violations of section 6 and/or 7, separate confirmation letters (*i.e.*, Letters of Findings) and CMP assessment letters shall be issued when the violations involve workers with disabilities paid subminimum wages (*see* FOH 52f16(e)).

(3) *SCA, PCA, and/or CWHSSA violations found*

At the conclusion of each investigation in which violations of the SCA, the PCA, and/or the CWHSSA were disclosed and future compliance was assured, the employer will be notified by letter, signed by the DD and/or ADD, stating the investigation findings. The letter shall be forwarded to the director of the facility and the president and/or chairman of the board of directors. Individual copies of the above letter shall be placed in the case file, and forwarded to the regional enforcement coordinator: section 14 and the Certification Team in the Chicago RO. Note: if, in the above situation, violations of FLSA section 6 and/or 7 also occurred, contact the regional enforcement coordinator: section 14 prior to preparing the employer notification letter. Standard procedures regarding the notification of contracting agencies shall be followed.

(4) *Violations discovered (the FLSA, the SCA, the PCA, and/or the CWHSSA) and future compliance not assured*

DDs shall consult with the regional enforcement coordinator: section 14 and the SOL, through appropriate channels, prior to issuing any Letter of Findings when the employer has not agreed to come into compliance.

64h02 <u>Narrative report requirements for section 14(c) investigations.</u>

(a) Profile section

(1) Precede the standard four-part narrative with a *work center/institution profile section*, a concise summary of the activities provided to the workers with disabilities, the nature of the work program, and the types of rehabilitation services offered. The profile should include the following:

a. Corporate and legal name of the employer

b. A listing of all establishments operated by the facility

c. Primary disabilities of the workers served by the facility

d. Primary source of income of the employer (if possible, include as a D exhibit, a copy of the employer's most recent financial statement

e. The nature of any board, lodging, or other facilities furnished

f. The name and address of the president of the board of directors or appropriate corporate officials if it is a for-profit corporation

g. The name of the executive director and length of service with the work center

h. A brief statement of the disposition of any prior investigation

(2) For *patient worker* cases, also note the type of institution, whether it is for-profit or not-for-profit, public or private, and the primary disability group served. Report the total number of patients in the institution at the time of the investigation and the number of patients who are employees of the institution.

(3) For investigations involving the SCA or the PCA, standard government contract reporting procedures shall be followed (*see* FOH 54b).

(b) Coverage section

It is important to document employees' covered status. Employees of section 14(c) certificate holders are usually covered on an individual basis. Reference the supporting documents in the coverage section of the narrative. These documents might include staff interviews reflecting that clients are engaged in interstate commerce, invoices showing goods shipped in commerce, initial conference notes including the employer's admission of coverage, or a list of major contracts on which employees work. This section should clearly describe the flow of goods in interstate commerce, identifying which employees are covered, and which employees, if any, are not covered.

(c) Exemption section

(1) The exemption status of staff employees should be reported here, following normal reporting requirements.

(2) Section 13(a)(7) provides an exemption for employees who are exempted by regulations, order, or certificate of the Secretary issued under section 14. Neither the FLSA nor the certificate exempts workers who have disabilities for the work being performed from the overtime provisions of the act.

(d) Status of compliance section

Discuss the investigation findings as they pertain to both workers who have disabilities for the work being performed and other employees of the firm following normal reporting requirements. In addition, discuss the following section 14(c) issues:

(1) *Misclassification*

If employees have been misclassified as having disabilities for the work being performed and paid a subminimum wage, discuss in the compliance section how these violations were substantiated and how back wages were computed.

(2) *Commensurate wages*

If the subminimum wage paid was not commensurate, include the following in the status of compliance section:

a. An explanation of the method the facility used to derive the rate paid workers with disabilities, and why this method did not result in commensurate wages. Identify the steps taken to substantiate that commensurate wages were not paid, such as confirming time studies, a prevailing wage survey, staff interviews, and/or observations of hourly employees.

b. An explanation of the violations that resulted from the failure to pay commensurate wage rates and what the facility must do to achieve compliance.

(3) *Certificate status*

Reference the certificate number and date of issuance, or note the absence of proper certification.

(4) *Section 14(c) recordkeeping*

The narrative should highlight any deficiencies in disability, productivity, and production standards records required by 29 CFR 525.16. Copies of time studies, prevailing wage surveys, and other documents substantiating either compliance or non-compliance should be incorporated into the case file and referenced in the narrative by exhibit number. Discuss here any violations regarding failure to inform workers of terms of the certificate and failure to display the poster.

(5) *Method of computation*

Clearly describe the method of back wage computation. List the back wage findings and the number of employees involved.

(e) Disposition section

Regular reporting procedures shall be followed. WHIs shall relate any explanation the employer offers for the violations and describe any actions the employer has agreed to take to come into and/or maintain compliance. WHIs will report all compliance assistance materials provided to the employer. The disposition section of the narrative should conclude with recommendations from the WHI as to what further action, if any, is necessary to ensure future compliance and back wage payment. For example, the WHI could recommend any of the following courses of action:

(1) Second-level conference

(2) Referral to the SOL for litigation

(3) Certificate revocation

(4) CMP assessment for willful and repeat section 6 and/or 7 violations and/or child labor violations

(5) Employee notification of section 14(c)(5) or section 16(b)

(6) Reinvestigation after a predetermined amount of time

(7) Appropriate actions involving government contract violations

(f) Print the narrative and WH-51. The narrative report may be saved to database.

64h03 **WHISARD.**

(a) Work center investigations and investigations of the employment of workers with disabilities in competitive employment under section 14(c) should be registered in WHISARD as "SMW14" cases. Patient worker investigations should be registered as "SMWPW."

(b) See the FOH for specific instructions for reporting the findings of work center and patient worker investigations. The WHI should ensure that subminimum wage back wages due a worker with a disability under the SCA and section 14(c) of the FLSA are properly recorded in WHISARD.

(c) WHISARD uses the North American Industry Classification System (NAICS) rather than Standard Industrial Classification (SIC). Some of the more common NAICS are:

- Private work centers: NAICS 62431 (private vocational rehabilitation services)
- State operated work centers: NAICS 9180
- Local government operated work centers: NAICS 9680

Note: the NAICS selection tree picks only government-operated facilities when the word "sheltered" is entered.

64h04 **Advising section 14(c) certification team and regional enforcement coordinator: section 14 of investigation findings.**

(a) After the investigation has been concluded, the DO shall forward a copy of WH-51, narrative, and correspondence advising the employer of the investigation findings to the appropriate regional enforcement coordinator: section 14 and the Certification Team located within the Chicago RO (*see* FOH 64d00(h) for the address of the Chicago RO). The Certification Team must have this information in order to properly process the firm's application to renew certification.

(b) This is in addition to the normal MODO follow-up procedures required by FOH 61.

64h05 **Petition for review.**

(a) Any employee paid a subminimum wage, or his or her parent or guardian, may petition the Secretary, under section 14(c)(5) of the FLSA, to have the subminimum wage reviewed to

determine if the wage is justified. Upon receipt of the petition, it shall be forwarded promptly to the NO, OP, DEPP, FMLA/OLS Branch. The NO will then promptly forward the document to the SOL who will contact the chief administrative law judge (ALJ) who will schedule a hearing to determine the validity of the subminimum wage. In all matters relating to the propriety of a subminimum wage, the burden of proof rests with the employer (*see* 29 CFR 525.22).

(b) Although the petition does not have to follow a particular format or form, it must be signed by the individual, or his or her parent or guardian, and should contain the name and address of the individual filing the petition, and the name and address of his or her employer. A petition may be filed in person or by mail with the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S3510, 200 Constitution Avenue, NW, Washington, DC, 20210.

(c) When a DO receives a complaint filed by an employee paid a subminimum wage, the complaint should *not* automatically be treated as a petition for a review of the subminimum wage by an ALJ. Unless the employee specifically requests a section 14(c)(5) action, the complaint should be scheduled for investigation in accordance with standard DO procedures. Then, if the investigation does not substantiate the complainant's allegation, the complainant should be informed of his or her right to petition under section 14(c)(5).

(d) Since the statute establishes strict time frames for the processing and addressing of petitions for review, all actions by WHD personnel in handling such petitions must be taken promptly.

64i ESTABLISHING PIECE RATES AND PERSONAL FATIGUE AND DELAY (PF&D) ALLOWANCES

64i00 <u>How to determine an accurate commensurate wage based on a piece rate.</u>

(a) If the prevailing wage study reveals that the prevailing wage is a piece rate, the employer should pay the same piece rate to the worker with a disability. In this situation, there is no need to perform a time study (*see* FOH 64g07 for what to do if the prevailing wage is hourly and the employer wishes to establish the hourly commensurate rate).

(b) This section contains guidance for doing a time study when the prevailing wage survey indicated that workers were paid *by the hour*, not by the piece, and the employer wishes to pay a *piece rate* to the workers with disabilities. To determine this rate, the employer must time study workers who do not have disabilities or use other accepted work measurement methods (*see* FOH 64g04) before he or she can convert the hourly prevailing wage into an equivalent prevailing piece rate.

(c) When stopwatch time studies are used, the steps the employer must follow to determine an accurate commensurate wage based on a piece rate, when the prevailing wage rate is an hourly wage, are discussed below. *See* FOH 64g04 and FOH 64i00(e) for guidance when MTM or MODAPTS work measurements are used.

(1) Develop a job description.

(2) Perform a task analysis.

(3) Select the standard setter(s).

(4) Time the worker(s) who do not have disabilities (*i.e.*, the standard setter(s)) performing the work.

(d) The employer should have completed all these steps. They are discussed in more detail below. When reviewing an employer's time studies, the WHI should verify that, at a minimum, the employer completed the steps below that are in *Italics*. These are also the same requirements the WHI must follow when conducting his or her own time study, either because none was done previously or to confirm the results of the employer's study.

(1) *Develop a job description:*

a. *Define specific job duties, responsibilities, and general tasks.* The WHI must be able to verify that the work performed by the worker with a disability is the same as that performed in the time study.

b. *Specify the types of equipment and materials to be used.* The WHI must be able to verify that the material and equipment used by the worker with the disability is the same as that used in the time study.

c. *List the types of skills, training, or experience required.*

d. *Indicate the days and times the work is performed if such factors could have an impact on the productivity of the worker*.

(2) *Perform a task analysis:*

a. *Identify the components, tasks, and subtasks to be performed.*

b. *Develop an accurate picture of the method and procedures used to accomplish the tasks.*

c. *Include types of equipment and supplies to be used. Specify the area where the work will be performed.*

d. *Determine a definite start and stop point.* The entire job cycle must be timed. The job cycle begins at a specific point, such as picking up the first piece in an assembly. It ends when that point is reached again. The WHI must be able to verify that the clock was not stopped to accommodate irregular elements (*e.g.*, equipment failure or depletion of needed supplies), or that if it was stopped while the worker with a disability repaired errors, it was also was stopped while the standard setter was timed (*see* rework discussion in FOH 64j02(b)(1)).

e. *Ensure that when the worker with a disability performs the actual work, it is performed in the same way the standard setter performed the work when establishing the standard, or in a way that allows the worker with a disability to be more productive* (*see* FOH 64i02 for use of jigs in time studies).

(3) *Choose the standard setter(s):*

Most frequently, this will be a staff member(s) or worker(s) who is:

- Qualified to perform the task
- Familiar, experienced, and comfortable with the work
- Able to perform in a typical work environment
- Able to maintain a consistent and efficient pace
- Able to perform at or close to 100 percent productivity

Note: only if three staff members are not available and the job is extremely simple should the WHI attempt to time study himself or herself. It is very difficult for a WHI to both perform the work and time himself or herself.

(4) *Time the standard setter (i.e., the worker who does not have disabilities) performing the job:*

a. This procedure is known as setting the standard.

b. *The individual conducting the study (i.e., the observer) must:*

- *Use a generally recognized method of work measurement (see 29 CFR 525.12(h)(1) and FOH 64g04).*
- *Assure that the standard setter performs the task exactly as it will be assigned to the worker with a disability.*
- *Structure the study to avoid, as much as possible, lost time situations.* "Lost time" is a term used by NISH that the WHI may find on time study documents. Lost time is time excluded from a time study for an activity that is not a regularly recurring part of the job (*e.g.*, time lost when a supervisor acting as the standard setter is interrupted during the time study by an employee's question).
- *Compare the standard setter's actions to the written procedures.*
- *Time the standard setter's work using the same start and stop points as designated earlier.*
- *Read the stopwatch and make recordings nearly simultaneously.*
- *Document the measurement used to set the standard.* It is important that the employer and/or WHI record the method used, date the standard was set, and personnel involved in conducting the measurement to ensure the standard can be verified.
- *Conduct the study three times and determine average time per unit.* However, because the WHI will often need to confirm several time studies, if the original confirming study corroborates the employer's results, the WHI is not required to repeat it. If, on the other hand, the results of the confirming study indicate a problem, the WHI should conduct further time studies.

- *When possible, use three different people as standard setters*. Although 29 CFR 525 does not specifically require timing three different people, using three different people allows for the fact that different people normally work at different paces.

- *Conduct the study for a period long enough to ensure that the work pace may be sustained throughout the day*. Many work centers conduct 25-minute time studies, although 29 CFR 525 does not require a specific length. For most assembly jobs, 20 to 25 minutes is long enough to establish a valid production standard.

- *Make an allowance for PF&D* (as required by 29 CFR 525.12(h)(2)(ii)). *See* FOH 64i01 below for a discussion of PF&D.

- *Use these results to set the piece rate*. For example, if the standard was 200 envelopes stuffed per hour after allowing for an appropriate PF&D (*i.e.*, the average number done by the workers who do not have disabilities) and the prevailing wage was $7.20, the piece rate would be $0.036 per envelope ($7.20 ÷ 200 = $0.036).

- *The WHI must note whether the employer included rework time when setting the standard and whether the employer counted or discarded defective products. The practice must be the same for both the standard setter and the workers with disabilities for the wage to be truly commensurate.*

(e) Procedures for work centers using MTM or MODAPTS

(1) As explained in FOH 64g03(c), MTM and MODAPTS are acceptable work measurement methods.

(2) The WHI should verify that the individual using these methods has received professional training in those methods.

a. Evidence of this training will be a certificate of completion for these specific methods. Training in similar sounding methods should be questioned.

b. Training that is secondhand should also be questioned. Secondhand training means that the work center sends one person to professional training and that person trains other staff members.

(3) The WHI may find it necessary to conduct confirming stopwatch time studies of these work measurements.

64i01 <u>Allowance for non-productive time: PF&D required only for piece rate time studies.</u>

(a) Defining PF&D

(1) Normal fatigue prevents all employees from producing at their most rapid pace throughout the work day. In addition, breaks, clean-up time, and delay time while materials are being restocked or the finished products are removed all reduce the amount a worker can produce.

(2) Employers must take this non-productive time into consideration when determining piece rates by including what is known as a PF&D factor. 29 CFR 525.12(h)(2)(ii) states that when determining piece rates "[a]ppropriate time shall be allowed for personal time, fatigue, and unavoidable delays. Generally, not less than 15% allowances (9-10 minutes per hour) shall be used in conducting time studies."

(3) A properly computed piece rate will include a PF&D that also takes into account time spent by workers for traditional breaks or rest periods (*e.g.*, 10 to 15 minute breaks). When the PF&D factor has been accurately computed, the employer need not pay additional wages for these breaks. PF&D does not include or cover downtime as discussed in FOH 64e01(b)(1).

(4) Employers who fail to provide the required allowance, or provide an insufficient allowance, are at an unfair competitive advantage to employers who do give an adequate PF&D allowance. If the WHI finds that a facility under investigation failed to make a proper allowance for PF&D when performing time studies to determine piece rates, that employer has most likely paid employees less than the commensurate rate and may have incurred a back wage liability under section 14(c).

(5) The WHD will not object to an employer establishing a PF&D that is greater than required by the regulations as this would result in the worker with a disability receiving wages above the applicable commensurate wage.

(b) The WHI should determine whether the PF&D allowance used in the time study is large enough to cover all non-productive time that constitutes hours worked (*e.g.*, waiting for more materials, taking coffee breaks, or waiting while adjustments are made to machines). Even though the facility may have made an allowance, if the WHI finds non-productive work time in excess of this allowance, the facility has most likely paid employees less than the commensurate rate and may have incurred a back wage liability under section 14(c). Should the WHI encounter a situation where it appears a 9- or 10-minute PF&D is not sufficient for the type of work being performed, he or she should, following established procedures, discuss this with the regional enforcement coordinator: section 14 prior to taking any action.

(1) The PF&D allowance is incorporated into the piece rate to be paid workers with disabilities by either multiplying:

a. the standard time it takes a worker who does not have a disability to perform a task by an allowance factor, *or*

b. the number of units produced by the worker who does not have a disability by an allowance percentage.

(2) To calculate a piece rate, the facility divides the prevailing hourly wage by the average hourly production rate (*i.e.*, the average number of units produced in a 50- or 51-minute hour by a worker who does not have disabilities). More detail is provided below.

<u>Scenario:</u>

Three workers who do not have disabilities are each timed for 50 minutes. They produce a total of 840 units. Average productivity is 280 (840 divided by 3). If the

prevailing wage is $8.00 per hour, the piece rate would be $0.0286 ($8.00 divided by 280 units). A worker with a disability who produced 185 units in an hour would earn $5.291 in that hour (185 multiplied by $0.0286 per unit).

Note that in this example the exact piece rate, $0.0285714, was *rounded up* to $0.0286 per piece. The WHD will not normally question computations that are carried out to the fifth decimal point and then *rounded up* to four decimal places. 29 CFR 525.12(h)(1)(ii) states that piece rates "shall not be less than the prevailing piece rates…." For this reason, piece rates are always rounded up, even though the digit to be rounded is less than the numeral five. For example, 0.04934 should be rounded to 0.0494 (*see* FOH 64g06(f)). Because this practice differs from usual rounding procedures, employers sometimes make an error when computing piece rates. *Errors in rounding piece rates often result in a back wage liability.*

The example above is meant to demonstrate correct rounding practices used when computing piece rates. The WHI will note that the commensurate rate was $5.291 in this example, more than the current section 6(a)(1) minimum wage of $5.15 per hour. The employer would be in compliance with the FLSA if he or she paid the worker with the disability $5.15 per hour rather than the commensurate rate of $5.291. The section 14(c) employer is not legally obliged by the FLSA to pay a commensurate rate in excess of the applicable section 6(a) minimum wage.

(3) A direct way to arrive at the 10-minute allowance is to use the 50-minute hour. The formula using the 50-minute hour is:

$$\frac{\text{Number of Units Produced}}{\text{Number of minutes} \times 50 \text{ minutes}} = \text{hourly production standard}$$

For 75 units produced in 15 minutes, the hourly production standard is 250 units:

$$\frac{75 \text{ units}}{15 \text{ minutes} \times 50 \text{ minutes}} = 250 \text{ units per (50-minute) hour.}$$

(4) In some cases, it may not be possible to do a 25-minute work observation and simply multiply by two to arrive at a 10-minute PF&D allowance. For example, there may be a job for which the employer has established a standard of 200 units per 50-minute hour, but there are only enough available materials to observe 100 units being produced. In that case, the WHI should compute an average time per unit from his or her observation and compare it to the average time per unit expected to be produced in a 50-minute hour (*i.e.*, 3,000 seconds). By dividing 3,000 seconds by 200 units, it is determined that it takes 15 seconds to produce each unit (3,000 seconds divided by 200 units equals 15 seconds per unit). This means that in 15 minutes (*i.e.*, 900 seconds), the employee may be expected to produce 60 units.

(5) There may be a case where it appears that there are enough raw materials to observe three workers who do not have disabilities for 20 minutes, but not 25. If the employer is using a 10-minute allowance for PF&D, the average number of units produced in 20 minutes should be multiplied by 2.5 to arrive at the standard for that work observation. That standard can then be compared to the standard set by the employer's time study.

(c) The WHI must be able to evaluate the variety of methods employers use in their attempt to provide an adequate PF&D allowance. The simplest method of providing an adequate PF&D allowance is described above, the 50- or 51-minute hour. However, the WHI may encounter more complex methods. One distinction the WHI should note is the difference between an *allowance factor* and an *allowance percentage*. Much confusion results when employers mistakenly use the two interchangeably.

(1) *Allowance factor*

An allowance factor represents a formula used by employers to provide the allowance percentage in their time studies.

(2) *Allowance percentage*

An allowance percentage takes into account that *portion* of the total time available for work that is not actively productive due to the worker's personal time *(e.g.*, breaks), fatigue, and unavoidable delays. Unavoidable delays include anything that prevents the worker from working (*e.g.*, waiting for materials, equipment breakdowns, socializing, etc.). The 9 or 10 minutes an hour PF&D required by the regulations equates to 15 percent (*i.e.*, 9 minutes divided by 60 minutes) or 16.67 percent (*i.e.*, 10 minutes divided by 60 minutes) of an hour respectively.

(d) Allowance factor

A 9-minute PF&D allowance is equivalent to 15 percent of an hour and a 10-minute allowance is equivalent to 16.67 percent of an hour. However, employers sometimes attempt to satisfy the PF&D requirement by using *allowance factors* of 1.15 or 1.1667 as equivalents to 9- or 10-minute *allowance percentages*. Use of either of these allowance factors results in an overstatement of the normal expected productivity of the worker who does not have a disability.

(1) The following example demonstrates how using an *incorrect* allowance factor unfairly reduces the wages of a worker paid a subminimum wage.

<u>Scenario:</u>

Suppose that it takes 10 seconds for an individual without a disability to perform an assembly process. The 10 seconds per assembly would be the standard time to perform the process. The employer wishes to add a 15 percent allowance to the standard time to account for PF&D. Some work center employers will multiply the standard time by an allowance factor of 1.15 thinking they are providing the 15 percent PF&D allowance. This has the effect of changing the standard time to 11.5 (10 × 1.15) seconds per assembly. When 3,600 seconds (*i.e.*, 60 minutes) is divided by 11.5 seconds per assembly, the result in normal expected productivity is 313.04347 assemblies per hour.

However, suppose that, instead, 3,060 seconds (*i.e.*, 51 minutes) is divided by 10 seconds per assembly. The result is 306 assemblies per hour, a difference of 7.04347 assemblies per hour. Multiplied by the number of hours worked per day, days per week, and weeks per year, this error would result in a significant loss of wages to the worker with a disability performing the assemblies.

(2) The *correct* allowance factor for a 51-minute hour (*i.e.*, a 9-minute, or 15 percent, allowance) is actually 1.1764705, computed as follows:

60 minutes ÷ (60 minutes - 9 minutes) = 1.1764705

Continuing the same example, if the employer multiplies the standard time of 10 seconds per assembly by the correct allowance factor of 1.1764705 (representing a 9-minute, or 15 percent, allowance), the result is 11.1764705 seconds per assembly. Dividing 3,600 seconds (*i.e.*, 60 minutes) by 11.1764705 seconds results in 306.00002 units per hour. Thus, the requirement of providing a 15 percent PF&D allowance has been met.

(3) The same logic applies when an employer claims to have given an allowance of 10 minutes per hour by applying a factor of 1.1667 to the standard time of the worker who does not have a disability. The correct allowance factor for a 10-minute PF&D, or 16.67 percent of an hour, allowance is *not* 1.1667, but 1.20, computed as follows:

60 minutes ÷ (60 minutes - 10 minutes) = 1.2

(4) Summary of correct PF&D allowance factors:

a. For a correct PF&D allowance of 9 minutes an hour, multiply the standard *time* of the worker who does not have a disability by 1.1764705 (may be rounded to 1.1765).

b. For a correct PF&D allowance of 10 minutes an hour, multiply the standard *time* of the worker who does not have a disability by 1.2.

(5) Common errors involving allowance factors. Two incorrect figures employers use as allowance factors are 1.1667 and 1.15. The faulty reasoning behind these errors is:

a. Since 9 is 15 percent of 60, multiplying the standard time by 1.15 is mistakenly considered the same as giving a 9-minute allowance.

b. Since 10 is 16.67 percent of 60, multiplying the standard time by 1.1667 is mistakenly considered the same as giving a 10-minute allowance.

(e) Allowance percentage

The WHI must also ensure that the allowance percentages, when used, comply with the requirement for a PF&D allowance. These are also acceptable when done correctly.

(1) For a PF&D allowance of 9 minutes:

Use 85 percent (*i.e.*, 100 percent minus 15 percent). 85 percent of 60 minutes is 51 minutes.

Multiplying the number of *units* produced in 60 minutes by 85 percent (*i.e.*, giving an allowance percentage of 85) will yield a 9-minute PF&D allowance.

(2) For a PF&D allowance of 10 minutes:

Use 83.33 percent (*i.e.*, 100 percent minus 16.667 percent). 83.33 percent of 60 minutes is 50 minutes.

Multiplying the number of *units* produced in 60 minutes by 83.33 percent (*i.e.*, giving an allowance percentage of 83.33) will yield a 10-minute PF&D allowance.

(3) The accuracy of using an *allowance percentage* to provide for PF&D can be demonstrated using the same starting point as the example above: the production standard is 10 seconds per unit and the employer wishes to give an allowance of 9 minutes. In 1 hour (*i.e.*, 3,600 seconds), 360 units will be produced. Multiplying 360 by a percentage factor of 85 percent yields an expected production rate of 306 units per hour. This is the same amount as in the example above when the 1.1764705 allowance factor was used. Thus, using either the correct allowance factor or the correct allowance percentage will yield the same accurate PF&D.

(4) Use of any percentage allowance greater than 85 percent results in a PF&D allowance that is less than 15 percent, and so is not in compliance.

(f) Simpler alternatives for allowing for an appropriate PF&D

The following, which have been discussed above, are two easier ways of computing PF&D. If employers have had difficulty with other methods of figuring the allowance, the WHI may wish to explain these methods as possible alternatives:

(1) Divide 3,060 seconds (*i.e.*, 51-minute hour) by the standard for workers who do not have disabilities (seconds per unit) and this will allow for a 9-minute PF&D. To allow for a 50-minute hour, divide 3,000 seconds by the standard for workers who do not have disabilities.

(2) Simply conduct a 50- or 51-minute time study. Or, conduct a 25-minute time study and multiply by 2 (yields a 50-minute hour). To yield a 51-minute hour, conduct a 25½-minute study and multiply by 2.

64i02 <u>Use of jigs in time studies.</u>

(a) There are circumstances where modifications (*e.g.*, jigs or fixtures) must be used to accommodate the special needs of workers with the most severe disabilities, or to help them be more productive. A separate time study does not have to be made utilizing these special modifications. Generally, if a jig would increase the productivity of a worker with a disability, yet impede the work of the worker who does not have a disability, the WHI will not question the standard setter's use or non-use of the jig during the time study (*see* 29 CFR 525.12(h)(2)(iii)).

(b) The following is an example of the use of a jig. A worker who does not have a disability is able to pack a specific number of items in a fishing gear box without having difficulty counting the quantities (*i.e.*, 4 swivels per box, 10 hooks per box, and 9 weights per box). The worker who does not have a disability picks up the correct quantities and places them in the box without difficulty. Some workers with disabilities, however, are unable to determine the difference between the quantities and must use a counting or matching jig. One type of jig allows the workers with disabilities to put one weight into each of nine slots on the jig, and the worker is taught not to put any weights into the box until all nine slots are filled.

(1) Because use of these counting jigs would impede the production of the worker without a disability, they need not be used in the time study.

(2) However, as in the example above, the employer has the option of conducting a second time study in which the worker who does not have a disability uses the jig, because this would have the effect of increasing the wages of the worker with a disability. In this situation, the employer would be paying more than the law requires.

64j ESTABLISHING OBJECTIVE STANDARDS FOR HOURLY PAY RATES

64j00 General.

(a) *See* FOH 64g06 for what to do if the prevailing wage was an hourly rate that the employer wishes to convert to a piece rate when paying the workers with disabilities.

(b) Some employers may have used pre-established (*i.e.*, off-the-shelf) industrial standards in lieu of conducting a time study. These are typically too general to use when setting the standard for workers who do not have disabilities. If pre-existing industrial standards are adopted as the measure of production for the workers who do not have disabilities, they must be verifiable and reflect the work methods used by the workers with disabilities.

(c) Some general principles involving time-based measurements of hourly paid workers with disabilities include:

(1) Initial evaluation of worker's productivity must be made within the first month after employment.

(2) Results of productivity evaluation should be recorded and the worker's wages adjusted retroactively not later than the first pay period following the initial evaluation.

(3) A review of worker's productivity must be made at least every 6 months thereafter.

(4) Time-based measurements should not be conducted before the worker has time to become familiar with the job.

(5) Evaluations shall not be done when a worker is fatigued or subject to conditions that will result in less than normal productivity.

(6) Just as it is recommended that either three different standard setters be timed or that the same standard setter be timed three different times and the results averaged, the worker with the disability should also be timed on three different occasions and the results averaged.

(7) There are some hourly paid jobs that do not lend themselves to complete time-based measurement because the entire job cycle is too long, or because the amount of work depends upon the actions of others.

a. For example, a janitorial job often involves cleaning at a number of different sites with different cleaning tasks over the course of a week; or the bagging

of groceries at a supermarket and policing the dining room at a fast food restaurant depend upon the number of customers and the products they buy.

b. An acceptable way to objectively evaluate a worker's productivity would be to set up a standardized job simulation. Using the techniques described in FOH 64j00(e)(4) below, time a standard setter(s) and the worker with a disability in the simulated setting.

(d) The following is a summary of the steps an employer shall follow when conducting *a time-based measurement when the prevailing wage survey indicated that workers were paid by the hour, not by the piece, and the employer wishes to pay a commensurate hourly rate.* A detailed description of these steps is contained in FOH 64j00(e) below.

(1) Develop a job description.

(2) Perform a task analysis that includes both quality and quantity standards.

(3) Select the worker(s) who do not have disabilities to be timed (*i.e.*, the standard setter(s)).

(4) Time the worker who does not have disabilities performing the job. This sets the standard of productivity (*i.e.*, quantity and quality) of the worker who does not have disabilities for the job.

(5) Time the worker with a disability performing the job. This sets the level of productivity (*i.e.*, quantity and quality) of the worker with a disability.

(e) The employer should have completed all these steps in FOH 64j00(d) above. They are discussed in more detail below. When reviewing an employer's time studies, the WHI should verify that, at a minimum, the employer completed the steps below that are in *Italics*. These are also the same requirements the WHI must follow when conducting his or her own time study or observing a new time study conducted by the employer, either because none was done previously, or to confirm the results of the employer's earlier study.

(1) *Develop a description of the work to be performed:*

a. *Define specific job duties, responsibilities, and general tasks.*

b. List the types of skills, training, or experience required.

c. Indicate the days and times the work is performed if such factors could have an impact of the productivity of the worker.

d. Indicate to whom the worker reports.

(2) *Perform a task analysis:*

a. *Identify the components, tasks, and subtasks to be performed.*

b. *Develop an accurate picture of the method and procedures used to accomplish the tasks.*

c. *Include types of equipment and supplies to be used.* Specify the area, location, floor, building, and the like, where the work is to be performed.

d. *Establish the minimum acceptable quantity and quality standards for the job.* These standards must be realistic and achievable by the worker who does not have a disability while working at a normal pace that could be comfortably sustained throughout an entire work shift. These standards could be based on the historic on-the-job performance of workers who do not have a disability.

e. *Determine a definite start and stop point.* The start point is the action that begins the job cycle, such as getting out a mop and bucket. The stop point for an hourly job is the action that completes the job, such as putting the mop and bucket away. *See* FOH 64j01 if the tasks are dissimilar.

f. *Note the methods and procedures that will be used by the worker who does not have a disability when establishing the standard so that they are the same when the worker with a disability is evaluated.* When the worker with the disability performs the actual work, it must be performed in the same way the standard setter performed the work when establishing the standard, or in a way that allows the worker with a disability to be more productive (*see* FOH 64i02 for use of jigs in time studies).

g. *Make certain that the task analysis is an accurate description of the work, and is the way the work is actually accomplished.*

(3) *Select the person(s) who does not have a disability to perform the work (i.e., the standard setter(s)).* This will usually be an employee who does not have a disability or a staff member(s) who is:

- qualified to perform the task;
- familiar, experienced, and comfortable with the work;
- able to perform in a typical work environment;
- able to maintain a consistent and efficient pace; and
- able to perform at or close to 100 percent productivity.

(4) *Time the worker who does not have a disability (i.e., the standard setter) performing the job*:

a. This is known as setting the standard.

b. *The individual conducting the study (i.e., the observer) must:*

1. *Assure that the standard setter performs the task exactly as it will be performed by the worker with a disability.*

2. *Compare the standard setter's actions to the written procedures.*

3. *Structure the study to avoid, as much as possible, lost time situations.* "Lost time" is a term used by NISH that the WHI may find on time study documents. Lost time is time excluded from a time study for an activity that is not a regularly recurring part of the job (*e.g.*, time lost when a supervisor acting as the standard setter is interrupted during the time study by an employee's question).

4. *Time the standard setter's work using the same start and stop times as designated earlier.*

5. *Read the stopwatch and make recordings.*

6. *Document the measurement used to set the standard.*

7. *Conduct the study three times and determine average time.* It is recommended that either three different standard setters be timed, or that the same standard setter be timed three different times and the results averaged. When possible, use three different people as standard setters. Using three different people allows for the fact that different people normally work at different paces.

(5) *Time the worker with a disability performing the job.* Evaluate the performance of the worker with a disability following the procedures discussed in FOH 64j02.

(f) The WHI should verify that the steps discussed in FOH 64j00(e) above were taken, and especially note whether the employer included rework time when setting the standard. The importance of the employer's treatment of rework time is explained below in 64j02(b)(1).

64j01 **<u>How to determine a single commensurate hourly rate when the work involves dissimilar tasks.</u>**

(a) Many hourly paid jobs are composed of dissimilar tasks. In such a situation, if the employer wishes to evaluate an employee on each task, the following steps must be taken. They are the same whether conducted by the employer or the WHI.

(1) Subdivide the job into its component tasks.

(2) Time the standard setter(s) to determine the length of time spent in each component task.

(3) Note the ratio of time spent by the standard setter in each component task to the time taken to complete all of the tasks (*i.e.*, the job as a whole).

(4) Time the worker with a disability.

(5) Rate the productivity of the worker with a disability.

(b) See the following example of janitorial work for a demonstration of this method.

(1) *Subdivide the job into its component tasks*. Assume that a particular janitorial position requires that the employee move furniture, vacuum, mop, and empty trash. Assume that each of these tasks requires different skills.

(2) *Time the standard setter(s)* to determine the length of time spent in each component task. This may be done by a stopwatch measurement or any other established industrial work measurement technique.

Note the ratio of time spent in each individual task to the time spent in performance of the total job to determine the percentage of time each task takes. In this example, assume that the worker who does not have a disability (*i.e.*, the standard setter) spends 25 percent of his or her time in each of the four component janitorial tasks mentioned above.

(3) *Time the worker with a disability*. To ensure that the standard setter and the worker with a disability perform at levels that can be sustained throughout the workday, it is recommended that they be studied three times, for at least 30 minutes, ideally at different times of day. Time studies of a shorter duration often result in unrealistic productivity rates that cannot be sustained throughout the workday.

(4) *Rate the worker with a disability's productivity* by following these steps:

a. Divide the standard setter's time by the time of the worker with a disability to get a percentage rating of that worker's productivity in each task. In the following example, assume that the standard is based on the average time of three workers who do not have disabilities, and the time for the worker with disabilities is the average of three different tests (*see* FOH 64j01(b)(4)).

b. Multiply this percentage by the percentage of time that each component took the standard setter. In this example it was determined that each task took 25 percent of the standard setter's total time. This results in a new productivity percentage for each task.

c. Total the four percentages obtained in the previous step.

d. Multiply this percentage by the prevailing wage to get the commensurate rate.

(c) The calculations for the above example are demonstrated, step by step, below:

- Study 1: In this example, you find that moving furniture takes the worker who does not have a disability 40 minutes and the worker with a disability 65 minutes:

  40 ÷ 65 = 61.5% (or 0.615)

  0.615 x 25% = 15.4% (or 0.154) (25 percent of the total was the percentage of time taken by each task)

- Study 2: Vacuuming takes the worker who does not have a disability 38 minutes and the worker with a disability 50 minutes:

  38 ÷ 50 = 76% (or 0.76)

0.76 x 25% = 19% (or 0.19) (25% of the total was the percentage of time taken by each task)

- Study 3: Mopping also takes the worker who does not have a disability 38 minutes and the worker with a disability 50 minutes:

  38 ÷ 50 = 76% (or 0.76)

  0.76 x 25% = 19% (or 0.19) (25% of the total was the percentage of time taken by each task)

- Study 4: Emptying trash cans takes the worker who does not have a disability 30 minutes and the worker with a disability 60 minutes:

  30 ÷ 60 = 50% (or 0.50)

  0.50 x 25% = 12.5% (or .125) (25% of the total was the percentage of time taken by each task)

- Next, *total the results* of each of the individual studies:

  Study 1 + Study 2 + Study 3 + Study 4 = Total for job

  0.154 + 0.19 + 0.19 + 0.125 = 0.659

In the above example, the work performed by the worker with a disability met the minimum acceptable quality standards established for the job. Based on the quantity of work performed, the worker with a disability is about 66 percent (65.9 percent) as productive as the worker who does not have a disability. So if the prevailing wage were $7.00 per hour, the commensurate wage would be $4.613 ($7.00 × 0.659).

64j02 **<u>Quantity and quality when computing hourly commensurate wages.</u>**

(a) FLSA section 14(c)(1)(B) and 29 CFR 525.12(d) require that the subminimum wages paid workers with disabilities be commensurate with those paid experienced workers who do not have disabilities employed in the vicinity for essentially the same type, *quality*, and *quantity* of work.

(b) The following are two methods that employers can use to ensure that they take both quality and quantity of work into consideration when computing hourly commensurate wages.

(1) *Rework*

a. Rework is perhaps the simplest method of evaluating the performance of workers from both a quality and quantity standpoint. It requires that the employer accurately define both the minimal acceptable quantity standard (*i.e.*, amount of work) and the minimal acceptable quality standard before workers are evaluated.

b. Once these standards are defined, the worker who does not have a disability is then subjected to a time study. When the worker indicates that he or she has satisfactorily completed the work, the clock is stopped, time is recorded, and work product is examined by the individual(s) conducting the study to

ensure that the worker has met, at least, the minimum acceptable pre-established quantity and quality standards.

1. If the minimum acceptable standards have been met, the time as recorded is the standard by which the work of the worker with a disability is compared to establish the commensurate wage rate.

2. If either of the minimum acceptable standards is not met, the worker is advised of the shortcoming(s) and the study will resume with the worker performing rework. The clock will again be started and continue ticking while the worker corrects and/or completes the work product to that point where it meets the minimum acceptable standards. The time spent during the initial study, and all time spent performing rework, are then added together to establish the standard of the worker who does not have a disability.

c. The worker with a disability is then subjected to an identical time study and held to the exact quality and quantity standards as the worker who does not have a disability. When the worker indicates that he or she has satisfactorily completed the work, the clock is stopped, time is recorded, and work product is examined by the individual(s) conducting the study to ensure that the worker has met, at least, the minimum acceptable pre-established quantity and quality standards.

1. If the minimum acceptable quality and quantity standards have been met, the time as recorded is then compared to that of the standard setter (*i.e.*, the worker who does not have a disability). The percentage yielded by this comparison is then applied to the prevailing wage in order to determine the commensurate wage.

2. If either of the minimum acceptable standards is not met, the worker is advised of the shortcoming(s) and the study will resume with the worker performing *rework*. The clock will again be started and continue ticking while the worker corrects and/or completes the work product to that point where it meets the minimum acceptable standards. The time spent during the initial study, and all time spent performing rework, are then added together and compared to that of the standard setter (*i.e.*, the worker who does not have a disability). The percentage obtained by this comparison is then applied to the prevailing wage in order to determine the commensurate wage.

d. When using the *rework* methodology, it is imperative that both the standard setter and the worker with a disability be held to the same minimum acceptable standards of quality and quantity.

1. These standards must be predetermined, written, and clearly articulated to the workers before the time studies are conducted.

2. Examples of quality standards for hourly paid jobs could include:

- The number of streaks left on a mirror or window to be cleaned by a janitor
- The amount of waste paper remaining in a waste basket to be emptied by a custodian
- The number of pieces of mail that were incorrectly sorted by a mail room attendant
- How many patches of un-cut grass remain on a lawn being mowed by a landscape worker

e. When possible, use three different people as the standard setter. Although 29 CFR 525 does not specifically require timing three different people, using three different people allows for the fact that different people normally work at different paces.

(2) *90/10 Rating*

Although *not required* by the regulations, one method of measuring quality that the WHD has accepted when determining an hourly commensurate rate is a technique known as the 90/10 Rating. Various forms have been created by employers and interested parties that assist them in performing the 90/10 Rating. Although the WHD has not officially reviewed and approved any of these forms, the WHD accepts their use when properly completed. Although the 90/10 methodology was designed to be used when rework is not included in the time studies, some employers still choose to use the 90/10 even after including rework. In these situations, the WHD accepts this practice as long as there is no deduction from the quality rating because it is to the benefit of the worker with a disability.

a. Under the 90/10 Rating, the standard setter *must* perform up to the pre-established minimum acceptable quality and quantity standards when being time studied. If he or she does not, the employer must either re-define the standards to comport with the performance of the worker without a disability or conduct another time study.

b. Under this method, a 90 percent rating factor is assigned to the quantity of work performed and a 10 percent rating factor assigned to quality of the work performed. Time studies are conducted, under identical circumstances, to determine the productivity, both in terms of quality and quantity, of both the worker who does not have a disability and the worker who has a disability.

1. To determine the worker with a disability's quantity rating, the employer must first compare the quantity of work performed by the worker with a disability to that of the standard setter (*i.e.*, the worker who does not have a disability). This figure is then multiplied by 90 percent.

A. A very simple example might be that the minimum acceptable number of wastebaskets to be emptied by a custodian in 30 minutes, as confirmed by the time study of the standard setter, is 20. If the worker with a disability

empties 15 during the 30-minute time study, that worker has an initial quantity rating of 75 percent (*i.e.*, 15 divided by 20). When this is multiplied by 90 percent, the final quantity rating is 0.675 or 67.5 percent.

B. When determining the worker with a disability's quantity rating, the employer must arrive at that rating by evaluating the worker only on the job components actually performed. The work measurement method of breaking down a job into its components, and then rating the worker on each individual component, is referred to as factoring. The employer may only rate the worker on the components actually performed and may not penalize a worker because he or she fails to perform, or is incapable of performing, a certain component(s) of the job.

Factoring is not an acceptable work sampling method when the employer rates a worker on job components the employee cannot or will not perform. For example, a job description may require that a groundskeeper perform the following tasks: picking up trash, sweeping the sidewalk, and operating a power-driven lawn mower. If the employer hires a worker with a disability who can and does pick up trash and sweep the sidewalk, but, for whatever reason, does not operate the lawn mower, the employer must rate that employee only on picking up trash and sweeping the sidewalk. Some employers may attempt to assign a rating of 33⅓ percent to each of the three components, and then, in order to arrive at a total score, add the ratings awarded the employee for his or her performance of each of the three components. In this example, the employer may not penalize the employee for not operating the lawn mower. The employer would be improperly factoring if he or she included a rating of zero for operating the lawn mower in the employee's rating. Such factoring would significantly reduce the employee's rating, and thus, his or her commensurate wages for the work he or she performs.

2. To determine the worker with a disability's quality rating, the employer must compare the quality of the work performed by the worker with a disability to that of the work performed by the worker who does not have a disability. This figure is then multiplied by 10 percent.

Continuing with the example above, if the quality standard was that no more than four wastebaskets may have any debris remaining in them after being emptied, and the worker with a disability leaves debris in only one of the wastebaskets, the initial quality rating would be 100 percent. This figure is then multiplied by 10 percent to arrive at the final quality rating of 10 percent.

Note: had the worker with a disability left debris in five of the wastebaskets, the employer would be allowed to assign a lower initial quality rating based on an objectively pre-determined scale.

c. The employer then adds together the final quality and quantity ratings that were obtained for the worker with a disability. This is then multiplied by the prevailing wage to obtain the commensurate wage rate of the worker with a disability.

Again, using the example above, the evaluation of the work performed by the worker with a disability yielded a total final rating of 77.5 percent (*i.e.*, 67.5 percent for quantity plus 10 percent for quality). If the prevailing wage for the job being performed is $6.50 per hour, the commensurate rate would be $5.0375 or $5.04 per hour (77.5 percent multiplied by $6.50 per hour yields $5.0375 per hour).

d. WHIs may encounter employers who have modified the standard 90/10 Rating form to assign a higher rating to quality. The form may assign ratings of 80/20, 70/30, etc. The WHD does not automatically accept such adjustments to the 90/10 Rating, and employers must be able to document that a higher quality rating is warranted. WHIs should contact the regional enforcement coordinator: section 14, through established procedures, when encountering a modified 90/10 Rating.

64j03 **Fatigue considerations and hourly commensurate rates.**

(a) 29 CFR 525.12(j)(3), which provides instructions for calculating hourly rates, states that evaluations of workers paid on an hourly basis *should not be conducted* if the worker is "fatigued or subject to conditions that result in less than normal productivity." No PF&D allowance is required when setting commensurate hourly rates because hourly workers must be paid for the short breaks and downtime that would be accounted for by such an allowance. The use of a PF&D allowance is required by 29 CFR 525.12(h)(2)(ii), *only when calculating piece rates*.

(b) The WHD finds time studies acceptable when the worker is observed and rated under a simulation of actual work conditions, is rested and not fatigued, and has taken care of personal needs, and when there are no undue disruptions, delays, or interference.

(c) However, in light of 29 CFR 525.12(j)(3), the employer *may choose* to include a PF&D allowance if the worker cannot be evaluated under the conditions just described, or because the employer wishes to pay workers with disabilities wages that exceed the applicable commensurate wage rate.

64k **ADDENDUM**

64k00 **Glossary.**

Section 14c Glossary

Advocacy Groups/Interest Parties: The Inv may encounter various advocacy groups/interested parties - for example, NIB (National Industries for the Blind), NFB (National Federation for the Blind), NISH (formerly known as National Industries for the Severely Handicapped, but now known only as NISH), CARF (Committee on Accreditation of Rehabilitation Facilities) or The Arc (formerly known as Association for Retarded Citizens, but now known only as The Arc). Questions Inv's may encounter concerning these outside groups should be addressed, through established procedures, to the Regional Section 14 Team Leader. Questions *from* these outside groups should also be referred to the Regional Section 14 Team Leader.

Alamo Foundation Decision: A decision in which the Supreme Court ruled that the employees of an organization that engages in commercial activities in competition with other businesses are protected by the FLSA even though the employer may be a not-for-profit organization [Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278, 53 USLW 4489, 27 Wage and Hour Cas. (BNA) 209, 36 Empl. Prac. Dec. P 35, 147, 102 Lab.Cas. P 34,655 (U.S.Ark., Apr 23, 1985)(NO. 83-1935] *(See FOH 64b02(a)(3))*.

Allowance Factor: See PF&D *(See FOH 64i01(d))*.

Allowance Percentage: See PF&D *(See FOH 64i01(e))*.

Americans with Disabilities Act (ADA). This Federal law, which took effect July 26, 1992, prohibits employers from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment. The Solicitor's Office has reviewed the ADA and its legislative history and has concluded that the ADA does not nullify the provisions of sec 14(c). ADA affords protection to individuals who, with or without reasonable accommodation, can perform the essential functions of the job. An employer is not required to lower quality or production standards to make an accommodation *(See FOH 64a02)*.

Branch Facilities: Physically separate establishments of the same enterprise. WH policy and procedures require that each branch establishment have its own certificate to pay SMW's *(See FOH 64d00(e)(1))*.

Certification Team: The Midwest Regional Office Certification Team is the only team charged with processing applications from employers to pay workers with disabilities SMW's and is the only office that issues certificates authorizing the payment of SMW's under sec 14(c) of the FLSA. The address and telephone numbers of the Wage Specialists who serve on the Certification Team are located at FOH 64d00(h).

Client/Consumers: Terms commonly refer to workers with disabilities who are employed by a work center, hospital or institution or other employer *(See FOH 64a01)*.

Commensurate Wage: A special minimum wage (SMW) based on the individual productivity of the worker with a disability in proportion to the productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity where the worker with a disability is employed. The commensurate wage in the context of DOL certification is always an SMW , i.e., a wage below the applicable MW required by sec 6(a). When an Inv finds that the wages paid are not truly commensurate, a violation has occurred and BW's are due *(See FOH 64g05)*.

Committee on Accreditation of Rehabilitation Facilities (CARF): A private, not-for-profit organization working to promote quality assistance for people with disabilities by accrediting the facilities that employ them. Through a longstanding agreement, CARF contacts the WH National Office regarding our record of any unresolved enforcement issues WH may have with firms seeking accreditation.

Community Rehabilitation Program (CRP): Not-for-profit agencies that provide rehabilitation and employment opportunities for people with disabilities. Some may be affiliated with national organizations such as Goodwill Industries or The Arc, while others are private not-for-profit organizations located solely within their local communities *(See FOH 64b00)*.

Comparable Business: A business that either employs a similar number of employees in a similar type work as the sec 14(c) employer, or competes for contracts of a similar size and nature as the employer of the workers with disabilities. These are the businesses that sec 14(c) employers are to contact when performing a prevailing wage study *(See FOH 64g03(e))*.

Compensable Time: Time for which the employer must pay the employee with a disability. It does not include time spent in work simulations (see below) *(See FOH 64e01)*.

Competitive Employment: Refers to the employment of a client/consumer by private industry *(See FOH 64b02(a)(4))*.

De-skilling: An unacceptable method in which an arbitrary decrease is made in the prevailing wage to account for differences in methods, tasks, or equipment used by workers with disabilities as compared to workers who do not have disabilities in industry. If comparable jobs cannot be found, prevailing wage data should be collected on jobs requiring the same general skill levels *(See FOH 64g03(i)(3))*. The following is an example of de-skilling:

> Assume that the properly determined prevailing wage for hand packaging is $6.00 and that the hand packing job performed in a work center includes the following steps: counting bolts, placing a label on the bag the bolts go in, putting 10 bolts into the labeled bag, putting 24 filled bags into a box for packing and then sealing the box.
>
> De-skilling would occur if the employer arbitrarily decided that labeling the bags is not as difficult as counting the bolts and therefore the SMW of an employee who only performed labeling should be based on a prevailing wage of $5.75 an hour rather than $6.00. The same would be true if the employer decided that the SMW of an employee who only sealed the boxes should be based on a prevailing wage of $5.50 an hour.

Downtime: Time when the worker with a disability is not performing direct work activity but is waiting to be engaged in work. Downtime is compensable time when the worker is on the job but not producing due to factors outside of his or her control, such as lack of work, equipment breakdowns, or waiting for supplies. In the context of sec 14(c), if a facility provides rehabilitation services, recreation or other clearly non-work services to workers with disabilities during periods of downtime, the time will not be considered compensable, so long as the rehabilitation services provided are not primarily for the purpose of increasing job productivity. Time spent in work sampling and/or work simulation (see below) are also considered to be rehabilitation services. *See FOH 64e01(b) and 64i01(a)(3).*

Enclave Worksite: A worksite of a competitive employer where a worker with a disability or a group of workers with disabilities are working and supervised by staff from the work center staff . The workers remain on the work center's payroll and authorization to pay an SMW is based on the work center's certificate *(See FOH 64d00(e)(1)c.).*

Experienced Worker: A worker who has learned the basic elements or requirements of the work to be performed, ordinarily by completion of a probationary or training period. Typically, such a worker will have received at least one pay raise after successful completion of the probationary or training period *(See FOH 64g03(c)).*

Factoring: A work sampling method in which a job is broken into components and the worker with a disability is rated on each component. Factoring **is not an acceptable method of work measurement** when the worker with a disability is rated on a component(s) he or she cannot or will not perform. The worker with a disability must perform a component if he or she is to be rated on that component. For example, a job description may require that a groundskeeper perform the following tasks: picking up trash, sweeping the sidewalk, and operating a "weed-whacker." If the employer hires a worker with a disability who can and does pick up trash and sweep the sidewalk, yet is afraid to operate the weed whacker and refuses to do so, the employer must rate that employee only on picking up trash and sweeping the sidewalk. The employer may not penalize the employee for not operating the weed whacker. The employer, in this example, would be improperly factoring if he or she included a rating of "zero" for operating the weed whacker in the employee's rating. Such factoring would significantly reduce the employee's rating, and thus his or her commensurate wages *(See FOH 64j02(e)(2)b.1.).*

Hospital or Institution: A public or private, not-for-profit or for-profit, facility primarily engaged in providing residential care for the sick, the aged, or the mentally ill or retarded, including but not limited to nursing homes, intermediate care facilities, rest homes, convalescent homes, homes for the elderly and infirm, halfway houses, residential centers for drug addicts or alcoholics, and the like, whether licensed or not licensed. "Primarily" means that more than 50 percent of the facility's income is attributable to this residential care. These facilities may apply for sec 14(c) certificates to pay SMW's to "patient workers" (see below) *(See FOH 64b02(b)).*

Hours Worked: See compensable time.

Individualized Education Program (IEP): A document prepared for each student with a disability participating in a community-based work placement which lists the transition services established for exploration, assessment, training, or cooperative vocational education that the worker needs *(See FOH 6408(c)(3)).*

Individual Plan for Employment (IPE): A document prepared for each individual with a disability (not a student) participating in a community-based rehabilitation organization program. It must include a statement of needed transition services established for vocational exploration, assessment, or training for the worker with a disability. This document was formerly known as an Individualized Written Rehabilitation Plan (IWRP) *(See FOH 6408(c)(3))*.

Javitts-Wagner-O'Day Act (JWOD): The JWOD Act requires Federal agencies to purchase designated products and services from certain not-for-profit organizations. Qualifying organizations must receive at least 75% of their direct labor from individuals who are blind or have severe disabilities.

Jigs or Fixtures: Modifications made to production methods to accommodate special needs of individual workers with disabilities, for example use of a device with a predetermined number of openings to help the worker "count" the correct number of items. The jig may impede the production of a worker who does not have a disability and need not be used in the timestudy of the worker who does not have a disability. Any jigs or fixtures used when a job is timestudied must be made available to the worker with a disability who does the job *(See FOH 64i02)*.

Learning Disability (LD): Unlike other disabilities, the term "learning disability" does not have a precise definition. LD describes a number of learning or behavioral disabilities, ranging from mild to severe, which may be manifested by various combinations of impairments in perception, conceptualization, language, memory, and control of attention, impulse, or motor function. LD is accepted as a disability for the work to be performed when certain criteria are met *(See FOH 64a01(e))*.

Leveling: See Performance Leveling

Locality or Vicinity: The geographic area from which the labor force of the community is drawn *(See FOH 64g03(e)*.

Lost Time: A term used by NISH that the Inv may find on timestudy documents. Lost time is time excluded from a timestudy for an activity which is not a regularly recurring part of the job. Example: time lost when a supervisor acting as the standard setter is interrupted during the timestudy by an employee's question *(See FOH 64i01(d)(4) and 64j00(e)(4)b.3.)*.

McNamara-O'Hara Service Contract Act (SCA): This Act requires that federal service contracts in excess of $2,500 include wage determinations issued by DOL. The wage determination rate for the same work the worker with a disability performs is used as the prevailing wage when figuring commensurate wages. Employees with disabilities performing work on these contracts must be paid the full fringe benefit amount. *(See FOH 64b03.)*

Methods Time Measurement-Work (MTM): A work measurement system in which a predetermined time value is assigned to every manual motion involved in performing a given task *(See FOH 64g04(c)(2))*.

Modular Arrangement of Predetermined Time Standards (MODAPTS): A work measurement system. This predetermined time system deals with standard time values or units of human physical work, called "modules" or "MODS" *(See FOH 64g04(c)(3))*.

NIB - National Industries for the Blind: The "Central Nonprofit Agency" established by JWOD and designated by the Committee for Purchase From People Who Are Blind or Severely Disabled to provide technical assistance to qualified not-for-profit community agencies that employ people who are blind on JWOD contracts. Facilities must be associated with NISH or NIB in order to receive JWOD contracts.

NISH: The "Central Nonprofit Agency" established by JWOD and designated by the Committee for Purchase From People Who Are Blind or Severely Disabled to provide technical assistance to qualified not-for-profit community rehabilitation programs that employ people with disabilities on JWOD contracts. Facilities must be associated with NISH or NIB in order to receive JWOD contracts.

Office of Enforcement Policy (OEP): That section of WH national office that administers sec 14(c).

Patient Worker: A worker with a disability who is employed by a hospital or institution that provides residential care where such worker receives treatment or care. It does not matter whether such worker is a resident of the establishment or receiving care on an outpatient basis *(See FOH 64d00(e)(2))*.

Performance Leveling (or leveling): Refers to adjustments made to timestudy performance level results when the productivity of the person being timestudied does not represent normal or near normal performance. Such adjustments should be made only by a person knowledgeable in this technique, as evidenced by successful completion of training in this area *(See FOH 64g06(c)(1)a.)*.

Performance Measurement III (PMIII): A work measurement system developed by Goodwill Industries to measure the performance of workers with disabilities employed in sorting and salvage work *(See FOH 64g07(b)(2))*.

Personal Time, Fatigue, and Unavoidable Delays (PF&D): Time allowed (by established industrial work measurement methods) to cover certain periods of downtime for employees paid by piece rate. Generally a PF&D of not less than 15% (9 - 10 minutes per hour) is sufficient. To achieve an acceptable PF&D the employer may: *(See FOH 64i01.)*

- Multiply the number of units produced by the standard setter in 60 minutes by an allowance *percentage* of either 85% for a 51 minute hour, or an allowance percentage of 83.33% for a 50 minute hour, or

- Multiply the standard setter's time by an allowance *factor* of 1.2 for a 50-minute hour, or an allowance factor of 1.1764705 (may be rounded to 1.176) for a 51-minute hour.

Piece Rate: The amount of money paid per task performed or piece produced. A piece rate used to determine the commensurate wages, when properly established, must include consideration of quantity and quality of production and a factor covering PF&D. A proper piece rate, when multiplied by the standard of the worker who does not have a disability, should equal at least the prevailing wage range *(See FOH 64i00)*.

Pooled Piece Rates (team work wages): A method of payment used when each worker's individual contribution to the finished product cannot be determined separately. In such situations, the employer should make every effort to objectively divide the earnings according to the productivity level of each individual worker *(See FOH 64g05(c))*.

President's Committee on Employment of People with Disabilities: A small Federal agency created in 1947 to coordinate and promote public and private efforts to enhance the employment of people with disabilities. The Committee provides information, training and technical assistance to businesses, labor organizations, advocacy groups, rehabilitation and service providers, families and individuals with disabilities. Its activities include periodic job fairs for people with disabilities who are seeking employment. This agency is different from the Presidential Task Force on Employment of Adults with Disabilities.

Presidential Task Force on Employment of Adults with Disabilities: This task force, created by Executive Order No. 13078 signed by President Clinton on March 13, 1998, is charged with the mission of creating and coordinating an aggressive national policy to bring adults with disabilities into gainful employment at a rate that is as close as possible to that of the general adult population. Although the Task Force is headquartered within DOL's Frances Perkins Building, it is not part of DOL. The Secretary of Labor is the Chair of the Task Force and several other Members of the Cabinet serve as members. The Task Force should not be confused with the President's Committee on Employment of People with Disabilities.

Prevailing Wage Rate: A wage rate paid an experienced worker, who does not have a disability, in industry in the vicinity for essentially the same type, quantity and quality of work to be performed by a worker with a disability receiving an SMW. The prevailing wage may not be less than the statutory MW. *(See FOH 64g03.)*

Productivity Time Standard: Standard time per task performed by a worker who does not have a disability, determined by established industrial work measurement methods. See also "Standard for Worker who does not have a Disability." *(See FOH 64i00.)*

Quality Standards: Standards which establish what is an acceptable product or completed task in an industry or for a particular job. This is an essential component of the productivity comparison necessary for establishing commensurate wage rates. *(See FOH 64j02.)*

Regional Section 14 Team Leader: An experienced enforcement official located within each of the five Wage and Hour Division Regions who has administration and oversight responsibilities regarding that Region's Section 14 programs. The Regional Section 14 Team Leader is an internal and external resource with expertise in Section 14 programs and is the primary regional liaison with the Midwest Regional Office Certification Team and the NO Child Labor and Special Employment Team/OEP.

Rehabilitation Services: Services provided to workers with disabilities, including such services as counseling, psychological testing, mobility training, medical treatments, personal care, physical therapy, occupational therapy, recreation, and physical exercise. These services may also include work samples and/or work simulation *(See FOH 64e01(a)).*

Rework: Time spent by the worker redoing a product or work activity of unacceptable quality, i.e., that does not meet the industry quality standard, in order to bring the work product up to the acceptable level of quality *(See FOH 64j02(b)).*

School Work Experience Program (SWEP): A program in which a school system may place students with disabilities in jobs in the community at SMW's. Child labor restrictions still apply. The school applies for the certificate, which names the location at which the student(s) will be placed. Separate certificates are required for each business at which students are placed. The original certificate is maintained at the school and the school provides a copy to the business *(See FOH 64d00(e)(3)b.).*

Sheltered Workshop or Work Center: Centers that have historically provided rehabilitation services, day treatment, training, and/or employment opportunities to individuals with disabilities. Work centers no longer refer to themselves as "sheltered workshops" nor do they perceive themselves as offering "sheltered" employment. See also Work Center. *(See FOH 64b00.)*

Skills Training and Employment Preparation Services (STEPS): An employment project funded by the U.S. Department of Health and Human Services. It is designed to serve people whose primary disability is epilepsy and whose condition is severe enough to meet the definition of developmentally disabled. The program consists of prevocational group classes, transitional employment experiences, and closely supported job placement.

Souder Decision: A court decision holding that the MW and OT provisions of the FLSA generally apply to patient workers. The determination of an employment relationship does not depend on the level of performance of the patient or on whether the work is of therapeutic value to the patient. In general, an employment relationship exists where a patient is performing work that is of any consequential economic benefit to the residential care facility or institution. Consequential economic benefit generally means that the work would have to be done by employees of the employer who do not have disabilities, if the worker/patient with a disability did not do it. This applies whether the patient is voluntarily committed or committed pursuant to a civil court order. (U.S. District Court for the District of Columbia decision. Souder v Brennan, 72 CCH LAB.Cas.32,980(D.D.C. 1973)

Special Minimum Wage (SMW): A wage paid a worker with a disability that is commensurate with that worker's individual productivity as compared to the wage and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity where the worker with a disability is employed. The commensurate wage is always a special minimum wage, i.e., a wage below that required by sec 6(a). Before an SMW rate may be paid, the employer must obtain a certificate under sec 14(c) *(See FOH 64a00(a)).*

Spoilage Allowance: An allowance generally given for unacceptable or spoiled work. The work is acceptable so long as the allowance is not exceeded. The allowance, if used, must be the same for both the standard setter and the worker with a disability who is being evaluated.

Standard for Worker who does not have a Disability (sometimes called "the norm" or "normal productivity"): That amount of work which describes the level of production expected of the worker who does not have a disability. Usually it is expressed as a standard number of units per hour or time per task performed by worker who does not have a disability. It is determined by established industrial work measurement methods, generally using the same production method as the workers with disabilities will use. It is the basic objective gauge against which the productivity of the worker with a disability is measured. See also "Productivity Time Standard and Standard Production Rate" *(See FOH 64g05(b)).*

Standard Production Rate: The number of units an experienced worker who does not have a disability for the work is expected to produce per hour, determined by established industrial work measurement methods. See also "Standard for Worker who does not have a Disability" and "Productivity Time Standard and Standard Production Rate" *(See FOH 64g05(b))*.

Standard Setter: The average, experienced, worker who does not have a disability for the work being performed whom the employer time studies to set the performance standard *(See FOH 64i00(d)(3))*.

Supported Employment/Work: Term referring to work programs in which job coaches work with individuals with disabilities who are placed in employment settings (outside of the work center or rehabilitation center) with workers who do not have disabilities. The job coaches typically provide extensive training and actually perform the job where necessary *(See FOH 64d00(e)(1)c.)*.

Task Analysis: The process of identifying the manageable components, tasks, and subtasks of the job to be performed *(See FOH 64i00(d)(2) and 64j00(e)(2))*.

Vicinity or Locality: The geographic area from which the labor force of the community is drawn *(See FOH 64g03(e))*.

Work Activity Center (WAC): Referred to centers which served individuals with the most severe disabilities, those whose physical or mental impairment was so severe that their productive capacity was so inconsequential that they could not earn even 50% of the MW (former sec 14(c)(3)(A) of the FLSA). There was no minimum guarantee in a WAC, only the requirement that a commensurate wage be paid.

Prior to the 1986 FLSA amendments, two separate SMW certificates were issued: one for work activities centers (WAC) and one for regular work programs (RWP). The regular work program certificates (RWP) applied to workers with disabilities who *could* earn at least 50% of the MW and contained a requirement that guaranteed them payment of at least 50% of the MW. Participants in the two programs were to be physically separated in a work center.

Work Center (Formerly Sheltered Workshop or SWS): Centers that have historically provided rehabilitation services, day treatment, training, and/or employment opportunities to individuals with disabilities. *(See FOH 64b00.)*

Work Measurement: A determination of the time it should take to perform an operation, or element of an operation, using a prescribed method. *(See FOH 64g04.)*

Work Samples/Simulation: Work samples or simulations are activities which are structured to resemble the work performed in the facility but are performed away from the normal production area. These activities are for the benefit of the client and do not yield a product used to fulfill any of the facility's contracts. None of the materials, goods or services produced is intermingled with the normal work product of the employer and the facility does not derive any economic benefit from them. Clients are supervised by non-production personnel and the clients' activities must be a specific part of a well-defined program of rehabilitation. When the above criteria are met, work simulation is *not* hours worked under FLSA and need not be compensated *(See FOH 64e01(c))*.

Worker With a Disability: An individual whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury, for the work to be performed. *(See FOH 64a01.)*

Vision Center Decision: A district court decision that held once the Secretary issues a certificate approving an SMW, the Secretary must have concluded that the SMW must have complied with the law before the certificate was issued. The court noted that the Secretary has additional authority to investigate and to revoke the certificate of a non-complying employer and that a worker with a disability who is being paid an SMW also may petition the Secretary to review the rate he or she is receiving. The impact of this decision is that SOL will not initiate actions to recover sec 6 BW's due employees paid SMW's until after WH has retroactively revoked (back to the date the violations began) the employer's certificate which authorized the payment of SMWs. [Herman v. Vision Center of Central Ohio, Inc., S.D. Ohio, Case No. C2-94-657 (Dec. 16, 1997)] *(See FOH 64h00(a)(1)).*

90/10 Quantity/Quality Hourly Rating: One common and acceptable work measurement method used to determine an hourly commensurate rate where a 90 percent rating factor is assigned to the quantity of work performed and a 10 percent rating factor is assigned to quality of the work performed. The practice developed from a 1973 DOL demonstration study which determined that this method resulted in the closest correlation to objectively determined actual earnings. The quantity and quality ratings for the worker with a disability must be based on the same quantity and quality standards used when evaluating the worker who does not have a disability *(See FOH 64j02(b)(2)).*

Common Acronyms:

CARF-Committee on Accreditation of Rehabilitation Facilities

CRP-Community Rehabilitation Program.

IDEA-Individuals with Disabilities Education Act

IEP-Individualized Education Program

IPE-Individual Plan for Employment (formerly called an Individualized Written Rehabilitation Plan - IWRP)

MODAPTS-Modular Arrangement of Predetermined Time Standards

MTM-Methods Time Measurement-Work

NFB-National Federation for the Blind

NIB-National Industries for the Blind

NISH-formerly known as National Industries for the Severely Handicapped, but now known only as NISH. The name "NISH" is no longer an acronym but the full name of the organization.

OEP-Office of Enforcement Policy

PF&D-Personal Fatigue and Delay

PMIII-Performance Measurement III

SCA-Service Contract Act (formerly abbreviated MOSCA, at times, for the McNamara-O'Hara Service Contract Act)

STEPS-Skills Training and Employment Preparation Services

SWEP-School Work Experience Program

The Arc-formerly known as Association for Retarded Citizens, but now known only as The Arc

64k01 **Application for Authority to Employ Workers with Disabilities at Subminimum Wage (WH-226).**

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Certificate Authorizing Special Minimum Wage Rates Under Section 14(C) of the Fair Labor Standards Act

230 SOUTH DEARBORN STREET
ROOM # 524
CHICAGO, IL 60604-1591

Certificate Number: 05-13843-S-001 **Date:** 12/14/2000

FOR BRANCH LOCATION:

LMNOP WORK CENTER
P.O. BOX 777
JAZZCAT, US 00000

LMNOP WORK CENTER
1000 TRANE STREET
JAZZCAT, US 00000

/SHELTERED WORKSHOP/

This special certificate authorizes the employment of workers with disabilities in accordance with the requirements of 29 CFR part 525, effective 12/05/2000

The certificate will remain in effect provided that all applicable provisions of the Fair Labor Standards Act, the Walsh-Healey Public Contracts Act, the McNamara O'Hara Service Contract Act, and the contract Work Hours and Safety Standards Act and the regulations issued pursuant thereto are fully complied with. In addition current information concerning the employment of workers with disabilities by this certificate holder must be furnished to the Wage and Hour Division upon request but in no event later than 11/30/2002

The enclosed certificate does not constitute a statement of compliance by the Department of Labor nor does it convey a good faith defense to the employer should violations of the Fair Labor Standards Act (FLSA), the Walsh-Healey Public Contracts Act (PCA), the McNamara-O'Hara Service Contract Act (SCA) or the Contract Work Hours and Safety Standards Act (CWHSSA) occur.

Please contact the following Wage Specialist should you have any questions regarding the issuance of this certificate:
Chris Giles Phone

See the reverse of this certificate and the applicable regulations for further information.

NOTICE TO WORKERS WITH DISABILITIES PAID AT SPECIAL MINIMUM WAGES

The Fair Labor Standards Act (FLSA) provides that workers with disabilities whose disabilities impair their ability to perform the type of work being done in the establishment may be employed at wage rates below the minimum otherwise required in FLSA. Such employment is permitted only under certificates issued by the Department of Labor and must reflect the productivity of the individual worker as related to the productivity of a worker not disabled for the work being performed, and the wages being paid to experienced workers performing the same or similar work in the vicinity. Such wages are referred to as "commensurate wage rates." This establishment has a certificate authorizing the payment of commensurate wages to workers with disabilities. Workers not disabled for the work to be performed, including workers who may otherwise have disabilities, *must receive at least the statutory minimum wage.*

For purposes of payment of commensurate wages under a certificate, a worker with a disability is defined as:

An individual whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury, for the work to be performed.

Disabilities which may affect productive capacity include blindness, mental illness, mental retardation, cerebral palsy, alcoholism, and drug addiction. The following disabilities do not ordinarily affect productive capacity for purposes of paying commensurate wages: educational disabilities; chronic unemployment; receipt of welfare benefits; nonattendance at school; juvenile delinquency; and correctional parole or probation.

Each worker with a disability and , where appropriate, the parent or guardian of such worker, shall be informed orally and in writing by the employer of the terms of the certificate under which such worker is employed.

Complaints or questions regarding the terms and conditions of employment under a certificate may be directed to the Wage and Hour Division, U.S Department of Labor. Action will be taken to address an individual's concerns, including where appropriate, a formal investigation of the employer.

Workers with disabilities paid at special minimum wages may also petition the Administrator of the Wage and Hour Division of the Department of Labor for a review of their wage rates by an Administrative Law Judge. No particular form of petition is required, except that it must be signed by *the worker with a disability or his or her parent or guardian and should contain the name and address of the employer. Petitions should be* mailed to: Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210

Wage and Hour Representative	Title	Phone
JOHN R. FRASER	DEPUTY ADMINISTRATOR	

Form WH-228-MIS
Rev. July 1996

1. **COMMENSURATE WAGE RATES**

   A. **PIECE RATE PAYMENTS.** Workers with disabilities (including patient workers in hospitals or institutions) employed on a piece rate basis must be paid not less than the prevailing piece rate paid experienced employees not disabled for the work to be performed engaged in essentially the same type of work in the vicinity. In the absence of established piece rates for similar work, time studies or other tests may be used to establish piece rates.

   B. **HOURLY RATE PAYMENTS.** Workers with disabilities (including patient workers in hospitals or institutions) employed on an hourly rate basis must be paid wage rates at least commensurate with the prevailing hourly wage rate paid experienced employees not disabled for the work to be performed in the vicinity for essentially the same type, quality, and quantity of work.

2. **CONTRACTS SUBJECT TO THE McNAMARA O'HARA SERVICE CONTRACT ACT**

   This certificate extends authority to pay commensurate wages to workers with disabilities performing work subject to the McNamara O'Hara Service Contract Act (SCA) but not less than the minimum wage rates specified below.

   A. **MINIMUM WAGE.** The SCA wage determination incorporated in a service contract with the Federal Government or the District of Columbia will specify the prevailing minimum wage rates and fringe benefits which are to be paid to each of the classes of service employees performing covered SCA contract work or work necessary to the performance of the contract.

   Workers with disabilities shall be paid commensurate wage rates based on the applicable SCA wage determination.

   B. **FRINGE BENEFITS.** All workers with disabilities who perform work on contracts subject to SCA or who perform work necessary to the performance of the contract shall be paid fringe benefits in full as stated on the applicable SCA wage determination and in accordance with the provisions of 29 CFR Part 4.

   C. **VIOLATIONS OF THESE SCA PROVISIONS.** Failure to comply with these SCA provisions may result in the withholding of funds to cover unpaid wages and debarment from future Federal service contracts.

   D. **COVERAGE OF OTHER EMPLOYEES.** If a certificate holder is providing any services (other than linen supply service), subject to SCA, those workers in the establishment in which the services are being performed who are not performing the service work must be paid in accordance with the applicable provisions of the FLSA. This holds true even where the non-service work would not otherwise be subject to the FLSA. Any questions regarding this requirements should be immediately directed to the office issuing this certificate.

3. **OVERTIME PAYMENT.**

   A. **FAIR LABOR STANDARDS ACT.** Persons covered by this Act, unless exempt, shall be paid not less than ONE AND ONE-HALF TIMES THEIR REGULAR RATES OF PAY AFTER 40 HOURS OF WORK IN A WORKWEEK.

   B. **PUBLIC CONTRACTS ACT.** Persons covered by this Act, unless exempt, shall be paid not less than ONE AND ONE-HALF TIMES THEIR REGULAR RATES OF PAY AFTER 40 HOURS OF WORK IN A WORKWEEK.

   C. **SERVICE CONTRACT ACT.** Persons covered by this Act, unless exempt, shall be paid overtime in accordance with the terms of the FLSA or the CONTRACT WORK HOURS AND SAFETY STANDARDS ACT, for all hours worked over 40 hours a workweek.

4. **RECORD KEEPING REQUIREMENTS.** In addition to the records required by Regulations 29 CFR Part 516, each certificate holder shall keep those records required by Regulation 29 CFR Part 4.6(g), 4.185, and Part 525.16, as applicable, including but not limited to:

   A. **DISABILITY** showing nature of the disability of each worker employed at a commensurate wage rate;

   B. **PRODUCTIVITY** showing the productivity of each worker with a disability or patient worker on a continuing basis or at periodic intervals (not to exceed 6 months in the case of workers paid hourly wage rates), including documents explaining how the productivity of workers with disabilities not paid a piece rate is determined;

   C. **PREVAILING** wage rates paid in the vicinity to experienced workers not disabled for the work to be performed (updated at least every 12 months);

   D. **PRODUCTION** standards and supporting documentation, including work measurements.

5. **Child Labor.** Minors younger than 18 years old must be employed in accordance with the child labor provisions of FLSA. No person under 18 may be employed in manufacturing or on a PCA contract.

6. **COMPLIANCE WITH HIGHER STANDARDS.** No provisions of this certificate shall excuse noncompliance with any other Federal, State, or local law or ordinance establishing higher standards.

7. **REVIEW OR CANCELLATION.** This certificate is issued without prejudice to the rights of any party to petition for review as provided in Regulation 29 CFR Part 525. The terms of this certificate may be amended for cause upon the request of the certificate holder, or worker with a disability or the guardian or parent of such worker or upon the initiative of the Administrator or the Administrator's authorized representative. This certificate is revocable by the Administrator or the Administrator's authorized representative for cause.

64k02 Sample letters.

(a) Sample appointment letter

The following is an example of an appointment letter that WHIs can adapt depending on the particular assignment. FOH 64f01 directs WHIs to send section 14(c) employers an appointment letter prior to visiting the establishment to ensure the presence of the executive director and facilitate the examination of necessary documentation.

SAMPLE APPOINTMENT LETTER

March 21, 2001

Workshop Director
XYZ Vocational Training Center
222 E. Oak Street
Harbor, Pennsylvania 19096

Dear Sir/Madame:

The Wage and Hour Division is responsible for the administration and enforcement of a number of Federal laws involving labor standards. These include the Fair Labor Standards Act (FLSA) and the McNamara-O'Hara Service Contract Act (SCA). The Division has specific responsibilities under Section 14(c) of the FLSA, which provides for the employment of workers with disabilities at special minimum wages that are less than the Federal minimum wage. We also have certain responsibilities under the Davis Bacon and Related Acts, the Contract Work Hour and Safety Standards Act, the Family and Medical Leave Act, and the Immigration Reform and Control Act of 1986 (IRCA).

This is to advise you that I will call on you on Wednesday, April 11, 2001 at 9:00 a.m. at the above address. The purpose of my visit will be to conduct an investigation to determine your firm's level of compliance with the Fair Labor Standards Act and other appropriate Acts. As part of the investigation, I will tour your establishment, including any work centers, and you may be asked to replicate time studies to verify the accuracy of the special minimum wages paid to clients performing covered work. Every effort will be made to conduct this assignment expeditiously and with a minimum of inconvenience to you and your employees.

Please prepare the following information so that it is available during the investigation:

(1) Names and addresses of the President and Board of Directors or Corporate Officers;

(2) A listing of all branch establishments or supported employment sites;

(3) Copies of the financial statements for past three years. If you are a for-profit operation, a list of your gross annual dollar volume of sales for the past three years;

(4) A list of all staff members which reflects each employee's hourly rate or salary, descriptive job title, and whether you consider that employee exempt from overtime;

(5) Payroll and time records, for both the staff and clients for the past two years, including a copy of the most recently completed payroll;

(6) Documents substantiating the type and severity of the disability(s) of each worker who is paid a special minimum wage;

(7) Timestudies documenting standards used to establish piece rates and/or hourly commensurate wage rates;

(8) Evaluations and documentation used to determine the special minimum wages paid employees on an hourly basis (such as the quality standards used);

(9) Prevailing wage survey data for the last two years;

(10) If you employ patient workers, please provide the following information:

- Whether your institution is for-profit or not-for-profit;
- Whether your institution is public or private;
- The primary disability group you serve;
- The total number of patients in the institution at the present time;
- The number of patients who are also employees of the institution;

(11) Contract information:

a. If you have, or have had SCA contracts or subcontracts in the last two years, please provide the following information for each contract:

- Name and address of contractor;
- Name of prime contractor if work was/is performed as a subcontractor;
- Name and address of contracting agency;
- Contracting officer name and phone number;
- Brief description of work;
- Number of workers employed on the contract;
- Period of contract performance;
- Dollar amount of contract;
- Copies of any applicable SCA wage determinations;

b. If you have, or have had in the last two years, production contracts or subcontracts, please provide the following *additional* information for each contract:

- Name and address of customer;
- Geographic source of raw materials or component parts;
- Final geographic destinations of goods produced;

(12) Birth dates for all employees under age 19 who worked during the past 24 months;

(13) Federal Employer Identification Number (FEIN);

(14) Employment Eligibility Verification forms, I-9s, for all current employees hired after November, 1986 ***[Inv's will follow current FOH guidelines regarding the reviewing of I-9s when deciding to add this requirement].***

Thank you in advance for your assistance in this matter. Please do not hesitate to contact me at (717) 445-3030 should you have any questions.

Sincerely,

Jordan Smith
Investigator

(b) Letter of Findings

A Letter of Findings shall be sent to the employer at the conclusion of each section 14(c) investigation to advise the employer in writing of the issues discussed and agreements reached during the final conference (*see* FOH 64h01(e)).

(1) The Letter of Findings should:

a. state the period of investigation;

b. list violations found for staff employees separately from those for clients;

c. list the violations by act, specify the types of violation under each act, and mention the number of employees affected and amount of back wages due;

d. provide the citation in 29 CFR 525, or other appropriate regulation, for each of the violations found;

e. include a section of comments and recommendations to assist the employer's future compliance;

f. when appropriate (*e.g.*, when the WHI still has some questions regarding the employer's efforts to come into compliance), the employer shall be asked to respond to the Letter of Findings. He or she should be directed to send a letter to the DO, within 30 days of the date of the Letter of Findings, describing the steps and/or changes that have been taken since the conclusion of the investigation to come into compliance and assure compliance for the future.

(2) *Sample Letter of Findings*

(3) Sample letter of findings.

[Date]

[Center Director & address]

Dear:

Thank you for your courtesy and consideration extended to our Investigator ***[Inv first and last name]*** in his/her recent investigation of your work center ***[or institution, establishment, etc.]***. The investigation covered both staff members and workers with disabilities employed at subminimum wages by the ***[insert name of establishment]*** at ***[specify exactly all locations included in the investigation]***. The investigation period was ***[date]*** to ***[date]***.

The investigation was to determine your compliance with the Fair Labor Standards Act (FLSA) ***[add the Service Contract Act or Public Contracts Act if applicable to this investigation]*** and particularly with the terms and conditions of your subminimum wage certificate(s) issued under the FLSA. These terms and conditions are described in Regulations 29 CFR Part 525, a copy of which was previously provided to you.

The investigation report shows that you failed to comply with the FLSA as follows: *[be specific and accurate, obtaining input from Regional Section 14 Team Leader as needed. List violations involving SCA and/or PCA in separate sections of the letter. Include BW's due to the number of employees under each section. Segregate violations involving staff from violations involving workers paid SMW's under Sec 14(c)]. The following are examples of possible violations that might be encountered:*

1. *The employer failed to use the proper prevailing wage rate for most of the contract work performed during the investigation period. According to information provided, either the statutory MW was used as the prevailing wage or only one firm was contacted for prevailing wage information. To compute BW's, the firm conducted a prevailing wage survey for contract work and recalculated the piece rates that should have been paid. The difference between the piece rate paid and the new, correct piece rate was multiplied by the total pieces produced by each consumer. BW's found due were $2204 for 289 clients.*

2. *Firm failed to count as hours worked all compensable travel time and downtime for employees. Many employees performed contract work at the facility prior to being transported to a community enclave. BW's were calculated by comparing a regular rate, developed for a sample two-month period of time (6/98 – 8/98), to the quarterly average used previously by the firm to pay for these hours. Firm multiplied the figures computed for the sample period, by 8 quarters, for all employees owed BW's. BW's found due were $6,706 for 299 employees.*

3. *Firm failed to pay employees placed at Techno Industries (a community-based enclave) wages based on those paid experienced Techno Industries employees. BW's were calculated by multiplying the difference between the corrected wage and the wage paid by the total hours clients worked at the enclave. BW's found due were $9,605 for 24 employees.*

The report indicates that on *[date of final conference]*, you met with Investigator *[Inv's last name]*, *[list name and title of those present at final conference]* at *[list where final conference was held]*. At that meeting, it is my understanding that you agreed to full compliance with the FLSA *[add other acts as applicable]* and the terms and conditions of your certificate(s). Specifically you agreed to *[be specific and accurate, obtaining input from Regional Section 14 Team Leader as needed]. The following are examples of employer commitments:*

1. *You agreed to compute prevailing wage rates, as often as required but not less than every 12 months, in accordance with the provisions of Regulations 29 CFR Part 525.10.*

2. *You agreed to record and compensate all traveltime and downtime which properly qualify as "hours worked" in accordance with Regulations 29 CFR Part 785.*

3. *You agreed to pay all clients placed at the Techno Industries enclave site commensurate wages based upon the prevailing wages paid experienced workers as defined in Regulations 29 CFR Part 525.3k.*

[Here request confirming letter from employer verifying steps taken to comply, if DO deems necessary. See FOH 64h01(e)(2).}

You also agreed to {***describe here BW situation - paid, not paid yet with payment date, etc. and any specific followup action needed, with deadlines].***

In consideration of your agreement to comply and pay the backwages due, I plan to administratively close the file upon your submission of proof of payment of the back wages.

[Insert as needed] We would like to direct your attention to Section 16(e) of the FLSA and Regulations 29 CFR Part 578. As you will note, Section 16(e) provides for the assessment of a civil money penalty for any repeated or willful violations of Sections 6 or 7, in an amount not to exceed $1,000 for each such violation. No penalty is being assessed as a result of this investigation. If at any time in the future your firm is found to have violated the monetary provisions of the FLSA, it will be subject to such penalties. A copy of Regulations, Part 578 is enclosed for your reference.

If you have any questions about the investigation or any aspect of the FLSA, please contact Investigator ***[Inv's last name]*** or me at the number shown above.

Sincerely,

[name of DD]
District Director

CC: President of the Board of Directors

Enclosure: Part 578 ***[Insert as needed].***

Chapter 65

OTHER SPECIAL INVESTIGATION PROCEDURES

Table of Contents

65a RESERVED

65b FULL-TIME STUDENTS

65b00 Effective period.
65b01 (Reserved.)
65b02 Testing allowable percentage.
65b03 Fiscal month.
65b04 Occupations in which full-time students may be employed.
65b05 Full-time students who receive tips.
65b06 Employment contrary to certificates.
65b07 Computations for hours in excess of allowable percentage.
65b08 Full-time students in hospitals, nursing homes, and schools.

65c APPRENTICES

65c00 Apprentices employed at subminimum wages.
65c01 Compliance with apprenticeship conditions.
65c02 PCA compliance.
65c03 Child labor compliance.

65d STUDENT-LEARNERS

65d00 Non-potential litigation violations.
65d01 Potential litigation violations.
65d02 Temporary authorization and ensuing certificate.
65d03 (Reserved.)
65d04 Student training programs.
65d05 Child labor compliance.
65d06 PCA compliance.

65e STUDENT WORKERS

65e00 Employment of student workers.

65f DISCHARGE OR DISCRIMINATION

65f00 FLSA section 15(a)(3).
65f01 Investigation procedure in discharge or discrimination cases.

65g DEDUCTIONS FOR FACILITIES FURNISHED: SECTION 3(m)

65g00 Reasonable cost of facilities.
65g01 Fair value of facilities.
65g02 Formal determinations of “reasonable cost” and “fair value” of facilities.

N LIC N

65h INVESTIGATION PROCEDURE WHEN FLSA SECTION 7(b)(1) OR 7(b)(2) IS INVOLVED

65h00 Examination of the agreement.
65h01 Examination of the hours records.
65h02 Unapproved amendments to agreement.

65i LOCATING ASSETS OF EMPLOYERS WHO DEFAULT ON BACK WAGE JUDGMENTS

65i00 Background.
65i01 Business records.
65i02 Government records.
65i03 Completing the investigation.

N
LIC
N

65a RESERVED

N
LIC
N

N
LIC
N

65b FULL-TIME STUDENTS

65b00 Effective period.

(a) Subminimum wage rates may be authorized for full-time students upon application for a certificate under the provisions of 29 CFR 519. If a certificate is issued, the regulations and terms of the certificate shall govern with respect to such employment during the effective period stated on the certificate. Certificates are not issued retroactively; however, a certificate may continue to apply after its scheduled expiration date until final action is taken on a timely and properly executed application for renewal (*see* 29 CFR 519.3(d) and 29 CFR 519.6(a)).

(b) No violation should be charged where a certificate-holding retail or service establishment or farm changes ownership, but the new employer continues to comply with the terms of the certificate granted to the predecessor employer. Information on a change in name or ownership during the effective period of a full-time student certificate should be forwarded to the National Office (NO) promptly so that the successor establishment may be contacted, and appropriate action may be taken for continued use of the existing certificate, a replacement certificate, or a new application and a new certificate. The applicable certificate rate would, of course, be not less than 85 percent of the applicable minimum wage in effect when the work is performed. For example, the old owner may be an enterprise with an annual dollar volume (ADV) of less than 1 million dollars, and the new owner may be an enterprise with an ADV of 1 million dollars or more and thus subject to section 6(a)(1) of the Fair Labor Standards Act (FLSA).

65b01 (Reserved.)

65b02 Testing allowable percentage.

(a) The principles set out below shall be followed in determining whether the percentage of full-time student hours at subminimum wages that is authorized under certificate has been exceeded.

(b) The hours worked by all employees of the establishment or farm(s), without regard to their exemption status, shall be included in the total number of hours worked by all employees in both the base month and current month being tested for compliance.

(c) The hours worked by non-exempt full-time students, as such are defined in 29 CFR 519.2(a), who were paid less than the applicable statutory minimum wage shall be included in the total number of hours worked by full-time students at subminimum wages in the current month being tested for compliance.

(d) The percentage computed by dividing FOH 65b02(c) by FOH 65b02(b) may not legally exceed the percentage indicated in the certificate for the current month being tested. For an agricultural certificate, the 07/29/1967 revision of 29 CFR 519 permits the monthly percentage indicated in the certificate to vary with seasonal factors, as compared with the base year (*see* 29 CFR 519.2(g)). In many cases, it will be necessary to test a number of months to determine compliance with the monthly percentage(s) allowed under an agricultural certificate. The following example illustrates this principle:

Scenario:

The certificate in effect for Farmer Jones allows 40 percent for the month of August. Farmer Jones harvested his crop during August in the base year, but because of seasonal factors in the current year, he does not harvest his crop until September. Under 29 CFR 519.2(g), Farmer Jones may employ in September any of the August allowance he did not use that month plus any September allowance in the certificate. The same principle may be applied where the harvest season in the current year does not take place entirely in 1 calendar month.

(e) Base month data need be tested only at the discretion of the Wage and Hour Investigator (WHI) and then only if an applicant has submitted his or her own base month data in making application for the certificate. In the event the test is to be made, *see* 29 CFR 519.6(c)(1).

(f) In most instances, the employer will have in his or her records the information necessary to determine the application of 29 CFR 519 (or for use in completing WH-321). If such information is not readily available, reasonable estimates of the total hours worked by non-exempt full-time students paid less than the statutory minimum wage and the total hours of employment of all employees will suffice for those months in which no serious violations are indicated. A more precise measurement is needed in those months in which serious violations are indicated. It should be noted that the count of total hours of employment of all employees includes exempt employees with respect to whom there is no requirement to record hours worked, as in the case of employees exempt under 29 CFR 541, or certain exempt farm employees (*see* 29 CFR 519.7(b)(3)). As stated above, reasonable estimates of the hours worked by such employees will suffice in most instances, and it will not ordinarily be necessary to interview them to determine the number of hours worked.

65b03 Fiscal month.

29 CFR 519.2(g) provides that either the calendar or fiscal month may be used by the employer for purposes of relating the current month to the base month. A fiscal month, for purposes of the regulations, is a month adopted by the employer for business purposes that does not coincide with the calendar month. Such a fiscal month may, for example, end on the same day (*e.g.*, the 23rd or 27th) each calendar month, or it may end on a given day, such as the last Saturday of each calendar month. In some instances, there may be 13 fiscal months in a year.

65b04 Occupations in which full-time students may be employed.

(a) The phrase "same general classes" in 29 CFR 519.4(f) was designed to avoid a narrow interpretation of occupational duties and accommodate the situations where some shifting or subdividing of occupational content occur. For example, a salesclerk during the base year may have had duties of stocking counters, waiting on customers, and receiving payment for goods purchased. With the trend to self-service stores, some of these duties may now be performed by stock clerks, others may be assumed by cashiers, and others may simply be discontinued. Those full-time students now performing duties that were performed in the base year by salesclerks at less than $1.00 an hour should not be held to be outside the scope of a certificate authorizing the employment of salesclerks at subminimum wages.

(b) Full-time students below 18 years of age in a retail or service establishment or below 16 years of age in agriculture may not be employed in occupations covered by hazardous occupations orders (HOs).

(c) 29 CFR 519.2(a) establishes a 14 year minimum age for all full-time students. This means that a full-time student in agriculture must be at least 14 years of age even though employed outside school hours in a non-hazardous farm job.

65b05 Full-time students who receive tips.

In many cases where a full-time student qualifies as a tipped employee, the principles applicable to tipped employees (*see* 29 CFR 531.7, 29 CFR 531.50 -.60, FOH 30d, and FOH 52n) apply. However, the certificate rate, rather than the statutory minimum wage rate, is the applicable minimum wage rate (*see* section 3(m) of the FLSA) and shall be used for purposes of the 50 percent test.

65b06 Employment contrary to certificates.

(a) If an employer has paid less than the subminimum wages specified in the certificate to employees otherwise properly classified as full-time students, back wages based on the difference between the rate paid and the authorized subminimum wages shall be computed for such employees.

(b) An employee is entitled to the statutory minimum wage for every working hour he or she is ineligible for the subminimum wage authorized by a certificate. Hours worked in the following categories are not eligible for the subminimum wage:

(1) All hours worked outside of the effective period of a valid certificate (*see* FOH 65b00)

(2) All hours in excess of those authorized at a subminimum wage by a valid certificate (*see* FOH 65b02)

(3) All hours worked by employees improperly classified as full-time students under 29 CFR 519.2(a)

(4) Those hours worked by full-time students in occupations not of the same general classes as those authorized in the certificate (*see* FOH 65b04 and 29 CFR 519.4(f))

(5) Those hours of employment of any full-time student prohibited by the child labor provisions of the FLSA, or by any other federal, state, or local child labor law or ordinance (*see* 29 CFR 519.4(d))

(6) Those hours of employment of any full-time students 16 years of age or older during their (*i.e.*, the individual student's) scheduled hours of instruction (*see* 29 CFR 519.6(f))

(7) Those hours of employment of full-time students in excess of the daily or weekly hours limitations under 29 CFR 519.4(e)

65b07 Computations for hours in excess of allowable percentage.

In situations where a certified establishment has exceeded the number of hours of employment at subminimum wages permitted under certificate, back wages due for the excess hours *shall* be computed at the applicable statutory minimum wage. If the employer

agrees to pay the back wages due, he or she shall be requested to allocate such back wages by any reasonable method he or she may wish to apply. Where the employer declines to follow this procedure, the WHI shall allocate the back wages for such excess hours to the full-time students involved by the most practical and equitable means. No computations will be made by ascertaining the point in any month in which the establishment's allowable number of hours at subminimum wages has been exhausted and applying the applicable statutory minimum wage to all subsequent hours worked by the full-time students involved.

65b08 **Full-time students in hospitals, nursing homes, and schools.**

Although specifically excluded from the section 13(a)(2) exemption, hospitals, nursing homes, and schools for physically or mentally handicapped or gifted children may qualify as retail or service establishments if the tests are met (*see* last sentence of section 13(a)(2) and FOH 21g02). Therefore, where such establishments meet this statutory definition, they may qualify for full-time student certificates. On the other hand, preschools, elementary or secondary schools, and institutions of higher learning are not within the retail concept. Thus, such establishments do not qualify for full-time student certificates.

N LIC N

65c APPRENTICES

65c00 Apprentices employed at subminimum wages.

(a) When an establishment being investigated for compliance with the FLSA is found to be employing apprentices at wage rates lower than the applicable statutory minimum wage, the WHI shall ascertain whether the employer has special apprentice certificates (*i.e.*, WH-207) for the apprentices employed at such lower wage rates.

(b) If the employer does not have apprentice certificates, the WHI shall ascertain whether he or she has a registered apprenticeship program. If the employer has such a registered program and it provides for wages below the applicable statutory minimum wage, but he or she has not submitted for registration the individual apprentice agreements for each apprentice, the WHI shall instruct the employer to enter into an agreement with each apprentice, submit each agreement to the recognized agency for registration, and then send the agreement, or one true copy of it, to the regional administrator (RA). The RA shall retain the copy as a request for an apprenticeship certificate and act on it in accordance with 29 CFR 521.

(c) Where subminimum wages are to be paid and if the conditions contained in 29 CFR 521.5 are fulfilled, the registered apprenticeship program shall serve as a temporary certificate for a period of 90 days from the beginning date of employment of the worker as an apprentice. After the 90-day period has elapsed, the employment is subject to the applicable statutory minimum wage in the absence of an apprentice certificate.

(d) If the employer does not have a registered apprenticeship program, the WHI shall inform him or her that the apprentices are being employed in violation of the applicable statutory minimum wage, and shall inform him or her of the procedure to obtain a registered apprentice program and individual registered apprentice agreements provided through the Bureau of Apprenticeship and Training (BAT) of the United States (U.S.) Department of Labor (DOL), or through the proper state apprenticeship agency (*see* 29 CFR 521.5).

(b) (7)(E)

[redacted]

65c01 Compliance with apprenticeship conditions.

(a) An employer is in compliance with the FLSA in employing an apprentice at a subminimum wage rate when:

(1) the apprenticeship program has been registered by the appropriate apprenticeship agency;

(2) an individual apprentice agreement has been entered into under the program and duly registered, and one true copy thereof has been submitted to the RA within 90 days of the date that the apprentice began his or her employment with the employer as an apprentice in the occupation specified in the agreement; and

(3) he or she is complying with the terms of the apprenticeship certificate.

(b) A registered apprenticeship program shall constitute a temporary special certificate authorizing the employment of an apprentice at the wages and under the conditions specified in the program until a special certificate has been issued or denied, if within a period of 90 days from the beginning date of the apprentice's employment, the employer complies with the requirements in FOH 65c01(a) above (*see* FOH 65c00(c)).

65c02 **PCA compliance.**

If apprentices are employed on work to which the Walsh-Healey Public Contracts Act (PCA) applies, the WHI shall refer to the applicable minimum wage determination, if any, to ascertain whether and the extent to which special provisions are made for apprentices. Where the minimum wage determination contains no reference to apprentices, the question of subminimum wage rates shall be decided by referring to 41 CFR 50-201.1102 and Rulings and Interpretations Number 3 (R&I No. 3), section 41(g)(2).

65c03 **Child labor compliance.**

The WHI shall check the dates of birth of apprentices to determine compliance with the applicable child labor provisions. HOs 5, 8, 10, 12, 14, 16, and 17 do not apply to apprentices provided the three conditions for exemption set forth in (c) of these orders are met.

65d STUDENT-LEARNERS

65d00 Non-potential litigation violations.

(b) (7)(E) [redacted]

65d01 Potential litigation violations.

(b) (7)(E) [redacted].

65d02 Temporary authorization and ensuing certificate.

The certification of the appropriate school official on the reverse side of the application constitutes a temporary authorization for the employment of the named student-learner at a subminimum wage in accordance with 29 CFR 520. This temporary authorization is effective from the date the application is sent to the Wage and Hour Division (WHD), and, at the end of 30 days, shall become the permanent special student-learner certificate, unless after review, the Administrator of the WHD (Administrator) or his or her authorized representative denies the application, issues a certificate with modified terms and conditions, or expressly extends the period of review. If the period of review is extended, the temporary authorization will continue in effect until the WHD takes final action. Any failure to pay the applicable statutory minimum wage prior to the filing of an application for a student-learner certificate constitutes a violation of section 6 of the FLSA and the back wages due will be the difference between the wages paid and the statutory, or wage order, minimum. If the employer has not paid the subminimum wages permitted under temporary authorization or the certificate, the back wages due will be the difference between the wages paid for the hours worked by the student-learner and the minimum standards required by temporary authorization or the certificate. In the event an application is denied, the full section 6 minimum wage of the FLSA will be applicable after the date of denial.

65d03 (Reserved.)

65d04 Student training programs.

(a) Frequently, public high schools arrange for senior students to undergo brief periods on the job training prior to their graduation. Commonly involved are students taking secretarial, business, and commercial courses. Arrangements are made with local employers, usually by one of the school officials, to permit the students to be present at the offices of the employers

for a 2- or 3-week period (either full- or part-time) to observe and actually participate in the various office functions in close association with and under the supervision of regular employees. The time spent in the program is considered by the school as part of its regular curriculum for such students, and the employers and the students understand that the students are not employees and are not entitled to wages for the time spent in training.

(b) Whether the students would be considered as employees under the FLSA, the PCA, or the McNamara-O'Hara Service Contract Act (SCA) will depend upon all of the circumstances surrounding their activities for the employers to whom they are assigned. The Supreme Court, in evaluating the status of trainees in other cases, has set forth criteria (*see* FOH 10b11) to be considered in determining the existence of an employment relationship under the FLSA. If all of these criteria are met, the students are not employees within the meaning of the FLSA, the PCA, or the SCA.

65d05 **Child labor compliance.**

(a) The WHI shall check the dates of birth of student-learners and student-workers to determine compliance with the applicable child labor provisions.

(b) Student-learners are exempt from HOs 5, 8, 10, 12, 14, 16, and 17, provided their employment meets the requirements for exemption set forth in (c) of these orders.

(c) The student-learner exemptions from the non-agricultural HOs (*see* section 3(l) of the FLSA) are entirely separate from the student-learner exemptions under the minimum wage provisions (*see* section 14 of the FLSA). Either exemption may apply independently of the other, or both may apply. The important differences in the requirements under the two types of exemptions are as follows:

Requirements	Section 14	Section 3(l)
Certificate	Individual student-learner certificates issued by the WHD.	Not required.
Written agreement	Statement outlining vocational training program must be included in application, to be signed by the employer, appropriate school official, and student-learner. Employer copy of application must be on file.	Written agreement specifying conditions must be signed by the employer and school, and be kept on file by both the employer and school.
Wage and hours	As specified by the certificate and in accordance with 29 CFR 520.6 that provide, among other things, a limitation on rate of pay and number of hours that may be worked.	Work in HOs must be incidental to training, intermittent and for short periods of time, and under direct and close supervision of a qualified and experienced person.
Safety instruction	No provision.	Safety instruction must be given by the school and correlated by the employer with on-the-job training.

Requirements	Section 14	Section 3(l)
Age	At least 16 years.	16- and 17-year-olds only.
Enrollment	Enrollment in a bona fide cooperative vocational training program accredited by a recognized state or local education authority.	Same as under section 14; in addition, in a course of study in a substantially similar program conducted by a private school.
Applicability after graduation	Certificates not valid following graduation.	Minors who graduate from high school before reaching 18 may continue to be employed in occupations in which they have completed their training as student-learners.

65d06 PCA compliance.

41 CFR 50-201.1102 provides a tolerance for the employment of student-learners at subminimum wage rates that are less than those set by the applicable PCA minimum wage determination where such employment is in accordance with a certificate issued under 29 CFR 520. 41 CFR 50-201.1102 also provides for the issuance of student-learner certificates under 29 CFR 520 in situations where the student-learner is paid at least the applicable FLSA minimum wage but less than the minimum wage rate set by the applicable PCA minimum wage determination.

LIC N

N
LIC
N

65e STUDENT WORKERS

65e00 Employment of student workers.

29 CFR 527 sets forth the conditions that govern the certification and employment of student workers at subminimum wages.

N
LIC
N

N
LIC
N

65f DISCHARGE OR DISCRIMINATION

65f00 FLSA section 15(a)(3).

(a) FLSA section 15(a)(3) states that it is a violation to "discharge or in any manner discriminate against an employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on any industry committee."

(b) Section 15(a)(3) applies to all employees of an employer even though they may not be covered by any other section of the FLSA.

65f01 (b) (7)(E) [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

N
LIC
N

65g DEDUCTIONS FOR FACIILITIES FURNISHED: SECTION 3(m)

65g00 Reasonable cost of facilities.

In deciding whether deductions for facilities exceed the amount permitted under section 3(m), the experience and judgment of the WHI and his or her supervisors are the best guides. It should be kept in mind that the test in 29 CFR 531.3 is reasonable cost rather than value or comparable prices, and that if the issue is litigated, it will be necessary to prove that the charges exceed actual cost or that the cost is not reasonable. In general, comparable prices may be used as rough guides for this purpose but these tests are not completely reliable.

(b) (7)(E)

[redacted]

65g01 Fair value of facilities.

In all cases where cost to the employer is not a true measure of the value of the facilities to the employee, it may be appropriate to apply the "fair value" provisions as set out in 29 CFR 531.5. However, until further experience provides adequate guidance in the application of' this new provision or section 3(m), the facts specified in 29 CFR 531.4 -.5 shall be obtained and the issues submitted to the Office of the Solicitor (SOL).

65g02 Formal determinations of "reasonable cost" and "fair value" of facilities.

29 CFR 531.4 -.5 set forth the procedures to be followed in making formal determinations of "reasonable cost" and "fair value," as these terms are used in section 3(m) of the FLSA.

N
LIC
N

65h INVESTIGATION PROCEDURE WHEN FLSA SECTION 7(b)(1) OR 7(b)(2) IS INVOLVED

65h00 Examination of the agreement.

The WHI shall examine the employer's copy of the agreement made pursuant to section 7(b)(1) or 7(b)(2) of the FLSA, and the letter from the WHD approving it. If the employer has not received an opinion letter concerning the validity of the agreement under investigation, the RA shall submit the investigation to the Assistant Administrator (AA) for the Office of Policy (OP) with a copy of the agreement, if the employer has not already submitted the agreement.

65h01 Examination of the hours records.

(a) (b) (7)(E) [redacted]

(b) Under section 7(b)(2) agreements, (b) (7)(E) [redacted]

(c) If, in the course of investigation, the facts indicate that the agreement has been applied in practice in such a way as to result in a violation of section 7(b)(1) or 7(b)(2), the RO shall submit the investigation to the AA for the OP.

65h02 Unapproved amendments to agreement.

If any amendments have been made to the agreement subsequent to its approval by the WHD, and the amendments were not submitted to the NO and approved in an opinion letter, a copy of the amendments shall be obtained and submitted to the AA for the OP. The employer shall be advised of the requirement in 29 CFR 516.11 that each amendment or addition to the collective bargaining agreement must be filed with the Administrator within 30 days after it has been made. (b) (7)(E) [redacted]

N
LIC
N

65i LOCATING ASSETS OF EMPLOYERS WHO DEFAULT ON BACK WAGE JUDGMENTS

65i00 Background.

(a) (b) (7)(E) [redacted] The DD will monitor such assignments to ensure that the expenditure of staff hours necessary to successfully locate assets is warranted in terms of the size of the judgment and other enforcement priorities.

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) (1) A variety of business and government records are useful in locating assets. To find the pertinent records, it is essential to understand the difference between real and personal property, because federal, state, and local laws and systems of records concerning ownership and changes therein differ for each type of property. In addition, the WHI should be familiar with the means of identifying the extent of the employer's interest in real or personal property that may be subject to a mortgage or other lien. (b) (7)(E) [redacted]

(2) In general, real estate or real property is land and anything that is permanently erected, growing upon, or affixed to the land. All other property is usually defined as personal property. The chief characteristic of personal property is mobility. Furnishings and furniture, office equipment, livestock, vehicles, farm machinery, mortgages, securities, leases franchises, and licenses (*i.e.*, anything the owner can move at will) comprise personal property.

(3) Such property may be subject to what is called a chattel mortgage, or it may have been sold under a conditional sales contract. Under the latter, the title remains with

the seller until all conditions of the contract have been met and such property *cannot* be attached. Normally, when the full purchase price has been paid to the seller, the seller will convey title and the buyer will own the property free and clear. This property can be attached.

(4) However, when an owner has clear title to certain personal property, it may be used as security for a loan. A chattel mortgage is the formal security instrument such a borrower gives the lender. The chattel mortgage is evidence of the respective interests of both the borrower and the lender in the personal property. The full value of the borrower's interest may be attached. State law determines whether and how a chattel mortgage or conditional sales contract is recorded.

65i01 <u>Business records.</u>

(a) Significant information useful in locating an employer's assets is maintained in a variety of record systems created by private businesses. (b) (7)(E) [redacted]

(b) Among the records available are:

(1) Abstract and title company records for locating real property, owners thereof, and nature of any liens or other encumbrances thereupon. These include:

a. Maps and tract books

b. Escrow index of purchasers and sellers of real estate (primary source of information)

c. Escrow files (number obtained from index; the escrow file will contain escrow instructions, agreements, and settlements)

d. Abstracts and title policies

e. Special purpose newspapers published for use by attorneys, real estate brokers, insurance companies, and financial institutions often contain complete reports on transfers of properties, amounts of mortgages, and releases of mortgages

(2) Agriculture records for locating crops, processed or unprocessed, livestock, etc.

a. State cattle control boards (some states maintain records of all cattle brought in and taken out of state by owner)

b. Storage companies that may store crops or livestock

c. Transportation companies that transport the same

d. Insurance companies that insure such shipments

(3) Financial reports, such as Dun & Bradstreet, rate the creditworthiness of businesses. These reports may be available as reference materials at public libraries, along with stock and bond rating services, such as Moody's or Standard & Poor's. Much information may be obtained from such reports.

(4) Public utility company records to locate place of operations and determine size of business by magnitude of utility usage

a. Present and previous address of subscriber

b. Payments made for service

c. Payments made for major purchases

(5) Bonding company records to determine magnitude of operations; dollar volume of contracts awarded, and number of employees

a. Financial statements and data on applications for bond

b. Address of person on bond

c. Amount of bond

65i02 <u>Government records.</u>

(a) State and local government records

State, county, and municipal governments are primary sources of information, particularly concerning ownership of and liens against real and personal property. There are so many different organizational structures in the U.S. for these units of government and their subdivisions that it is impossible to identify sources by name for all of the various records listed below. However, some examples may be useful.

The agencies of state government are normally located in the state capital, although the name varies from state to state. For example, the agency where corporations are registered (*see* FOH 65i02(a)(9) below) is called the Board of Corporation Taxes in Pennsylvania, while in Virginia, it is called the Virginia State Corporation Commission. These agencies may be used for locating assets, lien information on assets, and address of record of the employer. Similarly, state agencies register motor vehicles and license businesses. As for local governments, courthouse property records register the ownership of real property in grantor and grantee books, and maintain fictitious name records that show owners of businesses, and records of business licenses that show owners of businesses and sometimes the approximate value of machinery, equipment, and inventory.

Common sense will be the best guide to the pertinent records maintained by state and local governments. The records that are maintained by most jurisdictions include:

(1) Sale and transfer of property

(2) Mortgages and releases

(3) Judgments, garnishments, chattel mortgages, and other liens

(4) Conditional sales contracts

(5) Changes of name

(6) Auto licenses, transfers, and sales of vehicles

(7) Occupancy and business privilege licenses

(8) Building and other permits

(9) Registration of corporate entities and annual reports

(10) Registration of non-corporate business entities

(11) Fictitious names index

(12) Professional registrations

(13) Real estate tax payments

(14) Personal property tax returns

(15) State income tax returns

(16) Inventories of estates

(17) Bids, purchase orders, contracts, and warrants for payment to the employer from local governments for services or goods provided

(18) Public utility records

(b) Federal government records

(1) *Federal Aviation Agency*

This agency maintains records that reflect the chain of ownership of all civil aircraft in the U.S. These records include documents relative to their manufacture and sale (*e.g.*, sales contracts, bills of sale, mortgages, liens, and transfers). Information will be furnished in response to telephone requests. However, certified copies of information documents will not be issued without an official written request addressed to:

Aircraft Registration Branch AC 350
Federal Aviation Agency
Field Box 1082
Oklahoma City, Oklahoma 73101

(2) *Department of Agriculture*

Locations of licensed meatpackers and food canners

(3) *Department of State*

Import and export licenses

(4) *Bureau of Customs*

a. Record of importers and exporters

b. Record of customhouse brokers

c. Record of customhouse truckers (*e.g.*, cartage licenses)

(5) *Interstate Commerce Commission*

The Interstate Commerce Commission has information concerning individuals who are or have been officers of transportation firms engaged in interstate commerce, including employment and financial affiliations.

(6) *Securities and Exchange Commission*

Records of corporate registrants of securities offered for public sale, which usually show a description of registrant's properties and business, certified financial statements, and information as to the registrant's management

65i03 <u>Completing the investigation.</u>

(b) (7)(E) [redacted]

Chapter 67

GOVERNMENT CONTRACT ENFORCEMENT POLICY AND PROCEDURES

Table of Contents

67a INTRODUCTION

67a00 General.
67a01 Interpretations of law.

67b WALSH-HEALEY PUBLIC CONTRACTS ACT (PCA)

67b00 Coverage based on contracts.
67b01 Initiating investigations.
67b02 Contracts classified for security purposes.
67b03 Canceled, concluded, or indefinite contracts.
67b04 Community rehabilitation programs (CRPs) and work centers.
67b05 Primary contractor investigations.
67b06 No or minor violations chargeable.
67b07 Serious violations chargeable.
67b08 Secondary contractor investigation.
67b09 Knowingly employed under the PCA.
67b10 PCA serious violations defined.
67b11 Liquidated damages.
67b12 Withholding.

67c McNAMARA-O'HARA SERVICE CONTRACT ACT (SCA)

67c00 Purpose and use of the SCA procedures.
67c01 Scheduling SCA investigations.
67c02 Investigation to be concurrent.
67c03 Conciliations of SCA complaints.
67c04 Integrated investigations: application of whichever standards are higher.
67c05 SCA wage determinations.
67c06 Investigative period and statute of limitations.
67c07 Contractor with main office outside DO jurisdiction.
67c08 Notification to prime contractor of investigation of subcontractors.
67c09 Initiating investigations and/or obtaining contract information.
67c10 Contracting agency contact.
67c11 Wage determinations: timeliness and appropriateness.
67c12 Omission of the SCA stipulations or wage determination from the contract or inclusion of the incorrect wage determination in the contract.
67c13 Randolph-Sheppard Act: contracts for the blind.
67c14 Federal supply schedule contracts by the GSA.
67c15 Fishery observer contracts.
67c16 Debarred contractors.
67c17 Employee interviews.
67c18 Segregation: covered and non-covered work.
67c19 Segregation: employees working in more than one classification.
67c20 Conformances: investigation procedures.

67c21 Employment of apprentices.
67c22 Section 4(c).
67c23 Bona fide fringe benefit plans.
67c24 Cash equivalents for fringe benefits.
67c25 Collectively bargained benefits.
67c26 Disposition of the SCA and/or CWHSSA investigation findings: WHI and/or DD.
67c27 Second-level conferences.
67c28 Withholding of contract funds: SCA and/or CWHSSA - DO action.
67c29 Withholding of contract funds: SCA and/or CWHSSA - RO action.
67c30 Payments from funds transferred to the WHD.
67c31 Bankruptcy.
67c32 Debarment.
67c33 Narrative report.
67c34 WH-51, WH-55, WH-56, and WH-58.

67d DAVIS-BACON ACT (DBA) AND DAVIS-BACON RELATED ACTS (DBRA)

67d00 Scheduling or initiating DBRA and/or CWHSSA investigations.
67d01 Concurrent investigations.
67d02 Reporting DBRA cases.
67d03 Investigation procedures: general.
67d04 Conciliation of DBRA and/or CWHSSA complaints.
67d05 Cooperation with contracting agency representatives.
67d06 Open or prior investigations by contracting agency.
67d07 Investigative period.
67d08 Contractor with main office outside DO jurisdiction.
67d09 Notification to prime contractor of investigation of subcontractors.
67d10 Initiating investigation and/or determining DBRA and/or CWHSSA coverage.
67d11 Omission of the DBRA and/or CWHSSA stipulations or wage determination from a covered contract or inclusion of the incorrect or inapplicable wage determination in contract.
67d12 Posting of wage determination.
67d13 Determination of DBRA compliance: general.
67d14 Employee interviews.
67d15 Conformability of classification and/or wage rates.
67d16 Segregation: covered and non-covered work.
67d17 Segregation: employees working in more than one classification.
67d18 Employment of apprentices and trainees.
67d19 Employment of helpers.
67d20 Clean-up work.
67d21 Landscape contracting.
67d22 Sewer repair service.
67d23 Supply and installation contracts.
67d24 Fringe benefits.
67d25 Pension and profit-sharing plans.
67d26 Holiday pay.
67d27 Segregation of contract work subject to the CWHSSA.
67d28 Limited CWHSSA exemptions, variations, and tolerances.
67d29 Section 7(f) plans and the CWHSSA.

67d30 CWHSSA liquidated damages.
67d31 (Reserved.)
67d32 Copeland "Anti-Kickback" Act and falsification investigations.
67d33 Disposition of DBRA and/or CWHSSA investigation findings: WHI and/or DD.
67d34 Unresolved DBRA and/or CWHSSA issues.
67d35 Withholding of contract funds: DBRA and/or CWHSSA - DO action.
67d36 Withholding of contract funds: DBRA and/or CWHSSA - RO action.
67d37 Content of investigation files disclosing DBRA and/or CWHSSA violations.
67d38 Second-level conferences.
67d39 Recommendations for debarment by the WHI and/or DD.
67d40 Furnishing of investigation file material to the contracting agency.
67d41 Referral of DBRA and/or CWHSSA violation cases to the RA.
67d42 Disposition of DBRA and/or CWHSSA investigation by the RA.
67d43 Disposition of debarment cases by the RO.
67d44 Disposition of Copeland "Anti-Kickback" Act violation cases by the RA.
67d45 Implementation of ALJ decisions pursuant to 29 CFR 5.11(b) and 29 CFR 5.12(b).
67d46 Availability of DBRA wage determinations.
67d47 Conduct of wage rate surveys under the DBRA.

67a INTRODUCTION

67a00 General.

FOH 67 contains procedural instructions for scheduling, conducting, and disposing of investigations by the Wage and Hour Division (WHD) under the various laws where the WHD has been designated by the Secretary of Labor (Secretary) as the responsible representative for enforcement in government contracts. It is not the intent to provide procedures for all possible contingencies. Practical judgment must be applied to all situations as they arise.

67a01 Interpretations of law.

(a) FOH 13 provides basic guidance in interpreting the Walsh-Healey Public Contracts Act (PCA). Rulings and Interpretations Number 3 (R&I No. 3), as well as 41 CFR 201.1 -210.1, provide additional information and guidance.

(b) FOH 14 provides basic guidance in interpreting the McNamara-O'Hara Service Contract Act (SCA). 29 CFR 4 provides additional information and guidance.

(c) FOH 15 provides basic guidance in interpreting the Davis-Bacon Act (DBA) and the Davis-Bacon and Related Acts (DBRA), as well as the Contract Work Hours and Safety Standards Act (CWHSSA). 29 CFR 1, 29 CFR 3, and 29 CFR 5 -7 provide additional information and guidance.

67b WALSH-HEALEY PUBLIC CONTRACTS ACT (PCA)

67b00 Coverage based on contracts.

(a) The sole basis for coverage under the PCA is a contract by some agency of the government with a contractor to provide materials, supplies, articles, or equipment. Fair Labor Standards Act (FLSA) coverage does not need to exist in order for the FLSA minimum wage and overtime requirements to apply to the persons employed in the manufacture or furnishing of these goods that are part of the contract.

(b) Vendors (*i.e.*, contractors) of Multi-Agency Contracts (MACs), Multiple Award Schedules (MASs), Governmentwide Acquisition Contracts (GWACs), and Blanket Purchase Agreements (BPAs) are generally covered regardless of the dollar amount of the contractor's deliveries due to their contractual arrangement with the overall contracting agency (*e.g.*, General Services Administration (GSA) and Department of Defense). Many of these schedules and agreements can be identified and researched on the agency websites to determine whether the PCA stipulations are included (*e.g.*, http://www.gsa.gov).

(c) Since the monetary requirements of the PCA are not the same as the FLSA, it is important to recognize that all employees may not be covered under both the PCA and the FLSA for the entire investigative period. The application of the PCA is only for employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the performance of the contract (*see* 41 CFR 50-201.102). It also is important to be clear for purposes of liquidated damages which hours are worked on PCA contract and which may not be worked on FLSA contract.

67b01 Initiating investigations.

(a) Complaints are seldom received identifying the PCA as the act violated. (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted] If the invitation to bid on a contract within the scope of the act includes the stipulations, either directly or by reference, coverage results since the invitation to bid becomes a part of the contract.

(c) (b) (7)(E) [redacted] Minimum wage and overtime issues can continue to be investigated under the FLSA.

67b02 Contracts classified for security purposes.

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

67b03 Canceled, concluded, or indefinite contracts.

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) When contractors are providing deliveries ordered from MACs, GWACs, MASs, or BPAs they will most likely be covered regardless of the dollar amount of their deliveries (*see* FOH 67b00(b) above), and the investigation will be continued.

67b04 Community rehabilitation programs (CRPs) and work centers.

Community rehabilitation programs (CRPs) and work centers that specialize in the employment of workers with disabilities under section 14(c) of the FLSA often use government contracts. (b) (7)(E) [redacted]
(b) (7)(E) [redacted]

67b05 Primary contractor investigations.

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

67b06 No or minor violations chargeable.

(b) (7)(E) [redacted]

67b07 Serious violations chargeable.

(b) (7)(E) [redacted]

67b08 Secondary contractor investigation.

(b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

67b09 **Knowingly employed under the PCA.**

(a) Section 2 of the PCA provides that an employer who violates the child labor provisions is liable for liquidated damages in the sum of $10.00 for each day that each underage minor is knowingly employed on work subject to the PCA. These damages are assessable only when the employer can be charged with knowledge of the facts regarding the minor's age and employment of the minor on the contract. It must be shown that the employer had actual or constructive knowledge of the facts.

(b) 29 CFR 50-201.104 provides that an employer will not be deemed to have knowingly employed an underage minor under the PCA, if, during the employment of the minor, he or she has on file for the minor an employment or age certificate showing the minor is at least 16 years of age.

(c) Whether a minor has been knowingly employed on PCA work is a question of fact. (b) (7)(E) [redacted] It is not necessary that all the pertinent facts be in the possession of the same individual. For example, if a personnel manager knew the underage minor's age and a foreman knew that the minor worked on the contract, knowledge of both facts is imputed to the employer.

(d) (b) (7)(E) [redacted]

67b10 **PCA serious violations defined.**

(a) PCA violations are considered serious as follows:

(1) *Overtime violations*

If numerous employees and a considerable amount of money are involved, or if a few employees are involved in continuous violation

(2) *Minimum wage violations*

Same as overtime

(3) *Apprentice, student-learner, or workers with disabilities violations*

Same as overtime

(4) *Child labor*

Any child labor violations for which a penalty is assessable in accordance with FOH 52g13

(b) A combination of two or more types of PCA violations may be serious even though any one type alone does not fall in that category.

67b11 **Liquidated damages.**

(a) Section 2 of the PCA and section 59 of the R&I No. 3 identify that any breach or violation of any of the stipulations render the contractor liable for liquidated damages, in addition to damages for any other breach of the contract. Liquidated damages are a sum equal to the amount of any deductions, rebates, refunds, or underpayments of wages due to any employee engaged in the performance of the contract, and the sum of $10.00 per day for each person under 16 years of age or each convict laborer knowingly employed in the performance of the contract.

(b) (b) (7)(E) [redacted]

(3) Evidence of knowingly employed relates to knowing the age or the convict status of the employee (*see* 41 CFR 201-104). (b) (7)(E) [redacted]

67b12 **Withholding.**

(a) Section 60(a) of the R&I No. 3 identifies that any sums of money due to the government may be withheld from any amounts due on any such contracts. The withholding process is similar to the withholding process under other government contracts and is done only with the concurrence and guidance of the regional enforcement coordinator: government contracts.

(b) Currently, under applicable regulations implementing the PCA, "in all industries the minimum wage applicable to employees described in [41 CFR] Sec. 50-201.102" is $4.25 per hour, set in 1991 when the FLSA minimum wage increased to that level (*see* 56 FR 32258, 07/15/1991). There has been no official increase in the PCA minimum wage since. 41 CFR 50-201.1101 "Minimum wages" requires that "prevailing wages and changes therein will be published in the Federal Register by the Wage and Hour Division." Withholding strictly for prevailing minimum wage can only include underpayments of the prevailing minimum wages. Withholding that includes overtime violations can include all wages because it is tied to the regular rate in section 7 of the FLSA.

67c McNAMARA-O'HARA SERVICE CONTRACT ACT (SCA)

67c00 Purpose and use of the SCA procedures.

(a) These policy and procedural instructions supplement and will be used in conjunction with the investigation procedures with respect to the FLSA, the PCA, and/or the CWHSSA outlined elsewhere in this chapter and volume.

(b) It must be kept in mind that the WHD, and not the contracting agencies, has the sole responsibility for enforcement of the SCA, and it is the DOL's policy to carry out a vigorous and effective investigation program in this area. Further, there is *no* private right of action provision under the SCA.

(c) Unlike the SCA, the WHD does not have sole responsibility for enforcement of the CWHSSA. (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

67c01 Scheduling SCA investigations.

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) In some situations, an investigation of a closed contract may be appropriate to support a debarment and/or criminal action. (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

67c02 Investigation to be concurrent.

Except where specifically limited by the DD, all investigations for compliance with the SCA will include all other laws that apply such as the FLSA, the CWHSSA, H-2B, the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), and Occupational Safety and Health Administration (OSHA) field sanitation. Likewise, where an FLSA and/or PCA investigation is being made, and the SCA applies to a contract issued to the employer, an SCA and CWHSSA investigation will be made concurrently (for instructions regarding the handling and disposition of cases involving the CWHSSA, *see* FOH 67d34 -36 and FOH 67d42). Normal procedures will be followed for concurrent investigations, including housing subject to the MSPA or OSHA temporary labor camp standards and transportation subject to the MSPA (*see* guidance for H-2B, the MSPA, OSHA field sanitation and temporary labor camps).

In conducting concurrent investigations under multiple statutes, it must be kept in mind that violations of the respective statutes must be developed and processed independently, and that violations under one act cannot be used as the basis for action under another act where there were no violations found under the second act. For example, if a reforestation contractor, subject to the MSPA as a farm labor contractor and also employing H-2B workers, was determined to be in violation of the SCA and such violations warranted SCA debarment action, SCA violations could not be used for the revocation of the MSPA certificate under the MSPA, unless violations were cited under the MSPA, standing alone, that warranted certificate revocation, nor could SCA violations be used as a basis for H-2B sanctions unless violations were cited under H-2B.

67c03 Conciliations of SCA complaints.

Conciliations of SCA complaints may be conducted only where the violation involves a minor, limited violation such as a final paycheck. Prior to handling an SCA complaint as a conciliation, the DD and/or ADD must discuss the matter with the regional enforcement coordinator: government contracts to ensure there are no pending actions.

67c04 Integrated investigations: application of whichever standards are higher.

Where an employee is subject to more than one act concurrently, the obligation of the employer is to comply with whichever standards are higher. For example, a particular employee may be concurrently subject to the FLSA, the CWHSSA, the SCA, H-2B, and/or the MSPA. The FLSA minimum wage is $7.25 per hour, the prevailing minimum wage established under the SCA or H-2B may be $7.50 per hour for the work being performed by the employee, and the rate disclosed under the MSPA may be $10.00. In such a case, the $10.00 rate disclosed under the MSPA will be applied. The amount of overtime back wages due will be computed in the normal manner under the FLSA and/or the CWHSSA using time and one-half the $10.00 MSPA disclosed wage as the rate for overtime purposes, if applicable, for the time spent on concurrent SCA, FLSA, CWHSSA, MSPA, and/or H-2B work as this would be the highest applicable rate.

67c05 SCA wage determinations.

(a) An SCA wage determination applies to employees performing on a service contract *only* where the particular wage determination has been made part of *that* contract (*see* FOH 67c12).

(b) In the absence of a wage determination made applicable to a particular service contract, the minimum wage specified under section 6(a)(1) of the FLSA applies and is enforceable as a self-executing provision (*see* section 2(b)(1) of the SCA). Where no wage determination is applicable, the minimum wage specified under section 6(b) of the FLSA may apply to performance on certain linen supply contracts (*see* section 6(e)(2) of the FLSA and FOH 30(f)), or to performance on contracts with the United States (U.S.) Department of Veterans Affairs to provide nursing home care for veterans.

(c) Inquiries received for wage determinations by the RO will be handled by referring the interested parties to the online wage determinations posted at http://www.wdol.gov. In the event the relevant wage determination is not posted online, the party will be referred to the NO, OGC, Division of Wage Determinations, Service Contracts Wage Determinations Branch.

67c06 **Investigative period and statute of limitations.**

(b) (7)(E) [redacted]

67c07 **Contractor with main office outside DO jurisdiction.**

(b) (7)(E) [redacted]

67c08 **Notification to prime contractor of investigation of subcontractors.**

The prime contractor is ultimately responsible for back wages resulting from SCA and/or CWHSSA violations committed by one of its subcontractors, if the subcontractor refuses to make restitution (*see* 29 CFR 4.114). (b) (7)(E) [redacted]

67c09 **Initiating investigations and/or obtaining contract information.**

(a) (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

67c10 **Contracting agency contact.**

(b) (7)(E) [redacted]

67c11 **Wage determinations: timeliness and appropriateness.**

In June of each year, health and welfare benefits are updated and notice is given to the contracting agencies via All Agency Memorandum (AAM). (b) (7)(E) [redacted]

67c12 **Omission of the SCA stipulations or wage determination from the contract or inclusion of the incorrect wage determination in the contract.**

(a) 29 CFR 4.4 -.6 set forth the obligations of the contracting agencies regarding the inclusion of the SCA stipulations and wage determinations in invitations for bids and contracts.

(b) (b) (7)(E) [redacted]

(c) If the agency did not follow the procedures outlined in 29 CFR 4.4(b) or 29 CFR 4.4(c) (*e.g.*, included an obsolete wage determination or included an incorrect wage determination from

http://www.wdol.gov), the district office (DO) will explain the requirements of the SCA and request that the contracting agency take corrective action. (b) (7)(E) [redacted]

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

(e) (b) (7)(E) [redacted]

(f) (b) (7)(E) [redacted] The obligation to insert the SCA stipulations and/or wage determination in subcontracts rests with the prime contractor and with the subcontractor in lower tier subcontracts (*see* 29 CFR 4.114). (b) (7)(E) [redacted]

(g) (b) (7)(E) [redacted] The WHI will

contact the contracting agency and inform it of the regulatory requirement in 29 CFR 5.5(b) to include the clause in contracts in the future.

(h) (b) (7)(E) [redacted]

67c13 **Randolph-Sheppard Act: contracts for the blind.**

The Department of Education's Rehabilitation Services Administration is involved in providing training and employment opportunities to the blind. Pursuant to its responsibilities under the Randolph-Sheppard Act, it provides opportunities for the blind to operate vending facilities, such as cafeterias, snack bars, and automatic vending machines, on federal property. The agency incorporates the SCA in contracts that it advertises, but often fails to incorporate the SCA in concessionaire contracts.

(b) (7)(E) [redacted]

[redacted]

67c14 **Federal supply schedule contracts by the GSA.**

The GSA has established a federal supply schedule for a number of services that can be procured by agencies through this umbrella contract. The GSA has a strong commitment to incorporating the appropriate wage determinations in this contract, and experience has demonstrated that the appropriate wage determinations have been incorporated into the contract. Accordingly, care must be exercised in reviewing contract documents before concluding that the contract lacks a wage determination. If assistance is required, the WHI may contact the contracting officer listed in each federal supply schedule. *See* FOH 67c12 if the contract does not include the appropriate wage determination.

67c15 **Fishery observer contracts.**

Contracts for fishery observers may not be subject to the SCA depending on the location of the work (*i.e.*, outside of the limits of the Outer Continental Shelf Lands Act) and the manner in which the services are procured (*i.e.*, paid for by a fishing vessel without direct government funds). (b) (7)(E) [redacted]

67c16 **Debarred contractors.**

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

67c17 Employee interviews.

(b) (7)(E) [redacted]

[redacted]

67c18 Segregation: covered and non-covered work.

(b) (7)(E) [redacted] The employer will be instructed to segregate appropriate records in the future (*see* 29 CFR 4.179 and FOH 14g00). (b) (7)(E) [redacted]

67c19 Segregation: employees working in more than one classification.

(b) (7)(E) [redacted] The employer will be instructed to segregate records in the future (*see* 29 CFR 4.169 and FOH 14g01). (b) (7)(E) [redacted]

67c20 **Conformances: investigation procedures.**

(b) (7)(E) [redacted]

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) If the contracting agency does not agree to submit a conformance, the WHI will advise the contractor and contracting agency that the matter will be referred to the NO in accordance with 29 CFR 4.6(b)(2)(vi) for a final determination of a proper conformed classification and wage and/or fringe benefit rates, and that such conformance determination will apply retroactively to the date such class of employees commenced work on the contract.

(d) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) (7)(E)

(e) Back wages cannot be computed and investigations cannot be completed until the final conformance action has been completed by the NO, OGC, Division of Wage Determinations, Service Contracts Wage Determination Branch.

(f) In no case does a WHI, ADD, DD, regional enforcement coordinator: government contracts, deputy regional administrator (DRA), or RA have the authority to conform wage rates or classifications, or make assignments of classes of employees not listed in a wage determination to some other classification.

67c21 **Employment of apprentices.**

(a) (b) (7)(E)

(b) **Registered apprentice ratio exceeded**

If a contractor or subcontractor employs apprentices in such a number that the permissible ratio is exceeded, all apprentices employed in excess of the ratio are considered to have been improperly employed, and will be entitled to the rate for the classification of work that they are performing. For example, if an employer is permitted to employ three apprentices under an approved plan and it is disclosed that the employer is employing five apprentices on the project, the first three apprentices employed on the project will be considered within the quota. The last two employed will be considered improperly employed, and must be paid the full prevailing wage rate for the work performed. Back wages are due to the two employees.
(b) (7)(E)

(c) Back wages will not be computed for minor, temporary, and inadvertent ratio imbalances that are promptly corrected.

67c22 **Section 4(c).**

(a) Section 4(c) requires a successor contractor to pay its employees the wages and fringes in the predecessor's collective bargaining agreement (CBA) to which they would have been entitled if employed by the predecessor. This obligation exists whether or not the employees of the predecessor contractor are hired by the successor contractor. This obligation exists even if the successor contractor is signatory to its own CBA or chooses to not sign the same CBA held by the predecessor contractor. The obligation of the successor contractor under section 4(c) is limited to the wage rate and fringe benefit requirements of the predecessor's CBA and does not extend to other terms and conditions, such as seniority, grievance procedures, work rules, and overtime.

(b) The obligations of section 4(c) are self-executing. Failure to include the CBA rates in the wage determination issued for the successor contract does not relieve a successor contractor of the statutory requirements to comply with the CBA rates. For example, if the contracting agency erroneously applied a prevailing wage determination for a particular contract rather than a wage determination based upon the predecessor's CBA, the new contractor is still obligated to pay the CBA rates.

(c) The sole exception to the self-executing provision of section 4(c) is contained in 29 CFR 4.1b(b) and is discussed in FOH 14j00. If the agency did not attempt to defeat the exception to section 4(c), then the successor contractor is responsible for complying with the CBA of the predecessor contractor, regardless of whether it received proper notice of the CBA.
(b) (7)(E) [redacted]

67c23 **Bona fide fringe benefit plans.**

(b) (7)(E) [redacted]

67c24 **Cash equivalents for fringe benefits.**

(b) (7)(E) [redacted]

67c25 Collectively bargained benefits.

(b) (7)(E) [redacted] Interpretation of the fringe benefit provisions of the CBA must be based on the intent of the signatory parties, provided that the interpretation does not violate the law. Some interpretations of the fringe benefit provisions of prevailing wage determinations may not be applicable to wage determinations issued pursuant to section 4(c). *See* 29 CFR 4.163(j).

Where section 4(c) applies, the successor contractor may discharge the obligation to furnish fringe benefits by any combination of bona fide fringe benefits and/or cash equivalents. For example, if an applicable wage determination requires a contractor to pay 20 cents per hour into a pension fund, this fringe benefit obligation will be met, if instead, hospitalization benefits costing not less than 20 cents per hour are provided, or if hospitalization benefits costing 10 cents per hour and life insurance benefits costing 10 cents per hour are provided. *See* 29 CFR 4.163(j).

67c26 Disposition of the SCA and/or CWHSSA investigation findings: WHI and/or DD.

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

(b) (7)(E) [redacted]

67c27 Second-level conferences.

(b) (7)(E) [redacted]

67c28 Withholding of contract funds: SCA and/or CWHSSA - DO action.

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

67c29 **<u>Withholding of contract funds: SCA and/or CWHSSA - RO action.</u>**

(b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)
[redacted]

F2-50 District Office: Due Process Letter – No Current Withholding

Subject: Referral for determination regarding the withholding of contract funds
Case Number: [insert case number]

As you are aware, a final conference was held on [ ] regarding the results of an investigation of your firm's (or your subcontractor's) performance on contract number [ ]. Present at that conference were [ ]. At that conference, the firm was advised that the investigation revealed that [ ] employees were underpaid in the amount of $[ ] as a result of [DB, DBRA, SCA and/or CWHSSA] violations. These violations were as a result of [provide brief description of violations]. During the final conference, the firm was provided with a Summary of Unpaid Wages listing individual employees and the amounts found due and an opportunity to discuss the violations. The record indicates that the firm has refused to pay the back wage findings in this matter.

In accordance with established procedures, the investigation report is being forwarded to [deciding official name and title] for review and a determination as to whether action should be taken to request the withholding of contract funds necessary to satisfy the back wage findings. Accordingly, you may submit your views on whether wage violations occurred to [deciding official name and address] within fifteen (15) days of the date of this letter. You will be advised of the determination in this matter after review of the investigation file and any submission that you provide in the time frame established.

Please be advised that any determination regarding the withholding of contract funds will not result in the distribution of these funds to the underpaid workers until such time as the administrative remedies available to your firm have been completed. Those procedures will be initiated by the Department and may be found in Department of Labor Regulations, 29 CFR [Part 5, 5.11(b) and Part 6, subpart C (Davis-Bacon)]; or [Part 6, Subpart B (SCA)], copy enclosed.

Of course, if your firm wishes to satisfy the back wage findings at this time, you may do so by forwarding a certified check to this office in the amount of $[ ], made payable to the Wage and Hour Division - Labor. Please include the case number listed above on your check.

Sincerely,

[District Director/Assistant District Director]

Enclosure

F2-51 Deciding Official: Determination to Request Withholding

Subject: Determination to withhold funds
Case No.: [insert case number]

This is in further reference to our letter dated [date] regarding the above-referenced matter.

After careful review of the investigation report [as well as any submissions provided by your firm], we have concluded that there is a reasonable basis to support the back wage findings in this matter. Accordingly, pursuant to Department of Labor regulations 29 CFR [Part 4.187(a) or Part 5.5(a)(2)], we have taken action to request that the contracting agency withhold sufficient funds to satisfy the back wage findings. A copy of our withholding request is enclosed.

As indicated to you in prior correspondence, your firm will have a subsequent opportunity to contest the back wage findings pursuant to the administrative processes provided in Department of Labor regulations 29 CFR [Parts 5 and 6 (DB)] or [Part 6 (SCA)].

Of course, if your firm wishes to satisfy the back wage findings at this time, you may do so by forwarding a certified check in the amount of $[ ] made payable to Wage and Hour Division - Labor. Please include the case number listed above on your check.

Sincerely,

[WH Deciding Official as designated by the regional office]

Enclosures

F2-52 District Office: Due Process Letter – Withholding Already Requested

Subject: Referral for determination as to whether the earlier withholding request should be affirmed
Case Number: [insert case number]

As you are aware, a final conference was held on [ ] regarding the results of an investigation of your firm's (or your subcontractor's) performance on contract number [ ]. Present at that conference were [ ]. At that conference, the firm was advised that the investigation revealed that [ ] employees were underpaid in the amount of $[ ] as a result of [DB, DBRA, SCA and/or CWHSSA] violations. These violations were as a result of [provide brief description of violations]. During the final conference, the firm was provided with a Summary of Unpaid Wages listing individual employees and the amounts found due and an opportunity to discuss the violations. The record indicates that the firm has refused to pay the back wage findings in this matter.

In accordance with established procedures, the investigation report is being forwarded to [deciding official name and title] for review and a determination as to whether the earlier request to withhold contract funds to satisfy the back wage findings should be affirmed. A copy of our withholding request is enclosed. Accordingly, you may submit your views on whether wage violations occurred to [deciding official name and address] within fifteen (15) days of the date of this letter. You will be advised of the determination in this matter after review of the investigation file and any submission that you provide in the time frame established.

Please be advised that any determination regarding the withholding of contract funds will not result in the distribution of these funds to the underpaid workers until such time as the administrative remedies available to your firm have been completed. Those procedures will be initiated by the Department and may be found in Department of Labor Regulations, 29 CFR [Part 5, 5.11(b) and Part 6, subpart C (Davis-Bacon)]; or [Part 6, Subpart B (SCA)], copy enclosed.

Of course, if your firm wishes to satisfy the back wage findings at this time, you may do so by forwarding a certified check to this office in the amount of $[ ], made payable to the Wage and Hour Division - Labor. Please include the case number listed above on your check.
Sincerely,

[District Director/Assistant District Director]
Enclosures

F2-53 Deciding Official: Affirmation of Previous Withholding Request

Subject: Affirmation of previous determination to withhold funds
Case No.: [insert case number]

This is in further reference to our letter dated [date] regarding the above-referenced matter.

After careful review of the investigation report [as well as any submissions provided by your firm], we have concluded that there is a reasonable basis to support the back wage findings in this matter. Accordingly, pursuant to Department of Labor regulations 29 CFR [Part 4.187(a) or Part 5.5(a)(2)], I affirm the earlier action requesting that the contracting agency withhold sufficient funds to satisfy the back wage findings.

As indicated to you in prior correspondence, your firm will have a subsequent opportunity to contest the back wage findings pursuant to the administrative processes provided in Department of Labor regulations 29 CFR [Parts 5 and 6 (DB)] or [Part 6 (SCA)].

Of course, if your firm wishes to satisfy the back wage findings at this time, you may do so by forwarding a certified check in the amount of $[ ] made payable to Wage and Hour Division - Labor. Please include the case number listed above on your check.

Sincerely,

[WH Deciding Official as designated by the regional office]

Enclosures

67c30 Payments from funds transferred to the WHD.

(b) (7)(E)

[redacted]

(b) (7)(E) [redacted]

67c31 **Bankruptcy.**

(b) (7)(E) [redacted]

67c32 **Debarment.**

(a) Section 5(a) of the SCA addresses debarring SCA violators and requires that any person or firm found to have violated the act, pursuant to a hearing before an ALJ in accordance with 29 CFR 6, will be debarred unless the Secretary of Labor (Secretary) otherwise recommends "*because of unusual circumstances*." Since Congress did not define "unusual circumstances," the meaning and intent of this term has been developed through the decisions of the ALJs. Congress did indicate, however, that the mere payment of back wage and promise of future compliance are insufficient for debarment relief. (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

[redacted]

(b) (7)(E)

(b) (7)(E)

67c33 **Narrative report.**

(b) (7)(E)

67c34 WH-51, WH-55, WH-56, and WH-58.

(b) (7)(E)
[redacted]

67d DAVIS-BACON ACT (DBA) AND/OR DAVIS-BACON RELATED ACTS (DBRA)

67d00 Scheduling or initiating DBRA and/or CWHSSA investigations.

(a) The DOL's role in the administration and enforcement of the DBRA and the CWHSSA essentially originates in the Reorganization Plan No. 14 of 1950. In brief, this document places the day-to-day responsibility for DBRA and CWHSSA enforcement on the contracting agencies, and assigns to the DOL both coordinating and oversight functions to ensure the uniform and effective administration of these laws, including the making of necessary investigations and issuance of uniform interpretations and regulations to be followed by all contracting agencies.

The respective functions of the contracting agencies and the DOL, delegated to the WHD, are outlined in AAM No. 76. Although the contracting agencies should perform day-to-day enforcement activities, there are many instances in which the WHD will have to take the initiative in investigative activity that ordinarily should have been assumed by the contracting agency. While the following examples are illustrative only, they indicate the types of situations in which the WHD may have to take investigative action.

(b) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

(c) (b) (7)(E) [redacted]

[redacted]

- [redacted]

(b) (7)(E) [redacted]

[redacted]

(d) (b) (7)(E) [redacted]

(e) [redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

(4) The DD will advise the complainant in writing that the complaint has been referred and will provide a contact name and address for the agency to which the referral is made. (b) (7)(E) [redacted]

(5) (b) (7)(E) [redacted]

67d01 Concurrent investigations.

(b) (7)(E) [redacted]

67d02 Reporting DBRA cases.

(b) (7)(E) [redacted]

[redacted]

[redacted]

67d03 Investigation procedures: general.

(b) (7)(E) [redacted]

67d04 Conciliation of DBRA and/or CWHSSA complaints.

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

67d05 **Cooperation with contracting agency representatives.**

(a) It must be kept in mind that the WHD does not have sole responsibility for enforcement of the DBRA or the CWHSSA. (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) Every attempt will be made to contact the contracting agency representative *before* a DBRA and/or CWHSSA investigation is initiated in order to give the agency an opportunity to conduct its own labor standards investigation, or to solicit its cooperation in our investigation if it cannot do the investigation itself. (b) (7)(E) [redacted]

67d06 **Open or prior investigations by contracting agency.**

(a) (b) (7)(E) [redacted] If the contracting agency's investigation has been completed and discussions with the agency's representative or other readily available information discloses no current compliance problems, no further action is required.

(b) (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

- [redacted]
- [redacted]

67d07 Investigative period.

(b) (7)(E) [redacted]

67d08 Contractor with main office outside DO jurisdiction.

(b) (7)(E) [redacted]

67d09 Notification to prime contractor of investigation of subcontractors.

The prime contractor is ultimately responsible for back wages resulting from DBRA and/or CWHSSA violations committed by one of its subcontractors, if the subcontractor refuses to make restitution (*see* 29 CFR 5.5(a)(6)). (b) (7)(E) [redacted]

67d10 Initiating investigation and/or determining DBRA and/or CWHSSA coverage.

(a) (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

67d11 **<u>Omission of the DBRA and/or CWHSSA stipulations or wage determination from a covered contract or inclusion of the incorrect or inapplicable wage determination in contract.</u>**

(a) In cases where the DBRA should apply, it may be found that the DBRA stipulations (*see* 29 CFR 5.5) and the DBRA wage determination are not contained in the prime contract either directly or by reference.

(b) (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

(c) (1) The DO and/or RO will send a letter or communication to the appropriate contracting official or agency that awarded the contract requesting that the contract be modified to incorporate the DBRA stipulations and/or applicable wage determination (*see* 29 CFR 1.6 for guidance regarding the use and effectiveness of wage determinations).

Written confirmation that corrective action has been taken will be requested from the agency. (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

(e) (b) (7)(E) [redacted]

(f) (b) (7)(E) [redacted]

67d12 **Posting of wage determination.**

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

67d13 **Determination of DBRA compliance: general.**

(a) The DBRA involves the application of specific minimum wage standards to separate and distinct classes of laborers or mechanics. No such persons employed at the site of the work in the performance of the contract may be paid for such work at a wage rate less than that specified in the wage determination for the type of work the employee performs. Wage rate, as used in the DBRA, includes the amount of fringe benefits specified on an applicable wage determination as explained in 29 CFR 5.20 -.32. (b) (7)(E) [redacted] Under the DBA, there are not standard classification definitions. This differs from the SCA classifications, which are defined in the "SCA Directory of Occupations." Note: questions as to the proper classification are resolved by making an area practice determination (*see* FOH 15f05).

(b) (7)(E) [redacted]

(b) If an employee is subject to state or local labor standards and the DBRA concurrently, the employer's minimum wage obligations to the employee are determined by whichever standards are higher. The WHD *does not* enforce state or local labor standards (*e.*g., state "Little Davis-Bacon laws). Questions regarding such matters must be referred to the proper state or local authorities.

67d14 **Employee interviews.**

(b) (7)(E) [redacted]

67d15 **Conformability of classifications and/or wage rates.**

(a) (b) (7)(E) [redacted]

(b) A classification and rate conformed in accordance with the procedure in 29 CFR 5.5(a)(1)(ii) is applicable retroactively to all workers performing work in the classification under the particular contract from the first day on which each employee performed work in the conformed classification, and not the date the conformance was undertaken and/or approved.

(c) (b) (7)(E) [redacted]

(d) The NO has 30 days from receipt of a conformance action request to respond, either approving, reversing, or modifying the proposed conformance or issuing a final determination in the case of disagreement. If additional time is necessary, such as to conduct an area practice survey, the NO will notify the contracting agency of the delay within 30 days of receipt.

(e) (b) (7)(E) [redacted]

67d16 **Segregation: covered and non-covered work.**

(a) In some cases, a laborer or mechanic may be employed for a portion of time in a workweek on work subject to the DBRA and non-covered work. If a contractor desires to segregate covered from non-covered work for purposes of applying the DBRA wage determination, the contractor must identify such covered work accurately in his or her records, or by other means. An arbitrary assignment of time on the basis of a formula as to covered and non-covered work is not sufficient. However, if the contractor does not wish to keep detailed records showing segregation on an hour-by-hour basis, records can be segregated on a wider basis of work shifts, days, or weeks in which such covered work was performed. If the contractor has effectively segregated such work, the employee is entitled to be paid in accordance with the wage determination only with respect to time the employee spends on work subject to the DBRA.

(b) (b) (7)(E) [redacted]

67d17 **Segregation: employees working in more than one classification.**

(a) A laborer or mechanic employed on a covered contract and performing work in more than one classification may be paid not less than the predetermined rate for the actual hours *spent* in each classification, provided the work performed can be separated into more than one classification, and provided that the time records are segregated in accordance with the actual hours spent in each classification. Work that is normally performed as part of a mechanic's craft is not separable. For example, a carpenter who, in the course of work, *intermittently* moved boards from a stockpile or truck to the place where they are to be used would be performing work merely incidental to the craft, and such work would not be separable from craft work for pay purposes. However, if an employee spends a significant (*i.e.*, 1 or more hours in a day), clearly segregable portion of time performing work, such as unloading, carrying materials, cleaning up, and the like, such time would not be compensable at the craft rate, if such work is performed by laborers under area practice. (b) (7)(E) [redacted]

(b) As a practical matter, some employers have not segregated their records adequately. (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

67d18 **Employment of apprentices and trainees.**

(a) (b) (7)(E) [redacted]

(b) Evidence of bona fide apprenticeship registration

29 CFR 5.5(a)(3)(i) requires that a contractor or subcontractor utilizing apprentices maintain written evidence of the registration of the program and the apprentices, and the ratios and wage rates prescribed in the applicable programs. (b) (7)(E) [redacted]

(c) Registered apprentice ratio exceeded

If a contractor or subcontractor employs apprentices in such a number that the permissible ratio is exceeded, all apprentices employed in excess of the ratio are considered to have been improperly employed, and will be entitled to the rate for the classification of work that they are performing. For example, if an employer is permitted to employ three apprentices under an approved plan and it is disclosed that the employer is employing five apprentices on the project, the first three apprentices employed on the project will be considered within the quota. The last two employed will be considered improperly employed, and must be paid the full prevailing wage rate for the work performed. Back wages are due to the two employees. (b) (7)(E) [redacted]

(d) Temporary excess employment of apprentices

(b) (7)(E) [redacted]

(e) Trainees

The principles set forth above regarding ratio exceeded and evidence of apprenticeship for apprentices are also applicable to trainees.

67d19 <u>Employment of helpers.</u>

(b) (7)(E) [redacted]

67d20 <u>Clean-up work.</u>

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

67d21 **Landscape contracting.**

(b) (7)(E) [redacted]

67d22 **Sewer repair service.**

(b) (7)(E) [redacted]

67d23 **Supply and installation contracts.**

(b) (7)(E) [redacted]

67d24 **Fringe benefits.**

(b) (7)(E) [redacted]

67d25 **Pension and profit-sharing plans.**

(b) (7)(E) [redacted]

67d26 **Holiday pay.**

(b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

67d27 **Segregation of contract work subject to the CWHSSA.**

(a) The CWHSSA contains no minimum wage standards, but requires overtime pay at the rate of time and one-half the basic rate of pay for all hours worked by laborers or mechanics in excess of 40 in a workweek *on contract work subject to the act* (*see* FOH 15k).

(b) If an employer desires to segregate covered from non-covered work for purposes of applying the CWHSSA overtime requirement, the employer must identify such covered work accurately in the records, or by other means. An arbitrary assignment of time on the basis of a formula, as between covered and non-covered work, is not sufficient. However, if the employer does not wish to keep detailed hour-by-hour records for segregation purposes under the CWHSSA, the records can be segregated on the wider basis of the work shifts, days, or weeks on which such covered work was performed. If the employer can demonstrate this type of segregation from the records, or by other means, it must be taken into consideration in determining any liability under the CWHSSA.

(c) If a laborer or mechanic in a given day or workweek performs work subject to the CWHSSA and not subject to the CWHSSA, only the work subject to the CWHSSA need be considered in computing any CWHSSA overtime compensation due, provided the employer has effectively segregated covered from non-covered work. Thus, before the payment of overtime is required under the CWHSSA, the employee must have worked:

(1) as a laborer or mechanic, and

(2) in excess of 40 hours in the workweek on covered contract work.

Other hours, if proper segregation has occurred, can be excluded from the total weekly hours for purposes of computing any overtime compensation due under the CWHSSA. Such hours are not, of course, excluded from the weekly total in computing the FLSA or PCA overtime compensation that may otherwise be due.

Scenario:

An employee works hours subject to the CWHSSA and hours not subject to the CWHSSA in the same workweek. Only the hours subject to the CWHSSA are considered when computing any CWHSSA overtime compensation due. All hours worked in the workweek, including hours covered by the CWHSSA, are considered when computing the FLSA or PCA overtime due. In the example below, assume that the employer has segregated the CWHSSA hours, the employee works as a laborer or mechanic on covered contract work for the CWHSSA hours, and the employer is subject to the FLSA overtime. Hours paid at bona fide premium rates under the CWHSSA are creditable toward FLSA overtime in accordance with 29 CFR 778.200(a) -(b).

Type of Hours	S	M	T	W	T	F	S
CWHSSA hours:	8	8	8	8	8	8	
Non-CWHSSA hours:							4

The CWHSSA overtime is due for 8 hours. The FLSA overtime is due for 4 hours.

(d) (b) (7)(E) [redacted]

67d28 **Limited CWHSSA exemptions, variations, and tolerances.**

In limited instances, pursuant to section 105 of the act, individual exemptions, variations, and tolerances under the CWHSSA have been granted to certain categories of workers on qualified contracts. However, such workers are to be paid overtime compensation as may be required by any other applicable law. (b) (7)(E) [redacted]

67d29 **Section 7(f) plans and the CWHSSA.**

As set forth in FOH 15k08, an FLSA section 7(f) plan, which is found to be valid, may continue to operate during periods in which the work of an employee is subject to the CWHSSA, provided that during those periods, the employee is paid in compliance with the overtime provisions of the CWHSSA.

67d30 **CWHSSA liquidated damages.**

(a) Violations of the CWHSSA render the contractor and subcontractor liable to the affected employees for unpaid wages and to the U.S. for liquidated damages computed at $10.00 for each calendar day that each laborer or mechanic was required or permitted to work over 40 hours in the workweek on contract work without payment of the required premium amounts. The CWHSSA provides for withholding under the terms of the contract for any unpaid wages and liquidated damages due under the act, and authorizes the Comptroller General of the U.S.

to make direct payments of the former to the affected employees from the funds withheld under the contract.

(b) (b) (7)(E) [redacted]

(c) Although the contracting officer is required in all violation cases to compute liquidated damages, the decision on whether to assess the damages is made by the federal agency. (b) (7)(E) [redacted]

67d31 **(Reserved.)**

67d32 **Copeland "Anti-Kickback" Act and falsification investigations.**

(b) (7)(E) [redacted]

[redacted]

67d33 **Disposition of DBRA and/or CWHSSA investigation findings: WHI and/or DD.**

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(3) (b) (7)(E) [redacted]

(e) (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(f) (b) (7)(E) [redacted]

(g) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]

[redacted]

(i) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

- [redacted]

- [redacted]

67d34 **Unresolved DBRA and/or CWHSSA issues.**

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

67d35 **Withholding of contract funds: DBRA and/or CWHSSA - DO action.**

(a) Contracts that contain contract clauses, specified in 29 CFR 5.5, provide that where funds remaining on a contract, on which DBRA violations have occurred, are insufficient to cover the back wage due on that contract, such additional funds as may be necessary to cover any underpayments may be withheld from any *other* federal contract with the same prime contractor, or any *other* federally-assisted contract subject to DBA prevailing wage requirements that is held by the same prime contractor (*i.e.*, cross-withholding). The revised contract clauses similarly provide for such cross-withholding to satisfy CWHSSA underpayments on any other federal contract with the same prime contractor, or any *other* federally-assisted contract subject to the CWHSSA that is held by the same prime contractor. Note that this cross-withholding provision is restricted to contracts held by the *same prime contractor*. The WHI will, therefore, identify and note in the file any other ongoing DBRA and/or CWHSSA contracts held by the same prime contractor early on in the investigation. Information on other contracts can be obtained from the contractor, from local offices of various federal contracting agencies in the general vicinity of the contractor or project, through employee interviews, and, where appropriate, through a MODO contact (*see* FOH 67d36, and revised 29 CFR 5.5(a)(2) and 29 CFR 5.5(b)(3)).

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

[redacted]

[redacted]

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

67d36 **Withholding of contract funds: DBRA and/or CWHSSA - RO action.**

- (b) (7)(E) [redacted]
- [redacted]

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

67d37 **Content of investigation files disclosing DBRA and/or CWHSSA violations.**

(a) (b) (7)(E) [redacted]

- [redacted]
- [redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

67d38 **Second-level conferences.**

(b) (7)(E) [redacted]

67d39 **Recommendations for debarment by the WHI and/or DD.**

(a) The term "debarment" refers to an action under which a contractor or subcontractor is found ineligible to be awarded any government contracts for a period of time, up to 3 years, because of labor standards violations meeting the criteria discussed in FOH 67d39(b) -(d) below. Under the DBA, the DOL initiates debarment action and recommends to the Comptroller General that such action be taken. Only the Comptroller General may debar under the DBA. However, the DOL has the debarment responsibility under the DBRA, including the Copeland Act and the CWHSSA. (b) (7)(E) [redacted]

(b) As set forth in 29 CFR 5.12, debarment is to be considered in those cases in which a contractor or subcontractor has committed willful or aggravated violations of the labor standards provisions of any of the related statutes (*i.e.* other than the DBA), listed in 29 CFR 5.1, or has committed violations of the DBA that constitute a disregard of its obligations to employees or subcontractors under that act.

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

(e) (b) (7)(E) [redacted]

(f) Section 3(a) of the DBA prohibits the award of contracts to a firm in which another person or firm, debarred for violations of that act, has an interest, and 29 CFR 5.12 prohibits award of contracts to a firm in which another person or firm, debarred for violations of a related act, has a substantial interest. The intent in both situations is to prohibit debarred persons or firms from evading the ineligibility sanctions by using another legal entity to obtain government contracts.

67d40 **Furnishing of investigation file material to the contracting agency.**

(b) (7)(E) [redacted]

67d41 **Referral of DBRA and/or CWHSSA violation cases to the RA.**

(b) (7)(E) [redacted]

67d42 <u>Disposition of DBRA and/or CWHSSA investigation by the RA.</u>

(a) No violation cases

(b) (7)(E) [redacted]

(b) Violation cases

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
- [redacted]
  - [redacted]
  - [redacted]

67d43 **Disposition of debarment cases by the RO.**

29 CFR 5.12 provides for the commencement of debarment proceedings against contractors or subcontractors if it is found that there is reasonable cause to believe that a contractor or subcontractor has committed willful or aggravated violations of the labor standards provisions of any of the statutes listed in 29 CFR 5.1, other than the DBA, or has committed violations of the Davis-Bacon Act which constitute a disregard of its obligations to employees or subcontractors under 3(a) thereof. (b) (7)(E) [redacted]

67d44 Disposition of Copeland "Anti-Kickback" violation cases by the RA.

(b) (7)(E) [redacted]

67d45 Implementation of ALJ decisions pursuant to 29 CFR 5.11(b) and 29 CFR 5.12(b).

The RO will notify contracting agencies of ALJ decisions and will request, where appropriate, the contracting agencies to transfer monies from withheld funds to the RO or the GAO, as appropriate, for disbursement to the affected employees. In DBA cases, the RO will also be responsible for referring all debarment and back wage actions to the Comptroller General upon receipt of the ALJ decision. In DBRA cases, the RO will disburse the back wages and will request that the NO, OGC, Government Contracts Branch place the contractor on the list of ineligible contractors.

Contractors have further appeal rights after the issuance of the ALJ decision; therefore, the RO should confirm that no appeal has been taken before taking the actions shown above (*e.g.*, debarment and back wages disbursement). Unless specifically requested to do so, it is not necessary for the RO to forward the case files to the NO.

67d46 Availability of DBRA wage determinations.

(a) DBRA wage determinations are available on the internet at http://www.wdol.gov. If there is a general wage determination applicable to a construction project, the contracting agency may use it without notifying the DOL. Otherwise, the contracting agency requests wage determinations from the NO on a project-by-project basis (*see* FOH 15f02 -03).

(b) Where DOs receive requests for DBA rates for informational purposes, requestors will be advised that wage determinations may be obtained from http://www.wdol.gov.

(c) Because wage determination rates may change frequently, caution must be exercised when furnishing copies of wage determinations to the public. If it is determined, for example, that the requestor is not seeking the rates merely for informational purposes but is bidding on a specific project and needs the rates for that purpose, he or she will be told to contact the contracting officer for that contract. That official is responsible for ensuring that all bidders have the applicable DBRA rates prior to bidding.

67d47 Conduct of wage rate surveys under the DBRA.

(a) The WHD has the responsibility to predetermine under the DBA and the related statutes, the wages and fringe benefits prevailing in the locality in which the work is to be performed for projects of a character similar to the type of construction for which a wage determination is being prepared. On occasion, a WHI, as assigned, may be responsible for the gathering of wage data in order that the WHD may more effectively perform its responsibility in this area.

(b) DO staff will conduct such wage surveys in response to requests from the regional enforcement coordinator: government contracts through the RA. Both the geographic scope and the amount of wage data required in any survey will vary and will be dependent upon the requirements and purpose of the particular survey. In some instances, a small amount of fact-finding or spot checking may be necessary, while in others, the magnitude of the problem may require the gathering of an extensive amount of data. In the conduct of a wage survey, specific instructions will be issued to meet the requirements of the particular case.

(c) Prior to the submission of the wage survey data to the RO, the DD and/or WHI will review its adequacy by telephone with the regional enforcement coordinator: government contracts and RWS.

N

Chapter 68

EMPLOYEE POLYGRAPH PROTECTION ACT

Table of Contents

68a GENERAL

68a00 (Reserved.)
68a01 Statutory and regulatory provisions.
68a02 Prohibitions.
68a03 Waiver of rights prohibited.
68a04 Effect on other laws and collective bargaining agreements.
68a05 DOL enforcement authority.
68a06 Private suit rights; effect of private suits.
68a07 Statute of limitations; investigative period.

68b COVERAGE AND EXEMPTIONS

68b00 (Reserved.)
68b01 Coverage.
68b02 Employer relationship.
68b03 Polygraph distinguished from lie detector.
68b04 Exemptions.

68c INVESTIGATION POLICY

68c00 (Reserved.)
68c01 Scheduling of EPPA compliance actions.
68c02 Complaint procedures.

68d INVESTIGATION PROCEDURES

68d00 (Reserved.)
68d01 Initial conference.
68d02 Records.
68d03 Employee interviews.
68d04 Determining compliance.
68d05 Assessment of CMPs.
68d06 Computation of back wages or damages.
68d07 Potential litigation.
68d08 Final conference.

68e EPPA REPORTING

68e00 (Reserved.)
68e01 File arrangement.
68e02 Narrative report.

68f DD AND/OR ADD ACTION

68f00 (Reserved.)
68f01 Second-level conferences.
68f02 Review of file.
68f03 Assessment of EPPA CMP.
68f04 Prior to assessment: close question of law.
68f05 Possible injunction.
68f06 Assessment.
68f07 After assessment.

68g RESERVED

68h INTERPRETATIONS: ONGOING INVESTIGATIONS INVOLVING ECONOMIC LOSS OR INJURY TO THE EMPLOYER'S BUSINESS

68h00 Inventory losses.

S
N T

68a GENERAL

68a00 (Reserved.)

68a01 Statutory and regulatory provisions.

The Employee Polygraph Protection Act of 1988 (EPPA), Pub. L. No. 100-347, 102 Stat. 646. Codified in 29 USC 2001 -2009, was enacted on 06/27/1988, with an effective date of 12/27/1988. The EPPA prohibits most private employers from using any type of lie detector test either for pre-employment screening of prospective employees (*i.e.*, job applicants), or for testing current employees during the course of employment. Federal, state, and local government employers are exempt. Polygraph tests, but no other type of lie detector test, are permitted under limited circumstances and subject to specified restrictions (*see* FOH 68b04 below). Employers who violate any EPPA provision may be assessed civil money penalties (CMPs) up to $10,000.00 per violation. The Secretary of Labor (Secretary) is authorized to file suit to enforce the EPPA, and individuals may file their own private suits. The courts may order appropriate legal or equitable relief for violations of the EPPA, including, but not limited to, employment, reinstatement, promotion, and payment of lost wages and benefits. The EPPA's implementing regulations are codified at 29 CFR 801.

68a02 Prohibitions.

Under the EPPA, covered employers may not:

(a) directly or indirectly require, request, suggest, or cause any employee or prospective employee to take a lie detector test;

(b) use, accept, refer to, or inquire concerning the results of a lie detector test of any employee or prospective employee;

(c) discharge, discipline, discriminate against in any manner, or deny employment or promotion, or threaten such action, against any employee or prospective employee on the basis of the results of any lie detector test, or because such a person refuses or declines to take a lie detector test;

(d) discharge, discipline, discriminate against in any manner, or deny employment or promotion, or threaten such action, against any employee or prospective employee for:

(1) filing a complaint or instituting a proceeding under or related to the EPPA,

(2) testifying in any such proceeding, or

(3) exercising any right afforded by the EPPA (*see* 29 CFR 801.4).

68a03 Waiver of rights prohibited.

The rights provided to employees by the EPPA may only be waived as part of a written settlement agreed to by the parties to a pending legal action or complaint filed with the Wage and Hour Division (WHD) under the EPPA (*see* section 6(d)).

68a04 **Effect on other laws and collective bargaining agreements.**

Except for the application of the EPPA exemptions for government employers and lie detector testing by the Federal Government of experts, consultants, or employees of federal contractors engaged in national security intelligence or counterintelligence functions (*see* sections 7(a) -(c) of the EPPA), the EPPA does not preempt any other provisions of a state or local law, or any provision of a collective bargaining agreement (CBA), that prohibit lie detector tests or that are more restrictive with respect to lie detector tests (*see* 29 CFR 801.5).

68a05 **DOL enforcement authority.**

Section 5 of the EPPA grants authority to the Secretary to issue rules and regulations, make investigations, and require the keeping of records, as necessary for the administration of the EPPA. The Secretary has been given the same subpoena authority under the EPPA as provided in the Fair Labor Standards Act (FLSA) (*see* sections 9 and 10 of the Federal Trade Commission Act, 15 USC 49 -50). *See* 29 CFR 801.40.

68a06 **Private suit rights; effect of private suits.**

(a) Private civil actions may be maintained against an employer in any federal or state court of competent jurisdiction by an employee or prospective employee, or on behalf of such employee, prospective employee, and others similarly situated. The court, in its discretion, may award the prevailing party reasonable costs of the action, including attorney's fees.

(b) (b) (7)(E) [redacted]

68a07 **Statute of limitations; investigative period.**

(a) A 3-year statute of limitations applies to private lawsuits under the EPPA (*see* section 6(c)(2)). It prevents the commencement of any court suit by an employee or prospective employee more than 3 years after the date of the alleged violation.

(b) (b) (7)(E) [redacted]

68b COVERAGE AND EXEMPTIONS

68b00 (Reserved.)

68b01 Coverage.

(a) Every employer engaged in or affecting commerce, or in the production of goods for commerce, is covered by the EPPA prohibitions. "Commerce" has the same meaning as in section 3(b) of the FLSA. Thus, by its terms "affecting commerce," EPPA coverage is broader than the FLSA and virtually extends to all employers (*see* 29 CFR 801.3(a)).

(b) The provisions of the EPPA extend to all employees of covered employers regardless of citizenship status, and to foreign corporations operating in the United States (U.S.). The act's provisions, moreover, extend to any actions relating to the administration of lie detector, including polygraph, tests that occur within the territorial jurisdiction of the U.S. (*see* 29 CFR 801.3(b)).

68b02 Employer relationship.

(a) Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee. Thus, state employment services, private employment placement agencies, job recruiting firms, and vocational trade schools, with respect to persons who may be referred to potential employers, are deemed employers because they are "acting directly or indirectly in the interest of an employer" (*see* 29 CFR 801.8(b)).

(b) The term "employer," as used in the act, includes a former employer (*i.e.*, an employee may quit rather than take a lie detector test, and any discrimination by the former employer is prohibited although no employer-employee relationship existed at the time an act of discrimination occurred) (*see* 29 CFR 801.8(c)).

(c) The EPPA does not apply to *bona fide* independent contractor relationships. Determinations of whether or not an individual is an employee or a *bona fide* independent contractor shall be based on the economic reality test established by the courts under the FLSA.

(d) Lie detector, including polygraph, testing by persons other than an employer is not precluded by the act. Thus, the EPPA's restrictions do not apply to public agencies in the performance of law enforcement activities, lawyers who administer lie detector tests to clients and potential witnesses, or fishing tournament officials who administer lie detector tests to winning contestants.

68b03 Polygraph distinguished from lie detector.

(a) Lie detector includes a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device, whether mechanical or electrical, that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual. It does not include *medical* tests used to determine the presence or absence of alcohol or controlled substances in bodily fluids, nor does it include written or oral tests commonly referred to as honesty or paper and pencil tests, whether machine scored or otherwise, or handwriting analysis testing (*see* 29 CFR 801.2(d)).

(b) "Polygraph," a type of lie detector, means an instrument that:

(1) records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(2) is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual (*see* 29 CFR 801.2(d)).

(c) The polygraph, *as defined*, is the only permissible form of lie detector test that private employers can administer under the EPPA, subject to specified restrictions on its use as set forth in sections 7, 8, and 10.

68b04 **Exemptions.**

(a) The EPPA contains several complete exclusions that allow the administration of any kind of lie detector test by certain types of employers. In addition, there are several limited exemptions that authorize *polygraph tests only* under certain specified conditions. These exclusions and exemptions are:

(1) *Public sector (i.e., government) employers*

Under section 7(a), federal, state, and local government employers are completely exempt. Thus, the EPPA has no application to employees and prospective employees of public agencies. This exclusion does not extend to contractors or non-governmental agents of a government entity, nor does it extend to government entities with respect to employees of a private employer with which the government has a contractual or other business relationship, except as noted in FOH 68b04(2) below. This exclusion *does* extend to any political subdivision of a state or local government, acting in the capacity of an employer. The term "any political subdivision of a State or local government" is defined in 29 CFR 801.10(c) (*see* 29 CFR 801.10).

(2) *National defense and security*

The *Federal Government* may administer any kind of lie detector test, in connection with its performance of intelligence and counterintelligence functions, to experts, consultants, or employees of contractors to the Department of Defense, Department of Energy, National Security Agency, Defense Intelligence Agency, Central Intelligence Agency, Federal Bureau of Investigation, and any other federal agency. This exemption does not apply to state or local government agencies or to their contractors (*see* sections 7(b) -(c) and 29 CFR 801.11).

(3) *Ongoing investigations of thefts, embezzlement, etc.*

Section 7(d) provides a limited exemption to permit all employers to utilize *polygraph tests*, but no other type of lie detector test, under specified restrictions if administered in connection with an ongoing investigation involving economic loss or injury to the employer's business (*see* 29 CFR 801.12).

(4) *Security services*

Section 7(e) authorizes the use of polygraph tests, but no other lie detector, under certain circumstances for *certain prospective employees* by certain private employers whose primary business purpose is to provide armored car, security alarm, and security guard services (*see* 29 CFR 801.14).

(5) *Controlled substances*

Section 7(f) authorizes the use of polygraph tests, but no other lie detector, under certain circumstances for certain prospective employees and certain current employees by employers who are authorized to manufacture, distribute, or dispense controlled substances under the Controlled Substances Act (CSA) (*see* 29 CFR 801.13).

(b) The use of polygraph tests under the exemptions listed in FOH 68b04(a)(3) -(5) above are conditioned upon compliance with restrictions set forth in sections 8 and 10 relating to how the polygraph test results are used, rights of the examinee, qualifications and other requirements of the examiner, and provisions of any state or local law or CBA that are more restrictive than the EPPA with respect to lie detector tests. Unless all of these requirements are met, any such polygraph tests are unlawful (*see* 29 CFR 801.5 and 29 CFR 801.20 -.26).

(c) Drug or alcohol use questions

29 CFR 801.12(d) prohibits the use of a polygraph test to determine whether an employee has used alcohol or drugs, even where the possible use may have contributed to an economic loss to the employer. Based on this section, a test may not be administered solely to determine whether an employee has used alcohol or drugs, nor may drug or alcohol use questions be raised as test questions, even where the use of such questions may be relevant for determining what transpired during a specific incident. Questions asked, during any polygraph test, about one's personal habits as to alcohol or drug use are considered needless intrusions into an employee's private life, and are prohibited by section 8(b)(1)(B) of the EPPA (*see* 29 CFR 801.22(b)(2)). A review of the EPPA, its legislative history, and 29 CFR 801 provides no reasons for allowing prohibited test questions to be asked as control questions. Therefore, control questions about drug and alcohol use are also prohibited by section 8(b)(1)(B) of the EPPA.

(d) Security services for air cargo transporters

While the EPPA's legislative history and 29 CFR 801 indicate that the section 6(e) exemption may be applied to public transportation, such as airports, the intended application for the exemption is to the physical security of the airport as a whole for the safe transport of the traveling public. The exemption was not intended to apply to the security of air cargo transportation companies since these facilities or operations cannot be said to have a significant impact on the health or safety of the public. The section 6(e) exemption does not apply to the protection of the aircraft, and operations and facilities of any air cargo transporter solely on the basis of the carrier's air travel routes, including high risk areas for illegal drug smuggling activities or other illegal activity.

(e) Reexaminations

Where the results of an initial polygraph examination administered by an employer in accordance with sections 7(d) -(f) of the EPPA are inconclusive, the employer may subject the examinee to a second examination without additional written statements and notices beyond those required by the EPPA for the initial examination. In the instance of an examination under section 7(d), the second examination must pertain to the identical specific incident that caused the first test to be administered. Moreover, such reexaminations under sections 7(d) -(f) must consist of the same questions asked during the initial examination. However, under conditions described in 29 CFR 801.24, additional relevant questions may be asked when properly reviewed with the examinee.

S
N T

68c INVESTIGATION POLICY

68c00 (Reserved.)

68c01 Scheduling of EPPA compliance actions.

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) Situations may occur in the course of an FLSA, government contract, or MSPA compliance action in which a WHI is presented with reliable information indicating possible EPPA violations. If this occurs, an EPPA investigation should be initiated.

(d) In the course of non-EPPA compliance actions, where employees ask questions about polygraph tests, they will be advised of the applicable provisions of the EPPA and their rights under the act. (b) (7)(E) [redacted]

(e) Complaints involving lie detector tests administered by federal agencies to employees of contractors engaged in national defense and security activities (*see* 7(b) -(c) exemptions) shall be forwarded through channels to the National Office (NO), Attention: assistant administrator (AA) for the Office of Policy (OP).

(f) Questions on this investigation policy should be addressed through channels to the NO, Attention: AA for the OP.

68c02 Complaint procedures.

(a) Before an EPPA compliance action is scheduled, the complaint should be reduced to writing, and the complainant should be requested to sign the statement providing permission to use the complainant's name discussed in FOH 68c02(c) below.

(b) EPPA complaints must be carefully screened. The following questions illustrate the areas to be covered as part of the screening process:

(1) If the complainant has not given permission to use his or her name, is access to the information acquired from a lie detector and/or polygraph test necessary to investigate and/or resolve the complaint?

(2) Is the complainant an employee or prospective employee of a federal, state, or local government agency? The EPPA does not apply to any lie detector tests of employees or job applicants in the public sector.

(3) What type of lie detector test was administered or intended to be administered? All lie detector tests, other than polygraph tests under certain conditions, are illegal for use in the private sector.

(4) Was the test administered or intended to be administered in a state or locality that prohibits such tests? Was the test prohibited by a CBA?

(5) Was the test a part of pre-employment screening? If so, in what industry? Armored car, security alarm, and security guard firms may use polygraph tests for pre-employment screening if the job applicant would be employed to protect certain facilities, materials, operations, or assets, and pharmaceutical industry firms may use polygraph tests if the job applicant would have direct access to controlled substances.

(6) Was the test administered or intended to be administered as part of an ongoing investigation of a theft or other economic loss to the employer? If so, what was the specific loss under investigation by the employer? Did the employee receive written notice stating why he or she had access to the lost property and why the employer had reasonable suspicion that the employee was involved? Different conditions apply in the controlled substances exemption for firms in pharmaceutical industries in connection with ongoing investigations.

(7) Did the complainant actually take the test? If so, was there compliance with the various restrictions applicable to such tests? For example, was advance written notice of at least 48 hours provided (24 hours in the case of a prospective employee)? Was the complainant provided (and did he or she sign) a notice of examinee rights? Was the complainant provided all the test questions in advance in writing? Were any prohibited questions (*e.g.*, political affiliation, sexual preference, etc.) included in the test?

(8) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) [redacted] (b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

S

N T

68d INVESTIGATION PROCEDURES

68d00 (Reserved.)

68d01 Initial conference.

(a) At the outset of the compliance action, the WHI will advise the employer that the compliance action is limited to the EPPA. The basic information concerning coverage and exemptions under the EPPA will be explained. As appropriate, copies of the EPPA and 29 CFR 801 may be provided to the employer.

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

68d02 Records.

(a) The WHI will examine the employer's records pertaining to the lie detector test(s), or the request that a test be taken.

(b) As appropriate, the WHI will interview the test examiner and review the examiner's records pertaining to the test(s).

(c) (b) (7)(E) [redacted]

(d) Since the exemptions under the EPPA are conditional on the maintenance of records, as explained in 29 CFR 801.30, the WHI must take special care in documenting the existence or lack of each required record. Where practical, the WHI should request photocopies of records from the employer and test examiner to substantiate non-compliance with the EPPA.

68d03 Employee interviews.

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

68d04 **Determining compliance.**

(a) To determine compliance, the WHI should resolve the following issues:

(1) *Was a prohibited lie detector test instrument utilized?*

Federal, state, and local government employers may administer *any type* of lie detector test to their own employees (*see* section 7(a) of the EPPA). In addition, the *Federal Government* may administer *any type* of lie detector test to certain employees of contractors and consultants in connection with national defense or security (*see* sections 7(b)(1) -(2) and 7(c) of the EPPA). However, the use of any lie detector test instrument *other than* the polygraph (*e.g.*, voice stress analyzer) by any other type of employer is prohibited by the EPPA.

(2) *If a proper polygraph test instrument was utilized, was the employer within the scope of a permissible exemption, and were the related conditions satisfied?*

Private employers may administer polygraph tests to certain employees under specified conditions set forth in 29 CFR 801.12 if the test is administered in connection with an ongoing investigation of a specific economic loss or injury to the employer's business (*see* section 7(d) of the EPPA). In addition, private employers whose primary business purpose is to provide armored car, security alarm, or security guard services, and whose function includes protection of the public health or safety, national security, or certain assets (*e.g.*, currency, negotiable securities, precious commodities or instruments, or proprietary information) as set forth in 29 CFR 801.14, may administer polygraph tests under specified conditions to job applicants who will be hired to protect the public health or safety, national security, or the types of assets referred to in section 7(e) of the EPPA. Finally, as set forth in 29 CFR 801.13, employers required to register under the CSA (*e.g.*, pharmaceutical manufacturers, wholesale distributors, retail pharmacies, hospitals, clinics, importers/exporters, etc.) may administer polygraph tests under specified conditions to *job applicants* who would have *direct access* to the manufacture, storage, distribution, or sale of controlled substances, and to certain *current employees* in connection with an ongoing investigation of a loss or potential loss to the manufacture, distribution, or dispensing of controlled substances by the employer, if

the particular employees had *access* to the person or property under investigation (*see* section 7(f) of the EPPA).

(3) *If a proper polygraph test was administered by an employer within the scope of a permissible exemption, were all of the restrictions on polygraph testing met?*

Private employers who administer polygraph tests pursuant to an applicable exemption must satisfy specified conditions and restrictions as provided in sections 8 and 10 of the act. Failure to satisfy any of the applicable requirements nullifies the statutory authority to administer a polygraph test, and can subject the employer to the assessment of CMPs and other legal liabilities. The restrictions on polygraph use are set forth in 29 CFR 801.20 -.26.

(4) *If a proper polygraph test was correctly administered according to an applicable exemption and all of the restrictions and/or limitations were met, did the employer improperly take an adverse employment action based solely on the polygraph test results?*

The analysis of a polygraph test chart, or an employee's refusal to take a test, may be considered as part of the basis for an adverse employment action (*e.g.*, discharge, discipline, deny employment or promotion, etc.), *provided* that the adverse action taken is also based on some other *bona fide* reason. In the case of the ongoing investigation exemption (*see* section 7(d) of the EPPA and 29 CFR 801.12), the analysis of a polygraph test chart or the refusal to take a polygraph test may serve as part of the basis for an adverse employment action, *provided* the employer has additional supporting evidence (*see* section 8(a)(1) of the EPPA and 29 CFR 801.20). In the case of the security services and controlled substances exemptions (*see* sections 7(e) -(f) of the EPPA and 29 CFR 801.13 -.14), the analysis of a polygraph test may not be used as the *sole basis* for an adverse employment action (*see* section 8(a)(2) of the EPPA and 29 CFR 801.21). In the case of prospective employees, traditional factors, such as prior employment experience, education, job performance, and the like, may be a part of the basis for such employment decisions. Admissions or statements made by an employee or prospective employee before, during, or following a polygraph examination administered under any of these exemptions may also serve as a legitimate additional basis for such employment decisions.

(5) *Did the employer improperly take an adverse action based on polygraph or other lie detector test results, or based on refusal to take such a test, where no exemption was applicable?*

The law prohibits adverse action against employees, or prospective employees, who refuse to take lie detector tests, or on the basis of the results of such tests. This means that such refusal or test results cannot be *a factor* leading to the adverse action. (b) (7)(E) [redacted]

68d05 **Assessment of CMPs.**

(a) Section 6(a) of the EPPA authorizes the Secretary to assess employers CMPs of up to $10,000.00 for any violation of the EPPA. (b) (7)(E) [redacted] Subpart F of 29 CFR 801 prescribes the administrative process for assessment of the EPPA CMPs, including rules for requesting hearings before administrative law judges (ALJs) for appealing such CMP assessments. (b) (7)(E) [redacted]

(b) EPPA CMPs are collected in the same manner as under the MSPA. Unpaid CMPs that have become a final and unappealable order of the Secretary, or a final court judgment, may be referred to the Attorney General for recovery.

68d06 **Computation of back wages or damages.**

(a) An employer who violates the EPPA is liable to the employee or prospective employee affected by the violation for appropriate legal or equitable relief, including, but not limited to, employment, reinstatement, promotion, and payment of lost wages and benefits.

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) The EPPA provides that an individual's rights cannot be waived except by mutual agreement of the parties under the circumstances set forth in FOH 68a03. (b) (7)(E) [redacted]

68d07 **Potential litigation.**

(b) (7)(E) [redacted]

68d08 Final conference.

(a) A final conference should be arranged with an official of the firm who has authority to make decisions and commit the employer to taking corrective actions if violations of the EPPA are found. The WHI should explain pertinent provisions of the EPPA and 29 CFR 801, and where the alleged EPPA violations are substantiated by the investigation findings, explain the corrective actions necessary to achieve future compliance. (b) (7)(E) [redacted]

(b) The employer should be advised that a determination concerning assessment of any CMPs under the EPPA will be provided to the employer in writing as soon as possible following supervisory review of the investigation report. (b) (7)(E) [redacted]

S

N T

68e EPPA REPORTING

68e00 (Reserved.)

68e01 File arrangement.

Case file arrangement under the EPPA will follow the standard arrangement described in FOH 54b02. WH-525 will be filed in the order designated for WH-266: CMP Computation Summary Sheet FLSA Child Labor Civil Money Penalties (WH-266) or WH-518: MSPA CMP Computation Summary Sheet 29 CFR 500 (WH-518).

68e02 Narrative report.

The EPPA narrative reports shall be prepared in accordance with FOH 54b01. In addition, the narrative should include a concise summary of any previous EPPA investigation findings with respect to the employer, include copy of prior WH-525 if available, a description of the circumstances that bring the current violations within the criteria in 29 CFR 801.42(b) for consideration of CMP assessment, and a description of any relevant circumstances or the extent to which the employer had knowledge of the violations. As appropriate, recommendations for legal action shall be discussed fully in the narrative report.

S
N T

S

N T

68f DD AND/OR ADD ACTION

68f00 **(Reserved.)**

68f01 **Second-level conferences.**

(b) (7)(E) [redacted]

68f02 **Review of file.**

Upon receipt of the investigation file(s) from the WHI, the DD and/or ADD shall review the file to ensure that WH-525 has been properly completed, that the amount of CMPs shown accurately reflects the facts and factors to be considered in recommending a penalty, and that the facts and factors are clearly documented in the file. If the DD and/or ADD does not concur with the computed amount, the recommended modification must be documented in the file. The DD's and/or ADD's modifications shall be explicit as to both the facts upon which they are based and their relevance to the criteria enumerated in 29 CFR 801.42.

68f03 **Assessment of EPPA CMP.**

If the completed WH-525 indicates that a CMP is appropriate, the DD and/or ADD should discuss the proposed EPPA assessment with the regional administrator (RA) prior to assessment. (b) (7)(E) [redacted] On the basis of such review and consultation, the DD and/or ADD will determine the amount of monetary penalties to be assessed.

68f04 **Prior to assessment: close question of law.**

If the investigation reveals a situation, which poses a close question of law that has not previously been resolved, the file shall be transmitted to the NO, OP, Division of Enforcement Policy and Procedures, Family and Medical Leave Act and Other Labor Standards Branch for resolution. Clearly explain the facts and/or issues involved.

68f05 **Possible injunction.**

If the investigation indicates that injunctive action under section 6(b) of the act may be appropriate, the files should be referred to the JRC for consideration of litigation.

68f06 **Assessment.**

(a) The EPPA provides that a CMP of not more than $10,000.00 may be assessed for a violation of any provision of the act, for *each* employee affected. (b) (7)(E) [redacted]

(b) In any case in which assessment is appropriate, the DD and/or ADD shall send the employer the Notice of Penalty (*see* Correspondex Letter F2-23) by certified mail, enclosing a list of persons affected by each violation and amount assessed for each violation. The certified mail number shall be typed on the letter in the upper left-hand corner above the address, and on the envelope, for identification purposes. The signed return receipt shall be stapled to the inside of the file for evidence of, and use in, determining timeliness.

(c) If the Notice of Penalty is returned to the WHD by the U.S. Postal Service as "unclaimed" or "undeliverable," the DD and/or ADD shall determine whether it is appropriate for a WHI to make personal service. If the Notice of Penalty is returned with the notation "moved, left no address," the DD and/or ADD shall determine to what extent steps should be taken to locate the person to be assessed.

(d) A dated copy of the Notice of Penalty and WH-525(s) should be sent to the NO, Attention: OP. To facilitate statistical reporting, the Standard Industrial Code (SIC) and district office (DO) identification number should be noted on the Notice of Penalty under the certified mail number.

(e) For national or multiunit enterprises, the Notice of Penalty should be sent to both the main and branch offices. In these cases, copies of the Notice of Penalty, list of persons employed in violation, and WH-525(s) should also be sent to the main office-district office (MODO). When negotiations and the final conference are conducted with the main office, the Notice of Penalty should be sent to the main office with a copy to the branch. When negotiations and the final conference are conducted with the branch, the Notice of Penalty should be mailed to the branch with a copy forwarded to the main office.

(f) The DD and/or ADD shall provide guidance in the transmittal instructions for required further action in files being referred through the regional office (RO) to the RSOL for litigation, or to another DO for further handling or negotiations. WH-136: Investigation Transmittal Form (WH-136) should be used for transmittal of all such files with the notation, "EPPA/CMP."

68f07 **<u>After assessment.</u>**

(a) **Exceptions**

(1) 29 CFR 801.53 provides that exceptions to the Notice of Penalty be addressed and mailed to the official who issued the determination at the WHD address appearing on the determination notice. The date and time of receipt shall be clearly indicated on the letter of exception (*e.g.*, time and date stamped).

(2) When an exception has been filed, the receiving office must determine whether the exception is timely. In order to determine timeliness, the 30-day filing period is counted from the day following the date the Notice of Penalty was served on the employer, until the date on which the exception letter was received by the WHD. When service is made by certified mail, service is complete upon mailing, but 5 days shall be added to the 30-day period to allow time for the mail. A copy of the return receipt must be retained in the case file. When the 13th day falls on a Saturday, Sunday, or holiday, the next workday that follows will be considered the 13th day.

(b) Timely exceptions

After notification that a timely exception has been filed, the case should be referred to the RSOL. (b) (7)(E) [redacted]

(c) Negotiating procedures

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(3) (b) (7)(E) [redacted]

(4) A personal conference in lieu of telephone contact is preferred but not required. The conference should be handled by the DD and/or ADD with the concurrence of the RA. Use Correspondex Letter F2-24 to schedule such a conference.

(5) When an agreement on the amount of CMPs to be paid is reached, the employer should be requested to submit a certified check payable to "Wage and Hour Division – Labor," by a date specified by the DD and/or ADD. When the check is received in the RO, the Termination of Proceedings letter should be completed (*see* Correspondex Letter F2-26) and mailed to the employer or the employer's representative. The letter must not be mailed until the check for the agreed-upon amount is received. If installment payments are to be made, the DD and/or ADD may issue receipts for payment; however, the termination document should not be sent until full payment is made. Mail the original copy of the Termination of Proceeding to the employer, and place one copy in the investigation file. An addendum to the narrative should be prepared outlining the action taken.

(6) When certified checks or money orders are received by the RA as payment for penalties assessed, they will be examined by the certifying officer before they are given to the back wage clerk for entering in the receipts control register. A photocopy of the check shall be retained in the RO file with the F2-23 letter and WH-525. As in the procedure for handling back wage checks, the certifying officer should keep a memorandum record of the checks received as to the amount and number in order to ensure that all checks examined are properly accounted for in the receipts control register. EPPA CMP checks will be deposited to the Department of the Treasury on a certificate of deposit, SF-215, and processed through the nearest Federal Reserve Bank. The account symbol that shall apply to the depositing of EPPA CMPs is "16X1030." Particular attention should be given to the requirement that checks be deposited in the Federal Reserve Bank within 24 hours after their receipt in the RO, provided there is no conflict with the 3-day cutoff period at the end

of each month as stated in section 6813 of the ESA Manual. These payments will be identified as EPPA CMPs and posted to the receipts control register.

(7) If settlement cannot be reached, an addendum to the narrative should be prepared outlining the attempts at settlement. A letter should be prepared and mailed to the employer, or representative, restating the original CMP amount the DD and/or ADD, in consultation with the RA, has determined to be appropriate. Use Correspondex Letter F2-27 for this purpose. After the 30-day response time has elapsed, if the CMP has not been paid, the file should be sent to the RO for transmission to the RSOL for appropriate action.

(d) Untimely or no exception

(1) Where the exception has been deemed untimely or where no exception has been filed and the CMP is substantial, the DD and/or ADD shall send the Notice of Final Order (*see* Correspondex Letter F2-25), and if no response is received within 30 days, refer the case to the collection agent.

(2) (b) (7)(E) [redacted]

68g RESERVED

S
N T

NOT FOR PUBLIC DISTRIBUTION

68h INTERPRETATIONS: ONGOING INVESTIGATIONS INVOLVING ECONOMIC LOSS OR INJURY TO THE EMPLOYER'S BUSINESS

68h00 Inventory losses.

(a) For the ongoing investigation exemption to apply in the case of polygraph tests administered to employee(s) in response to shortages revealed by specific or routine inventory audits, the employer must:

(1) conduct an inventory audit that identifies with some degree of specificity the merchandise that is missing;

(2) conduct a subsequent investigation, which produces evidence that links specific missing items of inventory to the intentional wrongdoing of an employee or employees; and

(3) develop the basis for reasonably suspecting that the employee or employees to be tested were involved in the theft of the item(s) missing from inventory.

(b) Because the ongoing investigation must be of a specific incident or activity, the audit must be sufficiently detailed to permit identification of particular missing items or at least narrow categories of items, such as cigarettes, watches, or computer paper. Characterization of inventory, such as tobacco products, jewelry, or office supplies, ordinarily lacks the necessary specificity, as does an inventory audit that merely values the inventory in monetary terms, (*i.e.*, beginning value, additions, sales, and ending value).

(c) To meet the exemption's requirements, the employer must also establish evidence through subsequent or additional investigation that the missing inventory was not attributable to bookkeeping, delivery, cash register, or other like errors. A mere belief by the employer, without any related investigation, that such shortages are normally attributable to theft is not sufficient.

(d) The employer's investigation must also provide evidence that links the missing inventory to intentional wrongdoing by employees, as opposed to others who also may have access to the inventory identified as missing (*e.g.*, shoppers, warehouse and delivery workers, inventory auditors, etc.). An employer cannot attribute the missing inventory to theft by employees without evidence that employees were, in fact, involved.

(e) Finally, for the exemption to apply, the employer must articulate the basis for reasonably suspecting that the particular employee(s) to be polygraphed was involved in the missing inventory incident or activity under investigation.

NOT FOR PUBLIC DISTRIBUTION

Chapter 69

FAMILY AND MEDICAL LEAVE ACT (FMLA) INVESTIGATIVE PROCEDURES

Table of Contents

69a INTRODUCTION

69a00 General.

69b INITIATING INVESTIGATIONS

69b00 Complaint intake.
69b01 Federal employees.
69b02 Communication with complainant.
69b03 Delay in completion of compliance action.
69b04 Management review and assignment of complaints.
69b05 Investigation authority.

69c INVESTIGATION PROCEDURES

69c00 General.
69c01 Statute of limitations.
69c02 Complainant interview.
69c03 MODO contact.
69c04 Type of compliance actions.
69c05 Use of investigative and enforcement tools in FMLA compliance actions.
69c06 Initial conference with employer.
69c07 Employer policy review.
69c08 Records review.
69c09 Employee interviews.
69c10 FMLA interference and retaliation.
69c11 Computing back wages and determining remedies.
69c12 Disposition of findings and/or final conference.
69c13 Complainant notification.
69c14 Tolling agreement.
69c15 Settlement agreements and settlement releases and/or waivers.

69d INVESTIGATION REPORTING REQUIREMENTS

69d00 Narrative report requirements.
69d01 Conciliation reporting.
69d02 Case file arrangement.
69d03 Recording findings in WHISARD.

69e FMLA POLICY ISSUES

69e00 Sovereign immunity of states.
69e01 Native American tribes.
69e02 Religious institutions as employers.
69e03 Violations concerning designation of leave issues.

TI FOH LIC

69e04 Leave year issues.
69e05 Arbitration.
69e06 Complaints involving an adult son or daughter.
69e07 Special issues with USPS and FAA complaints.
69e08 Waiver of FMLA rights and/or DOL approval of private FMLA settlements.
69e09 State as a single employer.
69e10 Medical certification issues.
69e11 Return to work and/or fitness for duty.
69e12 Airline flight crew employees.
69e13 Military family leave provisions.

69f FMLA POSTING REQUIREMENTS AND CMPS FOR WILLFUL VIOLATIONS

69f00 FMLA posting requirements.
69f01 FMLA CMPs for willful violations of posting requirements.

69g INTERACTION WITH FEDERAL OR STATE LAWS

69g00 Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).
69g01 USERRA and FMLA eligibility requirements.
69g02 Impact of the Health Insurance Portability and Accountability Act (HIPAA) on FMLA enforcement.
69g03 State family and medical leave laws.

69h TEMPLATES AND/OR RESOURCES

69h00 Sample ABA 107(a) referral letter.
69h01 Sample tolling agreement.
69h02 Sample FMLA complaint intake form.
69h03 Sample FMLA employer policy review checklist.

TFO PUBLIC

69a INTRODUCTION

69a00 General.

(a) FOH 69 contains procedural instructions for scheduling, conducting, and resolving compliance actions by the Wage and Hour Division (WHD) under the Family and Medical Leave Act (FMLA). As in other WHD compliance actions, the goal of FMLA investigations is to achieve compliance efficiently and effectively. (b) (7)(E) [redacted]

(b) FMLA compliance actions, however, contain some components that differ from investigations under other WHD laws. (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

FOR PUBLIC

TI
LIC
P
TFO

69b INITIATING INVESTIGATIONS

69b00 Complaint intake.

(a) General

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(b) Complaint information

Any person who wishes to file a complaint regarding alleged violations of the FMLA may contact the WHD by telephone, letter, or personal visit. No particular form of complaint is required. (b) (7)(E) [redacted]

(c) However, FMLA regulations (*see* 29 CFR 825.401(c)) require that an FMLA complaint be reduced to writing, including a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation. While the complainant may voluntarily submit written documentation regarding his or her complaint, it may or may not include a full statement of the acts and/or omissions, all pertinent dates, etc.

Generally, after the complaint has been accepted, and before conducting the initial conference, the WHI will take a detailed interview statement from the complainant. This interview statement will meet the regulatory requirement that the complaint be reduced to writing. *See* FOH 69c02. If for some reason a complainant interview statement is not obtained, the required information must be obtained and reduced to writing through other means.

29 CFR 825.401(c)

(d) (b) (7)(E) [redacted]

In many instances, the potential complainant will have copies of documents supporting the alleged violation. (b) (7)(E) [redacted]

(b) (7)(E)

(e) Timeliness of complaints

Complaints should be filed with the WHD within a reasonable time of when the violation is discovered. The WHD needs sufficient time to review and act on the complaint within the FMLA statute of limitations. *See* FOH 69c01. In no event, may a complaint be filed with the Secretary of Labor (Secretary) more than 2 years after the alleged violation occurred (or 3 years in the case of a willful violation).

29 CFR 825.401(b)

(f) Prior history

(1) Prior history must be checked in *all* FMLA compliance actions. WHD enforcement personnel should review prior history to determine the validity and priority of the potential FMLA complaint.

(2) Knowledge of prior history is also critical in determining the appropriate type of compliance action (*e.g.*, full investigation, limited investigation, etc.; *see* FOH 69c04), use of enforcement tool(s) (*e.g.*, Appointment Letter, 72 Hour Letter, subpoena, etc.; *see* FOH 69c and FOH 86), and in early identification for potential litigation.

(3) Knowledge of prior history will also be needed to determine if an employer policy review, as required by FOH 69c07, may not be necessary.

(4) Contact with the main office-district office (MODO) is required in checking prior history. *See* FOH 69c03.

69b01 <u>Federal employees.</u>

(a) Most federal employees are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the USC). The Department of Labor's (DOL's) enforcement authority under Title I of the FMLA excludes these employees. *See* FOH 39b04.

(b) Federal employees subject to Title II will be advised to contact their agency's Human Resources (HR) Department or referred to the United States (U.S.) Office of Personnel Management (OPM) concerning their rights under the act.

TIO PUBLIC

(c) The WHD enforces the FMLA for certain federal employees, including employees of the U.S. Postal Service (USPS) (*see* FOH 69e07(a)); the Postal Regulatory Commission; the Federal Aviation Administration (FAA) (*see* FOH 69e07(b)); and certain part-time federal employees, federal employees serving on temporary appointments of less than 1 year, certain employees of the judicial branch, a*nd* employees of other federal executive agencies if not covered by Title II of the FMLA.

(d) Questions concerning the application of Title I to federal employees will be referred through normal channels to the regional enforcement coordinators: FMLA and to the NO, OP, DEPP, FMLA-OLS Branch.

29 CFR 825.109

69b02 **Communication with complainant.**

(a) The role of WHD enforcement staff in any FMLA action is one of an objective fact-finder. The complaint taker must remain neutral and professional even if the FMLA complaint deals with sensitive emergency, medical, and/or family crises. Staff will advise the complainant concerning the general application of the FMLA and the regulations, and will otherwise advise the complainant throughout the complaint intake process consistent with instructions provided at FOH 51a01. WHD management staff will make the final determination concerning whether to accept the complaint, and will prioritize accepted FMLA complaints consistent with FOH 51a01(f).

(b) In addition to the information contained in FOH 51a01, WHD enforcement staff will advise each potential FMLA complainant of the following:

(1) The WHD does not act as the complainant's personal or legal representative in discussions with the employer. Rather, WHD compliance actions are conducted to determine if a violation of the FMLA has occurred. If a violation is substantiated through the fact-finding process, the WHD will request that the employer correct and remedy violations uncovered during its investigation.

(2) The FMLA provides a 2-year statute of limitations (3 years if the violation is willful). Enforcement staff will advise the complainant that filing an administrative complaint with the WHD does not stop the statute of limitations from running. Only filing a complaint in court to initiate a lawsuit stops the statute from running. *See* FOH 69c01.

(3) (b) (7)(E) [redacted]

(4) The complainant, unless a state employee, may be advised of the right to retain his or her own attorney and bring private legal action against the employer under section 107(a) of the act. State employees' private right of action is limited to certain specific situations. *See* FOH 69e00 concerning sovereign immunity of states.

(5) *Available remedies for FMLA violations*

The complainant will be advised that available relief that the WHD may seek will depend upon the facts of the case and may include:

a. Reinstatement or promotion

b. Lost wages and other compensation

c. Employment benefits

d. Actual monetary loss sustained as a result of the violation (*e.g.*, the cost of providing health care) up to a sum equal to 12 weeks of the employee's wages (26 weeks in a case involving leave to care for a covered servicemember)

Administrative remedies under the FMLA do not include additional payments for pain or suffering or other punitive damages. S*ee* FOH 69c11. Additionally, the WHD may, in appropriate circumstances, assess an additional amount as liquidated damages equal to the sum of the amount of damages assessed plus interest. *See* FOH 53c00(b).

29 USC 2617(a)(1)
29 CFR 825.400(c)

(6) *Mitigation requirements*

WHD enforcement staff will advise the complainant that he or she has a responsibility to mitigate economic losses sustained as the result of an alleged illegal termination. The complainant will be advised he or she should maintain and be prepared to provide to WHD staff documentation of an active search for other work and wages earned during the interim. *See* FOH 69c11(b).

(7) The WHD does not have the authority to compel the employer to provide a remedy or correct violations if the employer disagrees with the WHD investigation findings; only the courts have such authority. The DOL may, in certain cases, decide to bring a lawsuit in federal court against employers who refuse to correct violations identified by the WHD. However, not every case is suitable for litigation by the DOL. Note that the right of an employee to bring a private lawsuit terminates upon the filing of a lawsuit by the Secretary.

29 USC 2617(a)(4)

69b03 (b) (7)(E) [redacted]

[redacted]

[redacted]

69b04 (b) (7)(E) [redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]

  [redacted]
- [redacted]

  [redacted]
- [redacted]
  - [redacted]

    [redacted]

[redacted] (b) (7)(E) [redacted]

69b05 Investigation authority.

(a) Authority to investigate

The WHD has the same authority to investigate and gather data under the FMLA as provided under section 11(a) of the FLSA, including the authority to enter premises, inspect records, interview employees, and investigate such "facts, conditions, practices, or matters as [the Secretary] may deem necessary or appropriate to determine whether any person has violated any provision" of the act (*see* 29 USC 211(a)).

29 USC 2616(a)

(b) Subpoena authority

The WHD has the same authority to issue a subpoena under the FMLA as provided by section 9 of the FLSA. The Administrator of the WHD (Administrator) or regional administrator (RA) may issue an administrative subpoena in order to obtain information that is required to complete a thorough investigation and is unobtainable through other means. A subpoena may be issued where the WHI can demonstrate and has documented that the typical process for obtaining records and evidence has been exercised to no avail. *See* FOH 86b00.

29 USC 2616(d)

(c) Injunctive relief

(1) If WHD enforcement staff is unable to prevent an employer from violating the FMLA, including retaliating against its employees, the WHD has the authority under section 107(d) of the FMLA to obtain an injunction to prevent the employer from violating the law further and force the employer into compliance. Under these provisions, the district courts of the U.S. may issue an injunction to:

a. restrain violations of section 105 of the FMLA, including the restraint of any withholding of payment of wages, salary, benefits, or other compensation, plus interest; or

b. award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

29 USC 2617(d)

(2) As with subpoenas, in order for an injunction to be issued, the WHI must demonstrate through well-founded evidence that the employer refuses to come into compliance, despite reasonable efforts on the part of the WHD.

(3) In any circumstance in which an injunction will be sought, the WHI must, through appropriate channels, consult with the regional solicitor of Labor (RSOL).

(d) Types of investigations

Enforcement of the FMLA may be based on the existence of a complaint(s) or may be based on FMLA strategic initiatives. FMLA strategic initiatives will be developed and pursued consistent with standard protocols, and among other considerations, may be designed to resolve systemic compliance issues in a corporation or industry. *See* FOH 69c04.

TI
LIC
P
TFO

TI
LIC
P
TFO

69c INVESTIGATION PROCEDURES

69c00 General.

[redacted] (b) (7)(E) [redacted]

(b) If a complainant is not satisfied with WHD's determination(s) regarding the complaint, the complainant may retain his or her own attorney and bring private legal action against the employer under section 107(a) of the act. State employees have a right to private action in certain specific situations. *See* FOH 69e00 concerning sovereign immunity.

(1) The WHD cannot assist or participate in any such private legal action, and the documentary evidence obtained during a WHD compliance action will be disclosed to persons outside the government only pursuant to a request under the Freedom of Information Act, which excludes certain information contained in law enforcement files from being released to the public based upon proprietary, privacy, or confidentiality reasons.

(2) The WHD does not investigate employers solely to obtain information for use by an employee in a private lawsuit.

[redacted] (b) (7)(E) [redacted]

69c01 Statute of limitations.

(a) The FMLA provides a 2-year statute of limitations for civil litigation starting from the date of the last event constituting the alleged violation, or 3 years when the alleged violation is willful.

29 USC 2617(c)
29 CFR 825.400(b)

(b) (7)(E) [redacted]

69c02 <u>Complainant interview.</u>

(a) Signed interview statement

(1) In most FMLA compliance actions, the WHI must obtain a signed complainant interview statement. *See* FOH 69b00(c). (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

69c03 (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

- (b) (7)(E) [redacted]

69c04 (b) (7)(E) [redacted]

- [redacted]
  - [redacted]
  - [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

69c05 **Use of investigative and enforcement tools in FMLA compliance actions.**

(a) The WHD has the same authority to review, copy, or transcribe records in the course of an FMLA investigation as it does pursuant to section 11 of the FLSA. (b) (7)(E) [redacted]

[redacted]

69c06 (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

69c07 **Employer policy review.**

[redacted] (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

(c) Sufficiency of information

(b) (7)(E) [redacted]

about his or her rights and obligations under the FMLA. The employer may use the FMLA poster for distribution to new hires.

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]
- [redacted]
  - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]

(b) (7)(E)

69c08 **Records review.**

(a) (b) (7)(E)

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) Employers subject to the FMLA are required to make, keep, and preserve records pertaining to their obligations under the act in accordance with the recordkeeping requirements of section 11(c) of the FLSA and 29 CFR 825.

(1) Records are required to be kept for no less than 3 years and made available for inspection, copying, and transcription by the DOL upon request.

(2) Records kept by employers with FMLA-eligible employees must contain the following:

a. Basic payroll and identifying employee data

b. Dates FMLA leave is taken by employees

c. Hours of FMLA leave if leave is taken in increments of less than a day

d. Copies of FMLA notices provided by an employee to his or her employer, and by an employer to its employees

e. Any documents describing employee benefits or employer policies and practices regarding the taking of paid or unpaid leave

f. Premium payments for employee benefits

g. Records of any dispute between the employer and an employee regarding the designation of leave as FMLA leave

(3) Covered employers with no eligible employees need to only maintain the basic payroll and identifying employee data.

(4) Covered employers in a joint employment situation must keep all the records in FOH 69c08(b)(2) above with respect to primary employees and basic payroll and identifying employee data with respect to any secondary employees.

(5) Covered employers are required to maintain records and documents relating to medical certifications and recertifications of employees or their family members as confidential medical records, separate from the usual personnel files, pursuant to 29 CFR 825.500(g).

29 CFR 825.500
FOH 39k

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]

69c09 **Employee interviews.**

- (b) (7)(E) [redacted]
- [redacted]
  - [redacted]
  - [redacted]

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted] reviewers and the RSOL determine which employees will be the best witnesses.

69c10 **FMLA interference and retaliation.**

An employer is prohibited from interfering with, restraining, or denying an employee's exercise of rights or attempt to exercise rights under the FMLA. An employer is also prohibited from discriminating against an employee or prospective employee for exercising or attempting to exercise his or her rights under the FMLA. Further, an employer is prohibited from discharging or in any other manner discriminating against any person, whether or not an employee, for opposing any unlawful practice under this law. Any person, whether or not an employer, is prohibited from discharging or in any other manner discriminating against any person, whether or not an employee, for filing a charge or instituting or causing to be instituted a proceeding related to the FMLA, for giving or being about to give information in connection with an inquiry or proceeding relating to a right under the FMLA, or for testifying or being about to testify in any inquiry or proceeding relating to a right under the FMLA.

29 USC 2615
29 CFR 825.220(a)

(a) Interfering with the exercise of an employee's rights includes an employer's refusal to grant FMLA leave, discouraging an employee from taking FMLA leave, or manipulation by an employer to avoid its FMLA responsibilities (*e.g.*, changing essential functions of the job in order to preclude the taking of leave).

(b) Discrimination includes discriminating or retaliating against employees or prospective employees who have used or have attempted to use FMLA leave.

(1) Discrimination may occur when FMLA leave takers are treated less generously than employees who have not taken FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits, besides health insurance benefits, those benefits must be provided to an employee on unpaid FMLA leave.

(2) Further, an employer may not use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, nor may FMLA leave be counted under no fault attendance policies.

29 CFR 825.220(b) -(c)

(b) (7)(E)

(c) Any violations of the FMLA or the DOL's regulations constitute interfering with, restraining, or denying the exercise of rights provided by the FMLA.

29 CFR 825.220(b)

(d) Employers may not induce employees to waive their prospective rights under the FMLA, nor may employees voluntarily waive their prospective rights under the act. For example, employees, or their collective bargaining representative, may not trade off the right to take FMLA leave against some other benefit offered by the employer, such as requiring an employee to take a light duty position in lieu of remaining on FMLA leave.

(1) However, this does not prevent an employee's voluntary and uncoerced acceptance of a light duty assignment while recovering from a serious health condition. Such an acceptance cannot be a condition of employment and does not constitute a waiver of the employee's future rights, including the right to be restored to the same or equivalent position the employee held when the employee's FMLA leave began. However, the employee's right to restoration ceases at the end of the applicable 12-month FMLA leave year. *See* FOH 39j07.

(2) This also does not prevent the settlement or release of FMLA claims by employees based on past employer conduct. Such a settlement does not require approval of the DOL or a court.

29 CFR 825.220(d)

(e) However, as stated in FOH 39j06, the FMLA does not entitle an employee to reinstatement or to any greater right, benefit, or position of employment than if the employee had been continuously employed during the FMLA leave period. If an employer asserts that the employee would not otherwise have been employed at the time reinstatement is requested, it must be able to substantiate such assertion in order to legally deny restoration.

29 CFR 825.216

69c11 **<u>Computing back wages and determining remedies.</u>**

(a) Persons who have been denied their legal rights under the FMLA are generally entitled to the type of remedy or relief that makes them whole. As the term implies, the "make whole" remedy is intended to restore the person who was the subject of the violation to where the person would have been if the violation had never occurred. Remedies may include both damages (*i.e.*, lost wages and certain monetary losses) and equitable relief (*i.e.*, reinstatement and other remedies such as withdrawal of adverse actions). Additionally, the WHD may, in appropriate circumstances, assess an additional amount as liquidated damages equal to the sum of the amount of damages assessed plus interest. *See* FOH 53c00(b).

29 USC 2617(a)(1)

(1) Damages are subject to mitigation. *See* FOH 69c11(b). Damages may include:

a. Wages, salary, or other compensation the employee would have received if the violation had never occurred, such as regular wages earned each pay period including overtime, commissions, tips, bonuses, raises, lodging, meals, shift differentials, and holiday pay.

Employment benefits, defined in 29 CFR 825.102, as all benefits provided or made available to employees by employers, including group life insurance,

health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions.

b. In cases where wages, salary, employment benefits, or other compensation have *not* been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation. These include out of pocket expenses, such as the cost of providing care to a family member, for up to a sum equal to 12 weeks of wages or salary for the employee, or 26 weeks in cases concerning leave taken to care for a covered servicemember.

c. Front pay may be sought where the employment relationship is so poisoned that no reasonable person could return to work (*see* FOH 69c10(b)(4) regarding constructive discharge).

Front pay may also be requested in lieu of reinstatement where an employer wishes to avoid reinstatement and the employee agrees or the reverse. Severance pay is a form of front pay.

Interest calculated at the prevailing rate and liquidated damages may be obtained in certain cases. The court may award, or the RSOL may negotiate, interest on monetary remedies or an additional amount equal to the monetary damages in liquidated damages. WHIs do not collect interest in an administrative settlement other than interest paid on monies paid on an installment basis pursuant to FOH 53c15. Liquidated damages are subject to reductions if the employer can prove it acted in good faith and had a reasonable belief that its actions were lawful. Consultation with the RSOL is required prior to the assessment of liquidated damages in FMLA compliance actions.

(2) *Equitable relief*, as appropriate, may include:

a. <u>Reinstatement</u>

An employee who was illegally terminated for exercising rights under the FMLA is entitled to be restored to the same position that the employee would have occupied, with appropriate seniority, had the termination never taken place, or to an equivalent position (*i.e.*, one that is virtually identical) with equivalent benefits, pay, and other terms and conditions of employment. An employee is not entitled to reinstatement to the same or equivalent position if:

1. The employee is no longer capable of performing an essential function of the job because of a physical or mental condition. The Americans with Disabilities Act (ADA) may govern the employer's obligations. *See* 29 CFR 825.702.

2. The employee refuses a valid offer of reinstatement to the same or an equivalent position, unless the workplace environment is such that reinstatement of the complainant is not reasonably possible. If reinstatement is not reasonably possible because of the workplace

environment, front pay in lieu of reinstatement may be an appropriate remedy.

3. For any reason unrelated to the employee's FMLA leave, the employee's position has been eliminated, made subject to layoff, or no longer exists at the end of the leave, *and* the employee would not have been employed in another capacity had he or she not taken the leave. If the employer eliminates the position in response to the employee's leave, the reinstatement right to the same or equivalent position continues.

29 CFR 825.216

b. Employment

If the employee's position no longer exists for reasons unrelated to FMLA leave, he or she must be offered any severance package or opportunity for employment in another position as is offered to similarly-situated employees. Applicable collective bargaining agreements (CBAs) and/or seniority provisions should be used as guidance in determining the employee's entitlement.

c. Automatic increases in wages

The employee is entitled to any lost wages resulting from the employer failing to enact automatic wage increases (*e.g.*, anniversary date step increases) as a result of FMLA leave.

d. Other remedies to be considered when resolving FMLA cases may include, but are not limited to:

1. Withdrawal of any adverse action (*e.g.*, points, suspension, etc.) incurred because of a no fault attendance policy

2. Elimination from the employee's records of all references to the unlawful adverse action(s)

3. Restoration of all benefits that had accrued prior to the start of the leave. This includes benefits such as vacation and sick leave (less any leave used for the FMLA) and seniority (note, however, that seniority does not accrue during periods of unpaid FMLA leave unless seniority accrues to employees on other equivalent types of unpaid leave)

4. Provision of any increases in benefits occurring while the employee was on leave

5. Payment of a bonus or other payment based on the achievement of a specified goal, such as hours worked, product sold, or perfect attendance, to the extent employees on equivalent leave status are paid the bonus (*see* FOH 39j02(b))

6. Opportunity to train or recertify if restoration to the same or equivalent position requires it

7. A neutral reference from the employer for purposes of future employment

(b) Mitigation of damages

Employees have a responsibility to mitigate economic losses sustained as the result of an alleged illegal termination. The complainant will be expected to provide to the WHD documentation of an active search for other work and the wages earned during the interim. The amount of monetary damages due an employee will be reduced by the earnings of the employee subsequent to his or her termination. The case file must include documentation concerning the efforts made by the employee to obtain other work and documentation of earnings used to mitigate the damages. The WHI must consider the following in determining mitigation:

(1) Wages earned by the employee since the termination. If a complainant is unable to secure employment for a period of time but subsequently obtains a position earning more than in his or her prior employment, lost wages may be computed on a quarterly or other basis in order to make the complainant whole.

(2) An employee's rejection of a valid offer of reinstatement to the entitled position. If the employee rejects such an offer, the further accrual of back wage liability ceases.

(3) Any change in the employee's availability status. Liability may cease to accrue at any point when the employee would have stopped working for the employer had the violation not occurred.

(4) Damages due are not mitigated by the value of unemployment insurance payments. Unemployment payments are not deducted from back wages owed by an employer. The WHI will advise the employee that he or she may be liable for repaying the amount of any such payments received once a settlement is achieved. Where the employer insists on deduction of unemployment payments, consultation with the RSOL through appropriate channels is required. As with all developments concerning remedies, the WHI will advise the employee of the employer's offer of repayment and that it does not include amounts deducted for these reasons.

(c) Bankruptcy

WHD enforcement staff conducting FMLA compliance actions will follow FOH 52a06 procedures upon learning that an FMLA employer has filed a bankruptcy petition, including that the WHI will promptly bring the matter to the attention of the DD and/or ADD. The DD and/or ADD will consult with the RSOL and take such action as is appropriate. Certain remedies under the FMLA, such as job restoration, may not be affected by the automatic stay provisions of the bankruptcy code; however, consultation with the RSOL is required in order for the investigation to proceed. *See* FOH 52a06.

69c12 **Disposition of findings and/or final conference.**

(a) (b) (7)(E) [redacted]

(b) Under the FMLA, as under other acts enforced by the WHD, the primary goal is achieving future compliance. In all compliance actions, it is imperative that the WHI discuss future compliance with the employer and list in the narrative all actions the employer will take to come into compliance.

(c) (b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

69c14 **Tolling agreement.**

(b) (7)(E)

(b) Tolling agreements are generally signed by the RA or other high-level regional official after appropriate consultation with the RSOL.

(b) (7)(E)

(a) (b) (7)(E)

(b) (7)(E)

(b) (7)(E) [redacted]

- [redacted]
- [redacted]

(b) (7)(E) [redacted]

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]

69e FMLA POLICY ISSUES

69e00 Sovereign immunity of states.

(a) The Eleventh Amendment to the Constitution provides states with sovereign immunity against most lawsuits from private persons. However, the Supreme Court held in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) that state employees are not barred by the Eleventh Amendment from bringing their own actions in court to enforce FMLA rights concerning leave to care for sick family members. The court reasoned that FMLA rights to leave for family care are based on remedying and preventing patterns of gender discrimination in the employment context, which is a valid basis for abrogating states' Eleventh Amendment immunity.

(b) In contrast, the Supreme Court held in *Coleman v. Court of Appeals of Maryland*, 132 U.S. 1327 (2012) that the Eleventh Amendment bars state employees from recovering money damages from states for FMLA violations concerning the self-care provisions of the FMLA because the right to FMLA leave for an employee's own serious health condition is not based on remedying and preventing such patterns of gender discrimination. The Supreme Court in *Coleman* addressed only a state employee's right to seek money damages in a private action against a state; it did not address a state employee's right to seek equitable (*i.e.*, injunctive) relief. A state employee may, in certain circumstances, be able to pursue a private action seeking equitable relief for FMLA violations relating to the employee's own serious health condition.

(c) Therefore, when a state employee files an FMLA complaint, the WHI must examine the case in light of the type of leave at issue.

(1) If the complaint involves the exercise of family leave (*e.g.*, leave for the birth or placement for adoption or foster care of a child, or to care for a qualifying family member with a serious health condition) or military-related leave (*e.g.*, qualifying exigency leave or military caregiver leave), the employee is free to bring his or her own lawsuit and may be advised that he or she has a section 107(a) right to bring a private action.

(2) If a state employee's FMLA complaint involves leave for the employee's own serious health condition (*i.e.*, leave for self-care purposes), only the Secretary can file suit against the state for back pay and other monetary damages. Therefore, WHD enforcement staff will not advise such employees that they have section 107(a) rights. *See* Wage and Hour Memorandum No. 2012-1.

(d) The DOL can bring FMLA suits against states regarding any type of covered leave and for all the remedies available under the act (*i.e.*, monetary damages and equitable relief).

(e) (b) (7)(E) [redacted]

69e01 Native American tribes.

(a) Because the FMLA is a statute of broad applicability that applies to both the public and private sectors, and there is nothing in either the statute or its legislative history that provides

an exemption for Native American tribes, the WHD may enforce the FMLA with tribal employers in appropriate circumstances.

(b) There are exceptions to this general rule when:

(1) the application of the law to a tribe touches on "exclusive rights of self-governance in purely intramural matters," and

(2) the application of the law to a tribe would "abrogate rights guaranteed by Indian treaties."

The WHD will review complaints on a case-by-case basis to avoid intrusion into governmental functions that are integral to tribal sovereignty.

60 FR 2179, 2181

69e02 **Religious institutions as employers.**

(a) There is nothing in the legislation or the legislative history to suggest that Congress intended religious institutions to be excluded from coverage under the FMLA. Because of the broad definition of "affecting commerce" (*see* FOH 39b00), any employer with 50 or more employees will be deemed to be an employer within the meaning of the FMLA.

(b) There may be some cases, however, where the First Amendment affects statutory coverage of an otherwise covered religious institution. Because of the principles of law involved, WHD enforcement staff will seek guidance from the regional enforcement coordinator: FMLA and the NO, OP, DEPP, FMLA-OLS Branch, through channels, where questions of FMLA coverage of a religious institution arise.

WHD Non-Administrator Opinion Letter FMLA 1995-76

69e03 **Violations concerning designation of leave issues.**

(a) Generally, complaints involving only designation issues may not be suitable for action by the WHD in light of the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). Under this decision, the FMLA may provide a remedy for designation complaints only where the employee is able to show that the employer's failure to designate qualifying leave as FMLA leave prejudiced the employee in a specific way.

(1) (b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

- (b) (7)(E) [redacted]

- [redacted]

69e04 **Leave year issues.**

(a) Employers may choose the leave year for FMLA leave for reasons other than military caregiver leave.

(b) Under either the calendar leave year or any fixed 12-month leave year, such as a fiscal year, an employee may take 12 workweeks of FMLA leave at the end of one leave year, and if he or she continues to meet the FMLA eligibility criteria, take another 12 workweeks of FMLA leave at the beginning of the second leave year. Such stacking of leave is permissible under the FMLA in these circumstances.

(c) Employers are required to notify an employee of the type of leave year the employer uses in the rights and responsibilities notice (*see* 29 CFR 825.300(c)(1)(i)).

(d) If the employer fails to select a leave year option, the leave year option that is most beneficial to the employee will be used. The WHI should be aware of the potential for denial of leave violations where the leave year options are not accurately applied.

29 CFR 825.200
FOH 39e00(b)

69e05 **Arbitration.**

(a) The DOL has authority to proceed with an investigation and litigation on behalf of employees even when the employee has agreed to arbitrate employment disputes with his or her employer (*see EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)). However, the DOL must balance this authority with what the Supreme Court has called a "liberal federal policy favoring arbitration agreements" (*see Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)). Deferral to arbitration may be appropriate where:

(1) the arbitration agreement covers the same statutory claim for relief that would be brought by the DOL,

(2) the arbitration of a different matter (*e.g.*, arbitration of a workers' compensation matter) would likely resolve the factual dispute in a way that would dispose of the FMLA claim,

(3) the complaint involves an individual claim for relief, or

(4) the complaint can be more efficiently and expeditiously arbitrated.

WHD Opinion Letter FMLA 2003-1-A

(b) (b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

(d) Binding arbitration does not stop the FMLA's statute of limitations. (b) (7)(E) [redacted]

69e06 **<u>Complaints involving an adult son or daughter.</u>**

(a) Complaints involving the need to care for a son or daughter, who is 18 or older and has a serious health condition, must be handled with special care. To qualify for leave, the adult son or daughter must have an existing mental or physical disability that renders him or her incapable of self-care at the time FMLA leave is to begin, as well as a qualifying serious health condition, which requires the employee to provide care. The serious health condition may or may not be the disability. *See* FOH 39d03(d)(2).

73 FR 67934 and 73 FR 67951 -67952
WHD Non-Administrator Opinion Letter FMLA 2003-2

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

[redacted]

(b) (7)(E)

(c) Leave to care for a son or daughter for military caregiver and qualifying exigency leave purposes is not limited to children under the age of 18. *See* FOH 39d08 -09. An employee who is the parent of a current servicemember or veteran and who has been denied military caregiver FMLA leave to care for his or her son or daughter with disabilities may qualify for non-military FMLA leave, if the employee's child qualifies as an adult son or daughter under the FMLA (*i.e.*, 18 or older and incapable of self-care because of a mental or physical disability), and the child's injury qualifies as a serious health condition.

(b) (7)(E)

Administrator Interpretations Letter FMLA 2013-1

69e07 **<u>Special issues with USPS and FAA complaints.</u>**

(a) **USPS complaints**

(1) USPS employees are subject to Title I of the FMLA and are under the scope of the WHD's enforcement authority. Under no circumstances should a USPS employee be referred to the OPM concerning FMLA issues.

(b) (7)(E)

(b) (7)(E)

(b) (7)(E) [redacted]

- [redacted] (b) (7)(E) [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]

69e08 **Waiver of FMLA rights and/or DOL approval of private FMLA settlements.**

(a) Employees are prohibited from waiving their prospective rights under the FMLA. This does not preclude an employer from offering and an employee from accepting a settlement intended to address past claims under the FMLA. *See* 29 CFR 825.220(d). WHD enforcement staff will not review or offer an opinion on any employer settlement offer. *See* FOH 69c15.

(b) (b) (7)(E) [redacted]

69e09 **State as a single employer.**

(a) Section 101(4) of the FMLA defines the term "employer" to include any "public agency" as defined in section 3(x) of the FLSA. Section 3(x) of the FLSA defines "public agency" to

include the government of a state. Under both the FLSA and 29 CFR 825.108(c), a state is viewed as a single employer.

(b) Although the act does not mention the state as a single employer for other purposes, such as leave usage, it is incongruous that a state be considered a single employer for one purpose of the act, and not a single employer for another part of the act.

(c) Where two state agencies are part of the same state government, as evidenced by the census of governments, an employee who transfers from one agency to another agency within the state will have his or her employment considered one continuous employment for the purposes of determining both eligibility and leave usage under the FMLA.

69e10 **Medical certification issues.**

(a) Medical certification in a new leave year

(1) Except in cases of military caregiver leave or qualifying exigency leave, any time an employee's need for FMLA leave extends beyond the end of the employer's applicable 12-month leave year, the employer may request a new medical certification in conjunction with the employee's first FMLA absence in the new 12-month leave period.

(2) The employer may contact the health care provider for purposes of clarifying and/or authenticating the new medical certification. The employer may request a second and third, as appropriate, opinion if it has reason to doubt the validity of the new medical certification. The employer may request recertification for subsequent absences in the new leave year, subject to the limitations at 29 CFR 825.308. *See* 29 CFR 825.200(b).

29 CFR 825.305(e)
WHD Opinion Letter FMLA 2005-2-A

(b) Information on medical certification forms

(1) The information included on the medical certification form for leave for an employee's own serious health condition or a family member's serious health condition is sufficient, if it includes all of the information required by section 103(b) of the FMLA and 29 CFR 825.306 that is pertinent to the leave requested.

a. If the serious health condition involves continuing treatment by a health care provider, the certification form may contain information about a regimen of continuing treatment. A regimen of continuing treatment includes office visits to determine if a serious health condition exists and evaluate the condition, as well as courses of prescription medicines or therapy requiring special equipment. It does not include routine physicals, eye, or dental examinations, over-the-counter medications, or instructions for bed rest, drinking fluids, exercise, or similar activities that could be initiated without a visit to a health care provider.

b. An employer may request a general description of the regimen of continuing treatment that may include an indication of whether medication has been prescribed rather than use of over-the-counter medication.

29 CFR 825.113

(2) If the medical certification confirms a period of incapacity of more than 3 consecutive, full days and includes two or more visits to the health provider within 30 days of the first day of incapacity, no additional regimen of treatment information need be provided for the form to be sufficient.

29 CFR 825.115(a)

(3) A medical certification for a chronic serious health conditions must provide sufficient information to confirm that the patient requires periodic visits for treatment at least twice per year due to the condition. The certification of a chronic condition may, but is not required to, contain information concerning a treatment regimen (*e.g.*, prescription medication information).

29 CFR 825.115(c)

(4) An employer may choose to use the DOL's two optional forms (*see* WH-380-E and WH-380-F) for obtaining medical certification of a serious health condition, or may develop its own forms, but may not make them mandatory and refuse to accept certification in any other format. An employer may not request any additional information beyond that specified by the FMLA and its regulations. Although the employer may adopt a particular form as standard, if an employee submits an otherwise sufficient certification, such as a completed WH-380-E or WH-380-F, or a form developed by the employee's union that contains all of the required information, the employer may not reject the medical certification as insufficient. *See* FOH 39h01.

29 CFR 825.306(b)
73 FR 67934, 68015

(c) Mandatory requirement of second or third opinions

(1) Where an employer questions the validity of the initial medical certification and denies leave without obtaining a second or third opinion, the employer must be able to substantiate reasonable cause for denial of the FMLA leave. The validity of the denial will be determined on a case-by-case basis.

(2) Where leave is denied based on the lack of a second opinion, or based on a second opinion that differs from an initial certification, and the employer fails to obtain a third opinion, the employer must be able to substantiate the denial based on the facts of the situation. Complaints involving this issue may be investigated to determine if the employer can substantiate the validity of the denial of leave.

29 CFR 825.307

(d) Recertification when frequency and duration are at issue

In the case of leave needed intermittently for unforeseen leave, a sufficient certification must include the health care provider's estimate of the frequency and duration of periods of incapacity due to the serious health condition. *See* FOH 39h01(a)(3). The employer may require recertification less than 30 days after a previous certification has been submitted if the circumstances described by the previous certification have changed significantly, including significant changes in the frequency and duration of leave. The employer also may provide a record of the employee's absence pattern and ask the health care provider if it is consistent with the serious health condition. The employer may not require recertification for each absence in excess of the estimate provided on the medical certification. *See* FOH 39h01(g).

29 CFR 825.308

69e11 <u>Return to work and/or fitness for duty.</u>

(a) Complaints dealing with return-to-work issues under the FMLA *(i.e.*, fitness-for-duty tests) must be considered in light of section 104(a)(4) of the act. This section of the FMLA permits an employer, as a condition of job restoration, to have a uniformly applied practice or policy that requires employees returning from FMLA leave for their own serious health condition to provide certification from the employee's health care provider that the employee is able to resume work.

(b) This provision does not supersede a valid state or local law or a CBA that governs the return to work of the employee, which may apply to both continuous and intermittent FMLA leaves.

(c) An employer is not entitled to a fitness-for-duty certification for each absence taken on an intermittent or reduced leave schedule basis. However, an employer may request a fitness-for-duty certification for intermittent absences, up to once every 30 days, where reasonable safety concerns exist regarding the employee's ability to perform his or her job duties. "Reasonable safety concerns" means a reasonable belief of *significant* risk of harm to the employee or others.

29 CFR 825.312

69e12 <u>Airline flight crew employees.</u>

(a) Airline flight crew employees include pilots, copilots, flight attendants, and flight engineers. They do not include other employees of the airlines, such as those in positions in customer service and baggage departments. Note, however, that the normal FMLA eligibility and calculation of leave rules apply to such employees. *See* FOH 39m.

(b) Special eligibility requirements

In order to determine if an airline flight crew member meets the special hours of service requirement, in addition to meeting the normal FMLA eligibility criteria, the WHI must examine both employee and employer records that show:

(1) the employee's applicable month guarantee,

(2) whether the employee worked or was paid for not less than 60 percent of the applicable month guarantee in the previous 12 months, and

(3) whether the employee worked or was paid for no less than 504 hours in the previous 12 months.

a. Determining the hours an employee has worked is made by examining the employee's duty hours. Duty hours include the *flight* or *block* hours (*i.e.*, in-flight time), as well as additional time before and after the flight, as determined by employer's policy or applicable CBA. The principles for determining hours worked under the FLSA do not apply for determining airline flight crew employees' eligibility.

b. Additionally, to the extent that airline flight crew employees are paid for time spent in training, the time will count toward the airline flight crew employee's hours of service requirement.

78 FR 8834, 8862
29 CFR 825.801

(c) Calculation of leave

(1) Airline flight crew employees are entitled to *72* days of FMLA leave during a 12-month leave period (*156* days of FMLA military caregiver leave in a single 12-month leave period). *See* FOH 39m02(b). WHIs must ensure through examination of records that the employer did not designate leave in increments of greater than 1 day, unless it was necessary to comport with the leave taker's needs.

(2) The physical impossibility rule may also apply to airline flight crew employees. *See* 29 CFR 825.802(c).

(3) If an employer chooses to restore an employee to work on the same day during which intermittent or reduced schedule FMLA leave is taken, the employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken.

29 CFR 825.802
78 FR 8834 and 78 FR 8865

(d) Recordkeeping requirements

In addition to the regular FMLA recordkeeping requirements, employers of eligible airline flight crew employees are required to make and keep, and WHIs must verify:

(1) documents containing information specifying the applicable monthly guarantee with respect to each category of employee to whom such guarantee applies, including copies of any relevant CBAs or employer's policy documents; and

(2) records of hours worked and hours paid. *See* FOH 39m03.

29 CFR 825.803

69e13 Military family leave provisions.

(a) Qualifying exigency leave

(1) Qualifying exigency leave is calculated in the same manner as FMLA leave for any other qualifying reason except military caregiver leave.

(2) In order to determine if the leave in question is a qualifying exigency for which an employee can take leave, the WHI should collect information about and evidence of the alleged exigency.

(3) For example, if an employee takes leave for events for a military informational briefing, a brochure or pamphlet from these events would serve as evidence of the qualifying exigency.

(4) A qualifying exigency related to childcare must be for one or more of the reasons specified in 29 CFR 825.126(b)(3). Childcare that is regular and routine is not a protected qualifying exigency leave reason. For example, if childcare is needed for school holidays or regularly scheduled teacher service days, it would *not* qualify as a qualifying exigency for which an employee could take FMLA leave.

(5) A qualifying exigency related to parental leave must be for one or more of the reasons specified in 29 CFR 825.126(b)(8). Parental care that is regular and routine is not a protected qualifying exigency leave reason. For example, if a parent requires daily companionship, leave sought for that reason would not qualify as a qualifying exigency for which an employee could take FMLA leave.

29 CFR 825.126

(b) Military caregiver leave

(1) *12-month leave year*

a. Military caregiver leave is based on a single 12-month leave year that is determined by the first date an employee takes leave to care for his or her ill or injured family member and ends 12 months from that date. This single 12-month period may overlap with the method for determining the 12-month period that an employer uses for FMLA leave for all other qualifying reasons, but may not align exactly with that 12-month leave period.

b. Therefore, if an employee is taking both military caregiver and FMLA leave for a reason other than military caregiver leave, an employer will need to keep, and the WHI will need to examine, records of both leave years applicable to that employee.

c. An employee who takes long periods of FMLA military caregiver leave may subsequently fail to meet the FMLA hours of service eligibility requirement for future leave needed for other FMLA-qualifying reasons.

(2) *Next of kin*

a. The next of kin must be a blood relative of the covered servicemember, but is not the covered servicemember's spouse, parent, son, or daughter.

b. The covered servicemember may specifically designate in writing a blood relative as his or her nearest blood relative for purposes of FMLA military caregiver leave. This is not the same as the military CADRE designation.

c. An employer may require documentation of relationship consistent with 29 CFR 825.122(k) to establish that an employee is a covered servicemember's next of kin. If the employer questions the next of kin relationship, additional fact-finding analysis may be required. However, absent an employer's inquiry into the validity of the next of kin relationship, the WHD will not challenge that relationship.

(3) *Military caregiver leave for veterans*

a. Type of discharge

To be a covered servicemember, a veteran must have been discharged or released under conditions other than dishonorable. The veteran's discharge papers (*see* DD Form 214: Certificate of Release or Discharge from Active Duty (DD Form 214)) or other record of separation should include information relevant to the type of discharge. The WHI may address questions concerning the type of discharge, through normal channels, to the regional enforcement coordinator: FMLA who will consult with the NO, OP, DEPP, FMLA-OLS Branch as necessary.

b. 5-year period

1. An employee may only take military caregiver leave for a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness *and* who was a member of the U.S. Armed Forces, including a member of the National Guard or Reserve, at any time during the period of 5 years preceding the date on which the employee first takes leave to care for the veteran.

2. The employee must commence the leave within this 5-year period. So long as the leave commences within the 5-year period, the employee may continue the leave for the duration of the single 12-month period, even if it extends past the 5-year period (*see* FOH 39d09(a)(1)b.).

3. The date of discharge is essential in determining whether a veteran is a covered veteran for FMLA leave purposes. Most members of the military who are discharged will receive DD Form 214, which may serve as verification of the veteran's discharge date and type of discharge.

4. The time between the enactment of the National Defense Authorization Act for Fiscal Year 2010 on 10/28/2009 and the effective date of FMLA regulations on 03/08/2013 does not count toward the 5-year period to care for a covered veteran (*see* FOH 39d09(a)(1)b.).

5. WHD enforcement staff will need to determine if the first instance of leave in question occurred within the 5-year period using the appropriate method described in FOH 39d09(a)(1)b.

(4) *Second and third opinions and recertifications*

a. An employer may not request a second or third opinion on a certification for military caregiver leave unless the original certification is provided by an FMLA-approved, non-military affiliated health care provider.

b. Recertifications are not permitted for military caregiver leave, regardless of the health care provider certifying the leave.

FOH 39h07(f).

69f FMLA POSTING REQUIREMENTS AND CMPS FOR WILLFUL VIOLATIONS

69f00 FMLA posting requirements.

(a) Every employer subject to the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the act's provisions and providing information concerning the procedures for filing complaints of violations of the act with the WHD.

29 CFR 825.300(a)

(b) The notice must be posted prominently where it can be readily seen by employees and applicants for employment, but such posting may be electronic where it otherwise meets these requirements. If a significant portion of the workers are not literate in English, the notice must be posted in a language in which the workers are literate.

29 CFR 825.300(a)

(c) The WHD will assess a willful violation in circumstances generally following the guidance provided in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (*e.g.*, if the employer was previously advised by a responsible official of the WHD of the posting requirement, was given a copy of the notice, and failed to post it (*see* FOH 52f14(b)(2)). (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

69f01 FMLA CMPs for willful violations of posting requirements.

(a) (b) (7)(E) [redacted]

29 CFR 825.402

(b) Employers may appeal these assessments by following the procedures in 29 CFR 825.403.

(c) (b) (7)(E) [redacted]

69g INTERACTION WITH FEDERAL OR STATE LAWS

69g00 Consolidated Omnibus Budget Reconciliation Act of 1986.

(a) The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) amended the ERISA. The COBRA provides that terminated employees or those employees who would otherwise lose health care coverage because of reduced work hours may be able to continue group health coverage for themselves and their families for limited periods of time.

(1) COBRA continuation coverage laws are administered by several agencies. The DOL's Employment Benefits Security Administration (EBSA) and the Department of the Treasury's Internal Revenue Service share jurisdiction over private-sector group health plans.

(2) The Department of Health and Human Services (HHS) administers the continuation coverage law as it affects public-sector health plans. The Centers for Medicare and Medicaid Services of the HHS offers information about COBRA provisions for public-sector employees.

(3) Questions from the public concerning the COBRA should be directed to the EBSA.

(b) As noted in the FMLA's legislative history, the taking of FMLA leave is not a qualifying event triggering coverage under the COBRA. Neither is the discontinuation of health coverage due to an employee's failure to pay his or her share of the health insurance premium. However, the COBRA may be applicable when it becomes known that an employee is not returning to employment, and therefore ceases to be entitled to FMLA protections.

S. REP. NO. 103-3, at 32 (1993)
H.R. REP. NO. 103-8, at 44 (1993)

69g01 USERRA and FMLA eligibility requirements.

(a) Returning servicemembers have rights under the USERRA, enforced by DOL's Veterans' Employment and Training Service (VETS). The USERRA requires that returning servicemembers are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed.

(1) Under the USERRA, a returning servicemember would be eligible for FMLA leave if the months and hours that he or she would have worked for the civilian employer during the period of military service, combined with the months employed and the hours actually worked, meet the FMLA eligibility threshold of 12 months and 1,250 hours of service with the employer.

(2) For example, an employee who normally works a 40-hour week leaves civilian employment on 11/05/2010 to serve a tour of duty, and is re-employed by the same civilian employer on 06/10/2011. On 07/01/2011, the employee begins FMLA leave, at which time the employee has only 840 hours of service for the civilian employer in the 12 months prior to the leave (18 weeks prior to military service and 3 weeks following re-employment at 40 hours per week). If the employee is otherwise eligible for FMLA leave, the 1,240 hours that the employee would have worked but

for his or her tour of duty (31 weeks at 40 hours per week) will be added to the 840 hours of service, for a total of 2,080 hours for purposes of determining FMLA eligibility.

(b) WHIs may use guidance available on the VETS website (www.dol.gov/vets) or the online DOL USERRA compliance assistance page (www.dol.gov/compliance/laws/comp-userra.htm) for reference.

(b) (7)(E)

69g02 Impact of the Health Insurance Portability and Accountability Act (HIPAA) on FMLA enforcement.

(a) HHS regulations

(1) Regulations issued by the HHS pursuant to the HIPAA can be found at 45 CFR 160 and 45 CFR 164. Information on the law can be found at the HHS' website (www.hhs.gov/ocr/hipaa/).

(2) The HIPAA's privacy rule places restrictions on the use and disclosure of an individual's protected health information (PHI) by covered entities. Unless use or disclosure of PHI is specifically permitted or required by the privacy rule, the individual's authorization is required.

(3) Employers generally are *not* covered entities under the HIPAA unless they are self-insured for employee health benefits or have in-house medical providers who engage

in covered transactions. Employment records, even of covered entities, are excluded from the definition of PHI and are not subject to the privacy rule. Covered entities include:

a. Group health plans

b. Health insurance issuers and issuers of long-term care policies

c. Health care clearinghouses that convert electronic health data for other firms

d. Health care providers, such as doctors, if they engage in electronic transactions to carry out health care-related financial and administrative activities (*e.g.* submission of claim or payment information)

(b) Transfer of PHI from employee to employer

The transmission of health information via an FMLA medical certification or other document from the health care provider to the patient and/or employee, and the subsequent transmission of the information from the employee to his or her employer are not covered by the HIPAA privacy rule.

(c) Transfer of PHI between third parties

(1) The transmission of PHI from a HIPAA-covered health care provider to an employer is covered under the privacy rule, and requires an authorization from the patient and/or employee to the health care provider. This may occur when second and third opinions are required, or for the release of authentication and/or clarification information to the employer. The HHS defines the necessary elements in the individual authorization, not the WHD.

(2) If an employee does not provide the required HIPPA authorization when second and third opinions are required, or for the release of authentication and/or clarification information to the employer, the employee will have failed to meet his or her FMLA medical certification obligations, and the leave will not be FMLA-protected leave.

29 CFR 825.307

(b) (7)(E)

[redacted]

(e) Questions concerning the impact of the HIPAA privacy rule should be directed through appropriate channels to the NO, OP, DEPP, FMLA-OLS Branch.

69g03 **State family and medical leave laws.**

(a) Currently, 11 states (California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin) and the District of Columbia have enacted family and medical leave statutes. Pages comparing the key provisions of the federal FMLA to state family leave laws are accessible from the WHD internet website.

(b) Covered employers must comply with the federal or state provision that provides the greater benefit to their employees (*see* 29 USC 2651(b)). However, the DOL will not enforce state family and medical leave laws, and complainants with issues under these laws should be referred to the appropriate state agency (*see* FOH 39n00).

69h TEMPLATES AND RESOURCES

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)
[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

Chapter 71

ENFORCEMENT OF H-1B LABOR CONDITION APPLICATION

Table of Contents

71a INTRODUCTION

71a00 Background and statutory standards: division of responsibilities.
71a01 Labor Condition Application (LCA).
71a02 Coverage.

71b COMPLAINT INTAKE PROCESS

71b00 General.
71b01 Complaint from an aggrieved party.
71b02 Complaint from credible source other than aggrieved party.
71b03 Secretary-certified investigations.
71b04 Random investigations of willful violators.
71b05 Confidentiality of complainants and informants.
71b06 Deadline for filing an actionable complaint.
71b07 Employer out of business or bankrupt.

71c INVESTIGATION PROCEDURES

71c00 Investigation overview and objectives.
71c01 Scope of investigation.
71c02 Investigation period.
71c03 Initial contact with employer; investigative techniques.
71c04 Public access file.
71c05 Documents authorizing employment.
71c06 Posting of notice via hand copy or electronically.
71c07 H-1B-dependent and willful violator employers.
71c08 Portability.

71d ENFORCEMENT ISSUES

71d01 Required wage documentation.
71d02 Exempt H-1B worker.
71d03 Recruitment and selection of U.S. workers.
71d04 Displacement or lay off of U.S. workers.
71d05 Whistleblower protections.
71d06 Prevailing wage rate request to the ETA during an investigation.
71d07 Non-productive status and/or benching.
71d08 USCIS fees.
71d09 Required wage rate.
71d10 Payment of wages and benefits.
71d11 Deductions.
71d12 Place of employment: worksite.
71d13 Short-term placement.
71d14 Notification requirements.

NOT FOR DISTRIBUTION

71d15 Changes in employer's corporate structure or identity.
71d16 Misrepresentation of a material fact on the LCA.
71d17 Working conditions.
71d18 Strike or lockout provisions.
71d19 Specific and accurate information on the LCA.
71d20 Early cessation penalty.
71d21 Required records.
71d22 Failed to otherwise comply with subpart H or I.
71d23 Good faith compliance or conformity.

71e LIST OF VIOLATIONS AND REMEDIES

71e00 Level or degree of employer's wrong-doing in violations.
71e01 Misrepresentation of a material fact on the LCA.
71e02 Failed to pay wages as required.
71e02A Failed to offer benefits, equal eligibility for benefits, or both.
71e03 Failed to provide working conditions as required.
71e04 Filed an LCA during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.
71e05 Failed to provide notice of the filing of the LCA.
71e06 Failed to accurately specify on the LCA.
71e07 Displaced a U.S. worker.
71e08 Failed to make the required displacement inquiry of another employer at a worksite where an H-1B nonimmigrant was placed, as required.
71e09 Failed to recruit in good faith steps, as required.
71e10 Displaced a U.S. worker within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the LCA, in the course of committing a willful failure and/or willful misrepresentation of a material fact on an LCA, as prohibited.
71e11 Required and/or accepted from an H-1B worker, payment or remittance of the additional $750.00, $1000.00, and/or $1,500.00 fee incurred in filing an H-1B petition.
71e12 Required or attempted to require an H-1B nonimmigrant to pay a penalty for ceasing employment prior to an agreed upon date.
71e13 Discriminated against an employee for protected conduct.
71e14 Failed to make available for public examination the LCA and necessary document(s) at the employer's principal place of business or worksite.
71e15 Failed to maintain documentation, as required.
71e16 Failed to cooperate in the investigation, as required.
71e17 Failed to comply with the provisions of subpart H or I.

71f REMEDIES

71f00 General.
71f01 Civil money penalty.
71f02 Back wages.
71f03 Other remedy(ies).
71f04 Employer's satisfaction of penalties and remedies.
71f05 Debarment.
71f06 An employer's refusal to comply, pay back wages, and/or perform the remedy(ies).

NOT FOR DISTRIBUTION

71g REVIEW AND DISPOSITION

71g00 Review.
71g01 Disposition.

71h WRITTEN NOTIFICATION OF INVESTIGATION FINDINGS

71h00 General.
71h01 Service of determination letter and cover memo.

71i POST-DETERMINATION LETTER ISSUES

71i00 Request for hearing.
71i01 Handling of investigation findings that became a final agency action.
71i02 Unfulfilled performance of remedy(ies).
71i03 Fulfilled performance of remedy(ies).
71i04 Installment payments.

71j PROGRAM COORDINATION

71j00 Exchange of information between the WHD and the Department of Homeland Security's USCIS.
71j01 Debarment notification to the USCIS.
71j02 Exchange of information between the ETA and WHD.

71k H-1B1 NONIMMIGRANT WORKERS

71k00 Background and enforcement responsibilities.

71l E-3 NONIMMIGRANT WORKERS

71l00 Background and enforcement responsibilities.

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTION

71a INTRODUCTION

71a00 Background and statutory standards: division of responsibilities.

(a) The H-1B program allows an employer to hire a nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability. A "nonimmigrant" is an Immigration and Nationality Act (INA) term for an individual from another country who is authorized by the Department of Homeland Security's United States (U.S.) Citizenship and Immigration Services (USCIS) (formerly the Immigration and Nationality Service (INS)) to enter the U.S. for a limited period of time for specific purposes. This is the opposite of an "immigrant," who is an individual authorized by the USCIS to remain permanently in the U.S. The nonimmigrant in this program is the individual certified by USCIS as eligible for H-1B status or "TN" status (*see* 20 CFR 655.700(c)(2) for more information on "TN" status).

(b) The H-1B process begins with the employer's filing of a Labor Condition Application (LCA) Form ETA 9035 (Form ETA 9035) and/or Form ETA 9035E (Form ETA 9035E) with the Employment and Training Administration (ETA) (*see* 20 CFR 655.700(b)(1) and FOH 71a00(b)).

(c) The Wage and Hour Division (WHD) enforces all elements of the LCA, which include the material facts and labor condition statements. The regulations for this program are in 20 CFR 655 subparts H and I (*see* 20 CFR 655.700(b) for other agencies' responsibilities under the H-1B program).

71a01 Labor Condition Application (LCA).

(a) Function and purpose of the LCA

(1) The LCA is the document that a prospective H-1B employer files to initiate employment of an H-1B worker (*see* 20 CFR 655.700(b)). The LCA is *not* employee specific; it does not identify a particular foreign worker who is to be employed (*see* section 212(n)(1)(D) of the INA and 20 CFR 655.730(c)(2)). The visa petition (USCIS Form I-129: Petition for Nonimmigrant Worker (Form I-129)/USCIS Form I-129: H-1B Data Collection and Filing Fee Exemption (Form I-129W), filed by the employer with the USCIS, is employee specific; it identifies the foreign workers and sets their qualifications for USCIS adjudication.

(2) The LCA is the basis for the WHD's enforcement of the employer's H-1B obligations. The employer's submission of, and signature on, the LCA make enforceable "promises," "statements," or "attestations." *See* 20 CFR 655.730(d). LCA obligations are in effect/enforceable for the entire validity period of the LCA, as follows:

a. The validity period of the LCA *begins and ends* on the dates specified by the ETA official who certifies the LCA. If the H-1B worker begins employment with a new H-1B employer prior to the ETA certification date (pursuant to the portability option (*see* FOH 71a00(b)), the beginning date of the LCA's validity period is the date on which the H-1B worker began employment.

b. The LCA validity period *ends* on the date specified by the ETA official who certifies the LCA, *except that* the LCA remains in effect and enforceable for

NOT FOR PUBLIC DISTRIBUTION

as long as any H-1B worker is employed pursuant to it *or* until the conclusion of any WHD enforcement proceeding involving the LCA, including any hearings and appeals (whichever date is the latest) (*see* 20 CFR 655.750(a)).

c. For wage obligations during the LCA's validity period, *see* 20 CFR 655.731(c)(6) -(7).

(b) Types of LCAs

Investigations may disclose several types of LCA forms depending upon the date on which the employer filed the LCA with the ETA (*see* 20 CFR 655.720 and http://www.lca.doleta.gov).

(c) Regardless of which LCA form is used, the employer's submission of and signature on the LCA make promises, statements, or attestations that are enforced by the WHD. For the three-page, four-page, or electronic LCA, these promises are fully spelled-out in the cover pages: Form ETA 9035CP (http://www.lca.doleta.gov). In signing and submitting the LCA, the employer is stating that he or she has read these provisions and agrees to them.

(d) Procedures for employer's filing of the LCA

The employer must file the LCA with an ETA processing center, which determines whether to certify it for the employment of H-1B workers. The ETA regional certifying officers, located in all of the ETA regional offices, do *not* process LCAs (*see* 20 CFR 655.721). There are two procedures for the employer to file an LCA: electronically at http://www.lca.doleta.gov or U.S. mail (*see* 20 CFR 655.720). LCAs require that the employer seeking to employ an H-1B worker attest to:

(1) paying the H-1B nonimmigrant worker the required wage (*see* 20 CFR 655.731),

(2) establishing the working conditions requirement (*see* 20 CFR 655.732),

(3) establishing the no strike or lockout requirement (*see* 20 CFR 655.733), and

(4) establishing the notice requirement (*see* 20 CFR 655.734).

(e) Additional obligations apply to H-1B dependent employers (*see* 20 CFR 655.736(a)), willful violators (*see* 20 CFR 655.736(f)), and employers (*see* 20 CFR 655.736(g).

(f) The WHD's access to LCAs certified by the ETA

(1) Certified LCAs can be viewed at (b) (7)(E) [redacted]
Enter the employer's employer identification number (EIN) or the employer name and the employer state. This information is available to the public and provides access to information by searching, viewing, and printing information on any certified LCA; the system does not provide an actual LCA (just the information contained in the LCA).

NOT FOR PUBLIC DISTRIBUTION

(2) ETA's LCA Online-ESA System provides the WHD access to information by searching, viewing, and printing certified LCAs. Access is limited to WHD staff only. The relevant LCA can be printed and used by the WHD.

(3) The LCA Online ESA System is accessed at www.lca.doleta.gov/esa. Press "Enter" and follow the instructions. To obtain the "LCA Online-ESA User Guide," go to www.lca.doleta.gov/esa and click on the "Online Help" hyperlink at the top of the webpage.

(4) The WHI should contact the national office (NO), Office of Policy (OP), Division of Enforcement Policy and Procedures (DEPP), Farm Labor/Immigration Branch, for any LCA not available.

71a02 **Coverage.**

(a) An employer is covered under the H-1B program if it has an LCA certified by the ETA. The WHD need not prove an employment relationship between the LCA-filing employer and the H-1B worker(s). The LCA-filing employer is deemed to be the employer of the H-1B worker(s), and the employment relationship exists as a matter of law (*see* FOH 71d04(f)).

(b) The employer identified on the LCA is the subject of the investigation. The H-1B program does not include the Fair Labor Standards Act (FLSA) enterprise concept. (b) (7)(E) [redacted]

(c) Foreign workers might work for an employer before acquiring H-1B status (*e.g.*, employment under another nonimmigrant visa classification, such as F-1 (student), or illegally) and/or

after their H-1B status has expired (*e.g.*, working after acquiring other employment authorization, such as the permanent program's greencard, or illegally). H-1B provisions apply to the worker only when the worker is in H-1B status (as authorized by USCIS on the USCIS Form I-797: Notice of Action (Form I-797)), and employed by the employer. A worker employed under the H-1B portability provision may begin employment, and be subject to all H-1B provisions, while the Form I-129/Form I-129W is pending with the USCIS, but this pre-adjudication work time will not be reflected on the USCIS notice of action when it is issued (*see* 65 FR 80110 and 65 FR 80118).

(1) A worker employed by the employer, even before and/or after H-1B status, is subject to the protections found under other programs enforced by the WHD. For example, a foreign worker employed by the employer under the F-1 (student) or J-1 (summer work/travel) visa classification could be protected by the FLSA, Family and Medical Leave Act (FMLA), government contract acts (*i.e.*, Davis Bacon Act (DBA) or McNamara-O'Hara Service Contract Act (SCA)), or any other program enforced by the WHD, assuming the employer has the required program coverage.

NOT FOR PUBLIC DISTRIBUTION

71b COMPLAINT INTAKE PROCESS

71b00 General.

(a) WHD enforcement will be initiated *only* through one of four processes:

(1) Aggrieved party complaints (*see* FOH 71b01, 8 USC 1182(n)(2)(A), and 20 CFR 655.806);

(2) Credible source investigations (*see* FOH 71b02, 8 USC 1182(n)(2)(G)(ii), and 20 CFR 655.807);

(3) Secretary of Labor (Secretary)-certified investigations (*see* FOH 71b02, 8 USC 1182(n)(2)(G)(i), and 20 CFR 655.807(h)); or

(4) Random investigations of willful violators (*see* FOH 71b03, 8 USC 1182(n)(2)(F), and 20 CFR 655.808).

(5) Complaints received from other than aggrieved parties should be considered as possible credible source investigations. Information that fails to qualify for either investigation process should be considered for a Secretary-certified investigation.

(b) Until further notice, provide a copy of every non-actionable H-1B complaint to the NO, OP, DEPP, Farm Labor/Immigration Branch, to allow the NO to maintain data on *total* number of complaints received.

(c) All complaints must be in writing. The H-1B complaint form (H-1B Nonimmigrant Information Form, WH-4) (*see* FOH 54: WH-4) may be used for this purpose. This WH-4 form is found at http://www.dol.gov/dol/esa/public/forms/whd/WH-4.pdf. If the complainant makes oral contact, the WHI who receives the oral communication will reduce the complaint to writing. If the WH-4 is not used by the complainant (*i.e.*, the complainant submits a written complaint without using the form), the information requested on the form must be obtained by the WHI for the investigative file.

(d) Standard main office-district office (MODO) procedures specified in FOH 61 will be followed in H-1B cases. Where an H-1B employer has operations in multiple worksites encompassing the jurisdiction of more than a single WHD district office (DO), but the H-1B employer's main office does not maintain the public access files, the DO with jurisdiction over the location of the H-1B employer's public access file is its MODO.

(e) Aggrieved party complaints may not be conciliated except for complaints alleging only a failure to pay a final paycheck (*see* FOH 71c01(a)(6)). The WHD lacks authority to close an investigation and/or compliance action administratively without issuance of a determination as to whether violations occurred. A determination letter must be issued on every actionable complaint received by the WHD (*see* 20 CFR 655.806(3)).

(f) Notice to complainant

One of the following letters must be issued on each complaint:

(1) *Notice to the complainant that the complaint is not actionable*

NOT FOR DISTRIBUTION

If the complaint does not present reasonable cause for investigation, the complianant must be sent a no cause (to investigate) letter advising that no investigation will be scheduled. An oral notice to the complianant is not sufficient for this purpose. The complianant may submit a new complaint with additional information.

(2) *Notice to the complainant that the complaint is actionable*

If the complaint presents reasonable cause for an investigation, the complianant may be sent a notification letter to complainant advising that the WHD will investigate.

(g) Determination letter concluding investigation

The WHD is required by the INA to issue a formal determination in every investigation and/or compliance action, and must assess back wages owed workers and other remedies as appropriate (*see* 8 USC 1182(n)(2)(A) -(B), 8 USC 1182(n)(2)(D), FOH 71b07, and 20 CFR 655.815).

71b01 <u>Complaint from an aggrieved party (20 CFR 655.806).</u>

(a) The INA authorizes the Department of Labor (DOL) to conduct an investigation on a complaint from an aggrieved person or organization, including bargaining representatives (*see* 20 CFR 655.715), filed within 12 months of the alleged violation. To be an *aggrieved party*, the complianant must be a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the H-1B program (*see* 20 CFR 655.805). The complianant may be anonymous, but the screening of complaints shall establish that they are aggrieved parties. Aggrieved parties include, but are not limited to:

(1) a worker whose job, or job prospects, wages and/or working conditions are adversely affected by the employer's alleged violation(s);

(2) a bargaining representative for workers;

(3) a government agency with programs impacted by the alleged violation(s), such as the Department of State; or

(4) an employer's competitor adversely affected by the alleged violation(s).

(b) Screening of complaint

Each complaint must be reviewed and/or screened to determine if reasonable cause exists to initiate an investigation, and include the following elements:

(1) *Employer coverage*

The employer must have a certified LCA. Coverage is assumed, if complianants indicate that they are H-1B workers employed by the employer or that the employer employs an H-1B worker, even if the complianant cannot provide a copy of the LCA. The LCA must be reviewed if there is any question about whether or not an LCA has been certified, *see* FOH 71a01(f). If there is no LCA on file, there is no coverage to authorize an investigation. If an investigation is initiated, and later fact-finding determines that there is *no* LCA on file, the investigation should be discontinued and

NOT FOR DISTRIBUTION

the complianant and employer so notified. A no coverage determination letter must be issued. The complianant must be an aggrieved party.

(2) *Allegation of violation(s) of the H-1B program*

An investigation will be initiated where there is reasonable cause to believe that an H-1B violation has been committed (*e.g.*, only on a complaint with allegations which, if true, would constitute violations of the program). In screening a complaint, the WHI may contact the complainant to clarify allegations or obtain additional information. Such contacts should not be so detailed or extensive as to constitute fact-finding, which would begin after the complaint is determined to present reasonable cause and an investigation is initiated. The categories of violations are identified in the regulation at 20 CFR 655.805 (*see* FOH 71e01 -17).

(c) Deadline for screening a complaint

The reasonable cause determination must be made within 10 days of the date the aggrieved party complaint is received by the WHD (*see* 20 CFR 655.806(a)(2)). The complaint is accepted for filing if reasonable cause to believe a violation occurred is found. The date of the *receipt* of the complaint, not the date of the completion of the *screening*, is the controlling date for determining the 12-month window for a timely and/or actionable complaint (*i.e.*, there must be allegation(s) of violation(s) within 12 months prior to date of receipt of complaint). If no reasonable cause exists to initiate an investigation, the complainant shall be advised and allowed to submit a new complaint with additional information. If the complainant alleges whistleblower violations, *see* FOH 71d05.

71b02 <u>Complaint from a credible source (8 USC 1182(n)(2)(G)(ii) and 20 CFR 655.807).</u>

(a) Effective 03/08/2005, the H-1B Visa Reform Act of 2004 reinstates and expands the WHD's authority to conduct an investigation if it receives information from a known credible source likely to have knowledge of an employer's practices or labor conditions. The credible source information must meet the requirements listed in FOH 71b02(c)(2). The INA requires that an investigation based on credible information from a source other than an aggrieved party must be conducted under specific procedures, including a notice to the employer to allow a rebuttal of the allegations (*see* FOH 71c03(b) and FOH 71c03(d) below). A case shall be set up in WHISARD as an investigation to capture time spent by WHIs on the responsibilities described below pertaining to complaint intake, screening, notice to employer, and opportunity for employer response.

(b) Receipt of complaint

A complaint may be filed either orally or in writing (*see* FOH 71b00(c) and 20 CFR 655.807(a)). The WHD office that receives the complaint shall forward the information to the NO, OP, DEPP, Farm Labor/Immigration Branch for review and processing, and shall obtain such additional information as the NO, OP, DEPP, Farm Labor/Immigration Branch may require, including interviewing the complainant if appropriate.

NOT FOR PUBLIC DISTRIBUTION

(c) Screening of complaint

Upon receipt of the complaint (*i.e.*, the WH-4 and any supporting material), the NO, OP, DEPP, Farm Labor/Immigration Branch shall determine if the information constitutes a basis for taking action. The criteria listed in 20 CFR 655.807 will be applied.

(1) Examples of credible sources of information (non-aggrieved parties) include but are not limited to:

a. An employer, who operates in the same building as an H-1B employer but who is in a different line of business and, therefore, is not a competitor, has been told by the employer's H-1B workers that they are not paid for travel expenses.

b. A payroll service contractor for an H-1B employer who reports that he or she was ordered by the employer to illegally reduce wages paid to H-1B workers.

c. A community activist (*e.g.*, immigrants' rights advocate) who reports that H-1B workers told him or her that they are not paid for all hours worked.

d. A police officer who reports that two H-1B workers reported to him or her that they did not get their last paycheck.

(2) *Types of violations*

The information from the source must provide a reasonable basis to believe that an employer has engaged in one of the following types of activity:

a. *Willfully* failed to meet one or more of the following conditions listed in 20 CFR 655.731(wages paid or benefits offered); 20 CFR 655.732 (working conditions); 20 CFR 655.733 (strikes or lockouts); 20 CFR 655.738(c) (displacement of U.S. workers); 20 CFR 655.738(d) (displacement of U.S. workers by secondary employer); and 20 CFR 655.739 (recruitment of U.S. workers).

b. Engaged in a *pattern or practice* of failures to meet a condition listed in FOH 71b02(c)(2)a.

c. Committed a *substantial* failure to comply with a condition listed in FOH 71b02(c)(2)a., and the failure affected multiple employees (*see* 20 CFR 655.807(d) -(e)).

(3) *Deadline for submission of information*

The violation(s) alleged by the source must have occurred within 12 months of the date that the DOL and/or WHD receives the information.

(d) Notice to employer

Except as provided in FOH 71b02(d)(2), below, if the NO, OP, DEPP, Farm Labor/Immigration Branch determines that the non-aggrieved party is a credible source and

NOT FOR DISTRIBUTION

the complaint is actionable, the DD and/or ADD will notify the employer in writing that allegations have been received.

(1) The notification shall include a description of the nature of the allegations in sufficient detail to enable the employer to respond, and shall request that the employer respond to the allegations within 10 days from the date of the notification although an additional period should be allowed if needed by the employer to respond before the commencement of an investigation. The notification may identify the source, but ordinarily will *not* do so (*see* 20 CFR 655.807(f)(1)).

(2) The notification to the employer may *be omitted when* such notification might interfere with an effort to secure the employer's compliance (as allowed by the statute). The NO, OP, DEPP, Farm Labor/Immigration Branch's review of the complaint will include a determination on this matter, and the DD will be given instructions by NO, OP, DEPP, Farm Labor/Immigration Branch (*see* 20 CFR 655.807(f)(2)).

(e) Opportunity for employer response

Except as provided in FOH 71b02(d)(2), the employer shall have an opportunity to respond to the allegations made by the complainant. The response may be in writing, in an informal meeting, or both. If the employer requests a meeting, the DD and/or ADD shall immediately contact the NO, OP, DEPP, Farm Labor/Immigration Branch for guidance concerning the participants and procedures for the meeting. All documents submitted by the employer shall become part of the WHD file. The DD and/or ADD shall forward the employer's response to the NO, OP, DEPP, Immigration/Farm Labor Branch, through appropriate channels, along with any recommendation or analysis that may be appropriate.

(f) Investigative procedures

An investigation shall be conducted in the same manner as an investigation on an aggrieved party complaint. Section 212(n) of the INA and 8 USC 1182(n)(2)(G)(viii) specify that the Secretary may certify a 60-day investigation. It is the WHD's position that this time frame is directory and not jurisdictional. It is important that the WHD make every effort to complete a credible source investigation within the time frame, but if the deadline cannot be met, the investigation will proceed to conclusion. The H-1B Visa Reform Act of 2004 specifies that if violations are found, the WHD must provide the employer with a determination of the violation(s) found and the opportunity for a hearing to take place within 120 days of the determination of violation.

71b03 <u>Secretary-certified investigations (8 USC 1182(n)(2)(G)(i)).</u>

(a) The H-1B Visa Reform Act of 2004 provides new authority, retroactive to 10/01/2003, to initiate an investigation of an employer if there is reasonable cause to believe that the employer is not in compliance with the LCA requirements. The investigation must be conducted under specific procedures described below, and may only be initiated for reasons other than completeness and obvious inaccuracies by the employer in complying with H-1B requirements. The Secretary (or Acting Secretary) must personally certify that reasonable cause exists and approve the investigation, and a notice must be provided to the employer to allow a rebuttal of the allegations (*see* FOH 71c03(d) below). A case shall be set up in WHISARD as a conciliation to capture time spent by WHIs on the responsibilities described

NOT FOR DISTRIBUTION

below pertaining to complaint intake, screening, notice to employer, and opportunity for employer response; however, the case *must* be dropped and coded as a "Drop" in WHISARD if the Secretary does not authorize an investigation. If authorized, the file will be changed in WHISARD from conciliation to investigation status.

(b) Unlike the aggrieved party and credible source investigating process, there is no statutory 12-month limit on receipt of information after the occurrence of the alleged violation(s) for a Secretary-certified investigation. Information alleging violations occurring more than 12 months previously will be considered during the NO review.

(c) An investigation can be conducted under this authority only if the Secretary (or Acting Secretary) personally authorizes the investigation by certifying that the statutory requirements for such a proceeding have been met. 20 CFR 655.807(h) discusses the process to obtain the Secretary's certification.

(1) The NO shall determine whether the matter will be referred to the Secretary, based on all the information in the file, including any documents or information provided by the employer in response to the allegations. No hearing or appeal is available from a determination declining to refer the matter to the Secretary.

(2) The Secretary shall determine whether a certification will be issued to authorize an investigation. No hearing or appeal shall be available from a denial of certification.

(d) Notice to employer

If the Secretary certifies that reasonable cause exists and approves commencement of the investigation, the DD and/or ADD will notify the employer in writing that allegations have been received, utilizing the guidance provided by 20 CFR 655.807(f) and NO, OP, DEPP, Farm Labor/Immigration Branch.

(e) Opportunity for employer response

The same procedure will be followed in this circumstance as is described in FOH 71b02(d) above.

(f) Investigative procedures

An investigation shall be conducted in the same manner as an investigation on an aggrieved party complaint, except that it shall be limited to the issues certified by the Secretary. The Secretary may certify an investigation that may be conducted for a period of up to 60 days (*see* 8 USC 1182(n)(2)(G)(viii)). It is the WHD's position that this time frame is directory and not jurisdictional. It is important that the WHD make every effort to complete a certified investigation within the time frame, but if the deadline cannot be met, the investigation will proceed to conclusion.

71b04 <u>Random investigations of willful violators (20 CFR 655.808).</u>

(a) The WHD may initiate random investigations of three categories of employers:

(1) Employers determined by the DOL to have willfully violated an LCA obligation

NOT FOR PUBLIC DISTRIBUTION

(2) Employers determined by the DOL to have willfully misrepresented a material fact on the LCA

(3) Employers determined by the DOL to have willfully failed to offer a job to an equally or better qualified U.S. applicant after recruitment (applicable only to H-1B-dependent or willful violator employers), or to have willfully misrepresented a material fact on the LCA with regard to such offer

(b) Random investigation authority applies only to employers found by final agency action on or after 10/21/1998 to have engaged in such willful conduct. Random investigations may be conducted within a period of up to 5 years after determination of the willful violation(s).

(c) Random investigations may be initiated *only* with the NO, OP, DEPP, Farm Labor/Immigration Branch approval. The investigation will follow the procedures for a complaint from an aggrieved party,except that the screening procedure will not be applied (*see* FOH 71c03(a) -(d)).

71b05 <u>Confidentiality of complainants and informants (20 CFR 655.800(d)).</u>

(a) Confidentiality rules apply in H-1B as applied in other programs. However, if the complainant or other confidential source requests an administrative hearing on the WHD determination letter, confidentiality is waived.

(b) Complaints under the H-1B program should be handled like any other WHD program complaint. However, if the employer asks, the employer may be advised that the investigation was initiated as a result of a complaint. The employer may be advised of the identity of the complainant if the complainant is a government agency or if the complainant authorizes his or her identity to be revealed. If the complainant is easily identifiable (*e.g.*, the complainant is the only H-1B worker employed by employer), permission to use the complainant's name should be obtained before initiating the investigation, or the complainant should be informed of the possibility his or her identity may be revealed during the investigation. If the complainant refuses to permit use of his or her name, and such refusal precludes the WHD's ability to identify any violation(s), the investigation should be closed with a no violation finding.

71b06 <u>Deadline for filing an actionable complaint (20 CFR 655.806(a)(5) and 20 CFR 655.807(c)).</u>

(a) Complaints must allege violation(s) which occurred within the 12-month window prior to the date of the receipt of the complaints. Complaints received after this deadline cannot be investigated (*see* FOH 71b02(c)(3)). Note: the crucial consideration is whether there are *allegations* of violation(s) within the 12-month period, not whether the investigation eventually reveals *actual* violations. Thus, if the complaint presents reasonable allegations of such violations, an investigation shall be initiated and shall be completed in accordance with FOH 71c02, even where the investigation does not substantiate the alleged violation(s) in the 12-month period. In the event that an alleged violation has not ended and is ongoing at the time that the complaint is filed and/or received, the last day that the alleged violation occurred, for purposes of screening the complaint, is considered to be the date that the complaint is filed and/or received.

NOT FOR PUBLIC DISTRIBUTION

(b) Examples based on the following scenario: the DOL's receipt of the complaint is 11/29/1999, which establishes the 12-month window as 11/30/1998 to 11/29/1999. The date the LCA was filed is 01/19/1998.

(1) *Wages*

The H-1B programmer complainant alleges pay at the prevailing wage rate, which is lower than the actual wage paid to similarly employed programmers with equivalent education and experience, from 01/01/1998 to 11/15/1998. The alleged violation is outside the 12-month window and is not actionable.

(2) *Posting the notice*

The complainant alleges that the employer did not post the notice at the worksite when the LCA was filed. Under the posting requirement, the last day the violation could have occurred was 01/29/1998 (*i.e.*, 10 days after the filing of the LCA). The date of the alleged violation is outside the 12-month window and the complaint is not actionable. The analysis would be different if the employer placed H-1B workers at worksites other than the initial worksites during the 12-month window, and has allegedly failed to post notices at such subsequent worksites at the time that the H-1B workers were placed there.

71b07 **Employer out of business or bankrupt.**

Investigations involving employers who go out of business during the course of the investigation must be completed, not dropped or closed administratively. The INA (*see* 8 USC 1182(n)(2)(A) -(B)) requires that a determination letter be issued on every actionable complaint. The investigation should be completed based on available evidence. The determination letter should be prepared in accordance with the joint review committee (JRC) procedures, and mailed by certified mail and return receipt to the employer's last known address. Where known, the employer's attorney and/or representative should be listed as a "cc" on the determination letter and provided a copy.

NOT FOR PUBLIC DISTRIBUTION

71c INVESTIGATION PROCEDURES

71c00 Investigation overview and objectives.

(a) As every determination is subject to appeal, every investigation shall be prepared to litigation standards.

(b) The basis for any finding of a violation must be fully documented and must be *included in the investigation file*. For example, if there is a finding that an employer failed to have an appropriate public access file (*see* FOH 71c04), then a full copy of the documentation that *was* disclosed in the employer's public access file should be included in the investigation file. If the size of the file means this is impracticable, the WHI should identify the documents in the file.

(c) Time limit on investigation

(1) The statute provides 30 calendar days to conduct an aggrieved party investigation and issue a determination letter (the letter advising the employer of the results of the investigation) (*see* FOH 71h00). The 30 days begin on the day of a finding that there is reasonable cause to conduct an investigation (*i.e.*, the "Date Registered" for WHISARD purposes). The WHD must also provide the employer with notice and the opportunity for a hearing within 60 days of the determination of the violation.

(2) The INA specifies that Secretary-certified and credible source investigations may be conducted for up to 60 days. The 60-day period begins on the day that a finding is made that there is reasonable cause to conduct an investigation (*i.e.*, the "Date Registered" for WHISARD purposes). In addition, the WHD must provide the employer with notice and the opportunity for a hearing within 120 days of the determination of the violation. Any H-1B investigation must be registered in WHISARD as either full investigation or limited investigation (*see* FOH 71c01(a)(2)).

(3) The 30- and 60-day time limits do not alter the need to conduct a complete, thorough investigation which meets litigation standards. The DOL takes the position that the time limits are not jurisdictional and that the WHD does not lose its investigative authority if the time limits are exceeded.

(4) The 30-day investigation, and 60-day investigations for Secretary-certified and credible source investigations, are suspended when a request is made by the WHD to the ETA to provide needed prevailing wage information. The suspension period begins on the date the written request is made to the ETA and ends on the date the ETA responds to the request. In the event the employer files an appeal to the ETA response, the suspension period extends to the date of final adjudication in the ETA administrative review process. Fact-finding for the investigation may continue during the period when the prevailing wage request and/or appeal is pending with the ETA (*see* FOH 71d06(d)).

(5) WHISARD provides automatic notification to the responsible manager when an H-1B investigation reaches the 20th calendar day from the WHISARD "Date Registered," 30th day, and every 120th day thereafter until the investigation is "Concluded" or placed in "Inactive Follow-up" in WHISARD.

NOT FOR DISTRIBUTION

71c01 Scope of investigation.

(a) Matters to be investigated

Each investigation shall review violation issue(s) alleged in the complaint as well as the following matters, even if not included in the complaint allegation(s) giving rise to the determination of reasonable cause:

(1) Wage and benefit provisions for all H-1B workers (*see* FOH 71d10 -11) except in last paycheck violations (*see* FOH 71c01(a)(6) below) unless the DD determines that review of *all* H-1B workers would not achieve the WHD goal of securing maximum compliance while ensuring effective use of investigation resources. A determination to limit an investigation, which is only to be done on an initial investigation, and is to be coded as a "limited investigation" in WHISARD *and* indicated in the determination letter (*see* FOH 71c01(e) below), should be made based on the severity of any violation; the potential benefit to be derived from reviewing all H-1B workers; the availability of pertinent evidence; and the resources needed to investigate and document any violation.

(2) The public access file (*see* FOH 71c04)

(3) Verification of the employer's dependency status if the employer filed any LCA or H-1B petition or request for an extension of status after 01/19/2001 but before 09/30/2003, or after 03/08/2005 (*see* FOH 71c07)

(4) If the employer is H-1B-dependent or a willful violator, the employer's compliance with recruitment, secondary employer inquiry, and non-displacement provisions (*see* FOH 71d03 -04)

(b) Where the complaint alleges *only* a last paycheck violation (*i.e.*, no other allegations of non-compliance), the compliance action may be limited to that violation and the case coded as a "Limited Investigation" in WHISARD. A more general investigation should be undertaken if the employer's conduct is willful. In either case, a determination letter must be issued, citing the violation and assessing appropriate remedy(ies) (*e.g.*, back wages, civil money penalties (CMPs) if willful).

(c) If the WHI discovers facts that give reason to believe that violations other than those identified in FOH 71c01(a) above may have occurred during the initial 12-month investigation period, the scope of the investigation may be expanded to include those additional potential violations, applying the judgment described in FOH 52a00. The WHD's goal is to secure maximum compliance while at the same time ensuring effective use of investigation resources. The judgment as to the scope of the investigation should take into account the severity of the possible violation and the potential benefit to be derived from pursuing it, along with the availability of evidence bearing on the issue and the resources needed to investigate and document the violation(s). The determination of the expansion of the investigation to include other areas of potential violation shall be made through coordination and/or consultation between the WHI, DD and/or ADD, and the RSOL.

(d) Examples of determining the scope of the investigation (in these examples, there was determined to be reasonable cause to initiate the investigation):

NOT FOR DISTRIBUTION

(1) Upon initiating fact-finding, the WHI determines no violation with regard to the public access file and verifies the employer accurately stated its status as non-H-1B-dependent on LCAs. However, the WHI determines that the complainant was underpaid as was alleged in the complaint, and that other H-1B workers were also underpaid in the initial 12-month investigation period. In this case, the WHI should determine back wages concerning all H-1B workers, not just the complainant.

(2) Upon initiating fact-finding based on a complaint alleging failure to post the required notice at the worksite, the WHI determines no violations occurred with regard to the matter complained about and also determines no violations occurred involving wages or public access file. Further, the WHI verifies the employer accurately stated its non-H-1B-dependent status on LCAs. However, the WHI has reason to believe that there was a strike or lockout violation. The scope of the investigation would be expanded to include this serious H-1B violation.

(3) Upon initiating the fact-finding, the WHI determines that the complainant was *not* underpaid as alleged and there appear to be no other H-1B violations. However, there are apparent violations under another WHD program (*e.g.*, FLSA, SCA). The WHI should make arrangements to promptly finalize the H-1B investigation following procedures specified in this FOH chapter. This will require a final JRC to review the investigation findings, a final conference with the employer dealing with the results of the H-1B investigation, and a determination letter to the employer with a copy to the complainant and other interested parties. If a determination is made to pursue the apparent violations under another WHD program (*e.g.*, FLSA, SCA), care must be taken to ensure that the employer understands the separate and distinct nature of the issues and the WHD's separate and distinct authority to investigate them. It is not necessary to hold up on the investigation of the other program violations while the H-1B case is being closed. As a matter of policy, the WHD will *not* rely upon authority under a different program to conduct H-1B investigations (*i.e.*, the WHD will *not* rely upon its investigation and/or subpoena authority under the FLSA in order to investigate facts which may lead to possible H-1B violations). However, apparent H-1B violations revealed in the course of a lawful investigation under a different program may be pursued only if personally authorized by the Secretary (*see* FOH 71b03).

(e) Violations occurring while the investigation is in progress

Ordinarily, the period during which the investigation is in progress should be short, because of the statutory deadline of 30 days for completion. However, absent unusual circumstances, the investigation should be updated for any case that has been pending for 1 year or less at the time of the final conference. In cases where the investigation is not completed for a longer period of time, consideration should be given in the JRC process whether to update the investigation to include violations that have occurred while the investigation is underway. Updating the investigation will also be considered in those cases where a subsequent actionable H-1B complaint is received against the same employer before the ongoing investigation is completed. Where the investigation is not updated, the determination letter should identify the last date covered by the investigation and make it clear that the employer is liable for any violations that occur after that date.

NOT FOR DISTRIBUTION

71c02 Investigation period.

The period covered in every investigation initiated as a result of an aggrieved party complaint will be limited, at the outset of the investigation, to the same 12-month period that constitutes the window used for determining reasonable cause. The investigation may be expanded to include periods before or after (*see* FOH 71c01(e) above) this initial 12-month period only in accordance with the following instructions:

(a) Period investigated

H-1B investigations shall always cover the 12-month period ending on the day the WHD received the complaint. The WHI should also review payroll records for the preceding 2 years (*see* FOH 71c03(a)(2)(B)). The only exception will be any last pay check investigation (*see* FOH 71c01(a)(6)) or other limitations as provided in FOH 71c01(a)(2)).

(b) A timely, actionable complaint provides the WHD the authority to investigate any compliance issues. If during the course of the investigation, the WHD learned that there was no violation for the complainant during the 12-month window, the investigation would not be terminated. Since there was reasonable cause to initiate the investigation, the investigation should be completed and all violations should be cited, even if the complainant receives no remedy such as back wages.

(c) Violations outside the 12-month window

As a general rule, the investigation only examines the 12-month window prior to receipt of the complaint, to determine compliance. However, an incident of a particular matter that occurred *only* before or after the 12-month window (*i.e.*, is not part of a continuing violation within the 12-month window), can also be cited.

(d) Wage and benefit violations occurring during and prior to the 12-month investigation period

If during the 12-month window the employer failed to correctly pay a certain H-1B worker, the investigation will be extended backwards on that individual until a calendar period is reached where the individual was no longer incorrectly paid. While collecting wage information regarding such incorrectly paid individuals, the investigation may uncover other H-1B workers who were underpaid prior to the 12-month window but never during the 12-month window; these under payments may be pursued. *See* FOH 71c02(e) below.

(e) Violations other than wage violations occurring during and prior to the 12-month investigation period

Violations other than wage violations found to have occurred within the initial 12-month investigation period may be pursued backwards beyond the window to include the entire period in which the violation occurred and for which reliable evidence is available. The decision whether or not to pursue such other particular violations backwards shall be made in consultation with the RSOL, giving consideration to the compliance benefits to be derived from the backward extension balanced against the resource expenditures involved. Extending an investigation backwards should be considered where there is a need for information that would aid in determining the substantial (*see* FOH 71e00(c)) or willful (*see* FOH 71e00(d)) nature of the employer's actions, if reliable evidence of the violation is available prior to the

NOT FOR DISTRIBUTION

12-month period. The imposition of larger CMP amounts, the establishment of additional debarment offenses or the identification of technical violations and/or inadvertent omissions or errors are *not* valid reasons to extend the investigation backwards.

(f) Statute of limitations

No statute of limitations, *per se*, applies to H-1B violations except for the effective date of the H-1B legislation (*i.e.*, 10/01/1991) and the date on which the LCA applicable to the H-B worker(s), through the visa petition and/or request for extension of status, was filed and/or certified by the ETA. However, when violations, whether wage or otherwise, appear to have extended backwards to a point in time *prior to 2 years* before the date of the complaint's filing, any decision to extend the investigation for a period longer than 2 years must include consultation with the RSOL to consider the availability of reliable evidence. *See* FOH 71g00 (Review and disposition).

71c03 <u>Initial contact with employer; investigative techniques.</u>

(a) Investigation based on aggrieved party complaint:

(1) As with most other programs coming under WHD enforcement, there is no statutory or regulatory requirement detailing the method of first contact with the H-1B employer when the WHD has determined a complaint provides reasonable cause for investigation. Whether initial contact is by phone, by letter, or by unannounced visit, it is always advisable to present an appointment letter to the employer detailing the documentation to be made available for inspection. *See* FOH 86a02 for additional guidance regarding initiating an investigation.

(2) At a minimum, access to the following *documents* should be requested:

a. The employer's public access file (*see* FOH 71c04); the WHI should request any missing materials including documentation of notice requirements (*see* FOH 71c06)

b. Payroll records for employees in the affected categories for last 2 years

c. Complete petition package for every H-1B worker employed by the employer in the last 2 years, including the Form I-129/Form I-129W and the Form I-797 (*see* FOH 71c05)

d. If an employer's dependency status is a part of the investigation:

1. Computations of the employer's H-1B dependency, including computations of the snap-shot test or the full computation (*see* FOH 71c07)

2. Records relating to displacement and recruitment of U.S. workers, including documentation of the non-displacement inquiry the employer has made of any secondary employer worksites at which the H-1B workers were placed (*see* FOH 71c08(c))

NOT FOR DISTRIBUTION

(3) (b) (7)(E) [redacted]

(b) Investigation based on credible source and Secretary-certified complaints

The initial contact with the employer will, in many cases, consist of the notification of the allegations, followed by the opportunity for a response by the employer (*see* FOH 71b02(c)). If the investigation is a credible source investigation, the WHI's contact with the employer shall follow the procedures for investigation on aggrieved party complaints. Secretary-certified investigations (*see* FOH 71b02(e)) shall follow the procedures for investigations on aggrieved party complaints as modified by the Secretary's certification.

(c) Random investigations of willful violators

Follow procedures for aggrieved party investigations outlined above.

(d) (b) (7)(E) [redacted]

(2) As questions arise, the WHI should ordinarily ask the employer directly before searching for an answer elsewhere. The employer may be able to explain the matter and establish compliance. Employer admissions on factual matters are valuable evidence and should be immediately documented by the WHI through memoranda to the file and inclusion in the narrative. In some cases, employer admissions may be the only evidence available and may be sufficient to establish the violation(s). For

example, the employer admits never posting LCA notices, or the H-1B-dependent or willful violator employer admits that it never made a secondary employer inquiry when required under the INA (*see* FOH 71d04(g)).

(3) (b) (7)(E) [redacted]

(4) Obtain e-mail addresses for H-1B workers in the same way that home addresses and phone numbers are regularly obtained for workers. H-1B workers often keep the same e-mail addresses for long periods, even if they change employers, or move to other cities in the U.S., or return to their home countries. Having the H-1B workers' e-mail addresses can enable the WHI to contact and interview the H-1B workers when needed during an investigation or in preparation for a hearing.

71c04 Public access file (20 CFR 655.760).

(a) Location of the public access file

The employer is obligated, within 1 day of filing the LCA, to maintain documents described in 20 CFR 655.760(a) for public examination at the employer's principal place of business in the U.S. or at the place of employment. The public access file shall be made available to members of the public, including employees, who request it. There are no regulatory standards for the appearance of the public access file. The file may be maintained in hard copy format or in electronic format. If the file is electronic, then the employer must provide effective access.

71c05 Documents authorizing employment.

(a) The WHI will review several types of employment documents as part of the investigation, including the LCAs, prevailing wage documents, and the USCIS petitions. The documents can be obtained, for investigation purposes, from a variety of sources: the employer, an H-1B worker, the complainant, ETA, state employment service and/or state workforce agency, or USCIS. The file must identify the source of each employment document in order to adequately address Freedom of Information Act (FOIA) requests. An exhibit chart should be prepared and included as an attachment to the case narrative, listing the sources of all of these documents in the case file.

(b) *Labor Condition Application*

While the LCA does not, by itself, authorize employment, it contains the employer's H-1B obligations and is, therefore, the basis for WHD enforcement. The LCA must be obtained during the course of the investigation (*see* FOH 71a02).

NOT FOR PUBLICATION

(1) The employer is required to maintain all LCAs it has filed with the ETA and to provide certified LCAs to the WHD upon request. A failure to maintain this documentation after employing H-1B workers should be cited as a violation.

(2) If no certified LCAs are provided by the employer or found by an ETA search (*see* FOH 71a02(g), the WHI may obtain the LCA and related forms from the appropriate USCIS service center (*see* FOH 71j00(b)).

(3) The WHI may be able to obtain copies of the LCAs from the H-1B workers. The regulations require that the employer provide H-1B workers a copy of the LCA under which they are employed.

(c) U.S. Citizenship and Immigration Services forms: Form I-129/Form I-129W, Form I-797, and Form I-94

(1) *Form I-129/I-129W: Visa Petition*

a. The Form I-129 (accompanied by the Form I-129W) is the employer's petition for a visa for a particular foreign worker. The Form I-129/Form I-129W provide information specific to individual workers, such as their experience and education, job title, job description, intended place(s) of employment, and the wages to be paid. The LCA is the primary supporting document to the Form I-129/Form I-129W package. The Form I-129/Form I-129W should be obtained from the employer to identify each H-1B worker the employer has employed under the program. Both sides are to be copied and placed into the investigation file as C exhibits with document source noted on exhibit chart. The WHI can contact the USCIS service center to obtain copies of the Form I-129/Form I-129W, if the employer fails to provide it.

(2) *Form I-797*

Form I-797 is a notice of action issued by the USCIS to the employer informing the employer of either the approval or denial of the USCIS Form I-129/Form I-129W petition. Form I-797 specifies the period of time that the H-1B classification is to be valid for a specific H-1B worker working for a specific employer. Upon employer's receipt of Form I-797, the visa application process for entry into the U.S. can proceed. A prospective H-1B worker already in the U.S. obtains an updated Form I-94 from USCIS. *See* FOH 71c05(c)(3) below.

a. Form I-797 contains the eligible to work date for determining the *employer's wage obligations* for H-1B workers already residing in the U.S. H-1B workers are entitled to wages beginning on the first day after the eligible to work date that the employee makes himself or herself available for work, but no later than 60 days after the eligible to work date or the date of adjustment of the worker's H-1B status, whichever is later. *See* FOH 71d07(b) and 20 CFR 655.731(c)(6).

b. An H-1B worker may begin working for a new H-1B employer on the date of the filing of the new employer's non-frivolous Form I-129/Form I-129W, pursuant to the portability option, which allows the H-1B worker to move to

NOT FOR PUBLIC

a new employer without waiting for the USCIS to complete the adjudication of Form I-129/Form I-129W. An H-1B worker who ports to a new employer under this option would be eligible to work even without a Form I-797.

c. It is possible for the USCIS to approve two Form I-129/Form I-129Ws from two different employers for one H-1B worker, thus allowing the H-1B worker to be legally employed part- time, at the same time, by two different H-1B employers. Each employer would have its own, separate obligations under the program; the FLSA concept of joint employment is not applicable.

(3) *Form I-94*

Form I-94 is the arrival and/or departure record. This form is issued by the USCIS to the H-1B worker, and is stamped by U.S. officials at the U.S. border to show the H-1B worker's arrival and/or departure dates. This form is also updated by the USCIS as a work authorization document, if the H-1B worker is already in the U.S. when the Form I-129/Form I-129W is approved.

a. The Form I-94's date stamp by U.S. border officials shows the date of entry by the potential H-1B worker into the U.S. The employer's wage obligation to such an H-1B worker begins when the H-1B worker enters into employment with the employer, but no later than 30 days after the date-of-entry on Form I-94 (*see* FOH 71d07 and 20 CFR 655.731(c)(6)).

(4) Copies of the above-described documents and any other USCIS documents reviewed during the investigation, which have a material impact on the conclusions of the investigation, shall be placed in the investigation file as C exhibits with an appropriate listing on the exhibit chart.

71c06 **Posting of notice, via hand copy or electronically.**

The employer is required to document compliance with notification requirements and to provide such documentation to the public (*see* FOH 71c04) and to the DOL upon request (*see* 20 CFR 655.734(b) and FOH 71d14).

71c07 **H-1B-dependent and willful violator employers (20 CFR 655.736(d)).**

Special attestations apply to H-1B-dependent and willful violator employers using LCAs filed from 01/20/2001 through 09/30/2003 and after 03/08/2005.

(a) An employer is considered H-1B dependent if her or she has:

(1) 25 or fewer full-time equivalent employees *and* at least 8 H-1B nonimmigrants; or

(2) 26 - 50 full-time equivalent employees *and* at least 13 H-1B nonimmigrants; or

(3) 51 or more full-time equivalent employees and 15 percent or more are H-1B nonimmigrants (*see* INA 212(n)(3)(A**)** and 20 CFR 655.736(a)).

(b) An employer found to have committed either a willful failure or a misrepresentation of a material fact by either the DOL (INA 212(n)(2)) or the Department of Justice (DOJ) (INA

NOT FOR PUB

212(n)(5)) is considered a willful violator. A list of willful violators is found in Fact Sheet No. 59 S.

(c) Background

(1) Per 20 CFR 655.736(c), every employer that files an LCA or seeks access to H-1B worker(s) by filing any Form I-129/Form I-129W petition or application for extension of status during these periods must take steps to determine whether it is an H-1B-dependent employer and must declare its status on the LCA and the Form I-129/Form I-129W. The employer must choose one of three statements listed on the LCA (*see* 20 CFR 655.736(e)).

(2) LCAs remain in effect for their validity period, as entered on the LCA by an ETA certifying official, with regard to the employer's obligations under these LCAs. An employer may continue to use a still-valid one-page or two-page LCA to support Form I-129/Form I-129W petitions and requests for extension of H-1B status, *provided that* the employer is, in fact, non-dependent.

(d) Every H-1B-dependent or willful violator employer is subject to additional attestation obligations on the LCA (*see* 20 CFR 655.736(g)) that include the non-displacement of U.S. workers, the recruitment of U.S. workers, and the offer of employment to equally or better qualified U.S. applicants (this last obligation is enforced by the DOJ, rather than by the WHD).

(e) Change in corporate structure or identity

An employer that experiences a change in corporate structure or a change in identity must re-determine its dependency status if it wishes to file a new LCA, a new H-1B petition, or a request for an extension of H-1B status for a worker. Required documentation is described in the public access materials (*see* 20 CFR 655.736(d)(6) and 20 CFR 655.730(e)).

(f) Single employer

An employer may determine its dependency status as a single employer under the IRC test (*see* 20 CFR 655.736(b)) and conclude that it is not H-1B-dependent. *See* 20 CFR 655.736(d)(7). Such an employer is instructed by the regulations to perform the snap-shot test (and/or full calculation if appropriate). *See* 20 CFR 655.736(c)(2). However, as an enforcement policy, the WHD will not assess CMPs for such an employer's failure to perform a snap-shot test or a full calculation if all of the corporate entities that make up the single employer have readily apparent non-dependent status. In all cases, the employer must maintain records, which should show the number of employees from each entity included in the single employer for purposes of the determination. In addition, the employer's public access file must contain a list of all entities included as a single employer (*see* 20 CFR 655.736(d)(7)).

(g) An H-1B-dependent or willful violator employer using an LCA to employ only exempt H-1B workers (*see* 20 CFR 655.737 and FOH 71d02) is not subject to the additional non-displacement and recruitment attestation obligations on the LCA. However, that employer is required to maintain a list of all exempt H-1B workers in the public access file (*see* 20 CFR 655.760(a)(9)).

NOT FOR PUBLIC USE

(h) Investigative verification of dependency status

The employer's H-1B dependency status shall be verified in every investigation where the employer has filed an LCA or sought access to H-1B worker(s), by filing a petition or application for extension of status, from 01/19/2001 through 09/30/2003 or after 03/08/2005.

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- (b) (7)(E) [redacted]
  - [redacted]
    [redacted]
  - [redacted]
    [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

71c08 **Portability (20 CFR 655.705(c)(4)).**

Under the October 2000 amendments, an H-1B worker may begin working for a new employer at the time a non-frivolous H-1B petition has been filed by the new employer with the USCIS, without waiting for USCIS' adjudication of that new petition. This so-called portability option for the movement of an H-1B worker from one employer to another does

not change the worker protections enforced by the WHD under the H-1B program. *See* 65 FR 80110 and 65 FR 80118 (12/20/2000).

NOT FOR PUBLIC

NOT FOR PUBS

71d ENFORCEMENT ISSUES

71d01 Required wage documentation.

(a) The employer is required to maintain all of the documentation it has used to determine both the prevailing wage and the actual wage rates (*see* 20 CFR 655.731(b)(2) -(3) and FOH 71d09).

(b) **Actual wage**

See FOH 71d09(c). The employer must document the basis used to establish the actual wage, including how the H-1B worker's wage rate relates to all other workers with substantially the same duties and responsibilities and similar qualifications and experience, and explaining any adjustments in wage rates in the pay system (*see* 20 CFR 655.731(b)(2)).

(c) **Prevailing wage**

See FOH 71d09(e). The employer must document the source utilized to establish the prevailing wage for the occupation and geographical area for which LCA was filed (*see* 20 CFR 655.731(b)(3)). If the employer obtained the prevailing from the state employer service and/or state workforce agency, and the job description was accurate, then the WHD will not question the validity of the wage rate (*i.e.*, the employer has safe harbor on the issue of the validity of the wage rate). Regardless of the source (*e.g.*, state employer service and/or state workforce agency, collective bargaining agreement (CBA), prevailing wage survey from an independent authoritative source), the employer must be able to provide a copy of the document upon request to the WHI.

(d) Since the required wage rate to be paid to an H-1B worker is the higher of either the actual wage or the prevailing wage, the documentation provided by the employer helps to establish the required wage rate. A failure to obtain, maintain, and/or provide the above documentation may be cited as a violation (*see* FOH 71e14 -15 or FOH 71e17). In the investigation, the prevailing wage must be determined in order to determine if the employer committed a wage violation. If the employer is unable to provide a valid source, WHI will obtain the prevailing wage from the ETA (*see* FOH 71d06)).

71d02 Exempt H-1B worker (20 CFR 655.737).

(a) An H-1B-dependent or willful violator employer is subject to the additional LCA requirements concerning non-displacement and recruitment of U.S. workers *unless* the LCA is designated and used only for the employment of exempt H-1B workers.

(b) "Exempt H-1B nonimmigrant worker" is a statutory term which is applied *only* in the context of determining which H-1B employers are subject to the *additional* obligations for recruitment and non-displacement of U.S. workers. This does not relieve an employer from any other H-1B requirements.

(1) An exempt H-1B worker is not, individually, outside of the H-1B program's protections for H-1B workers; the worker is fully entitled to all the protections of the H-1B program. The term "exempt worker" in the H-1B program does *not* have the same meaning as under the FLSA. Thus, an exempt H-1B worker is not exempt from

NOT FOR PUBLIC DISTRIBUTION

H-1B protections, in the way that a worker may be exempt from minimum wage and/or overtime protections under the various FLSA statutory exemptions.

(2) The H-1B-dependent or willful violator employer may be relieved from additional obligations with regard to particular LCA(s), due to the employment of only exempt H-1B worker(s) on the LCA(s).

(c) An exempt H-1B worker is either highly-paid or highly-educated, under the following criteria:

(1) *Wages*

The H-1B worker receives wages, including bonuses and similar compensation, at an annual rate equal to at least $60,000.00 (*see* 20 CFR 655.737(c)). The H-1B worker must actually receive the exempt wage. An H-1B worker's wages are not to be pro-rated for unpaid bench time (*i.e.*, H-1B worker cannot be exempt if unpaid bench time takes his or her wages below $60,000.00, even if such unpaid status would be acceptable under the regulation concerning benching (*see* 20 CFR 655.731(c)(7) and FOH 71d07). If an investigation determines that an H-1B worker has not yet worked a year, the WHI would determine whether the H-1B worker had been paid an average of $5,000.00 per month, including any guaranteed bonuses or similar compensation received. Additionally, as discussed in FOH 71d10, the $60,000.00 must be reported to the Internal Revenue Service (IRS) as earnings (*i.e.*, wages, tips, other compensation). For example, if the employer pays monthly, in any month where the employer reports less than $5,000.00 (monthly equivalent) to the IRS as earnings, the salary test has not been met.

(2) *Education*

The H-1B worker has attained a masters or higher degree, or its equivalent, in a specialty related to the intended employment. *See* 20 CFR 655.737(d).

(d) USCIS determination of exempt status

Prior to approving any Form I-129/Form I-129W, the USCIS will examine. among other things, the exempt status of any nonimmigrant whose petition is supported by an LCA that designates it will be used exclusively for exempt H-1B workers (*see* 20 CFR 655.737(e)(1)). The USCIS will first review the LCA for the guaranteed $60,000.00 salary. If the salary is not present, the USCIS will then review the LCA for education requirements. If the USCIS determines that the H-1B worker is not exempt, the USCIS will not grant the petition.

(e) The WHD determination of exempt status based on education

(1) If the USCIS determines that an H-1B worker is exempt based on wages and the WHI finds that the H-1B worker is not in fact paid the required amount, the WHI shall examine the Form I-129/Form I-129W package to determine whether the employer designated education as the basis for exempt status. Where such a designation of education was made, the WHI shall determine whether the H-1B worker is exempt on this basis (*see* 20 CFR 655.737(d)).

NOT FOR PUBLICATION

(2) If the USCIS, for any reason, has not made a determination of exempt status, and the WHI finds that the H-1B worker is not exempt based on wages, the WHI shall determine whether the H-1B worker is exempt based on education *if* the Form I-129/Form I-129W contains a designation of education as a basis for exempt status (*see* 20 CFR 655.737(d)).

(f) If the WHD investigation finds that the H-1B worker was not, in fact, exempt, then the employer would be subject to the non-displacement and recruitment requirements. Unless the employer's error in filling out the LCA was an inadvertent error, a violation should be cited. The violation can be cited as a misrepresentation (*see* 20 CFR 655.805(a)(1)) or a simple failure to comply with the regulations (*see* 20 CFR 655.805(a)(16)). Additionally, the WHI should explore the employer's compliance with the additional elements of recruitment, displacement inquiry, and displacement. If it is determined that there were U.S. workers illegally displaced, this violation must be cited, after consultation with RSOL via the DD and/or ADD and the NO, OP, DEPP, Farm Labor/Immigration Branch.

71d03 <u>Recruitment and selection of U.S. workers (20 CFR 655.739).</u>

Requirements for special attestations (*e.g.*, recruitment attestation) applicable to H-1B-dependent and willful violator employers contained in LCAs (ETA Form 9035 and/or ETA Form 9035E) filed on or after 10/01/2003 were reinstated on 03/08/2005, under the H-1B Visa Reform Act of 2004. However, the special attestations contained in any dependent or willful violator LCA will remain in place for the life of that LCA and will apply to any existing or future H-1B worker placement through the LCA.

(a) All H-1B-dependent and willful violator employers are subject to the recruitment of U.S. workers attestation obligation, *unless* the LCA is designated and used *only* for the employment of exempt H-1B workers (*see* FOH 71d02), *or unless* the LCA is used only for H-1B workers described in section 203(b)(1) of the INA (*i.e.*, aliens with extraordinary ability, aliens who are outstanding professors or researchers, or aliens who are employed by multinational firms to provide executive or managerial services). If an employer claims that the employer does not have to recruit because the H-1B workers fit one of those descriptions in section 203(b)(1) of the INA, the WHI should contact the NO, OP, DEPP, Farm Labor/Immigration Branch, which will consult with the USCIS.

(b) An employer subject to the recruitment requirement must take good faith steps to recruit U.S. workers prior to filing an LCA, filing a petition to hire an H-1B worker, or requesting an extension of an H-1B worker's nonimmigrant status.

(c) *Recruitment* is a process to attract the attention of individual(s) who may apply for employment, including but not limited to, soliciting applications from individual(s) for employment, receiving and/or reviewing applications, and considering applications so as to present the appropriate candidate(s) to the official(s) making the hiring decision(s). *See* FOH 71e09. As described in 20 CFR 655.739(d), this process can be internal or external to the employer's workforce, and active or passive. *See* FOH 71d03(d) below. The recruitment must use procedures that meet *industry-wide standards* (*see* 20 CFR 655.739(e) and FOH 71d03(e)) and it must offer compensation that is equal to at least the required wage (*see* 20 CFR 655.731(a)). The employer may use *legitimate selection criteria relevant to the job that are normal or customary to the type of job involved* (*see* FOH 71d03(g)), as long as the criteria are not applied in a discriminatory manner.

NOT FOR PUBLIC RELEASE

(d) The employer may use a variety of solicitation methods to recruit U.S. workers. The focus of the solicitation may be internal (*i.e.*, recruiting from within the company) and/or external (*i.e.*, seeking employees from outside the company). The solicitation techniques may be active (*i.e.*, seeking out candidates) and/or passive (*i.e.*, waiting for candidates to respond to notices) (*see* 20 CFR 655.739(d)(2) and FOH 71d03(f)).

(1) Active solicitation involves direct communication with potential applicants, both inside and outside the organization. Examples would include providing training to current employees, making contacts with trade and/or professional associations or labor unions, participating in job fairs, and using placement services at higher learning institutions.

(2) Passive solicitation involves the general distribution of information about available positions by advertising through newspapers, trade and/or professional journals, notices at the work site, job banks, or on the employer's internet homepage.

(e) Industry-wide standards

An employer is not required to use any particular recruitment method, but the methods shall be common in the industry (*see* 20 CFR 655.739(e)). "Industry," for this purpose, means the employers who primarily employ these types of workers (*e.g.*, all healthcare businesses employing computer engineers, and not just computer service and/or contractor companies employing computer engineers for placement at healthcare worksites) (*see* 20 CFR 655.739(b)).

(f) Legitimate selection criteria relevant to the job that are normal or customary to the type of job involved. The statute and regulations permit the employer to use the criteria listed at 20 CFR 655.793(f).

(g) The employer may not apply any otherwise-legitimate criteria in a discriminatory manner which could skew the recruitment process in favor of the H-1B workers, such as applying a selection criterion to U.S. candidates and not to H-1B candidates.

(h) The employer must conduct its recruitment in good faith. The employer's recruitment process must ensure that U.S. workers are given a fair chance in consideration for a job. *See* 20 CFR 655.739(h).

(i) Job offer to U.S. applicants

An employer subject to the recruitment requirement must also offer the job to a U.S. worker applicant as long as the U.S. worker has equal or better qualifications than the H-1B worker. This hiring provision is *not* enforced by the DOL, but by the DOJ. The DOJ's enforcement authority requires a complaint from the aggrieved U.S. worker. The WHD shall refer any such worker to the DOJ to file a complaint. The responsibility to administer this provision has been assigned to the Office of Special Counsel (OSC) for Immigration-Related Unfair Employment Practices in the DOJ, which administers several other statutes concerning employment discrimination based on national origin, citizenship status, and immigration document abuse. Its address is P.O. Box 27728-7728, Washington, DC 20038. Its telephone number and internet web address are 1 (800) 255-7688 (for workers) or 1 (800) 225-8155 (for employers), osc.crt@usdoj.gov, and OSC's website at www.USDOJ.gov/crt/osc.

NOT FOR PUB

(j) The employer has the burden to show that it is in compliance with the regulations (*see* 20 CFR 655.739(i)). The WHI must not attempt to contact any media in order to learn whether or not the employer recruited for U.S. workers. *See* FOH 50j. If the employer does not maintain records or other evidence that is has complied with the regulations pertaining to recruitment, there is a *prima facie* case that the employer did not comply and a violation should be cited.

71d04 **Displacement or lay off of U.S. workers (20 CFR 655.738).**

(a) All H-1B-dependent and willful violator employers subject to the non-displacement of U.S. workers obligations are prohibited from laying off any U.S. worker either directly (*i.e.*, in employer's own workforce) or secondarily (*i.e.*, at the worksite of another and/or secondary employer) from a job that is essentially the equivalent of the job for which an H-1B worker is sought (*see* 20 CFR 655.738). An H-1B-dependent or willful violator employer who utilizes an LCA to employ only exempt H-1B worker(s) is not subject to this displacement provision (*see* 20 CFR 655.737).

(b) All H-1B employers, whether H-1B dependent, H-1B non-dependent, or willful violators, are subject to an enhanced CMP of up to $35,000.00 and an increased debarment period of at least 3 years for willful violations during which U.S. workers employed by the employer were displaced within a specific period before and after the employer files any H-1B visa petition (*i.e.* beginning 90 days before, and ending 90 days after, the petition or request for extension of H-1B status is filed) (*see* FOH 71e00(d)(3) and FOH 71e10). This super penalty applies to all H-1B employers and to any willful violations, and must not be confused with the special non-displacement obligations of the H-1B-dependent and willful violator employer.

(c) There are *two types of displacement* of U.S. workers with regard to the H-1B-dependent or willful violator employer. Each type involves the displacement of a U.S. worker by an H-1B worker that performs the same or essentially similar job.

(1) *Direct displacement*

An H-1B-dependent or a willful violator employer is prohibited from displacing a U.S. worker *in its own workforce* within the period beginning 90 days before and ending 90 days after the date the H-1B petition or request for extension of H-1B status is filed. The employer's own workforce includes all U.S. workers employed by the employer. The statute does not define "employed by the employer." Therefore, the DOL must, per Supreme Court precedents, apply common law standards, not the FLSA standards, in determining when such an employment relationship exists (*see* 20 CFR 655.738(c) and 20 CFR 655.715). *See* FOH 71d04(f) below, for the common law standards.

(2) *Secondary displacement*

H-1B-dependent and willful violator employers are prohibited from placing an H-1B worker at a worksite of a secondary employer (*i.e.*, the H-1B employer's client) where there are indicia of an employment relationship between the H-1B worker and that other employer, until the H-1B employer inquires whether the secondary employer has or will displace any of its own U.S. workers and/or employees during the period 90 days before and 90 days after the date of the placement of the H-1B

NOT FOR PUBLIC USE

worker with the secondary employer (*see* 20 CFR 655.738(d)). *See* FOH 71d04(g) below for discussion of secondary displacement.

(d) Lay off

A U.S. worker is laid off, and therefore displaced for purposes of the H-1B statute and regulations, if the employer causes the U.S. worker's loss of employment by using the H-1B worker to perform the essentially equivalent job performed by the U.S. worker. A loss of employment however, would *not* be considered to be a lay off where any of the situations listed in 20 CFR 655.738(b)(1) occurs. 20 CFR 655.738(b)(1)(iv)(A) -(C) also lists the criteria to be reviewed in discerning the validity of a similar employment opportunity to determine if it, in fact, is a bona fide offer.

(e) Essentially equivalent jobs

In order for displacement to occur, within the meaning of the H-1B statute and regulations, the job from which the U.S. worker is laid off must be *essentially equivalent* to the job for which an H-1B worker is sought. To determine whether jobs of laid-off U.S. workers and H-1B workers are essentially equivalent, the two positions should be compared based upon job responsibilities, qualifications and experience of workers, and area of employment. The comparison of the two jobs should be on a one-to-one basis where appropriate. But a more broad comparison may be required if a company eliminates an entire department with several U.S. workers and replaces them with one or more H-1B workers. In the latter circumstance, U.S. worker(s) who held essentially equivalent job(s) as the H-1B worker(s) would be protected from such displacement (*see* 20 CFR 655.738(b)(2)). The factors of job responsibility, qualifications and experience, and area of employment (as described in 20 CFR 655.738(b)(2)) must be closely reviewed and analyzed to determine if jobs are essentially equivalent.

(f) Employed or employment relationship (common law test)

(1) The determination of an employment relationship between U.S. workers and an H-1B employer or a secondary employer is necessary *only* in the event of an apparent displacement of such U.S. workers. Note: it is never necessary to determine such a relationship between the H-1B worker(s) and the H-1B employer, since the relationship is deemed to exist as a result of the employer's having sponsored the worker(s) as the employer for H-1B employment-based nonimmigrant visa(s).

(2) The prohibition against displacement of U.S. workers is a protection that applies only to U.S. workers who are employed by the H-1B employer (*i.e.*, direct displacement prohibition) or by the secondary employer (*i.e.*, secondary displacement prohibition). Therefore, bona fide consultants and independent contractors who are, by definition, not employees, are not protected against the loss of work due to the use of H-1B workers, even though the consultants and independent contractors may be performing services for the H-1B employer or the secondary employer. *See* 20 CFR 655.738(c) -(d).

(3) The H-1B program does *not* use the suffer or permit to work test for an employment relationship that is used under the FLSA. Instead, the H-1B program uses the common law multi-factor test, in which the key determinant is the right to control the means and manner in which the work is performed. For enforcement purposes, the

NOT FOR PUB

WHD will assume that any U.S. worker treated as an employee for tax purposes and other purposes (*e.g.*, Federal Insurance Contributions Act (FICA), workers' compensation) is, in fact, an employee. Where the worker's status as an employee is not certain, the WHI shall make a determination considering the following and similar factors, which are not all required to be present to determine whether the U.S. worker receives displacement protection:

a. The putative employer has the right to control when, where, and how the worker performs the job

b. The work does not require a high level of skill or expertise

c. The putative employer, rather than the worker, furnishes the tools, materials, and equipment

d. The work is performed on the premises of the putative employer

e. There is a continuing relationship between the worker and the putative employer

f. The putative employer has the right to assign additional projects to the worker

g. The putative employer sets the hours of work and the duration of the job

h. The worker is paid by the hour, week, month or an annual salary rather than for the agreed cost of performing a particular job

i. The worker does not hire or pay assistants

j. The work performed by the worker is part of the regular business, including governmental, educational, and nonprofit operations, of the putative employer

k. The putative employer is itself in business

l. The worker is not engaged in his or her own distinct occupation or business

m. The putative employer provides the worker with benefits such as insurance, leave, or workers' compensation

n. The worker is considered an employee of the putative employer for tax purposes (*i.e.*, withholding of federal, state, and FICA taxes)

o. The putative employer can discharge the worker

p. The worker and the putative employer believe that they are creating an employee-employer relationship.

q. A useful reference in determining an employment relationship is the Equal Employment Opportunity Commission (EEOC) approach (*see* EEOC policy guidance on contingent workers (Notice No. 915.002, 12/03/1997)), which

NOT FOR PUBLICATION

provides a model for identifying particular factors that can be applied in the context of H-1B employment, particularly where workers are placed at third party employer worksites.

(4) The indicia of employment test, found in the H-1B regulation dealing with secondary displacement, is *not* the test for determining an employment relationship for purposes of identifying the U.S. worker(s) entitled to protection against displacement. Instead, the indicia of employment test (*see* FOH 71d04(g)(2)b. below) applies only to the identification of the H-1B worker(s) whose placement at a secondary employer's worksite(s) would trigger the prohibition against secondary displacement (which, in turn, protects the U.S. workers employed by the secondary employer).

(g) Secondary displacement

(1) *Protected U.S. workers*

An H-1B-dependent or willful violator employer is prohibited from displacing U.S. workers who are outside the employer's own workforce. The prohibition protects *only* U.S. worker(s) who are employed by the secondary employer at whose worksite(s) the H-1B employer places its own H-1B workers (not bona fide consultants or independent contractors). The displacement prohibition applies 90 days before and ends 90 days after the H-1B employer *places* an H-1B worker at the secondary employer's worksite(s) (prescribed period) in a position essentially equivalent to the job held by the (displaced) U.S. worker.

(2) *Triggering H-1B workers*

Not every placement of an H-1B worker will require the H-1B employer to make a displacement inquiry and thereby trigger and/or activate the secondary displacement prohibition. In order for this prohibition to be in effect, both of the following criteria must be met:

a. The H-1B worker employed by the H-1B-dependent or willful violator employer must perform duties at one or more worksites owned, operated, or controlled by the secondary employer. If the H-1B worker provides services to the secondary employer without being placed at the secondary employer's worksites(s), then the prohibition would not apply.

b. There must be indicia of an employment relationship between the H-1B worker and the secondary employer (*see* FOH 71d04(f)(4)). The common law factors are to be used to determine the existence of indicia of an employment relationship (*see* 20 CFR 655.738(d)(2)(ii)(A) -(I)). It is not necessary for *all* of the factors to be found in the case.

c. This indicia of employment relationship test does not constitute employment of these H-1B workers for purposes of making the secondary employer liable under the H-1B program.

(3) The secondary employer need not be an H-1B employer, but is any employer which accepts the placement of the H-1B workers; the participation of a middleman or intermediate employer and/or operator in the placement of the H-1B workers will not

NOT FOR PUBLIC USE

relieve the H-1B employer of its responsibilities regarding displacement of U.S. workers employed by the employer at whose worksite the H-1B workers are placed. The secondary employer's acceptance of the services of the H-1B workers does not make the secondary employer an H-1B employer (*see* 20 CFR 655.738(d)(3)).

(4) The H-1B employer, not the secondary employer, is subject to the non-displacement obligations and is liable if the secondary employer displaces any of its U.S. worker employees during the prescribed period. The secondary employer is liable only in circumstances where such secondary employer is an H-1B employer and has failed to comply with its own obligations. However, the secondary employer could be liable for violations under other statutes, such as the FLSA, if an employment relationship with the H-1B worker(s) exists for purposes of those statutes (*see* 20 CFR 655.738(d)(3)).

(5) *Good faith inquiry by employer*

If there is an indicia of employment between the H-1B worker and the secondary employer, the H-1B employer is prohibited from placing an H-1B worker at a secondary employer worksite or with a secondary employer (*i.e.*, the H-1B employer's client) until it has made a good faith inquiry of the secondary employer as to whether that employer has displaced or intends to displace a U.S. worker in the prescribed period as described in FOH 71d04(g)(1) above) (*see* 20 CFR 655.738(d)(5)). The H-1B employer must exercise *due diligence* and *make reasonable effort* to inquire about potential secondary displacement through methods which are to be documented in the public access file. *See* 20 CFR 655.738(d)(5)(i)(A) -(C) for methods (not all-inclusive) that an H-1B employer may utilize in this process.

(6) *Further and more specific inquiry by employer*

The H-1B employer's exercise of due diligence may require more specific inquiry about displacement if the H-1B employer has information that suggests that the secondary employer has or will displace U.S. workers during the prescribed period as described in FOH 71d04(d) above (*see* 20 CFR 655.738(d)(5)(ii)).

(7) *Strict liability*

Even if the H-1B employer makes the required inquiry regarding displacement at a secondary employer's job site, the H-1B employer will still be found in violation of the secondary displacement prohibition if the secondary employer in fact displaces any U.S. worker and/or employee in the prescribed period (*see* FOH 71e08). CMPs and other appropriate remedies may be imposed, but *debarment* can be imposed *only if* the DOL's final agency action finds that the:

a. employer knew or had reason to know of the secondary employer's displacement of U.S. worker(s) in its workforce at the time of the placement of the H-1B worker(s) with the secondary employer, including circumstances where the employer failed to make the required inquiry; or

b. employer has been subject to a previous sanction for secondary displacement involving the same secondary employer.

NOT FOR PUBLIC USE

(8) Since the secondary employer has no obligations under the H-1B program, the WHI shall not require but may encourage the secondary employer to reinstate the U.S. worker(s) and shall not instruct the secondary employer to pay any wages to such worker(s). In appropriate cases, the H-1B employer may be responsible for back pay and/or front pay to such worker(s). Such remedies are only to be used with prior NO, OP, DEPP, Farm Labor/Immigration Branch, SOL, and RSOL clearance.

(h) The H-1B employer is responsible for demonstrating compliance with the non-displacement obligations, both primary and secondary (*see* 20 CFR 655.738(e)). The WHI need not make contact with the employer's customers (*i.e.*, secondary employers) to learn whether or not the employer made the appropriate inquiry. Additionally, the WHI is not required to attempt contact with former U.S. workers within the employer's work force to determine if any had been displaced or laid off. If the employer does not maintain records or other evidence that it has complied with the regulations pertaining to displacement or the secondary employer inquiry, there is a violation and it should be cited. If the employer can credibly establish that it made an inquiry and made a contemporary notation of the inquiry (but is unable to produce the document), the employer should only be cited for a documentation violation.

71d05 Whistleblower protections (20 CFR 655.801).

(a) The whistleblower protections for employees are stated in 20 CFR 655.801(a) and administrative remedies available to the WHD as part of the enforcement process are listed in 20 CFR 655.801(b).

(b) Additional immigration status relief and/or protection may be available to the H-1B worker whistleblower. The INA directs the USCIS and the Secretary to devise a process under which an H-1B worker whistleblower who is otherwise eligible to remain and work in the U.S. may be allowed to seek appropriate employment in the U.S. for a period not to exceed the maximum stay allowed for the H-1B worker's visa classification (*see* INA 212(n)(2)(C)(v)). The WHD is responsible for providing the information needed by the USCIS to initiate this process. The USCIS (not WHD) will determine if the H-1B worker and/or complainant meets the statutory requirement to be otherwise eligible to remain and work in the U.S. The resulting visa status action, if any, taken by the USCIS is not dependent on, nor does it have to wait for, a final WHD determination that a whistleblower violation has in fact occurred.

(c) Screening of complaint

The WHD will screen whistleblower complaints, as it does with all H-1B complaints, to determine within 10 calendar days of date of receipt if the complaint provides reasonable cause to initiate an investigation. *See* FOH 71b01 for the complaint intake process (information may be supplemented, as appropriate, by interview of complainant). In addition to the requirements listed in 20 CFR 655.806(a), a whistleblower complaint must:

(1) concern an employee of the H-1B employer (for purposes of this section, the term "employee" includes present employees, former employees, and applicants for employment, whether or not the employee is an H-1B nonimmigrant);

(2) allege violations of protected activities as listed in 20 CFR 655.801(a)(1) -(2);

NOT FOR PUBLIC DISTRIBUTION

(3) provide information, supplemented as appropriate by interviews of the complainant, indicating that the employer intimidated, threatened, restrained, coerced, blacklisted, discharged, or otherwise took adverse action that discriminated against the employee (*e.g.*, a reduction in hours, a failure to promote, a change in work hours, refusal to sponsor for permanent employment or a forced relocation);

(4) provide information sufficient to raise the inference that the employer may have known about the protected activity and that the protected activity may have been a contributing factor in the adverse action (it would normally be considered sufficient, for example, if the complainant provides information that the employer took the adverse action shortly after the protected activity occurred); and

(5) Allege discrimination which occurred within the 12 months preceding the filing of the complaint with the WHD or, if there were continuing instances of alleged discrimination, at least one of the alleged discriminatory acts occurred within the preceding 12 months.

(d) Determination whether to make a referral to the USCIS

A whistleblower complaint that has been accepted for investigation will be referred to the USCIS, to decide if the whistleblower will be allowed to remain in the U.S. and obtain other employment, *only* if the criteria in FOH 71d05(c) above are present and *in addition*, either at the time the complaint is made or thereafter, there is reason to believe that because of a discriminatory action described in FOH 71d05(c), a complainant who is an H-1B worker:

(1) has lost his or her position, or is in danger of losing, or is about to lose his or her position with the H-1B employer; or

(2) may have been impeded in his or her opportunity to seek alternative H-1B employment or alternative legal status; or

(3) has suffered a significant deprivation of income; or

(4) has been threatened with the actions in FOH 71d05(d)(1), (2), or (3); or

(5) has been subjected to conduct by the employer with the purpose or effect of unreasonably interfering with the employee's work performance or creating an intimidating, hostile, or offensive work environment (if the WHD determines that there is not reasonable cause to believe a whistleblower violation has occurred, the complainant will be so notified; the complainant may choose to provide additional information which may constitute an actionable complaint).

(e) Method of referral to the USCIS

When the conditions in FOH 71d05(c) -(d) have been met, the responsible WHD office will notify the USCIS, after contacting and securing clearance from the NO, OP, DEPP, Farm Labor/Immigration Branch.

(1) Notification shall be made by completing the whistleblower notification letter.

NOT FOR PUBLIC USE

(2) The completed notification letter will be sent to the local USCIS district office (for locations, *see* http://www.ins.usdoj.gov/graphics/fieldoffices/statemap.htm), with a copy to the NO, OP, DEPP, Farm Labor/Immigration Branch at: U.S. Department of Labor, Wage and Hour Division, 200 Constitution Ave., NW, Room S-3510, Washington DC, 20210; Fax (202) 693-1302; and a copy included with the notification letter to the complainant.

(3) The WHI shall note a USCIS referral on WHISARD, the block/screen to be provided.

(4) The WHD shall advise the complainant that an investigation will be scheduled, using the notification letter to the complainant and attaching a copy of the whistleblower notification letter sent to the USCIS.

71d06 Prevailing wage rate request to the ETA during an investigation (20 CFR 655.731(d)).

(a) If the employer has failed to establish or document a valid prevailing wage rate (*see* FOH 71d01), the WHI should request that the employer obtain such rate. If the employer refuses, produces a prevailing wage source which does not satisfy the regulatory requirements, or refuses to apply the appropriate prevailing wage level (from a prevailing wage source providing several levels), then a prevailing wage rate must be obtained from the ETA. In such a case, the ETA will be the final arbiter on prevailing wage matters. To obtain a prevailing wage rate from the ETA, the WHI must:

(1) Prepare the prevailing wage request letter for all levels in the occupation, with an attached copy of the Form I-129/I-129W (including any attachments that offer a job description, including supplement H). If more than one H-1B worker is involved, attach the Form I-129/I-129W for one or more representative workers. If not provided by the employer at the initial conference, these documents should be requested from the H-1B worker, who would normally have personal file copies of documents relating to his or her nonimmigrant status. If not available from the employer or the H-1B worker, contact the USCIS (*see* FOH 71j00(b)).

(2) Submit the prevailing wage request letter by mail or fax to the appropriate National ETA Processing Center with jurisdiction over the geographic location where the prevailing wage rate is requested, either Atlanta or Chicago. Address the request to the Center Director. *See* FOH 71j02 for jurisdictional information and addresses.

(b) Prior to 03/08/2005, prevailing wage rates issued by the ETA provided two wage levels: level "I" (entry) or level "II" (experienced). The H-1B Visa Reform Act of 2004 requires that surveys used or made available by the DOL to determine prevailing wages must provide at least four levels of survey wage determinations commensurate with experience, education, and level of supervision. When requesting a prevailing wage rate, the WHI should provide all information available, (*i.e.*, that provided by the employer on the Form I-129/I-129W supplement H and all attachments) to the ETA so that the ETA can determine which level applies. The WHI should request not only the applicable level but also all levels so the WHD can determine the applicable wage and/or level if the H-1B worker performed duties at a higher level than described by the employer in the Form I-129/I-129W, or determine the applicable wage and/or level for other H-1B workers employed pursuant to that LCA. The INA provides that where an existing governmental survey has only two levels, two intermediate levels may be created by dividing by three the difference between the two levels offered, then adding the quotient to the first level, and subtracting that quotient from the

NOT FOR PUBLIC USE

second level to yield the two additional levels. The DOL provides wage surveys from the Occupational Employment Statistics Program (OES) at: www.flcdatacenter.com.

(c) The ETA office obtains the prevailing wage rate from state employment service or state workforce agency to respond to the WHI's prevailing wage request. The state employment service or state workforce agency is a federally-funded unit of the states providing prevailing wage rates for immigration programs administered by the ETA. Once the ETA provides a prevailing wage rate to the WHI, the WHI immediately notifies the employer of that rate and of rights to appeal. It should be made clear to the employer, whether by letter or orally, that appeal of the prevailing wage determination falls solely within the jurisdiction of the ETA. Any appeal must be made to the ETA, with a copy to the WHD, within 10 days of the employer's receipt of the WHD letter to the employer providing the ETA's prevailing rate determination.

(d) The time spent obtaining a prevailing wage rate from the ETA, including time involved in an appeal in the ETA system, is not counted against the 30-day statutory period to complete the WHD investigation. Investigation fact-finding may continue during this time. The WHI should maintain contact with the ETA to provide additional information which may be needed for the prevailing wage determination, and to know the status of the matter in the ETA system. The WHI should request copies of the ETA and employer correspondence for the investigation file. Once the ETA process is completed, the WHD investigation shall be completed, using the prevailing wage rate determined by the ETA.

71d07 Nonproductive status and/or benching (20 CFR 655.731(c)(7)).

(a) Nonproductive status (commonly referred to as benching) is the term applied to the situation where an H-1B worker is idle and/or nonproductive (*i.e.*, not producing income for the employer) due to a decision by the employer, lack of a permit or license, or for any other reason except as specified in 20 CFR 655.731(c)(7)(ii) and is not paid the required H-1B wage. The employer's wage obligation begins as soon as the H-1B worker has "entered into employment" with the employer (as defined in FOH 71d07(b) below), but in no event later than the 30- or 60-day windows described in 20 CFR 655.731(c)(6)(ii).

(1) Once the H-1B worker enters into employment with the employer, the employer must pay the required wage to the H-1B worker even if the H-1B worker is not yet productive (unless the nonpayment of wages is allowable under the benching rules, for reasons not attributable to the employer (*see* 20 CFR 655.731(c)(7)(ii))).

(2) Wages need not be paid during the maximum 30- and 60-day windows periods, prior to the H-1B worker's entering into employment. These periods are not considered to be bench time and are not to be analyzed under the benching standards.

(b) "Entered into employment"

(1) The H-1B worker enters into employment (on or after the date of need on the H-1B petition (*i.e.*, Form I-129)) when he or she first makes himself or herself available for work or otherwise comes under the direction or control of the employer, *or* when the H-1B worker's activities constitute hours worked under the FLSA concept (whichever comes first). Examples are described in 20 CFR 655.731(6)(i).

NOT FOR PUBLIC USE

(2) The file should include documentary evidence substantiating when an H-1B worker entered into employment; for example:

a. A statement from the H-1B worker indicating the date the worker made himself or herself available for work and the duties that the worker performed

b. A statement from another worker who observed the dates and type of work performed by the H-1B worker

c. Records of a stipend to the worker (*e.g.*, copies of any cancelled checks)

d. Records of the employer providing H-1B worker a company car and/or use of the company condo

e. Records of the employer adding the H-1B worker to the group insurance plan

f. Records of the preparation of the Form I-9 for the H-1B workers

(c) "Eligible to work"

"Eligible to work" means the date that an H-1B worker, already present in the U.S. when the petition was approved by the USCIS, is ready, able, and available to work for the new employer. The H-1B worker is considered to be eligible to work upon the date of need indicated on the approved Form I-129/I-129W petition, or the date of USCIS' approval of the worker's H-1B status, whichever is later. The eligible to work date never precedes the employment authorization date on the Form I-797 issued by the USCIS for the worker's H-1B status. Once the eligible to work date is established, the employer's wage obligation starts on the 60th day after the eligible to work date (unless the H-1B worker enters into employment on an earlier date (*see* FOH 71d07(b) above), which would trigger the wage obligation on that earlier date). When the wage obligation begins, the employer must thereafter pay the required wage for nonproductive and/or bench time, unless the nonproductive status is not attributable to the employer. *See* FOH 71c08.

(d) Termination of employment

(1) Once the wage obligation has been triggered, the employer must pay the required wage until the employment relationship is terminated (*see* 20 CFR 655.731(c)(7)(ii)), including payment for nonproductive and/or bench time, unless the nonproductive status is not attributable to the employer.

(2) A determination of a bona fide termination will be based on all the circumstances and/or evidence in an individual case and may be evidenced in various ways:

a. The best evidence is a copy of a letter and/or notice sent by the employer to the USCIS, notifying the USCIS that the H-1B worker's employment has been terminated as of a particular date. This notice is required by the USCIS regulations so that the worker's H-1B visa is cancelled (*see* 8 CFR 214.2(h)(11)). The WHI should always ask the employer to produce this notice if there is any question concerning the existence or date of a

NOT FOR PUBLIC DISTRIBUTION

termination of employment for an H-1B worker. The WHI may obtain additional clarification from the USCIS.

b. If the employer cannot produce a copy of a letter and/or notice to the USCIS, the WHI should request the employer to provide other evidence regarding the termination of the H-1B worker's employment. For example, the employer may have sent the H-1B worker an e-mail or letter, informing him or her that his or her employment is terminated as of a particular date. The form and date of such evidence will affect its weight (*i.e.*, an e-mail dated 06/01/2001 notifying the H-1B worker that employment is terminated as of 06/15/2001 could be appropriate documentation; whereas an e-mail dated 10/01/2001 stating the same termination date of 06/15/2001 would probably be unacceptable documentation).

(3) Where there is incomplete, inconsistent or conflicting information concerning the termination of the H-1B worker's employment, the WHI shall make a determination based on an assessment of the completeness and credibility of the available evidence.

(4) The WHD would *not* consider a bona fide termination to have occurred where the employer rehires the H-1B worker if or when work later becomes available, *except* if: the H-1B worker has been rehired after working under an H-1B visa for another employer during the period between the alleged termination and the rehire; the H-1B worker has been rehired after returning to his or her home country after the employer's cancellation of the H-1B visa through notice to the USCIS after the alleged termination; or the H-1B worker has been rehired after having been in the U.S. pursuant to a change of status subsequent to the alleged termination. A bona fide rehire must involve submission of new petition to the USCIS.

(5) The wage obligation covers the entire period until the date of the termination, including period(s) for which the WHD determined there had not been a bona fide termination. Benching standards are applied to determine if the employer is relieved from the payment of the required wage for any particular nonproductive time prior to the bona fide termination.

(6) The USCIS regulations require the employer to pay the H-1B worker's transportation to his or her home country if the employment is terminated prematurely (*see* 8 CFR 214.2(h)(4)(iii)(E)). However, this requirement is not enforced by the WHD through back wage assessment. Any questions about such return transportation should be referred to the local USCIS office.

(e) Schools or other educational institutions may have nonproductive (*i.e.*, non-work) periods for their H-1B workers, such as summer vacations or term breaks. The H-1B workers need not be paid during such periods, *provided that* the standards in 20 CFR 655.731(c)(4) are satisfied.

(f) Back wages for benched H-1B workers are to be computed as follows:

(1) The H-1B worker must be paid the required wage for all hours worked under the FLSA. Therefore, even if the H-1B worker is benched for reasons not attributable to the employer, the H-1B worker must still receive back wages for any hours worked during that time. *See* 20 CFR 655.731(c)(7)(ii). For example, an H-1B worker is on

NOT FOR PUBLIC USE

a 1-month voluntary personal leave (*i.e.*, legitimately benched without wages), but comes to the office to work for 2 days on an emergency project: hours worked. Back wages will be assessed for the 2 days of work.

(2) If the nonproductive and/or bench time is subject to the wage obligation, then the assessment of back wages will consider the following factors:

a. Salary vs. hourly wage

1. A salaried H-1B worker's wages due would be equal to the appropriate *pro rata* salary for the pay period with bench time (*e.g.*, if the monthly salary is $5,000.00 and the H-1B worker is benched without pay for 2 weeks, the back wages would be $2,307.96 ($5000.00 × 12 ÷ 26)). However, unlike the FLSA, the H-1B program does not use the workweek or pay period concept as a rigid measure for compliance with wage obligations (as done under the FLSA). The H-1B employer is allowed some flexibility in satisfying the wage obligations. The regulations permit the employer to have a salary system which pays less than an absolute *pro rata* installment each pay period, provided that the employer shows that the annual salary is satisfied through nondiscretionary payments such as quarterly production bonuses (*see* 20 CFR 655.731(c)(4)). If such a system is evidenced, then it should be taken into consideration in determining the extent of the benching violation and the back wage assessment.

2. An hourly wage H-1B worker's wages due would be equal to wages for the H-1B worker's established, regular number of full-time or part-time hours for a pay period (as described in FOH 71d07(f)(2)b.). In the H-1B program, as under the FLSA, the hourly wage an H-1B worker earns for his or her hours worked are due for the pay period when the work was performed. If the H-1B worker worked more than the normal number of hours in one pay period, he or she would be paid for those hours in that pay period; the extra or higher than normal hours and wages would not be reported and/or credited into another pay period for purposes of determining the extent of the H-1B benching violation and the back wage assessment.

b. Full-time vs. part-time

1. A full-time H-1B worker is any H-1B worker not designated as part-time either on the LCA or the Form I-129/I-129W. If the H-1B worker is *salaried*, then his or her wages due will be the *pro rata* payment for the pay period with bench time. If the H-1B worker is an *hourly wage* worker, then the wages due per week will be the hourly rate multiplied by 40 hours, or by a lower number of hours if the employer can show such number to be full-time employment.

2. A part-time H-1B worker is any worker designated as part-time either on the LCA or the Form I-129. The wages due for a pay period with bench time will be based on the number of hours for

NOT FOR PUBLICATION

part-time employment specified by the employer on the Form I-129. If the Form I-129 shows a range of hours for part-time employment, then the wages due will be based on the average number of hours normally worked by the H-1B worker, provided that the average is within the range shown on the Form I-129. The regulations require the employer to have hours records for part-time H-1B workers, whether salaried or paid an hourly wage (*see* 20 CFR 655.731(b)(1)).

c. Actual wage vs. prevailing wage

Where wages are required for a bench period, the WHI must determine which of the available rates (*i*.e, actual or prevailing wage) is the required wage to be enforced through back wages.

1. Actual wage

Where the employer has an established system that yields a specific wage payment regardless of circumstances (*e.g.*, some salary systems), then the actual wage will be enforced for bench time where the actual is higher than the applicable prevailing wage. However, the employer's actual wage system may include variable rates for different periods and circumstances. In particular, the system may have a no work, no pay provision, which would generate a wage rate of zero for nonproductive and/or bench time. A zero rate for an actual wage would necessarily be lower than any possible prevailing wage. In such a situation, the prevailing wage will be enforced for bench time.

2. Prevailing wage

Where the prevailing wage is higher than the employer's actual wage, either as a general matter or due to the employer's having a zero rate for nonproductive time, then the prevailing wage will be enforced for bench time.

d. Hours worked under established FLSA principles must be compensated, whether or not the time is considered by the employer to be productive (*i.e.*, an H-1B worker must be paid for time spent in training or orientation, and for on-call time).

71d08 USCIS fees.

(a) Basic fees

An employer filing a Form I-129/I-129W petition with the USCIS must submit a $130.00 filing fee ($185.00 filing fee effective 10/26/2005). This fee is considered to be a business expense for the employer. Consequently, the employer is prohibited from recouping this fee from the H-1B worker, through payroll deductions or other means, to the extent it reduces the H-1B worker's wages below the required wage. The amount of such fee illegally paid by the H-1B worker must be repaid.

NOT FOR PUBLICATION

(b) Petition fee

An additional $750.00 or $1,500.00 USCIS filing fee is required for most employers. Payment of this additional fee by the H-1B worker is prohibited by the INA, whether or not the payment would impinge on the H-1B worker's receipt of the required wage. The statute exempts any institution of higher education, nonprofit organization, entity related to or affiliated with an institute of higher education, or a nonprofit research organization or governmental research organization from payment of this fee. A violation will be cited and CMPs will be assessed if the employer recoups this fee, through payroll deductions or other means, from the H-1B worker or if the fee is paid to a third party by the H-1B worker. Back wages will be computed for the entire amount of the fee that was paid by the H-1B worker. Any employer which, mistakenly or otherwise, requires an H-1B worker to pay this fee will be cited for a wage violation (*i.e.*, as an illegal deduction) and the entire fee should be repaid to the worker.

(c) Premium processing fee

The employer may obtain expedited USCIS processing of the Form I-129/I-129W, by paying an additional special fee of $1,000.00. This fee, like the basic filing fee, is considered to be a business expense for the employer and, consequently, the employer is prohibited from recouping this fee from the H-1B worker, through payroll deductions or other means, to the extent it reduces the H-1B worker's wages below the required wage. In some rare circumstances, the employer may be able to establish that the use of premium processing was for the worker's primary benefit and was not a business expense. In such a case, the worker's payment of the fee would be permitted. The amount of such fee illegally paid by the H-1B worker must be repaid.

(d) H-1B Visa Reform Act of 2004 anti-fraud fee

The H-1B Visa Reform Act of 2004 mandates a $500.00 fraud prevention and detection fee to be paid by all employers which file an H-1B petition. This fee became effective 03/08/2005. Any employer which, mistakenly or otherwise, requires an H-1B worker to pay this fee will be cited for a wage violation (*i.e.*, as an illegal deduction) and the entire fee should be repaid to the worker.

71d09 <u>Required wage rate (20 CFR 655.731).</u>

(a) The employer must pay the H-1B worker no less than the required wage, which is the higher of the actual and the prevailing wage attested by the employer in all versions of the LCA.

(b) Overtime pay

The H-1B required wage does not have an overtime premium wage requirement. If the H-1B workers are *not* entitled to FLSA overtime pay, any overtime premium which is provided by the employer's actual wage system is counted/credited toward satisfaction of the H-1B's required wage. Such an employer is in compliance as long as the total gross amount paid, including non-FLSA overtime, divided by the hours worked is not less than the required wage rate. However, if the H-1B workers *are* entitled to FLSA overtime pay, the standard FLSA rules regarding the treatment of overtime pay are applicable to the H-1B workers' overtime premium. *See* FOH 71d10(g) for explanation of treatment of FLSA overtime pay for H-1B workers.

NOT FOR PUBLIC

(c) Standards for the actual wage

The actual wage for the H-1B worker is the wage paid under the employer's own wage scale or system to its workers with similar experience and qualifications for the same type of work the H-1B worker was brought into the U.S. to perform. When making the determination of actual wage, the employer may consider any legitimate business factors such as experience, job qualifications, education, specific job responsibility and function, job performance, and specialized knowledge. The employer's factors must relate to the statutory standards for actual wage (*i.e.*, experience; qualifications; specific employment in question) and cannot differentiate between H-1B and U.S. workers on the basis of market forces (*e.g.*, employer cannot simply pay the H-1B worker the lowest wage the H-1B worker is willing to accept). *See* FOH 71d01(b) and 20 CFR 655.731(a)(1). The employer's actual wage system must be applied in an even-handed manner to workers in the occupation, so as not to be discriminatory.

(d) Establishing and documenting the actual wage

It is the employer's responsibility to determine the actual wage in accordance with 20 CFR 655.731(a)(1) and to document the determination. The public access file must contain a description of the employer's actual wage system, in sufficient detail to show how the employer applied the system to determine the wage for the H-1B worker(s). At a minimum, the description should identify the factors that are considered and how they are applied. The description may be in various forms (*e.g.*, a copy of a CBA, a copy of a wage scale, a memo summarizing the system). Documentation of the determination of an actual wage for each H-1B worker must be maintained in that H-1B worker's individual personnel or payroll file, showing how the H-1B worker's actual wage relates to the wages paid to other employees with similar experience, qualifications, and duties. If this documentation is not maintained, the employer should be cited for violations of public access and/or recordkeeping, as appropriate.

(1) Discriminatory or illegal factors (*e.g.*, race or nationality) may not be applied by the employer in the determination of the wage rate.

(2) If the employer does not employ any individuals other than one H-1B worker in the occupation listed on the LCA, the rate that the employer pays the H-1B worker will be the H-1B worker's actual wage.

(3) If the employer has other employees in the same occupation, the H-1B worker's individual actual wage would be the rate that the employer's actual wage system yields for an individual with the H-1B worker's experience, qualifications, duties, etc.

(4) If the employer has other employees in the same occupation but has no discernible system for setting H-1B workers' rates of pay, the WHI shall determine the H-1B worker's actual wage from the best information available concerning the wages being paid to comparable workers.

a. If there is no documentation of the actual wage system and it cannot be reconstructed, it may be necessary to average the wages of the employer's workers with similar experience, qualifications, and duties, and then to use

NOT OFFICIAL PUBLICATION

that average as the actual wage for the H-1B worker(s) in determining the required wage.

b. The rate of pay entered on the LCA, sometimes called the intended wage, need not be the actual wage. However, the rate of pay should, at a minimum, reflect the required wage. If the rate of pay entered on the LCA is significantly higher than the rate paid to the H-1B worker(s), the WHI should examine the circumstances to determine whether the employer misrepresented a material fact on the LCA by entering a wage rate that could not or would not be paid (*see* FOH 71e01).

(5) The employer's actual wage system may include variable rates. These variables in the rate of pay in the actual wage system will affect the determination of the required wage for particular periods of time. For example, the employer may establish a different rate of pay for different tasks, or a different rate of pay for work at different worksites. The most common variable rates are differences in the pay rates for bench time and productive time (*e.g.*, some employers have a no work, no pay system for nonproductive time). Where the employer's actual wage system has a rate of zero for bench time, the prevailing wage becomes the required wage for bench time, except where the nonproductive status is not attributable to the employer and is, therefore, not subject to the payment of H-1B required wages.

(6) Pay adjustments (*e.g.*, cost of living increases, seniority increases), provided in the employer's actual wage system must be made in H-1B workers' wages in the same manner as in the wages of other employees (*see* 20 CFR 655.731(a)(1)).

(7) Changing economic conditions (or other valid factors) can require that an employer make substantive changes to its actual wage system; the actual wage can go up (*e.g.*, merit increases, cost of living, promotions, *etc*.) or down (*e.g.*, wage reductions). At the time that the actual wage change occurs, it should be recorded in the public access file (*see* 20 CFR 655.760(a)(3)). If the actual wage changes, whether higher or lower than the rate of pay on the LCA, there is no need for the employer to file a new LCA to record it because it is recorded in the public access file. However, if the employer decides to hire another H-1B worker, or extend an existing H-1B worker, the accompanying LCA, attached to the petition package, must correctly reflect the new rate of pay. If it does not, a new LCA must be obtained.

(e) Prevailing wage

The prevailing wage rate is the weighted average of wages (*i.e.*, mathematical mean) paid to all surveyed individuals in the same occupational classification and area of employment listed on the LCA as the H-1B worker. The Labor Certification for the Permanent Employment of Aliens in the U.S. (PERM) regulation published on 12/27/2004 (*see* 69 FR 77327 and 69 FR 77385) with an effective date of 03/28/2005, has modified the prevailing wage determination process in three significant ways:

(1) The use of the Davis-Bacon and Related Acts (DBRA) or the SCA is no longer controlling for prevailing wage determinations, although an employer may request those sources to be considered as an employer-provided source.

(2) If an employer-provided survey does not contain an arithmetic mean, and only provides the median, the median wage figure can be used for determining the prevailing wage. Employers may continue to submit published surveys from public or private sources or employer-conducted surveys as long as the survey complies with acceptable standards. Although the OES prevailing wage data will be provided for four skill levels, employer-provided surveys are not required to contain multiple levels.

(3) Emplyers that disagree with their prevailing wage determinations are afforded only one opportunity to provide supplemental information to the state employment service or state workforce agency. Employers may choose to file a new request for a prevailing wage determination or request review by the Certifying Officer and the Board of Alien Labor Certification Appeals.

(f) The employer must identify and document the prevailing wage rate level for the occupational classification in the area of intended employment as identified on the LCA. The public access file must identify the prevailing wage source and contain a copy of the documentation (*e.g.*, state employment service or state workforce agency determination, CBA, published survey).

(g) Unchallenged sources for prevailing wage. The WHD will not challenge prevailing wage rates, provided that the employer obtained the current prevailing wage rate for the occupation, area of employment as shown on the LCA, and has correctly applied the level, if the survey provides for more than one level, based on one of the following sources:

(1) CBA

(2) OES: the wage component of the survey administered by the Bureau of Labor Statistics (BLS) (http://www.flcdatacenter.com)

(3) Validated employer-provided survey

(h) State workforce agency

All prevailing wage determinations issued by the state employment service or state workforce agency are the same as OES rates. Most prevailing wage determinations issued by state employment service or state workforce agency are expressed as hourly rates. The employer may request that the determination be issued by the state employment service or state workforce agency as a salary. Or the employer may convert the state employment service or state workforce agency hourly rate into the salary equivalent (*i.e.*, hourly rate × 2,080 hours for an annual amount). The employer's LCA must accurately state the method of wage payment which will be used (*i.e.*, salary or hourly), so that the prevailing wage is accurately presented. However, if the employer obtained a prevailing wage rate for an occupation or for an area of employment other than that reflected on the LCA, the employer's use of any of these prevailing wage sources, as it pertains to the incorrect occupation or area of employment, would not be considered to be acceptable. Additionally, if the employer has incorrectly applied the level, if the survey provides for more than one level, that level of the survey would not be acceptable either.

(i) Additional sources for prevailing wage

There are two other sources listed in 20 CFR 655.731(a)(2)(iii)(B) -(C) that may be utilized by an employer in obtaining a prevailing wage rate. When evaluating the validity of these two additional sources, the WHI shall ensure that the conditions listed in 20 CFR 655.731(b)(3)(iii) have been met. This should include:

(1) The employer's prevailing wage rate is for the occupation and place of employment shown on the LCA

(2) The survey is the most current available from that source and it is no older than 24 months (*i.e.*, publication date no earlier than 24 months prior to date of LCA which used the survey), and is based on data collected within 24 months of the date of publication

(3) The survey was based on a statistically reliable sample of businesses randomly selected

(4) The survey was cross-industry, except for nonprofit and educational and research organizations as noted below in FOH 71d09(j)

(5) The survey was stratified (*i.e.*, includes small, medium, and large employers)

(6) The wage rate from the survey is a weighted average or mathematical "mean"

(7) The survey is local (*i.e.*, produces the prevailing wage for the area of intended employment shown on the LCA). This area is defined as the area within commuting distance of the worksite and/or place of employment. If the survey does not reflect a representative sample for the local area, the survey can be expanded (*i.e.*, not local) until a representative sample can be identified. To help WHIs determine if it is necessary to expand an area to obtain a representative sample, the WHI should consult with the local state employment service or state workforce agency.

(j) Academic and research organizations

The prevailing wage rate for an institution of higher education or an affiliated or related nonprofit entity, a nonprofit research organization or a governmental research organization, as defined in 20 CFR 656.40(c), need only take into account employees at such institutions and organizations in the area of intended employment (*see* 20 CFR 655.731(a)(2)(viii)).

(k) The investigation cannot be completed until the determination of the required wage has been made. If there are questions concerning the sufficiency of the documentation, the RSOL should be consulted. The back wages, if any will be the difference between the required wage and the wages actually received by the H-1B worker(s) (*see* FOH 71f02).

(l) The H-1B Visa Reform Act 2004, effective 03/08/2005, eliminated the *five percent discount on a state employment service or state workforce agency's prevailing wage determination*. Effective 03/08/2005, employers must pay at least 100 percent of the prevailing wage and back wages will be computed accordingly. Prior to 03/08/2005, if an employer relied on a prevailing wage from the wage component of the OES survey (*see* FOH 71d09(g) above) (whether obtained through the state employment service or state workforce agency or the

NOT FOR REVISION

BLS directly), there will be no violation cited and no back wages assessed where the employer paid at least 95 percent of the rate (*see* 20 CFR 655.731(a)(2)(iii) and 20 CFR 655.731(d)(4)). However, if the investigation reveals that the employer paid less than 95 percent, then the back wages will be computed based on 100 percent of the state employment service or state workforce agency prevailing wage. The ETA permanent labor certification regulation (on which this H-1B regulation is modeled) states that the 5 percent tolerance/discount does not apply to prevailing wage sources such as SCA, DBA, or CBA rates; therefore, there can be no discount on such rates. Also, the ETA regulation deals only with the prevailing wage and therefore has no effect on the employer's actual wage under the H-1B program; there is no tolerance/discount whatsoever on the actual wage.

71d10 Payment of wages and benefits (20 CFR 655.731(c)).

(a) Satisfaction of wage obligation

Once the WHI has determined the required wage rate, the fact-finding should ensure that the required wage rate is satisfied. The H-1B worker must be paid his or her wages cash in hand, free and clear, when due. The H-1B worker must actually receive the wages each pay period, except that deductions from wages may be made in accordance with 20 CFR 655.731(c)(9), FOH 71d11, and FOH 71e02. The H-1B worker's wages are due in accordance with the following standards:

(1) Salaried H-1B worker wages are due prorated payments on the employer's usual pay schedule but no less often than monthly, except that a rigid *pro rata* payment is not required if the employer has a pay system which includes nondiscretionary bonuses (*see* FOH 71d10(c) below, 20 CFR 655.731(c)(2)(v), and 20 CFR 655.731(c)(4)).

(2) Hourly wage H-1B worker wages are due at the end of the pay period in which the hours of work are performed, and no less often than monthly. The hourly rate payout may take into account the employer's nondiscretionary bonus system (*see* FOH 71d10(c) below, 20 CFR 655.731(c)(2)(v), and 20 CFR 655.731(c)(5)).

(3) Schools or other educational institutions may pay the required wage on a compressed schedule which may not provide a *pro rata* payout for every pay period (*see* FOH 71d07(f) and 20 CFR 655.731(c)(6)).

(b) Wages paid (for purposes of satisfying the required wage) must meet the criteria which are identified in 20 CFR 655.731(c)(1) -(2). *See* FOH 71d07(d) below and FOH 71d11.

(1) *Tax reports filed and taxes paid in accordance with the IRC*

The employer must be able to show that payments as reported for tax purposes have been paid to the IRS as required (*i.e.*, both the employer's and H-1B worker's payments). The gross wage is the compensation payment that should be reported as the H-1B worker's earnings for tax purposes.

a. The employer's payment of the required taxes should be shown on the IRS Form W-2: Wage and Tax Statement (Form W-2) filed by the employer with the IRS (not the Form 1099: Miscellaneous Income (Form 1099)) which reports compensation paid to non-employeess or contractors. The DOL does not enforce the IRS regulations concerning the use of the appropriate tax-

reporting forms. Therefore, the DOL cannot refuse to credit/count the employer's compensation to H-1B workers merely because the employer chose not to use the Form W-2 reporting form. However, since the H-1B worker is the employee of the sponsoring employer by operation of law, it may be appropriate to refer the matter to the IRS where the WHD investigation reveals that the employer is not properly acknowledging its employment status in the payment of income taxes.

b. The WHD will accept amended tax returns which show that the employer reported wages for IRS purposes. If this is done, the additional wages reported in the amendment may be credited as part of the employer's satisfaction of the H-1B required wage.

c. If earnings are paid in a foreign currency, the IRS instructions for Form W-2 require that the employer convert the foreign currency to U.S. dollars for tax purposes and keep records of the conversion rate. Therefore, any employer paying its H-1B worker in the worker's home country in that country's currency must be able to show that the IRS reporting requirements have been met, or that the earnings were not subject to U.S. federal taxes under the IRC. If the employer is unable to make this showing, the WHI shall use the best available information to determine the U.S. dollar value of all wages paid in foreign currency payments and reported as the H-1B worker's earnings for tax purposes.

(2) *Payment of FICA*

Unless the H-1B worker's home country has a totalization arrangement with the U.S. social security system, the employer must withhold and pay the FICA payments (*see* 20 CFR 655.731(c)(2)(iii)).

(c) Non-discretionary bonuses as wages

(1) The H-1B program does not require the use of the workweek or pay period concept used in FLSA investigations. The H-1B employer may take credit for certain payments that are not made during the pay period credited. *See* 20 CFR 655.731(c)(2)(v) and 20 CFR 655.731(c)(4).

(2) *Projected but not-yet-paid bonuses and similar payments (20 CFR 655.731(c)(2)(v))*

The employer may pay less than a *pro rata* salary or less than the required hourly rate in the pay period when the hours of work are performed, *provided that* the employer intends to use some form of non-discretionary supplemental payments in order to meet the wage obligation in the future. The employer must have documentation showing his or her commitment to make such payment such as a documented history of making such payments when due. The employer must be able to show the method of determining the amount of such supplemental and/or bonus payments, and that the payments combined with the routine and/or regular wage payments would ensure payment of at least the required wage for each pay period.

(3) Unlike non-discretionary bonuses, projected but not-yet-paid *discretionary bonuses* are not applicable toward the required wage rate as they are not guaranteed.

NOT OFFICIAL

(4) Claims of supplemental payments or bonus systems should be reviewed with the RSOL to determine whether a wage violation exists and, if so, the method of back wage computation.

(d) Once the supplemental and/or bonus payments are made, whether discretionary or non-discretionary, the payments are treated as wages under the standards for wages paid (*see* FOH 71d10(b) above).

(e) Facilities furnished to H-1B worker(s)

(1) An employer may take a wage credit (*i.e.*, may reduce or make a deduction from the cash-in-hand payment of the required wage) for matters which are principally for the benefit of and voluntarily agreed to by the H-1B worker in writing (*see* FOH 71d11 on deductions).

(2) Housing and food allowances meet the principal benefit of the worker test, *except in circumstances in which* they are employer business expenses as described in 20 CFR 655.731(c)(9)(iii).

(3) The wage credit (*i.e.*, deduction) cannot exceed the fair market value or actual cost, whichever is lower, and must be documented by the employer.

(4) The amount of the wage credit (*i.e.*, deduction) must appear on the payroll records and tax reports as wages.

(5) The amount of the wage credit (*i.e.*, deduction) must not exceed the limit on garnishments under the Consumer Credit Protection Act (CCPA) (*see* 29 CFR 870).

(f) Benefits and eligibility for benefits provided as compensation for services must be offered to H-1B worker(s) on the same basis and under the same criteria as those offered to U.S. workers. *See* 20 CFR 655.731(c)(3)(i) for detailed requirements.

(1) Benefits actually received by the H-1B worker(s) need not be identical to the benefits of U.S. workers, provided that the offers were the same and that the differences in the actual benefits were the result of voluntary choices by the H-1B worker(s) (*see* 20 CFR 655.731(c)(3)(ii)).

(2) If there are no U.S. workers similarly employed by the employer, so that the offer requirement is not applicable, the employer's fringe benefits or benefit policies may constitute a part of the employer's actual wage system applicable to the H-1B worker(s). For example, if the evidence shows that the employer *pays* a particular benefit, or has provided this benefit in the past to U.S. workers similarly employed, this would likely show that the benefit is part of the employer's actual wage and would be due the H-1B worker. The WHI should consult with the RSOL through appropriate channels to determine the actual wage for purposes of the employer's required wage obligation.

(3) Special rules apply to the employer's offer of benefits and rules for benefit eligibility when an employer is part of a multinational corporate operation. Per 20 CFR 655.731(c)(3)(iii), this employer has three options for meeting its obligation regarding benefits to H-1B worker(s) continued on the home country payroll.

NOT FOR PUBLICATION

(4) Benefits provided as compensation for services (*e.g.*, cash bonuses, stock options) may be credited against the required wage (*i.e.*, treated as wages paid) *provided that* the requirements described in FOH 71d10(b) above are satisfied.

(g) FLSA overtime pay

Many H-1B workers are not entitled to FLSA overtime pay because they are exempt either as salaried professionals (*see* section 13(a)(1) of the FLSA) or as skilled computer workers paid at least the FLSA exemption rate of $27.63 per hour (*see* section 13(a)(17) of the FLSA).

(1) Where the FLSA overtime requirement is *not* applicable, the employer may credit premiums paid for overtime hours to other workweeks.

(2) Where the FLSA overtime requirement *is* applicable, the following standards are to be followed:

a. The regular rate for the calculation of the FLSA overtime pay is the H-1B required wage rate for the hours worked in the pay period for which the overtime pay is owed (*e.g.*, where the prevailing wage is the required wage, and the prevailing wage is $18.00 per hour, the regular rate for purposes of FLSA overtime pay is $18.00; where the employer's actual wage is the required wage, and the actual wage is $20.00 per hour, the regular rate for purposes of FLSA overtime pay is $20.00). This is in accordance with the FLSA principle that the regular rate can be no less than the legally-required wage for the hours worked (here, the H-1B required wage rate). *See* 29 CFR 778.315.

b. The FLSA 40-hour week standard is used to determine whether overtime pay is due, even if the employer's standard for full-time work is greater than 40 hours per week.

c. Payment of overtime is compelled by a separate and distinct statutory obligation under the FLSA. Therefore, the employer is required to pay the H-1B required wage and, in addition, to pay the FLSA overtime premium wage for each pay period in which FLSA overtime hours are worked.

d. The employer's payment of FLSA overtime cannot be credited outside of the pay period in which the overtime pay is due. Therefore, the employer cannot credit FLSA overtime pay from overtime weeks to bench weeks in which the H-1B worker worked less than a full-time schedule and would be owed wages for bench time.

e. The employer will not be required to pay overtime on overtime. The FLSA overtime pay will not be considered to have become part of the employer's actual wage for purposes of the H-1B program, since this could have the result of making the FLSA overtime pay part of the H-1B required wage and, thus, part of the FLSA regular rate for future FLSA overtime compliance purposes.

(3) If during the course of the H-1B investigation, the WHI determines that there are also FLSA overtime violations, the FLSA findings should be separately reported under

NOT OFFICIAL PUBLICATION

the appropriate act in WHISARD. The straight time rate for overtime hours will be reflected under the H-1B program and the additional half time for overtime hours will be recorded under the FLSA program in WHISARD.

(4) Whether to bring litigation under H-1B or the FLSA for overtime violations will depend on the facts of the individual case and should be discussed with the RSOL. Factors to consider include: the amounts involved, the need for an injunction, and the utility of charging an individual as an FLSA employer.

71d11 Deductions (20 CFR 655.731(c)(9)).

(a) Deduction means any amount by which the H-1B worker's cash wages are decreased. A deduction may be shown on the payroll records, marked as a deduction or a wage credit (*e.g.*, FICA and housing). However, a deduction will also be considered to exist where the H-1B worker's cash wages have been decreased through out-of-pocket expenditures made by the H-1B worker for business expenses of the employer (*e.g.*, travel expenses paid by the H-1B worker while on the employer's business).

(b) A wage violation will exist where a deduction causes the cash wage to fall below the required wage, unless the deduction is made in accordance with the H-1B regulations. If the H-1B worker receives the required wage despite the deduction, there is no violation. Therefore, a deduction is not necessarily a violation, even where the deduction fails to satisfy the regulatory criteria for allowable deductions.

(c) Allowable deductions

Deductions which reduce the H-1B worker's cash wage below the required wage may be made *only* if they meet one of the following criteria (*see* 20 CFR 655.731(c)(9)):

(1) *Required by law*

The employer may make deductions required by law (*e.g.*, income tax and FICA) (*see* 20 CFR 655.731(c)(9)(i)).

(2) *Reasonable and customary*

The employer may make deductions which are authorized by a CBA, or are reasonable and customary in the occupation and/or area of employment (*see* 20 CFR 655.731(c)(9)(ii)), provided they:

a. do not recoup employer's business expense(s) (*see* FOH 71d11(d) below);

b. were revealed to the H-1B worker prior to the commencement of employment;

c. if, as a condition of employment, were clearly identified as such prior to the commencement of employment;

d. are made against wages of U.S. workers, if any, as well as H-1B workers; and

NOT FOR PUBLIC DISTRIBUTION

e. do not violate state or federal law.

(3) *Voluntary*

The employer may make deductions which meet all of the requirements listed in 20 CFR 655.731(c)(9)(iii).

(d) Business expenses

The employer cannot recoup business expenses (*e.g.*, cost of tools and equipment, transportation costs while on business travel, etc.) to the extent such recoupment reduces the H-1B worker's wage below the required wage (*see* 20 CFR 655.731(c)(9)(iii)(C)). *See* FOH 71d08 for treatment of the USCIS fees.

(1) Attorneys fees incurred in the preparation and filing of the LCA, the Form I-129/I-129W, or a request for extension of H-1B status, are considered to be an employer business expense. However, the employer's business expenses would *not* include costs and fees connected with the H-1B worker's personal obligations in obtaining the H-1B visa (*e.g*, translation of credential materials for submission to the U.S. Consulate) or with the H-1B worker's personal interests concerning the employment (*e.g.*, attorney hired by H-1B worker to negotiate the employment contract, or to review the H-1B worker's immigration status, or to obtain visas for the H-1B worker's family members). Claims that H-1B worker(s) have paid attorneys fees should be reviewed with the RSOL, through appropriate channels, to determine whether a violation exists and to determine back wages, in the event of a violation.

(2) Deductions that are not considered business expenses include: initial transportation from, and end-of-employment transportation to, the H-1B worker's home country (this is due to special treatment of transportation expenses in the INA); transportation for the H-1B worker's family; any expense incurred to obtain the H-1B worker's visa or visas for his or her family members at the U.S. Consulate or Embassy; and fair market value or reasonable cost of housing and food *unless* the H-1B worker is in business travel status, or the circumstances indicate that the arrangements for the H-1B worker's housing are principally for the convenience or benefit of the employer (*e.g.*, working and living at the worksite in an on-call status).

(3) If the employer advances the H-1B worker the cost of non-business expenses (*e.g.*, travel expenses for the H-1B worker and his or her family members from the home country), then the employer may later recoup those advances through voluntary deductions from the H-1B worker's wages, provided that the deductions are in compliance with the regulation for such deductions as discussed in FOH 71d11(c)(3) above (*see* 20 CFR 655.731(c)(9)(iii)(C) and FOH 71e02).

(e) Any unauthorized deduction taken from the required wages is considered by the DOL to be non-payment of that amount of wages. *See* 20 CFR 655.731(c)(11). An employer may never withhold payment of required wages, especially the last paycheck.

71d12 <u>Place of employment and worksite (20 CFR 655.715).</u>

(a) The employer's obligations under the H-1B program are focused around the H-1B worker's place of employment and worksite. The employer must have an LCA on file for every place

NOT OFFICIAL RON

of employment or worksite, determine the applicable prevailing wage rate, give notice to U.S. workers that H-1B workers may be hired, and comply with the strike or lockout prohibition.

(b) "Place of employment" is the worksite or physical location where the H-1B worker's work is actually performed (*see* 20 CFR 655.715). Most H-1B program requirements (*e.g.*, wages, notice, and strike or lockout) are tied to the place of employment and worksite.

(1) H-1B workers may have more than one place of employment and worksite during their stay in the U.S., since they may work for short periods at various worksites and be relocated from one worksite to another. Regardless of how often H-1B workers travel in the performance of their job, or how often they move from one location to another, every H-1B worker has a worksite at all times, for purposes of determining the LCA which controls the H-1B workers' wage rights and the employer's other obligations.

(2) An H-1B worker may perform work at some locations that are not considered worksites (*e.g.*, receiving training; making a sales call on a customer), as explained in FOH 71d12(c) below. The WHI will determine what location(s) constitute worksite(s) for the H-1B worker in an investigation, and then determine whether there are violations concerning the employer's treatment of wages, notice, and other matters with regard to such location(s).

(3) Worksite examples based on an H-1B worker's job functions are listed in 20 CFR 655.715.

(c) Non-worksite

For any days or periods when H-1B workers work at a non-worksite location, their worksite, for purposes of wages and other obligations, would be the H-1B workers' home base or regular worksite LCA. This regular worksite is often the location identified on the LCA used by the employer to petition for the H-1B worker, but it may be a different location if the H-1B workers were transferred, temporarily or permanently, to some other location after beginning employment. For any location that is not a worksite, there is no requirement to have an LCA on file for that location, to determine the prevailing wage, or to give notice to the U.S. workers of the employer's intent to hire an H-1B worker.

(1) There are two categories of non-worksite locations: training sites and short visit sites:

a. <u>Training locations</u>

The place of employment and/or worksite does not include locations where the H-1B worker temporarily participates in various types of employee developmental activities, such as training seminars and management conferences. This exception would not include the location of an H-1B worker's on-the-job training (*see* 20 CFR 655.715), or an H-1B worker's work as an instructor at a training location.

b. <u>Short visit locations</u>

Sometimes the nature and duration of an H-1B worker's job function may require frequent location changes and result in little time at any one location.

NOT OFFICIAL

The H-1B worker's visits may be recurring, but are to be on a casual (short-duration) basis. The following criteria are applied to such situations (*see* 20 CFR 655.715):

1. Peripatetic or constantly traveling H-1B worker

Where the H-1B worker's duties require frequent travel to various locations (local or non-local), and the worker's visit to a location does not exceed 5 consecutive work days, the location will not be considered to be a worksite. An H-1B worker who makes sales calls or performs service calls on customers' equipment would commonly be peripatetic and the customers' facilities would not be worksites for the H-1B worker.

2. Occasional short visits by H-1B worker

Where the H-1B worker spends most work time at one location but occasionally travels to other locations for short periods of time (*i.e.*, not exceeding 10 consecutive work days on any one visit), the location visited will not be considered to be a worksite.

3. The worksite analysis focuses on the normal duties of the H-1B worker's occupation, and not the nature of the employer's business. An employer operating as a staffing provider that routinely sends H-1B workers to customer locations to fill in for other workers or to supplement the customer's workforce in times of heavy workload would be a worksite, unless the nature of the H-1B worker's occupation normally involves frequent visits to various locations.

4. The H-1B worker cannot be sent to a short visit site as a strikebreaker (*i.e*., the H-1B worker is not to be at the location performing work in an occupation in which U.S. workers are on strike or in lockout). If such a placement of an H-1B worker occurs, the location would be considered to be a worksite. The employer would be subject to all the requirements regarding a worksite (*e.g.*, posting notices) and could be cited for a violation of the strike or lockout standards (*see* FOH 71d18).

c. <u>Non-worksite short visit examples, based on an H-1B worker's job functions (*see* 20 CFR 655.715)</u>

A customer location to which an H-1B computer programmer is sent to troubleshoot complaints regarding software malfunctions; a business location visited by an H-1B sales representative calling on prospective customers within a home office sales territory; a field office or out-station visited by an H-1B manager monitoring the performance of workers (*i.e.*, H-1B and/or U.S. workers); a customer's facilities where an H-1B accountant is conducting reviews or auditing records; or private homes where an H-1B physical therapist treats patients.

NOT FOR PUBLICATION

71d13 Short-term placement (20 CFR 655.735).

(a) Short-term placement is a regulatory exception to the usual requirements concerning worksite notice and prevailing wages. This exception provides an option that allows an employer to place an H-1B worker(s) at a worksite(s) within an area(s) of employment not listed on the employer's already existing LCA(s) (*i.e.*, non-LCA worksites). *See* FOH 71d12(c). This option enables the employer to move its H-1B worker(s) quickly to the worksite(s), without waiting to complete the LCA filing process. Thus, the employer is afforded some flexibility in the use of its H-1B workers to respond to business opportunities and needs.

(b) While the H-1B worker is on a short-term placement, his or her wage rates are controlled by the LCA for his or her permanent worksite, often called the home office.

(c) Travel and subsistence expenses

The H-1B employer must satisfy all requirements listed in 20 CFR 655.735(b)(3); the payment of actual expenses is required even where the H-1B worker's expenses do not take the H-1B worker's cash wage below the required wage. This is the only circumstance in which employer payment of the H-1B worker's travel and subsistence expenses is required without regard to any impact of the H-1B worker's payment of these expenses on receipt of the required wage. Where an employer is unable to demonstrate the actual expenses incurred, the WHI should use the best information available to make a determination. In such situations, the WHI may use the General Services Administration (GSA) standards for travel and subsistence expenses (*see* http://www.policyworks.gov/org/main/mt/homepage/mtt/perdiem/travel.shtml.)

(d) The employer cannot place an H-1B worker at a worksite where there is a strike or lockout in the H-1B worker's occupation. This prohibition applies to short-term placements as well as to permanent transfers and placements.

(e) Short-term not applicable where an LCA is in effect

Per 20 CFR 655.735(e), where the employer has an LCA in effect for the area of employment and occupation, the short-term placement option is *not* available as a method for placing H-1B workers at worksites. In addition, the H-1B worker's first worksite placement must be at a worksite in the area of employment identified on the LCA supporting that worker's Form I-129/I-129W petition. Therefore, no H-1B worker can be sent on a short-term placement as his or her initial job assignment.

(1) The short-term placement option does *not* provide a method by which the employer can send extra workers to an area or can evade the LCA obligations by treating some H-1B workers as temporary in that area.

(2) All H-1B workers at LCA-covered worksites must be employed in accordance with the LCA for that area and occupation. The existence of the LCA, with its local prevailing wage standard, may require the employer to make adjustments in the wages of H-1B workers who are sent to worksites in the area. The employer cannot avoid this possibility by claiming to be using the short-term placement option.

(3) Since the LCA has a designation of the number of H-1B workers to be employed by the employer in the area of employment, it is possible that the employer will be

overcrowding, or exceeding the designated LCA number by placing temporary H-1B workers at worksites in the area. If overcrowding is identified in an investigation, the DOL will not charge a violation of the LCA specificity requirement (*see* FOH 71d19) if the employer's violation is not willful and the employer has taken prompt action to come into compliance (*i.e.*, filing a new LCA to add more slots for H-1B workers).

(f) Standards for enforcement

The determination as to whether a placement is truly short-term is based the following regulatory standard (the "30 + 30" standard):

(1) 30 workdays in a 1-year period will be considered short-term. The days may be consecutive, but may also be broken into two or more placements during the 1-year period.

(2) An additional 30 workdays (*i.e.*, a total of 60) in a 1-year period will also be considered short-term, whether consecutive or broken into two or more placements, if the employer can show that the three criteria listed in 20 CFR 655.735(c)(1) -(3) have been met.

(3) For purposes of this test, "workday" means any day on which the H-1B worker performs any work at any worksite(s) in the non-LCA area, and "1-year period" means either the calendar year (January 1 through December 31) or the employer's fiscal year, whichever the employer has designated. *See* 20 CFR 655.735(d).

(4) For purposes of this test, the count of workdays is done worker-by-worker, and the short-term limit is reached when any one H-1B worker has accumulated the maximum number of days in a 1-year period. The employer is not allowed to continuously rotate H-1B workers in a manner that would evade the purposes of the short-term placement option. Where the employer continuously or virtually continuously has H-1B workers in an area, but moves individual workers out of the area in a pattern that avoids the maximum days limit, the employer has violated the short-term placement regulations.

(5) Once the short-term placement option is exhausted (*i.e.*, once any H-1B worker accumulates the maximum number of days at any worksite or combination of worksites in the area in a 1-year period), the employer must take one of the actions available in 20 CFR 655.735(f).

(g) Investigative findings and remedies

After the short-term determination is made, the WHI shall determine the employer's obligation and any appropriate remedies as follows:

(1) If the placement is short-term, the employer must meet all the requirements in 20 CFR 655.735 (b)(3)(i) -(iii). If the employer has an LCA in effect for the occupation in the area, the placement cannot be considered to be short-term and the wage and notice obligations under that LCA are fully applicable.

(2) If the placement is not short-term, and the employer has no LCA in effect for the occupation in the area, the employer must file an LCA for the area of employment

NOT FOR PUBLICATION

that covers the worksite(s) (which includes the requirement to determine the prevailing wage); the employer must:

a. satisfy the notification obligations (*i.e.*, give a copy of the new LCA to the H-1B worker(s) and provide notice at the worksite(s) to the union, or by hard copy posting, or by electronic posting, as appropriate);

b. pay the required wage rate applicable to the worksite; *and*

c. pay the H-1B worker's actual costs of travel while on the employer's business. *See* 20 CFR 655.735(g)).

(3) If the employer has an LCA for the occupation in the area, thus making the short-term placement option non-applicable, the employer must:

a. meet the notification obligations under that LCA (*i.e.*, give a copy of the LCA to the H-1B worker upon placement at a worksite in the area);

b. provide notice at the worksite(s) to the union, or by hard copy posting, or by electronic posting, as appropriate;

c. pay the required wage rate applicable under that LCA, which may require wage adjustments for the H-1B worker(s) in question; and

d. pay the H-1B worker's actual cost of travel while on the employer's business, if these expenses depressed the worker's wages below the required wage.

71d14 <u>Notification requirements (20 CFR 655.734).</u>

(a) Any employer filing an LCA for the employment of H-1B workers must provide notice to the H-1B worker(s) and to U.S. workers. A failure to meet this requirement will be cited as a violation, and can result in CMPs and debarment if the violation is substantial.

(b) Notice to H-1B workers

A copy of the LCA must be given to the H-1B worker per 20 CFR 655.734(a)(3). The LCA notice to the H-1B worker is required by the DOL regulation; the USCIS regulations require that USCIS give the employer a copy of the Form I-129/I-129W and the Form I-797, but the USCIS does not require that the employer give a copy of these documents to the H-1B worker. It is common practice for the employer to provide a copy of all of these documents, and many H-1B workers have these copies in their personal files.

(c) Notice to U.S. workers

This notification requirement can be met in one of two ways *(union notice* or *worksite notice)* (*see* 20 CFR 655.734).

(1) *Hard copy*

The employer must post a notice for at least 10 days in at least two conspicuous locations at each place of employment and/or worksite where any H-1B worker will

be employed. This requirement to notify workers also applies to a client's worksite. The H-1B employer cannot send an H-1B worker to a client's worksite if the client refuses to notify its workers. Appropriate locations for posting the notices include but are not limited to locations in the immediate proximity of the WHD and OSHA posters. The employer may post a copy of the LCA or may create a notice that contains all the required information (described in subparagraph (d) below). Where the employer places an H-1B worker at a worksite not contemplated at the time of filing the LCA, the employer shall post a notice on or before the date any H-1B worker begins work at that location.

(2) *Electronic*

The employer may provide an electronic notification to employees in the occupational classification for which H-1B workers are sought. *See* 20 CFR 655.734(a)(1)(ii)(B) for a description of methods that an H-1B employer can use to accomplish this requirement.

(3) *Contents of notice*

The notice must contain the following information: number of H-1B workers sought; occupational classification(s) in which the H-1B workers will be employed; wages offered; period of employment; location(s) at which the H-1B workers will be employed; and location where the LCA is available for public inspection.

a. In addition to the above, the following specific statement for all notices must be included: "Complaints alleging misrepresentation of material facts in the LCA and/or failure to comply with the terms of the LCA may be filed with any office of the Wage and Hour Division of the United States Department of Labor." *See* 20 CFR 655.734(a)(1)(ii).

b. If the employer is an H-1B-dependent employer or a willful violator, and the LCA is not being used only for exempt H-1B nonimmigrants, the notice must include "Complaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street and Constitution Avenue, NW, Washington, DC 20530."

(4) *New worksite(s*)

Where H-1B workers are placed at worksite(s) not contemplated when the LCA was filed, notice shall be provided in the manner described above at the new worksite(s) on or before the date the H-1B workers begin work at that site.

(5) The requirement for notice to U.S. workers applies whether or not an H-1B worker is ultimately approved to work for the employer on the LCA.

(6) The employer's notice violation must be *substantial* in order to be penalized by CMPs and debarment. An investigation may disclose that the employer failed to comply with the notice requirement in some respect (*e.g.*, failed to post the notice at one of several work sites or failed to give a copy of the LCA to every H-1B worker though many received them). If the employer immediately and completely corrects

NOT OFFICIAL PRODUCTION

the failures upon being informed by the WHI, the violation will be cited but will not be characterized as substantial. If the employer fails to correct the violation, it will be cited as substantial, resulting in a CMP assessment and debarment. Where the employer's failure to provide notice is pervasive or egregious (*e.g.*, no notice at any worksites), the violation should ordinarily be characterized as substantial and correction of the failure should be required as an administrative remedy, in addition to CMPs and debarment.

71d15 <u>Changes in employer's corporate structure or identity (20 CFR 655.730(e)).</u>

(a) A corporate employer may experience changes in corporate structure as a result of an acquisition, merger, spin-off, or other action. The employer's obligations and continued participation in the H-1B program will require particular attention by the employer.

(b) New corporate employer

The following criteria shall apply where an H-1B employer changes its corporate identity or structure:

(1) The new corporate entity may continue to employ the predecessor entity's existing H-1B workers without filing new LCA(s), regardless of whether or not there is a change in the EIN, *provided that* the new entity explicitly agrees to assume the predecessor entity's obligations and liabilities under the LCA(s). *See* 20 CFR 655.730(e)(1)(i) -(iv) for a list of required documentation in the public access file. The non-public records must contain a list of the H-1B workers transferred as employees of the new entity.

(2) The new corporate entity cannot use the predecessor entity's existing LCA(s) to employ H-1B worker(s). *See* 20 CFR 655.730(e)(2).

(c) Successor(s)-in-interest

If a change in corporate structure or identity occurs and the new corporate entity fails to comply with the standards discussed in the preceding subparagraphs, then liability for H-1B program obligations shall be imposed upon the entity(ies) that are identifiable as the sponsoring or original employer's successor(s)-in-interest. Whether there is a successor-in-interest generally depends on whether the successor firm had notice of the liability at issue, the ability of the predecessor to provide relief, whether there has been substantial continuity of business operations, whether the new employer uses the same plant, whether he or she uses the same or substantially the same work force, whether he or she uses the same or substantially the same supervisory personnel, whether the same jobs exist under substantially the same working conditions, whether he or she uses the same machinery, equipment and methods of production, and whether he or she produces the same products. If such possibilities are raised in an investigation, careful coordination among the WHI, DD and/or ADD, and RSOL is essential.

71d16 <u>Misrepresentation of a material fact on the LCA.</u>

(a) The employer is subject to CMPs and debarment upon the finding of a misrepresentation of a material fact on the LCA.

(b) "Misrepresentation" means that the employer made a statement on the LCA that was false at the time the LCA was filed. The employer must exercise reasonable care and diligence to ensure the accuracy of its LCA statements; failure to exercise such care and diligence may result in a false statement that could constitute a violation. The false statement may be a matter that was revealed through subsequent events (*e.g.*, LCA states that a particular wage rate would be paid, but evidence establishes that the employer never intended to pay that wage rate). To constitute a misrepresentation, the false statement must be more than an inadvertent error. Where the misrepresentation was willful (*i.e.*, the false statement was made knowingly, or the employer showed reckless disregard for the truthfulness of the statement), the violation is subject to an increased CMP ($5,000.00 maximum, rather than $1,000.00 maximum).

(c) "*Material fact*" means a significant item of information on the LCA. A material fact may include any of the following: the number of H-1B workers sought; the occupational classification for which the worker is sought; the rate of pay; the address where documentation is kept; the three-digit occupational group code; the job title; the part-time status of the employee(s); the prevailing wage rate and its source; the period of employment; the additional employer labor condition statements; and the location where the H-1B worker will work.

(d) The number of H-1B workers sought, the occupational classification for which the worker is sought, and the rate of pay (and only these three facts) can also be cited as a violation under fail to specify (*see* FOH 71d19) but are never cited under both fail to specify and misrepresentation of a material fact.

(e) For any violation committed by the employer that does not rise to the level of a misrepresentation, the violation can be cited as failed to otherwise comply with subpart H or I (*see* FOH 71d22 and FOH 71e17).

71d17 **<u>Working conditions (20 CFR 655.732).</u>**

(a) Any employer seeking to employ an H-1B worker must attest that the employment of H-1B worker(s) in the named occupation(s) will not adversely affect the working conditions of similarly employed U.S. workers. The employer's obligation extends for the longer of two periods: the validity period of the LCA(s) or the period during which the H-1B workers are employed by the employer.

(b) Working conditions include hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules. Protected working conditions do not include the right to a job. Therefore, if a U.S. worker is displaced by an H-1B worker, such displacement is not a violation of the working conditions attestation (even though it may violate other H-1B provisions or other laws).

(c) "Similarly employed" means having substantially comparable jobs in the occupational classification at the worksite and in the area of intended employment. The comparison is to be made among the employer's own employees, not among workers generally in the area of employment.

71d18 **<u>Strike or lockout provisions (20 CFR 655.733).</u>**

Any employer filing any LCA must attest that:

(a) On the date the LCA is signed and submitted there is no strike or lockout in the course of a labor dispute in the named occupation at the intended place of employment or worksite.

(b) The employer must adhere to requisites listed in 20 CFR 655.733(a)(1) if such a strike or lockout occurs after the LCA is submitted. *See* FOH 71e04 and 71d13(d).

71d19 Specific and accurate information on the LCA.

(a) The employer is required to provide specific and accurate information on the LCA concerning the number of H-1B workers sought, the occupational classification, and wage rate of the H-1B worker(s). Misrepresentation of these three items can, in the alternative, be cited as a material misrepresentation (*see* FOH 71d16) or failed to otherwise comply with subpart H or I (*see* FOH 71d22 and FOH 71e17).

(b) The employer's substantial failure to provide specific and accurate information would constitute a violation subject to a CMP not to exceed $1,000.00 per LCA (*see* FOH 71e06(b)(2)).

71d20 Early cessation penalty (20 CFR 655.731(c)(10)).

(a) The INA prohibits the employer from requiring an H-1B worker to pay a penalty for ceasing employment with the employer prior to a date agreed to by the H-1B worker and the employer. However, the employer is permitted to recoup bona fide liquidated damages for the employer's losses or expenses incurred due to the worker's leaving employment early (*see* 20 CFR 655.731(c)(10)(i)). *See* FOH 71b06 for procedures for screening complaints and conducting investigations for alleged early cessation penalty violations. Consultation with the RSOL on early cessation penalties is essential.

(b) The employment agreement between the employer and the H-1B worker may contain a provision imposing a monetary payment on H-1B workers if they terminate employment prior to the agreed date. The existence of such a contract clause does not, in itself, constitute a violation of the prohibition on an early cessation penalty and, conversely, does not ensure that the payment would constitute permissible liquidated damages. The determination of the nature of the payment, whether liquidated damages or a penalty, must be made in light of the controlling state law.

(c) Liquidated damages

In general, the laws of the various states recognize that liquidated damages are amounts which are fixed or stipulated by the parties at the inception of a contract, and which are reasonable approximations or estimates of the anticipated or actual damages caused to one party by the other party's breach of contract. The liquidated damages cannot be speculative; they must reflect a potential bona fide loss to the employer. Liquidated damages, in the context of an employee's early termination of employment, can cover business expenses and may include:

(1) Worker-related expenses incurred by the employer, such as employer-paid costs for transporting a worker and/or family members from home country to the U.S.; employer-paid room and board for a worker upon arrival in the U.S.; or attorney's fees and filing fees, other than the special petition and anti-fraud fee (*see* FOH 71d08) and training costs.

(2) Employer's losses attributable to an H-1B worker's early departure from employment, such as a customer's cancellation of a contract with the employer due to the unavailability of a crucial worker, or the employer's termination of a project or office due to the loss of a worker's services.

(d) Penalties

In general, the laws of the various states recognize that a penalty is an amount of money, fixed or stipulated in a contract, that is not a reasonable approximation or estimate of the damages actually resulting from the worker's early departure from employment. Characteristics of a penalty include: an amount of money that the employer routinely demands in a certain type of contract (*e.g.*, every H-1B contract specifies a termination payment of $30,000.00 to employer); an amount of money that is the same regardless of whether the agreement is terminated early in the contract period, when legitimate business losses might be substantial, or near the end, when such losses would be minimal; an unexplained or unjustified amount of money which is not attributed to any particular cost or loss; *and* an amount of money which appears unreasonable in comparison to the worker's earnings.

(e) Employer action to impose or collect penalty

Once an amount of money has been determined to constitute a penalty, a violation will be cited where the employer takes some action which can reasonably be construed as an effort to collect the penalty. A contract clause identifying the amount of money would not, in itself, be sufficient for an early cessation penalty violation (*see* FOH 71d05 concerning intimidation and/or retaliation). A violation would exist where the employer makes a written or oral demand for payment of the money, or where the employer has a history or a pattern of behavior of seeking payment of the money from other workers. An H-1B employer is not prohibited from seeking to collect any liquidated damages for the early termination or seeking to enforce, or obtain damages for, other contract terms allegedly breached by a worker.

(f) A violation will be cited for every H-1B worker against whom the employer seeks to impose and/or collect a penalty, including those workers who have entered a settlement with the employer concerning the payment, with or without a state court order. Such a settlement may affect whether, and the extent to which, monetary relief should be obtained for the H-1B worker. In such instances, the amount of the H-1B back wages, if any, should be determined only after consultation with the NO, OP, DEPP, Farm Labor/Immigration Branch. Where a state court, in adjudicating a lawsuit or approving a settlement between the parties, has itself expressly made a judicial determination based on the facts of the case that a payment is not a penalty under applicable state law, there can be no citation of an H-1B violation for an early cessation penalty.

(g) Employer's method of collection of liquidated damages

In no instance may an employer withhold an H-1B worker's final paycheck in an attempt to recover any asserted liquidated damages owed the employer.

(h) The special $750.00, $1,000.00, and/or $1,500.00 petition filing fee can never be considered to be a liquidated damage. The statute prohibits the H-1B worker's payment of this fee in any circumstances. *See* 20 CFR 655.731(c)(10)(ii) and FOH 71e11.

71d21 Required records.

H-1B employers are required to develop and maintain certain employment records to support their compliance with the attestations made on the LCA(s). These records include those specifically required by the H-1B program; *see* 20 CFR 655.731(b), 20 CFR 655.738(e), 20 CFR 655.739(i), 20 CFR 655.760, and 20 CFR 655.805(a)(15)) as well as those required by the FLSA. *See* FOH 71e15.

71d22 Failed to otherwise comply with subpart H or I.

(a) H-1B employers must comply with all regulatory requirements in 20 CFR 655 subpart H or I. CMPs and debarment may be imposed for violations of regulations that implement specific statutory standards (except public disclosure files).

(b) CMPs but not debarment are available for violations of public disclosure requirements and other regulatory requirements (such as recordkeeping or refusal to cooperate in an investigation, where the violation impedes the WHD's ability to determine whether an attestation violation has occurred, or the public's ability to have information needed to file a complaint) which are not drawn from specific statutory provisions. The distinction between these types of violations is clearly made in the regulation specifying the amounts of CMPs applicable to particular violations (*see* 20 CFR 655.810(b)).

(c) Violations which are not subject to CMPs and debarment shall nevertheless be cited in the determination letter. This violation category is used for any violation not addressed in FOH 71e01 -16. *See* FOH 71e17.

71d23 Good faith compliance or conformity (8 USC 1182(n)(2)(H)).

(a) The H-1B Visa Reform Act of 2004 provides for a good faith compliance defense, and a recognized industry standards defense.

(b) The H-1B employer meets the good faith defense requirement only when:

(1) the violation is technical or procedural only,

(2) the employer has made a good faith attempt to comply,

(3) the employer has corrected the problem within 10 business days of notice, and

(4) the employer has not engaged in a pattern or practice of willful violations under the H-1B program.

(c) The terms "technical" or "procedural" failures are not defined in the statute.

(1) Technical failures are minor violations which do not result in or cause substantive violations of the statute. Such technical failures may include clerical errors, insignificant failures to comply, or inadvertent mistakes.

(2) Procedural failures in most instances are similar to technical failures and involve minor procedural discrepancies, mistakes or omissions.

(3) Examples of technical or procedural failures:

NOT FOR PUBLICATION

a. A large firm with many public access files mixes up documents or fails to include a required document in an insignificant number of files.

b. Failure to report to the IRS in kind payments such as rent, bonuses, etc. as wages for tax purposes where the employer retroactively reports such wages, pays appropriate taxes and ceases the practice of non-reporting.

(d) Failures to meet attestation requirements are not technical or procedural in nature.

(e) Good faith requires that the employer affirmatively demonstrate that reasonable actions were taken to come into compliance.

(f) The WHI should provide notice of the technical or procedural failure as soon as practicable and should provide at least 10 business days to correct the failure. The WHI should document the date the notice was provided and note in the file the methods of compliance. The determination letter should not be issued until the period for correction has elapsed.

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

NOT FOR PUBLICATION

71e LIST OF VIOLATIONS AND REMEDIES

71e00 Level or degree of employer's wrongdoing in violations.

(a) The INA specifies certain degrees of wrongdoing necessary in order to impose a penalty for certain violations (*i.e.*, CMPs, debarment, or both). Some violations must be substantial (*see* FOH 71e05 -06 and FOH 71e09) and others must be willful (*see* FOH 71e01 -09), in order to assess CMPs and debarment. However, in any case where an H-1B worker has been denied money in violation of H-1B requirements, the employer will be liable without regard to whether or not the violation was willful or substantial.

(1) If any violation does not meet the substantial or willful standard, the violation should nevertheless be cited in the determination letter without assessment of CMPs.

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(d) Willful violation

(1) *Standard for willfulness*

The H-1B program uses the *Richland Shoe* standard for determining willfulness: the employer's action is willful if it is a knowing failure of compliance or a reckless disregard with respect to whether the conduct was contrary to the statute or regulations. *See* 20 CFR 655.805(c) and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). The employer's simple negligence, incorrect assumption of compliance, or mere carelessness in determining its H-1B obligations is not sufficient to meet the willful standard. Actions that are clearly inconsistent with the employer's attestation obligations, as set forth in the LCA, would be strong evidence that a violation was willful, absent evidence of inadvertence.

[redacted] (b) (7)(E) [redacted]

[redacted]

NOT FOR PUBLIC

(b) (7)(E) [redacted]

(3) *Violations requiring willfulness for imposition of penalties*

Willful violations are required for CMPs, up to $5,000.00 per violation, and debarment for an employer's failure to comply with the requirements concerning wage and benefits (*see* 20 CFR 655.731), working conditions (*see* 20 CFR 655.732), strike or lockout (*see* 20 CFR 655.733), notification (*see* 20 CFR 655.734), LCA specificity (*see* 20 CFR 655.730), displacement of U.S. workers: direct or secondary (*see* 20 CFR 655.738), recruitment of U.S. workers (*see* 20 CFR 655.739), or misrepresentation of a material fact on the LCA. A non-willful misrepresentation of a material fact is subject to a CMP up to $1,000.00.

[redacted] (b) (7)(E) [redacted]

[redacted] (b) (7)(E) [redacted]

[redacted] [redacted]

[redacted] [redacted]

(e) Super penalty for certain willful violations

Where the employer displaces a U.S. worker in its workforce (*i.e.*, U.S. worker employed by the violating employer) during the course of a willful violation, the willful violation is subject to an enhanced CMP up to $35,000.00 per violation plus debarment for at least 3 years. It is not necessary for the WHD to show a causation link between the violation and the displacement, where the actions are contemporaneous or nearly so. This enhanced CMP that applies to all H-1B employers, whether H-1B-dependent or non-dependent, requires NO, OP, DEPP, Farm Labor/Immigration Branch; SOL; and RSOL approval. *See* FOH 71e10.

(1) The super penalty applies where U.S. worker employees of the H-1B employer are displaced. The penalty does *not* apply to the loss of work for U.S. worker consultants

and bona fide independent contractors who performed services for the H-1B employer.

(2) In order for the super penalty to be applied, the displacement of the U.S. worker(s), in the course of the willful violation, must occur within the period beginning 90 days before and ending 90 days after the date of the employer's filing of any H-1B visa application (Form I-129/I-129W). In other words, the super penalty is applicable only during specific time periods and is *not* available for all willful violations involving displacements of U.S. workers.

(3) After an initial assessment that the violation(s) under investigation may be willful, the WHI should be alert to the possibility of displacement of U.S. worker(s) during the course of the violation(s) and within the pertinent time period(s).

(4) The super penalty for a willful violation involving displacement of U.S. worker(s) is *not* to be confused with the non-displacement obligation which applies only to H-1B-dependent and willful violator employers. *See* FOH 71d04. The following differences are significant:

a. The super penalty applies to all H-1B employers, rather than only to H-1B-dependent and willful violator employers.

b. The super penalty applies only where the displaced U.S. workers are employed by the violating H-1B employer. The secondary displacement concept, found in the H-1B-dependent and willful violator employer obligation, is not applicable to the super penalty.

c. The super penalty affects the size of the CMPs for the willful violation in which the displacement occurred. The displacement itself is not penalized by the super penalty. Therefore, an employer which is assessed a super penalty cannot be required to remedy the displacement through additional administrative remedies such as reinstatement.

H-1B Level or Degree of Wrongdoing: *Maximum* CMPs and *Minimum* Period of Debarment

Violation	Base	If substantial	If willful	Regulation cite at 29 CFR	FOH cite
Misrepresentation of material fact	$1,000.00 1 year	$1,000.00 1 year	$5,000.00 2 years	655.805(a)(1)	71e01
Failed to pay required wages or offer benefits	-	-	$5,000.00 2 years	655.805(a)(2)	71e02
Failed to provide required working conditions	-	-	$5,000.00 2 years	655.805(a)(3)	71e03
Filed LCA during a strike or lockout	$1,000.00 1 year	$1,000.00 1 year	$5,000.00 2 years	655.805(a)(4)	71e04

NOT FOR PUBLICATION

Violation	Base	If substantial	If willful	Regulation cite at 29 CFR	FOH cite
Failed to provide notice of filing the LCA	-	$1,000.00 1 year	$5,000.00 2 years	655.805(a)(5)	71e05
Failed to accurately specify number of workers sought, the occupational classification, or the wage rate and conditions	-	$1,000.00 1 year	$5,000.00 2 years	655.805(a)(6)	71e06
Displacement of U.S. worker*	$1,000.00 1 year	$1,000.00 1 year	$5,000.00 2 years	655.805(a)(7)	71e07
Failed to make required displacement inquiry of another employer at a worksite where H-1B workers are placed*	$1,000.00 1 year	$1,000.00 1 year	$5,000.00 2 years	655.805(a)(8)	71e08
Failed to take good faith steps in recruitment*	-	$1,000.00 1 year	$5,000.00 2 years	655.805(a)(9)	71e09
Displaced U.S. worker in the course of committing a willful violation	$35,000.00 3 years	$35,000.00 3 years	$35,000.00 3 years	655.805(a)(10)	71e10
Required/accepted payment of employer's $750.00/$1,500.00 fee for filing petition	$1,000.00 0 years	$1,000.00 0 years	$1,000.00 0 years	655.805(a)(11)	71e11
Required payment of penalty for early cessation of employment	$1,000.00 0 years	$1,000.00 0 years	$1,000.00 0 years	655.805(a)(12)	71e12
Discriminated or retaliated for protected actions	$5,000.00 2 years	$5,000.00 2 years	$5,000.00 2 years	655.805(a)(13)	71e13
Failed to make LCAs and public access documents available to public	$1,000.00 only if public impeded 0 years	$1,000.00 only if public impeded 0 years	$1,000.00 only if public impeded 0 years	655.805(a)(14)	71e14
Failed to maintain required documentation	$1,000.00 only if public impeded 0 years	$1,000.00 only if public impeded 0 years 0	$1,000.00 only if public impeded 0 years	655.805(a)(15)	71e15

NOT FOR PUBLICATION

Violation	Base	If substantial	If willful	Regulation cite at 29 CFR	FOH cite
Failed to otherwise comply	$1,000.00 only if WHD impeded 0 years	$1,000.00 only if WHD impeded 0 years	$1,000.00 only if WHD impeded 0 years	655.805(a)(16)	71e17
Failed to cooperate in Investigation	$1,000.00 only if WHD impeded 0 years	$1,000.00 only if WHD impeded 0 years	$1,000.00 only if WHD impeded 0 years	655.800(c) -(d)	71e16

*****Note: applies only to H-1B-dependent employers

71e01 Misrepresentation of a material fact on the LCA (20 CFR 655.730 and 20 CFR 655.805(a)(1)).

(a) *See* FOH 71d16.

(b) A violation of this standard can be non-willful or willful.

(1) A non-willful violation should be cited as "(Name of firm on LCA) misrepresented a material fact on the LCA in violation of 20 CFR 655.730. *See* 20 CFR 655.805(a)(1)."

Maximum CMP: $1,000.00 per violation

Minimum debarment: 1 year

(2) A willful violation should be cited as "(Name of firm on LCA) willfully misrepresented a material fact on the LCA in violation of 20 CFR 655.730. *See* 20 CFR 655.805(a)(1)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(c) Any additional remedy: the employer will be required to file an LCA that reflects the correct material facts. Filing a new LCA requires that the employer obtain the applicable prevailing wage and provide notice to workers.

(d) A willful violation involving the displacement of a U.S. worker employed by the employer may be subject to an enhanced CMP, up to $35,000.00, and an enhanced debarment (minimum of 3 years). *See* FOH 71e00(e) and FOH 71e10.

71e02 Failed to pay wages as required (20 CFR 655.731 and 20 CFR 655.805(a)(2)).

The wage category includes benefits and eligibility for benefits provided as compensation for services. However, benefit violations are cited separately (*see* FOH 71e02A below).

NOT TION

(a) *See* FOH 71d09 -10.

(b) A violation of this standard can be non-willful or willful.

(1) A non-willful violation pertaining to wages should be cited as "(Name of firm on LCA) failed to pay wages as required in violation of 20 CFR 655.731. *See* 20 CFR 655.805(a)(2)."

CMP: none

Debarment: none

(2) A willful violation pertaining to wages should be cited as "(Name of firm on LCA) willfully failed to pay wages as required in violation of 20 CFR 655.731. *See* 20 CFR 655.805(a)(2)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(c) Any additional remedy: the employer will be required to pay back wages and/or provide benefits as deemed appropriate.

(d) A willful violation involving the displacement of a U.S. worker employed by the employer may be subject to an enhanced CMP, up to $35,000.00, and an enhanced debarment of a minimum of 3 years. *See* FOH 71e00(e) and FOH 71e10.

71e02A **Failed to offer benefits, equal eligibility for benefits, or both (20 CFR 655.731(c)(3) and 20 CFR 655.805(a)(2)).**

(a) *See* FOH 71d09 -10.

(b) A violation of this standard can be non-willful or willful.

(1) A non-willful violation pertaining to benefits should be cited as "(Name of firm on LCA) failed to either offer benefits or equal eligibility for benefits or both in violation of 20 CFR 655.731(c)(3). *See* 20 CFR 655.805(a)(2)."

CMP: none

Debarment: none

(2) A willful violation pertaining to benefits should be cited as "(Name of firm on LCA) willfully failed to either offer benefits or equal eligibility for benefits or both in violation of 20 CFR 655.731(c)(3). *See* 20 CFR 655.805(a)(2)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(c) Any additional remedy: the employer will be required to pay back wages and/or provide benefits as deemed appropriate.

NOT ION

(d) A willful violation involving the displacement of a U.S. worker employed by the employer may be subject to an enhanced CMP, up to $35,000.00, and an enhanced debarment of a minimum of 3 years. *See* FOH 71e00(e) and FOH 71e10.

71e03 **Failed to provide working conditions as required (20 CFR 655.732 and 20 CFR 655.805(a)(3)).**

(a) *See* FOH 71d17.

(b) A violation of any part of this standard can be non-willful or willful.

(1) A non-willful violation should be cited as "(Name of firm on LCA) failed to provide working conditions as required in violation of 20 CFR 655.732. *See* 20 CFR 655.805(a)(3)."

CMP: none

Debarment: none

(2) A willful violation should be cited as "(Name of firm on LCA) willfully failed to provide working conditions as required in violation of 20 CFR 655.732. *See* 20 CFR 655.805(a)(3)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(c) Any additional remedy: the employer may be ordered to provide working conditions to H-1B workers comparable to those provided to U.S. workers. Other remedies may be formulated on a case by case basis, after consulting with DD and/or ADD; regional enforcement coordinator: immigration; RSOL; SOL; and the NO, OP, DEPP, Farm Labor/Immigration Branch (for failures pertaining to benefits, cite under 20 CFR 655.731 (*see* FOH 71e02)).

(d) A willful violation involving the displacement of a U.S. worker employed by the employer may be subject to an enhanced CMP, up to $35,000.00, and an enhanced debarment of a minimum of 3 years. *See* FOH 71e00(e) and FOH 71e10.

71e04 **Filed an LCA during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment (20 CFR 655.733 and 20 CFR 655.805(a)(4)).**

(a) *See* FOH 71d18.

(b) A violation of this standard can be non-willful or willful.

(1) A non-willful violation should be cited as "(Name of firm on LCA) filed an LCA during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment in violation of 20 CFR 655.733. *See* 20 CFR 655.805(a)(4)."

Maximum CMP: $1,000.00 per violation

Minimum debarment: 1 year

(2) A willful violation should be cited as "(Name of firm on LCA) willfully filed an LCA during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment in violation of 20 CFR 655.733. *See* 20 CFR 655.805(a)(4)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(c) Any additional remedy: the remedies for violations under this part should be formulated on a case by case basis, after consulting with the DD and/or ADD; regional enforcement coordinator: immigration; RSOL; SOL; and the NO, OP, DEPP, Farm Labor/Immigration Branch.

(d) A willful violation involving the displacement of a U.S. worker employed by the employer may be subject to an enhanced CMP, up to $35,000.00, and an enhanced debarment of a minimum of 3 years. *See* FOH 71e00(e) and FOH 71e10.

71e05 **Failed to provide notice of the filing of the LCA (20 CFR 655.734 and 20 CFR 655.805(a)(5)).**

(a) *See* FOH 71d14.

(b) A violation of this standard can be non-substantial, substantial, willful, or willful and substantial.

(1) A non-substantial violation should be cited as "(Name of firm on LCA) failed to provide notice of the filing of the LCA(s) in violation of 20 CFR 655.734. *See* 20 CFR 655.805(a)(5)."

CMP: none

Debarment: none

(2) A substantial violation should be cited as "(Name of firm on LCA) substantially failed to provide notice of the filing of the LCA(s) in violation of 20 CFR 655.734. *See* 20 CFR 655.805(a)(5)."

Maximum CMP: $1,000.00 per violation

Minimum debarment: 1 year

(3) A willful violation should be cited as "(Name of the firm of LCA) willfully failed to provide notice of the filing of the LCA(s) in violation of 20 CFR 655.734. *See* 20 CFR 655.805(a)(5)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

NOT TION

(4) A willful and substantial violation should be cited as "(Name of the firm on LCA) willfully and substantially failed to provide notice of the filing of the LCA(s) in violation of 20 CFR 655.734. *See* 20 CFR 655.805(a)(5)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(c) Any additional remedy: the employer may be required to provide the affected H-1B worker(s) with a copy of the applicable LCA(s), and/or re-post the required notice for the affected U.S. workers. Any other remedy may be formulated on a case by case basis, after consulting with DD and/or ADD; regional enforcement coordinator: immigration; RSOL; SOL; and the NO, OP, DEPP, Farm Labor/Immigration Branch.

(d) A willful violation involving the displacement of a U.S. worker employed by the employer may be subject to an enhanced CMP, up to $35,000.00, and an enhanced debarment of a minimum of 3 years. *See* FOH 71e00(e) and FOH 71e10.

71e06 **<u>Failed to accurately specify on the LCA (20 CFR 655.730(c) and 20 CFR 655.805(a)(6)).</u>**

(a) *See* FOH 71d19.

(b) A violation of this standard can be non-substantial, substantial, willful, or willful and substantial.

(1) A non-substantial violation of this standard should be cited as "(Name of firm on LCA) failed to specify accurately on the LCA in violation of 20 CFR 655.730(c). *See* 20 CFR 655.805(a)(6)."

CMP: none

Debarment: none

(2) A substantial violation should be cited as "(Name of firm on LCA) substantially failed to specify accurately on the LCA in violation of 20 CFR 655.730(c). *See* 20 CFR 655.805(a)(6)."

Maximum CMP: $1,000.00 per violation

Minimum debarment: 1 year

(3) A willful violation would be cited as "(Name of the firm on LCA) willfully failed to specify accurately on the LCA in violation of 20 CFR 655.730(c). *See* 20 CFR 655.805(a)(6)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(4) A willful and substantial violation would be cited as "(Name of firm on LCA) willfully and substantially failed to specify accurately on the LCA in violation of 20 CFR 655.730(c). *See* 20 CFR 655.805(a)(6)."

NOT TIGHT

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(c) Any additional remedy: an employer who violates this standard may be required to file a new LCA containing the correct information. Other remedies may be formulated on a case by case basis after consulting with the DD and/or ADD; regional enforcement coordinator: immigration; RSOL; SOL; and the NO, OP, DEPP, Farm Labor/Immigration Branch.

(d) A willful violation involving the displacement of a U.S. worker employed by the employer may be subject to an enhanced CMP, up to $35,000.00, and an enhanced debarment of a minimum of 3 years. *See* FOH 71e00(e) and FOH 71e10.

71e07 **Displaced a U.S. worker (20 CFR 655.738 and 20 CFR 655.805(a)(7)).**

(a) *See* FOH 71d04 and 71e10.

(b) A violation of this standard can be non-willful or willful.

(1) A non-willful violation should be cited as "(Name of firm on LCA) displaced a U.S. worker in violation of 20 CFR 655.738. *See* 20 CFR 655.805(a)(7)."

Maximum CMP: $1,000.00 per violation

Minimum debarment: 1 year

(2) A willful violation should be cited as "(Name of firm on LCA) willfully displaced a U.S. worker in violation of 20 CFR 655.738. *See* 20 CFR 655.805(a)(7)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(c) Any additional remedy: the employer may be required to pay back wages to the displaced U.S. workers, to reinstate these workers (direct displacement only), and/or provide front pay to these workers. Remedies will be formulated on a case by case basis *only* after consulting with the DD and/or ADD; regional enforcement coordinator: immigration; RSOL; SOL; and the NO, OP, DEPP, Farm Labor/Immigration Branch.

(d) A willful violation involving the displacement of a U.S. worker employed by the employer may be subject to an enhanced CMP, up to $35,000.00, and an enhanced debarment of a minimum of 3 years. *See* FOH 71e00(e) and FOH 71e10.

(e) The employer can be debarred for placing a H-1B worker with a secondary employer that displaced(es) its U.S. worker(s), only if the H-1B worker was non-exempt, or placed under an LCA not solely used for exempt employees, and one of the following criteria is met:

(1) At the time of the placement of the H-1B worker(s) with the secondary employer, the employer knew or had reason to know of the secondary employer's displacement of its U.S. worker(s); or

NOT FOR PUBLICATION

(2) The employer has been subject to an enforcement sanction based on a previous placement of an H-1B worker with the same secondary employer.

71e08 **Failed to make the required displacement inquiry of another employer at a worksite where an H-1B nonimmigrant was placed, as required (20 CFR 655.738 and 20 CFR 655.805(a)(8)).**

(a) *See* FOH 71d04.

(b) A violation of this standard can be non-willful or willful. This violation will be cited only against the primary employer (being investigated) and not against the secondary employer. A displacement is not necessary for this violation to be cited.

(1) A non-willful violation should be cited as "(Name of firm on LCA) failed to make the required displacement inquiry of another employer at a worksite where an H-1B nonimmigrant was placed as required under 20 CFR 655.738. *See* 20 CFR 655.805(a)(8)."

Maximum CMP: $1,000.00 per violation

Minimum debarment: 1 year

(2) A willful violation should be cited as "(Name of firm on LCA) failed to make the required displacement inquiry of another employer at a worksite where an H-1B nonimmigrant was placed as required under 20 CFR 655.738. *See* 20 CFR 655.805(a)(8)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(c) Any additional remedy: remedies will be formulated on a case by case basis *only* after consulting with the DD and/or ADD; regional enforcement coordinator: immigration; RSOL; SOL; and the NO, OP, DEPP, Farm Labor/Immigration Branch.

(d) A willful violation involving the displacement of a U.S. worker employed by the employer may be subject to an enhanced CMP, up to $35,000.00, and an enhanced debarment of a minimum of 3 years. *See* FOH 71e00(e) and FOH 71e10.

71e09 **Failed to recruit in good faith steps, as required (20 CFR 655.739 and 20 CFR 655.805(a)(9)).**

(a) *See* FOH 71d03.

(b) A violation of this standard can be non-substantial, substantial, or willful.

(1) A non-substantial violation of this standard should be cited as "(Name of firm on LCA) failed to recruit in good faith as required under 20 CFR 655.739. *See* 20 CFR 655.805(a)(9)."

CMP: none

Debarment: none

(2) A substantial violation should be cited as "(Name of firm on LCA) substantially failed to recruit in good faith as required under 20 CFR 655.739. *See* 20 CFR 655.805(a)(9)."

Maximum CMP: $1,000.00 per violation

Minimum debarment: 1 year

(3) A willful violation would be cited as "(Name of firm on LCA) willfully failed to recruit in good faith as required under 20 CFR 655.739. *See* 20 CFR 655.805(a)(9)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(4) A willful and substantial violation would be cited as "(Name of firm on LCA) willfully and substantially failed to recruit in good faith as required under 20 CFR 655.739. *See* 20 CFR 655.805(a)(9)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(c) Any additional remedy: the employer must ensure future compliance. Other remedies may be formulated on a case by case basis after consulting with the DD and/or ADD; regional enforcement coordinator: immigration; RSOL; SOL; and the NO, OP, DEPP, Farm Labor/Immigration Branch.

(d) A willful violation involving the displacement of a U.S. worker employed by the employer may be subject to an enhanced CMP, up to $35,000.00, and an enhanced debarment of a minimum of 3 years. *See* FOH 71e00(e) and FOH 71e10.

71e10 **Displaced a U.S. worker within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the LCA in the course of committing a willful failure and/or willful misrepresentation of a material fact on an LCA as prohibited under 20 CFR 655.738 and 20 CFR 655.805(a)(10).**

(a) This violation will be cited when the investigation disclosed that the employer did two things: committed a willful violation *and*, during the course of that violation (within a specific time period), displaced a U.S. worker employed by the employer. The applicable violations are listed in FOH 71e10(a)(2) below. A citation under this provision is the only citation appropriate for this displacement situation. When citing this violation, do *not* additionally charge employer with the willful failure and/or misrepresentation that the employer committed.

(1) *Displacement*

The employer displaced a U.S. worker employed by the employer only if the employee's loss of his or her job meets the criteria for displacement and/or lay off

NOT TIGN

described in FOH 71d04(d). The displacement must occur within the period beginning 90 days before and ending 90 days after the date of filing of any H-1B visa petition (Form I-129/I-129W). The filing date of Form I-129/I-129W is the "Receipt Date" appearing on the Form I-797.

(2) *Willful failures and/or willful misrepresentations*

a. Willful failures

1. Failed to pay wages (including benefits provided as compensation for services and/or wages for certain nonproductive time)

2. Failed to provide working conditions as required

3. Filed an LCA for H-1B nonimmigrant(s) during a strike or lockout

4. Failed to provide notice of the filing of the LCA as required

5. Failed to specify accurately on the LCA the number of workers sought, the occupational classification in which the H-1B nonimmigrant(s) will be employed, and/or the wage rate and conditions under which the H-1B nonimmigrant(s) will be employed

6. Failed to make the required displacement inquiry of another employer at a worksite where H-1B nonimmigrant(s) were placed

7. Failed to recruit in good faith as required

b. Willful misrepresentations

1. Misrepresented on the LCA the H-1B nonimmigrant's occupation

2. Misrepresented on the LCA the number of H-1B nonimmigrants sought

3. Misrepresented on the LCA the gross wage rate and/or how it should be paid (*i.e.*, whether hourly, weekly, biweekly, or monthly)

4. Misrepresented on the LCA the starting and ending dates of the H-1B nonimmigrant's employment

5. Misrepresented on the LCA the place(s) of intended employment

6. Misrepresented on the LCA the prevailing wage rate for the occupation in the area of intended employment and/or the specific source relied upon by the employer to determine the wage

7. Misrepresented on the LCA the employer's status as to whether or not the employer is H-1B-dependent and/or a willful violator, and if the employer is H-1B-dependent and/or a willful violator, whether the employer will use the application only in support of petitions for exempt H-1B nonimmigrants

NOT TION

(3) The employer who is cited for this violation may be either H-1B-dependent or non-dependent. Note: the enhanced penalty does not add to any substantive obligation imposed on a non-dependent employer.

(b) A violation of this standard should be cited as "(Name of firm on LCA) displaced a U.S. worker within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the LCA in the course of committing a willful failure to (insert the failure that was willful) and/or a willful misrepresentation of a material fact in an LCA as prohibited under 8 USC 1182(n)(2)(C)(iii), 20 CFR 655.738, 20 CFR 655.805(a)(10), and 20 CFR 655.___ (insert applicable CFR cite or cites from subpart H (20 CFR 655.730 - 20 CFR 655.734 and/or 20 CFR 655.739))."

Maximum CMP: $35,000.00 per violation

Minimum debarment: 3 years

(c) Any additional remedy: to be determined on a case by case basis after consultation with NO, OP, DEPP, Farm Labor/Immigration Branch.

(d) This violation does not include the concept of secondary displacement (*see* FOH 71d(04)).

71e11 **Required and/or accepted from an H-1B worker, payment or remittance of the additional $750.00, $1,000.00, and/or $1,500.00 fee incurred in filing an H-1B petition (20 CFR 655.731(c)(10)(ii) and 20 CFR 655.805(a)(11)).**

(a) *See* FOH 71d08(b).

(b) A violation of this standard should be cited as "(Name of firm on LCA) required or accepted from an H-1B worker, payment or remittance of the additional $750.00, $1,000.00 and/or $1,500.00 fee incurred in filing an H-1B petition as prohibited under 20 CFR 655.731(c)(10)(ii). *See* 20 CFR 655.805(a)(11)."

Maximum CMP: $1,000.00 per violation

Debarment: none

(c) Any additional remedy: the employer must ensure future compliance. All monies paid by the H-1B worker for any part or all of the $750.00, $1,000.00, and/or $1,500.00 filing fee must be restored to the H-1B worker. The employer shall be assessed for this reimbursement, even if the H-1B worker had paid the money to a third party.

71e12 **Required or attempted to require an H-1B nonimmigrant to pay a penalty for ceasing employment prior to an agreed upon date (20 CFR 655.731(c)(10)(i) and 20 CFR 655.805(a)(12)).**

(a) *See* FOH 71d20.

(b) A violation of this standard should be cited as "(Name of firm on LCA) required or attempted to require an H-1B nonimmigrant to pay a penalty for ceasing employment prior to an agreed upon date in violation of 20 CFR 655.731(c)(10)(i). *See* 20 CFR 655.805(a)(12)."

Maximum CMP: $1,000.00 per violation

Debarment: none

(c) Any additional remedy: the employer must ensure future compliance and repay the H-1B worker any penalty money that he or she paid.

71e13 **Discriminated against an employee for protected conduct (20 CFR 655.801 and 20 CFR 655.805(a)(13))**

(a) *See* FOH 71d05.

(b) Violation should be cited as "(Name of firm on LCA) discriminated against an employee for protected conduct as prohibited under 20 CFR 655.801. *See* 20 CFR 655.805(a)(13)."

Maximum CMP: $5,000.00 per violation

Minimum debarment: 2 years

(c) Any additional remedy: the employer must ensure future compliance. Remedies will be formulated on a case by case basis after consulting with the DD and/or ADD; regional enforcement coordinator: immigration; RSOL; SOL; and the NO, OP, DEPP, Farm Labor/Immigration Branch.

71e14 **Failed to make available for public examination the LCA and necessary document(s) at the employer's principal place of business or worksite (20 CFR 655.760(a) and 20 CFR 655.805(a)(14)).**

(a) *See* FOH 71c04.

(b) A violation of this standard should be cited as "(Name of firm on LCA) failed to make available for public examination the LCA and necessary document(s) at the employer's principal place of business or worksite in violation of 20 CFR 655.760(a). *See* 20 CFR 655.805(a)(14)." A CMP may be assessed if the violation impedes the public's ability to get the information it needs to file a complaint or it impedes the WHD's ability to determine if a substantive violation has occurred (*see* 20 CFR 655.810(b)(1)(vi)).

Maximum CMP: $1,000.00 per violation

Debarment: none

(c) Any additional remedy: the employer shall be required to create the required public access materials and to comply in the future.

(d) The employer's failure to maintain public access material may instead be cited as a failure to maintain documentation (*see* FOH 71e15), but not both for the same failure.

71e15 **Failed to maintain documentation, as required (20 CFR 655.731(b), 20 CFR 655.738(e), 20 CFR 655.739(i), and/or 20 CFR 655.760(c) and 20 CFR 655.805(a)(15)).**

(a) *See* FOH 71d21.

NOT FOR PUBLICATION

(b) A violation of this standard should be cited as "(Name of firm on LCA) failed to maintain documentation, as required by 20 CFR 655.731(b), 20 CFR 655.738(e), 20 CFR 655.739(i), and/or 20 CFR 655.760(c). *See* 20 CFR 655.805(a)(15)." A CMP may be assessed only if the violation impedes the WHD's ability to determine if an H-1B violation exists (*see* 20 CFR 655.810(b)(1)(vi)).

Maximum CMP: $1,000.00 per violation

Debarment: none

(c) Any additional remedy: the employer shall be required to develop and maintain the necessary documentation, and to comply in the future. Other remedies may be formulated on a case by case basis after consulting with the DD and/or ADD; regional enforcement coordinator: immigration; RSOL; SOL; and the NO, OP, DEPP, Farm Labor/Immigration Branch.

(d) The employer's failure to maintain documents that must be available to the public (*e.g.*, an LCA) may instead be cited as a public access failure (*see* FOH 71e14) but not both for the same violation.

71e16 **Failed to cooperate in the investigation, as required (20 CFR 655.800(c)).**

(a) A violation should be cited as "(Name of firm on LCA) failed to cooperate in the investigation as required by 20 CFR 655.800(c)." A CMP may be assessed only if the violation impedes the WHD's ability to determine if a violation exists (*see* 20 CFR 655.810(b)(1)(vi)).

Maximum CMP: $1,000.00 per violation

Debarment: none

(b) Any additional remedy: the employer must ensure future compliance and provide any records requested. Other remedies may be formulated on a case by case basis after consulting with the DD and/or ADD; regional enforcement coordinator: immigration; RSOL; SOL; and the NO, OP, DEPP Farm Labor/Immigration Branch.

71e17 **Failed to comply with the provisions of subpart H or I (20 CFR 655.7xx and 20 CFR 655.805(a)(16)).**

(a) *See* FOH 71d22.

(b) H-1B employers are required to comply with all the provisions contained in 20 CFR 655 subparts H or I. Any violation(s) of these regulations that are not listed in the preceding FOH sections (*see* FOH 71e01 -16) are cited under this standard, with the appropriate subpart H citation.

(c) Violations under this standard are cited as "(Name of firm on LCA) failed to comply with the provisions of subpart H or I in violation of (*insert the applicable section of subpart H*). *See* 20 CFR 655.805(a)(16)." A CMP may be assessed only if the violation impedes the WHD's ability to determine if an H-1B violation(s) exists (*see* 20 CFR 655.810(b)(1)(vi)).

Maximum CMP: $1,000.00 per violation

NOT FOR PUBLICATION

Debarment: none

(d) Any additional remedy: the employer shall be required to take appropriate action to correct any violation and to comply in the future.

TION

NOT

71f REMEDIES

71f00 General.

The regulations authorize the Administrator of the WHD (Administrator) to impose CMPs, back wages, and other appropriate remedies. The assessment of penalties and remedies is subject to administrative review.

71f01 Civil money penalty.

Use WH-592: Civil Money Penalty Computation Worksheet (*see* FOH 54: WH-592-1) to compute CMPs. A CMP can be assessed not to exceed $1,000.00; $5,000.00; or $35,000.00 depending on the violation. The CMP form takes into consideration the seven penalty assessment criteria found in 20 CFR 655.810(c) and the number of violations that should be cited (based on the number of workers affected or similar factors). For example, 15 workers willfully underpaid means 15 violations occurred. Additionally, the form, as in other programs, allows for no CMPs to be assessed if certain factors are met. *See* FOH 71e for a list of violations and remedies.

71f02 Back wages.

(a) If the investigation finds that an H-1B worker was not paid correctly, willfully or otherwise, back wages must be assessed. The back wages shall be equal to the difference between the amount that should have been paid (*i.e.*, required wages) and the amount that was actually paid to such H-1B worker(s). *See* INA 212(n)(2)(D) and 20 CFR 655.810(a). Any back wages computed are shown on the WH-56: Summary of Unpaid Wages (WH-56).

[redacted] (b) (7)(E) [redacted]

[redacted]

71f03 Other remedy(ies).

Any other remedy as deemed appropriate by the Administrator may be sought. For example, if an employer failed to post the required notice, the employer must post immediately at worksites where workers are currently working and agree to comply with the posting requirement in the future. Also, if the employer failed to offer benefits to H-1B workers as are offered to its U.S. workers, the employer must offer the benefits to the H-1B workers retroactive to the date they should have been offered or provided, and agree to comply in the future.

71f04 Employer's satisfaction of penalties and remedies.

(a) The CMPs, back wages and any other remedy(ies) are immediately due for payment or performance upon assessment by the Administrator unless a timely request for an

NOT FOR PUBLICATION

administrative hearing is filed. In such cases, the employer need not comply with any remedy until the administrative review process is concluded.

(b) The performance of any remedy shall follow procedures established in the determination letter, the DOL's administrative law judge (ALJ) decision, or the DOL's administrative review board (ARB) decision, whichever is applicable.

(c) Installment payment schedules are allowed following the normal WHD procedures.

71f05 **Debarment.**

(a) The DO shall notify the ETA and USCIS of the final determination of any violation requiring debarment, in accordance with 20 CFR 655.855.

(b) The debarment of an employer under the H-1B program prohibits the employer's future sponsorship of any alien on any temporary visa, not merely on H-1B visas, or as permanent residents (*i.e.*, green cards) for a prescribed period of time.

(c) The debarment is not a remedy imposed by the WHD, and is not discretionary for the ETA or USCIS. Debarment for at least the specified period automatically follows a DOL final agency action finding a debarable violation such as a misrepresentation of a material fact or a willful failure to pay the required wage rate. The USCIS has discretion to debar an employer for longer than the minimum period.

(d) Upon notification by the DO, the ETA shall suspend the employer's LCA (if applicable) and shall not approve an LCA or any applications for any other employment program administered by the ETA (*i.e.*, H-2A, H-2B, permanent labor certification (green card)) for the length of the debarment period imposed by the USCIS.

(e) The WHD's notification to the USCIS may recommend a debarment period within the range specified by the H-1B statute for the type of violation committed by the employer (*see* FOH 71j01). The USCIS has final authority concerning the length of the debarment period.

(f) The debarment of the employer does not invalidate the visas for H-1B workers already employed by the employer and does not require that these H-1B workers leave the U.S. These H-1B workers may continue their employment with the employer until the expiration dates of their H-1B visas. During this employment, they remain under the H-1B program's protections. If the employer is still debarred at the time that the H-1B workers' H-1B visas expire, any extension requests by the employer for these H-1B workers will not be approved. The debarment also bars the ETA from approving an application for permanent employment (*i.e.*, issuing a green card for any worker sponsored by the employer).

71f06 **An employer's refusal to comply, pay back wages, and/or perform the remedy(ies).**

If an employer refuses to comply, pay back wages, and/or perform the remedy(ies) after the assessment has become the final agency action, *see* FOH 71i02.

NOT TION

71g REVIEW AND DISPOSITION

71g00 Review.

(a) Special JRC procedures

JRC procedures are established for the H-1B program. The JRC procedures will enable the DOL teams to quickly identify and resolve legal issues and evidentiary problems, (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) Prepare a determination letter. *See* FOH 71h.

71g01 Disposition.

(a) Upon completion of the investigation, a final conference shall be held with the employer in (b) (7)(E) [redacted]

- (b) (7)(E) [redacted]
  - [redacted]

NOT

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

NOT

71h WRITTEN NOTIFICATION OF INVESTIGATION FINDINGS

71h00 General.

(a) Written notification of investigation findings to the employer

Upon JRC review and approval of any finding and remedy, if any, the employer must be provided with a determination letter. This letter can be personally served at the final conference or the DD and/or ADD may mail the determination letter to the employer. The complainant and any interested party must also be provided with written notification. *See* FOH 71h00(d) -(e) below for the procedure to notify any interested party, including the complainant.

(b) The determination letter will follow the format and text of the prototype letter, using the options appropriate to the particular investigation. The summary of violation(s) and remedy(ies) and the WH-56 (if back wages are due and the form has not previously been provided to the employer) will be attached to the determination letter. The form used to compute CMPs shall *not* be attached to the determination letter or otherwise provided to the employer. Additionally, the WHI may share with the employer the WH-55: Wage Transcription and Computation Sheet, but it shall *not* be attached to the determination letter. The RSOL must review and approve every determination letter. Therefore, the WHI must be prepared to provide the RSOL with any material needed for its review. *See* FOH 71g00(a). If the NO, OP, DEPP, Farm Labor/Immigration Branch and SOL were included in the JRC, they also must review the determination letter. *See* FOH 71g00(a)(4). If the NO, OP, DEPP, Farm Labor/Immigration Branch and SOL were not included in the JRC, the NO will continue to review the determination until the determination letters are incorporated into WHISARD. The regulations at 20 CFR 655.815 require that the determination letter incorporate all of FOH 71h00(c) below.

(c) The determination letter will:

(1) set forth the determination of the Administrator and the reason or reasons therefore, and in the case of a finding of violation(s) by an employer, prescribe any remedy, including the amount of any back wages assessed, the amount of any CMP assessed and the reason therefore, and/or any other remedy assessed;

(2) inform any interested party that he or she may request a hearing pursuant to 20 CFR 655.820;

(3) inform any interested party that in the absence of a timely request for a hearing, received by the ALJ within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable;

(4) set forth the procedure for requesting a hearing, the addresses of the ALJ with whom the request must be filed, and all parties upon whom copies of the request must be served;

(5) where appropriate, inform the parties that, pursuant to 20 CFR 655.855, the Administrator shall notify the ETA and USCIS of the occurrence of a violation by the employer; and

NOT FOR PUBLICATION

(6) advise that the complainant and any interested party will receive a copy of the determination letter as described in FOH 71h00(d) -(e) below. The determination letter and the interested party cover memo (*see* FOH 71h00(d) -(e)) are to be mailed to the complainant and any interested party on the same day the determination letter is provided, or mailed, to the employer.

(d) Written notification of investigation findings to any interested party

An interested party must be provided with a copy of the determination letter with his or her individual cover memo, as discussed in FOH 71h00(e) below and FOH 71h01, and provided an opportunity to appeal the investigation findings. A WH-56 that may be attached to the determination letter sent to the employer will *not* be attached to the determination letter copy provided to any interested party, including the complainant. An interested party is defined in the regulations (*see* 20 CFR 655.715) as a person or entity who or which may be affected by the actions of an H-1B employer or by the outcome of a particular investigation, and includes any person, organization or entity who or which has notified the DOL of his, her, or its interest or concern in the Administrator's determination. An interested party will include the following: any complainant; any H-1B worker due back wages or any H-1B worker who believes he or she is owed back wages but none were computed; any worker directly affected by a non-monetary remedy, such as a reinstatement order for a retaliation violation; any U.S. worker who has alleged that he or she was displaced or not recruited by the H-1B-dependent or willful violator employer; any collective bargaining representative of the investigated employer where the investigation found a notification violation; any secondary employer who displaced a U.S. worker; any person, organization, or entity who or which has notified the DOL of his, her, or its interest or concern in this determination; and any attorney or other representative of an interested party who has identified his or her representative status to the WHD.

(e) As mentioned in FOH 71h00(d) above, any interested party, including the complainant, will be provided his or her own copy of the determination letter with his or her individualized cover memo. The cover memo is individually tailored to properly notify each interested party of the investigation results. The determination letter with its cover memo can be hand-delivered or mailed. If mailed, *see* FOH 71h01 below. If hand-delivered, for evidentiary purposes, the investigation file must be properly annotated. TheWH-56 will never be provided to an interested party as part of the investigation.

71h01 <u>Service of determination letter and cover memo.</u>

(a) Copies of the determination letter must be provided to the employer, the complainant, and any interested party. As mentioned in FOH 71h00(e) above, an individualized cover memo, attached to the determination letter, is provided to each interested party. A copy of any cover memo should *not* be mailed to the ALJ or the employer as to do so could unnecessarily disclose the identity of witnesses or others affected by the investigation and could disclose other private information. A copy of any cover memo must also be provided to any DOL official, except the ALJ, who is listed as a "cc" on the determination letter.

(b) The determination letter should be served upon the employer and any interested party by certified mail or personal service. All letters mailed by certified mail should have the certified mail number typed on the letter to identify these documents for evidence. If these documents are mailed, they must be mailed within 10 days of the final conference. In

exceptional circumstances, these documents may be transmitted electronically (*see* FOH 71h01(e) below).

(c) A copy of the determination letter, plus a copy of the complaint, must be mailed to the ALJ, as provided in 20 CFR 655.815(b). These documents may be sent by regular mail. Copies of the determination letter and any cover memos should be mailed to the DOL officials.

(d) The WHI should routinely request complainants, and any individuals from whom they seek information relating to the investigation, to provide a postal address and to notify the WHI of any change in the address. In all cases, determination letters and a cover memo should be mailed to an individual or entity at his, her, or its last known postal address. The letter must be sent to the interested party even if his, her, or its address is believed to be no longer current. By sending the letter to the interested party's last known address, the WHD satisfies the notification requirements of the statute and regulation. Any envelopes returned as undeliverable should be retained in the investigation file.

(e) The WHI also may (if permitted by his or her office's policy) e-mail the determination letter to the employer, complainant, or other interested party if there is some doubt about the currency of the individual's postal address. In such instances, a hard copy of the e-mail should be retained in the investigation file along with the documents identified in FOH 71h01(d) above. To the extent technology permits, the WHI shall utilize any available e-mail options for receipts that the message has been delivered to the e-mail address and has been opened or read by the recipient. A hard copy of such receipts should be retained in the investigation file**.**

NOT

NOT
TION

71i POST-DETERMINATION LETTER ISSUES

71i00 Request for hearing.

(a) The H-1B statute provides that any interested party, including the complainant and the employer, may request an ALJ hearing, which is to be held within 60 days of the date of the WHD's determination letter. The request for hearing must be filed directly with the ALJ and must be received within 15 calendar days of the date on the determination letter, as explained in the letter. Should a request for hearing be submitted to the DO, rather than to the ALJ as directed in the determination letter, the request must be forwarded immediately to the ALJ. It is the ALJ who will make the determination about whether or not a request for a hearing is properly filed and timely.

(b) The WHD will not be a participant in many ALJ hearings. The WHD has the discretion to participate in any hearing, but its participation is required only where the WHD has determined that the H-1B employer has committed a violation and that particular determination has been challenged (*see* 20 CFR 655.820(b)(2)). Where the complainant or other interested party requests a hearing on a no violation determination, the complainant or the interested party will be the prosecuting party and the employer will be the respondent (*see* 20 CFR 655.820(b)(1)). The WHD will not conclude an H-1B investigation where the complainant or other interested party requests a hearing. A case will be concluded only after the investigation findings become a final agency action.

71i01 Handling of investigation findings that become a final agency action.

(a) The investigation findings become a final agency action of the Secretary upon the earliest of the following events:

(1) Where the Administrator issued the determination letter and no timely request for hearing (*i.e.*, within 15 calendar days of the date of the determination letter) is made by any party pursuant to 20 CFR 655.820

(2) Where, after a hearing, the ALJ issues a decision and order and no timely petition for review (*i.e.*, within 30 calendar days of the date of the decision and order) is filed with the ARB, pursuant to 20 CFR 655.845

(3) Where, after a review, the ARB either declines within 30 days to entertain the appeal, pursuant to 20 CFR 655.845(c), or the ARB reviews and affirms the ALJ's determination. To determine whether a timely request for an ALJ hearing or a petition to the ARB has been filed or granted, the WHI should inquire of the ALJ or the ARB: ALJ: (202) 693-7300; ARB: (202) 693-6200.

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

NOT

b. The DD and/or ADD must determine whether the employer has complied with any remedy imposed, and based on that determination, the DD and/or ADD must take one of the following actions: if any remedy has been fulfilled, *see* FOH 71i03; if any remedy has not been fulfilled within the prescribed time period, *see* FOH 71i02.

71i02 Unfulfilled performance of remedy(ies).

(a) The DO should ensure that the employer performs any imposed remedy (*e.g.*, pay back wages, pay CMPs, post the notice, etc.) that has become a final agency action. (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

(e) Under the INA, there is no individual private right to file suit against an employer for back wages as there is under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act. However, H-1B workers may have rights of action under contract law or other law in the state courts. The WHD has no authority or responsibility with regard to any such remedies available under state law.

71i03 Fulfilled performance of remedy(ies).

[redacted] (b) (7)(E) [redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- (b) (7)(E) [redacted]

71i04 **Installment payments.**

(b) (7)(E) [redacted]

NOT

NOT
TION

71j PROGRAM COORDINATION

71j00 Exchange of information between the WHD and the Department of Homeland Security's USCIS.

(a) The sharing of information and referrals between the USCIS and WHD should follow principles developed in the 1998 INS (*i.e.*, currently USCIS) memorandum of understanding (*see* FOH 50f20).

(b) For H-1B investigations, much of the communication between the WHD and USCIS will be conducted through one of the four service centers where H-1B petitions are adjudicated and where all related paperwork (*e.g.*, LCA and all USCIS forms) is maintained. The service centers, current contact person, public telephone numbers, and internal telephone numbers for WHD use only are as follows:

Eastern: Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virginia, and West Virginia

St. Albans, VT
Public: (800) 375-5283 (the same number for all four centers)
Jackie Moyer-Padilla, Internal: (802) 527-3259 x235

Northern: Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, Wisconsin, and Wyoming

Lincoln, NE
Public: (800) 375-5283
Ron Ryan, Internal: (402) 323-2560/2561

Southern: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas

Dallas, TX
Public: (800) 375-5283
Thomas Prusinowski, Internal: (214) 962-2023
Henry Jacobs, Internal: (214) 962-2017
Gary Conroy, Internal: (214) 962-2025
Cheryl Parker, Internal: (214) 962-2021
Ron Thomas, Internal: (214) 962-2022
Melissa Griffin, Internal: (214) 962-2032

Western: Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington

Laguna Nigel, CA
Public: (800) 375-5283
Rand Gallagher or Tim Bowman, Internal: (949) 389-3236/3230

(c) The Northern Service Center (Lincoln, NE) handles all questions and adjudication of petitions pertaining to North America Free Trade Agreement and all major and minor

NOT FOR PUBLICATION

professional sports teams. The Eastern Service Center (Vermont) handles H-1C petitions (area nurse shortages).

(d) For questions pertaining to the Form I-9, the WHI should contact the District of Columbia USCIS number at 1 (800) 357-2099 or (202) 305-1949. The local USCIS district office addresses and telephone numbers can be found at this web address: http://www.immigration.gov/graphics/fieldoffices/distsub_offices/index.htm.

71j01 Debarment notification to the USCIS.

(a) The H-1B statute requires the debarment of the employer when there is a final DOL action finding that the employer has committed a violation for which this penalty is prescribed. Debarment is not negotiable; if the finding of an appropriate violation becomes final, then debarment is required. The USCIS imposes the debarment, upon notification from the WHD that a final DOL action has occurred.

(b) A debarring violation is one of the following:

(1) Misrepresented a material fact on the LCA

(2) Filed an LCA during a strike or lockout in the course of a labor dispute

(3) Displaced a U.S. worker

(4) Failed to make an inquiry about displacement of a U.S. worker of the secondary employer

(5) Retaliated against a WB

(6) Substantially failed to provide notice of LCA filing

(7) Substantially failed to be specific on the LCA

(8) Substantially failed to recruit U.S. workers

(9) Willfully failed to pay the required wage rate

(10) Willfully failed to offer fringe benefits

(11) Willfully failed to provide working conditions

(12) Willfully filed a petition during a strike or lockout in the course of a labor dispute

(13) Willfully displaced a U.S. worker

(14) Willfully failed to make an inquiry about displacement of a U.S. worker of the secondary employer

(15) Willfully failed to provide notice of the LCA filing

(16) Willfully failed to be specific on the LCA

NOT FOR PUBLICATION

(17) Willfully failed to recruit U.S. workers

(18) Willfully misrepresented a material fact on the LCA

(c) The DD and/or ADD will send the notification to the USCIS utilizing the "USCIS Notification Letter." The notification will be sent only after the DOL finding of a debarring violation has become final (as provided in 20 CFR 655.855(b)).

(d) The USCIS debarment means that the employer will not be able to sponsor any future alien under any INA program. Any nonimmigrants already employed under the sponsorship of the debarred employer are not affected by the employer's debarment; existing visas are not revoked and workers are not deported. For the length of the debarment period, the USCIS will not approve the employer's petitions under H-1B, H-2A, H-2B, or any other nonimmigrant program, or under the permanent employment based program.

(e) The debarment period is a minimum of either 1, 2, or 3 years, depending on the violation cited (*see* 20 CFR 655.810(d)). Typically the minimum period is appropriate. However, in cases involving egregious behavior or repeat offenders, a longer debarment period may be considered. Examples of debarment period recommendations:

(1) The investigation found that there was a strike in the occupational classification at the place of employment at the time the firm filed the LCA. The employer, a first-time violator, ensured future compliance. Minimum debarment period: 1 year. Recommended debarment period: 1 year.

(2) The investigation found that the employer willfully paid less than the required wage, misrepresented the pay and occupation on the LCA, refused to pay back wages, and refused to comply in the future. Minimum debarment period: 2 years. Recommended debarment period: 2 years.

(3) During the investigation, the WHI was blocked by the employer at all phases of the investigation (*i.e.*, holding the opening conference, examining records, and holding the final conference) and impeded from examining the public access file. Employees were being harassed and intimidated by the employer to discourage their participation in the investigation. The investigation found that the employer had committed non-willful wage violations and substantial notice violations, in addition to the intimidation violations. Minimum debarment period: 1 year. Recommended debarment period: 2 years.

(4) The employer in FOH 71j01(e)(3) served the debarment period, remained (or re-entered) in the H-1B program, and a new investigation found additional violations including a willful failure to pay the required wage rate. Minimum debarment period: 2 years. Recommended debarment period: 3 years.

(f) When the USCIS receives any complaint from a worker or any other person it will refer this information through channels to the WHD.

NOT FOR PUBLIC DISTRIBUTION

71j02 Exchange of information between the ETA and WHD.

(a) The exchange of information between the ETA and WHD should take place informally. The ETA National Processing Centers and state Office of Workforce Security officials can be located at http://ows.doleta.gov/foreign.asp.

(b) For purposes of making a complaint to the WHD, the ETA is not considered to be an aggrieved party with respect to any information the ETA receives from an employer in connection with the employer's sponsorship of an alien in any immigrant (*i.e.*, green card) or nonimmigrant program (*e.g.*, H-1B, H-1C, H-2A, H-2B).

(c) When the ETA receives any complaint, directly or through the job service complaint system, it will immediately refer this information to the WHD through channels to the RA of the appropriate RO.

(d) The ETA will implement the debarment of a violating employer based upon notification from the WHD as specified in the regulations (*see* 20 CFR 655.855(a) and 20 CFR 655.855(d)). Upon the DOL enforcement action becoming final, the DD and/or ADD will notify the ETA NO utilizing the ETA debarment notification letter. The notification will be mailed to:

U.S. Department of Labor
Employment and Training Administration
Division of Foreign Labor Certification
200 Constitution Ave., NW, Room C4312
Washington, DC 20210

(e) The letter will inform the ETA of the calendar period that the WHD has recommended to the USCIS for debarment of the employer. The letter must include a copy of the LCA utilized during the investigation.

NOT FOR PUBLIC DISTRIBUTION

71k H-1B1 NONIMMIGRANT WORKERS

71k00 Background and enforcement responsibilities.

(a) The U.S.-Chile Free Trade Agreement (Chile FTA) and the U.S.-Singapore Free Trade Agreement (Singapore FTA) were implemented by the U.S. Congress through legislation (09/03/2003). The Chile FTA Implementation Act amends the INA to create a new visa category (the H-1B1 visa) for the temporary entry and employment in the U.S. of professionals from countries with which the U.S. has entered into agreements identified in section 214(g)(8)(A) of the INA. *See* section 101(a)(15)(H)(i)(b1) of the INA. The H-1B1 visa is available for individuals in specialty occupations who seek to come to the U.S. temporarily to engage in professional activities for an employer. These INA amendments were effective 01/01/2004. The INA as amended identifies two agreements with countries that qualify for the H-1B1 program (*i.e.*, the Chile FTA and Singapore FTA). Both agreements state that they cover "a business person seeking to engage in a business activity as a professional, or to perform training functions related to a particular profession, including conducting seminars, if the business person otherwise complies with immigration measures applicable to temporary entry."

(1) The number of Chilean professionals entering the U.S. on H-1B1 visas is limited to 1,400 annually.

(2) The number of Singaporean professionals entering the U.S. on H-1B1 visas is limited to 5,400 annually.

(b) The DOL has made the existing H-1B regulations generally applicable to H-1B1 nonimmigrants, rather than writing new rules for the H-1B1 program. The DOL's responsibilities regarding H-1B1 visas are to be implemented in a manner similar to those regarding the H-1B program for temporary employment of nonimmigrant aliens in specialty occupations and as fashion models. The new section in 20 CFR 655.700(d)(1) lists the provisions of the H-1B regulations that do not apply to H-1B1 nonimmigrants:

(1) H-1B1 visas are not available to fashion models of distinguished merit and ability.

(2) Provisions related to H-1B dependent employers and willful violators of the H-1B1 rules are not included in the legislation establishing the H-1B1 visa (specifically, 20 CFR 655.710(b), 20 CFR 655.730(d)(5), 20 CFR 655.730(e)(3), 20 CFR 655.736 -.739, 20 CFR 655.760(a)(8) -(10), part of 20 CFR 655.705(c), and 20 CFR 655.805(a)(7) -(9)).

(3) Portability of H-1B status provision is inapplicable to H-1B1 nonimmigrants (*see* FOH 71a00(b)).

(c) The employer's responsibilities under H-1B1 program are identified in 20 CFR 655.700(d)(4).

(1) The LCA must be filed and approved by the ETA for coverage to exist. Filing procedures are identified in 20 CFR 655.700(d)(3). The ETA will compile and maintain a list of H-1B1 labor attestations (*see* 20 CFR 655.760(b)).

NOT FOR PUBLIC DISTRIBUTION

(2) Enforcement provisions: the WHD will receive, investigate, and make determinations of complaints filed by any aggrieved person or organization regarding the failure of an employer to meet the terms of its attestation. Penalties for failure to meet conditions of the labor attestations are the same as those under the H-1B program.

NOT FOR PUBLIC DISTRIBUTION

71L E-3 NONIMMIGRANT WORKERS

71L00 Background and enforcement responsibilities.

(a) The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 was signed into law by the president on 05/11/2005. Division B, title V, section 501 of the act adds a new nonimmigrant visa classification for certain treaty aliens who are coming to the U.S. solely to perform services in a specialty occupation. The new visa category (*i.e.*, the E-3 visa) is for the temporary entry and employment in the U.S. of professionals from the country of Australia with which the U.S. has entered into an agreement identified in section 214(g)(8)(A) of the INA. *See* section 101(a)(15)(E)(iii) of the INA) The E-3 visa is available for Australian nationals who seek to come to the U.S. temporarily to engage in professional activities for an employer. These INA amendments were effective **TBA**.

(b) The DOL has made the existing H-1B regulations generally applicable to E-3 nonimmigrants, rather than writing a new rule for the E-3 program. The DOL's responsibilities regarding E-3 visas are to be implemented in a manner similar to those regarding the H-1B program for temporary employment of nonimmigrant aliens in specialty occupations and as fashion models. The new section in 20 CFR 655.700(d)(1) lists the provisions of the H-1B regulations that do not apply to E-3 nonimmigrants:

(1) Provisions related to H-1B dependent employers and willful violators of the H-1B rules are not included in the legislation establishing the E-3 visa (specifically, 20 CFR 655.710(b), 20 CFR 655.730(d)(5), 20 CFR 655.730(e)(3), 20 CFR 655.736 -.739, 20 CFR 655.760(a)(8) -(10), part of 20 CFR 655.705(c), and 20 CFR 655.805(a)(7) -(9)).

(2) Portability of H-1B status provision is inapplicable to E-3 nonimmigrants (*see* FOH 71a00(b)).

(c) The employer's responsibilities under E-3 program are identified in 20 CFR 655.700(d)(4).

(1) The LCA must be filed and approved by the ETA for coverageto exist. Filing procedures are identified in 20 CFR 655.700(d)(3). The ETA will compile and maintain a list of H-1B1 labor attestations (*see* 20 CFR 655.760(b)).

(2) Enforcement provisions: the WHD will receive, investigate and make determinations of complaints filed by any aggrieved person or organization regarding the failure of an employer to meet the terms of its attestation. Penalties for failure to meet conditions of the labor attestations are the same as those under the H-1B program.

NOT FOR PUBLIC DISTRIBUTION

Chapter 73

CHILD LABOR: INVESTIGATIVE PROCEDURES

Source: FOH Modernization revision 722, published 12/05/2016. Substantive revisions made *after* 12/05/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 12/05/2016 can be found here: http://esa.esa.dol.gov/whd/FOH/revisionchart.htm.

NOT FOR PUBLIC DISTRIBUTION

Table of Contents

73a INTRODUCTION

73a00 General.
73a01 State child labor standards.

73b CHILD LABOR COVERAGE UNDER THE FLSA

73b00 Child labor coverage: section 12(c).
73b01 Child labor coverage: section 12(a).

73c AGE CERTIFICATES AND AGE VERIFICATION OF MINORS

73c00 Purpose of age certificates.
73c01 Availability of age certificates.
73c02 Irregular or improperly issued age or employment certificates.
73c03 Age verification of minors.

73d INJURIES AND DEATHS OF MINORS

73d00 Reporting requirements.
73d01 NIOSH Fatality Assessment and Control Evaluation (FACE) Program.
73d02 Obtaining medical documentation for serious injuries under section 16(e)(1) of the FLSA.

73e CHILD LABOR PROVISIONS OF THE WALSH-HEALY PUBLIC CONTRACTS ACT

73e00 General.
73e01 Knowingly employed under the PCA.

73f GUIDELINES ON FEDERAL AND STATE CHILD LABOR PROVISIONS

73f00 General.
73f01 Field cooperation with migratory labor committees.

73g SPECIFIC ENFORCEMENT PROVISIONS

73g00 General.
73g01 Investigations involving work experience and career exploration or work-study program participants.

73g02 High school graduates, children excused from school on religious grounds, and expelled students.
73g03 Determining compliance with certain Child Labor Reg. 3 occupation standards.
73g04 Guidance concerning enforcement of child labor HOs.
73g05 Children employed in agriculture who move into another area.
73g06 WHI child labor tools.
73g07 Application of the parental exemption.

73h IMPLEMENTATION OF CHILD LABOR CMPS UNDER CLEPP AND NON-CLEPP

73h00 General.
73h01 Child labor CMPs.
73h02 CLEPP.
73h03 What is non-CLEPP?
73h04 Examples of non-CLEPP injuries.
73h05 Rules for death and serious injury cases.
73h06 Considerations for reductions in CMP assessments.
73h07 Responsibilities of assessing official.
73h08 Investigative procedures.
73h09 Child labor violations by state and local government entities and private employers in connection with JTPA-funded projects.

73a INTRODUCTION

73a00 General.

(a) The child labor standards enforced by the Wage and Hour Division (WHD) are contained in sections 3(l), 12, and 13(c) of the Fair Labor Standards Act (FLSA); and section 1(d) of the Walsh-Healey Public Contracts Act (PCA). The FLSA and PCA are the only statutes enforced by the WHD that contain child labor standards. Interpretative materials are contained in the FOH, 29 CFR 570, on the website, and in various publications (*e.g.*, WH-1330: Child Labor Bulletin 101 and WH-1295: Child Labor Bulletin 102).

(b) General compliance information concerning child labor is contained in FOH 33. Specific enforcement guidance is contained in this chapter.

(c) Questions regarding specific child labor enforcement positions and interpretations should be directed to the applicable regional enforcement coordinator: child labor or through appropriate channels to the National Office (NO), Office of Policy (OP), Division of Enforcement Policy and Procedures (DEPP), FLSA/Child Labor Branch.

73a01 State child labor standards.

(a) Employers covered under both the FLSA and state child labor provisions are generally held to the higher standard, the standard that is most protective. The WHD webpage provides information about the child labor provisions adopted by each state.

(b) Violations of state child labor standards that come to the attention of Wage and Hour Investigators (WHIs) will be reported to the district director (DD) and/or assistant district director (ADD) (*see* FOH 52a11).

NOT FOR PUBLIC DISTRIBUTION

73b CHILD LABOR COVERAGE UNDER THE FLSA

73b00 Child labor coverage: section 12(c).

(a) Section 12(c) provides that "no employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce." 29 CFR 570.112 -.113 discuss the provisions related to coverage under section 12(c).

(b) Coverage for the prohibition of the employment of oppressive child labor under section 12(c) is the same as under sections 6 and 7 (*i.e.*, individual and enterprise coverage) (*see* FOH 10 - 12).

(c) When a youth, whose employment is covered under section 12(c), is employed in violation of an applicable child labor standard (*i.e.*, minimum age standard, Child Labor Reg. 3, hazardous occupations order (HO), or agricultural HO), his or her employer may be charged with each violation and subject to an assessment of civil money penalties (CMPs) for such violations. The individual violations resulting from such employment will be recorded in WHISARD and reflected on the WH-103: Notice to Employer, Employment of Minors Contrary to the FLSA (WH-103).

73b01 Child labor coverage: section 12(a).

(a) Section 12(a) of the FLSA states that "no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed." *See* FOH 84a. Such goods are referred to as hot goods (*see* FOH 73b01(c)(1)b. for an example of hot goods). 29 CFR 570.104 -.111 contain the provisions related to coverage under section 12(a) (*see* FOH 73b02(c)(5) regarding the good faith purchaser defense).

(1) The term "goods" is defined in section 3(i) of the FLSA as "goods (including ships and marine equipment) wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof…." This definition expressly excludes goods after their delivery into the actual physical possession of an ultimate consumer other than a producer, manufacturer, or processor. The term includes such items as foodstuffs, clothing, machinery, printed materials, blueprints, and also includes intangibles (*see* 29 CFR 570.107).

(2) The term "commerce" is defined in section 3(b) of the FLSA as meaning "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

(3) The term "oppressive child labor" is defined in section 3(l) of the FLSA. Oppressive child labor can and does occur in establishments whose minor employees are not covered on an individual or enterprise basis under section 12(c) of the FLSA because the definition of oppressive child labor does *not* require that the minor employees be covered under the FLSA.

NOT FOR PUBLIC DISTRIBUTION

(b) Goods produced in an establishment in or about which oppressive child labor has been employed are barred as hot goods and are prohibited from being shipped or delivered for shipment in commerce under section 12(a) if:

(1) such goods were removed from the establishment while any oppressive child labor was still being employed in or about it, or

(2) such goods were removed from the establishment within 30 days after the employment of oppressive child labor had ceased in or about the establishment.

(c) The prohibitions of section 12(a) apply only to the *shipment of goods* in commerce that was actually produced in an establishment in or about which oppressive child labor was employed. If a WHI is aware that oppressive child labor was employed in an establishment that produces goods, the WHI should inform the employer of the hot goods provision, specifically that the goods, if removed from the establishment, might be barred as hot goods from being shipped or delivered for shipment in commerce. *See* 29 CFR 570.111.

(1) These hot goods provisions are applicable even though the underage employee does not himself or herself engage in the production of the goods, as long as somewhere in the establishment *in or about* which he or she is employed goods are produced that are subsequently shipped or delivered for shipment in commerce. It also does not matter if the youth's employment that constitutes the oppressive child labor is covered under section 12(c) of the FLSA (*see* FOH 73b01(c)(1)b. below).

a. For example, section 12(a) would apply where 14- or 15-year old minors are employed to load milk on trucks at a dairy establishment and deliver it to households if the dairy establishment produces some of its goods for shipment in commerce. This employment constitutes oppressive child labor because such work is prohibited by 29 CFR 570.33(k) and 29 CFR 570.33(n).

b. The hot goods provisions of section 12(a) also apply in the following example. A 15-year old minor works as a cashier in a small retail bakery that makes cakes and pies, some of which are shipped, or delivered for shipment, in commerce. Assume the minor does not handle checks or credit card transactions. Because the annual dollar volume of the enterprise is under $500,000.00, the minor is not covered on an enterprise basis under section 12(c). Because the minor is not employed in commerce or in the production of goods for commerce, he or she is not covered on an individual basis. But if this minor's employment was in violation of the child labor standards (*e.g.*, working until 10:00 p.m. in violation of the Child Labor Reg. 3 hours standards), oppressive child labor would have occurred. The products produced by the baker during the period of the oppressive child labor, and 30 days thereafter, would be hot goods under section 12(a).

1. Under the above scenario, the hot goods violation would be recorded in WHISARD and reflected on the WH-103.

2. Because the minor's employment was not covered on an enterprise or individual basis under section 12(c), the hours standards violations would *not* be recorded in WHISARD nor reflected on the WH-103.

NOT FOR PUBLIC DISTRIBUTION

c. Section 12(a) coverage also applies when a minor is employed by an employer other than the establishment owner or operator if that minor performs some work *in or about* the producing establishment. Section 12(a) coverage should always be considered when an underage minor is found employed and there is no coverage under section 12.

Scenario:

A driver's helper employed by a retail establishment to assist in the transportation of the products of a large, multistate, fruit and vegetable wholesaler to his or her employer's establishments, who regularly boards the delivery truck immediately outside the premises of the wholesaler, is considered employed in or about such establishment, without regard to whether he or she ever enters the wholesale facility itself (*see* FOH 73b01(c)(4) for additional information about employment in or about an establishment).

(2) Section 12(a) only applies to hot goods and bars a producer, manufacturer, or dealer from shipping or delivering hot goods in commerce. *To establish hot goods for purposes of section 12(a), the WHD does not have to show that a minor was engaged in the production of goods*. The WHD must only demonstrate that a minor was illegally employed in or about the establishment where the goods were produced within 30 days prior to the removal of the goods from the establishment. If 30 days pass after the child labor violation, and no further violations have occurred, the hot goods will have cooled, and shipment from the establishment is permitted. If the goods are removed before 30 days have passed, the goods are permanently hot. Finally, section 12(a) does not bar shipment or sale of goods where the initial shipment does not occur until the goods have cooled.

(3) A producer, manufacturer, or dealer may ship goods in commerce either by moving them itself in interstate or foreign commerce or by causing them to move, such as by delivery to a carrier.

a. A baker ships its bread in commerce whether it carries it in its own truck across state lines or sends it by contract or common carrier to its customers in other states.

b. A manufacturer delivers its goods for shipment in commerce when it transports its goods in-state to a distributor who, as the manufacturer is well aware, will ship the goods into another state.

Scenario:

A paper box manufacturer who ships a carton of boxes to a fresh fruit or vegetable packing shed within the same state, with knowledge or reason to believe that the boxes will there be filled with fruits or vegetables and shipped outside the state, has delivered the boxes for shipment in commerce.

c. However, the word "ship" must be applied in its ordinary meaning. It does not apply to the transmission of telegraphic messages, for example (*see* 29 CFR 570.106(a)).

NOT FOR PUBLIC DISTRIBUTION

(4) Consider both whether a minor is employed in or about the establishment.

a. A minor who performs occupational duties on the premises of the producing establishment is employed in that establishment. A minor is also employed in an establishment where the minor performs most duties off the premises but is regularly required to perform certain occupational duties in the establishment, such as loading or unloading a truck. This is true even though the minor is employed by someone other than the owner or operator of the particular establishment.

b. However, a minor is not employed in an establishment other than his or her employer's merely because such establishment is visited by the minor for brief periods of time and for the sole purpose of picking up or delivering a message or other small article.

c. If the minor cannot be considered as employed in the establishment, he or she may, nevertheless, be employed about it. However, the minor must perform occupational duties sufficiently close in proximity to the actual place of production to fall within the commonly understood meaning of the term "about," and the minor's occupation must be directly related to the activities carried on in the producing, manufacturing or dealing establishment.

1. For example, a driver's helper employed to assist in the distribution of the products of a bottling company who regularly boards the delivery truck immediately outside the premises of the bottling plant is considered employed in or about such establishment, without regard to whether he or she ever enters the plant itself.

2. On the other hand, employees working entirely within one establishment are not considered to be employed in or about a wholly different establishment occupying separate premises and operated by another employer. This would be true even though the two establishments are contiguous (*see* 29 CFR 570.110(b)).

(5) A good faith defense from the prohibition on shipping hot goods exists for a purchaser of these goods who has acquired these goods for value, in good faith, without notice that the goods were produced in violation of the FLSA, and in reliance on written assurance from the producer that the goods were produced in compliance with the FLSA (*see* 29 CFR 570.128, 29 CFR 789, and FOH 84a).

a. For example, a wholesaler who purchases goods in good faith from a producer, manufacturer, or dealer of such goods, who in turn sells these goods in his or her retail establishment, could have a good faith defense from the section 12(a) prohibitions.

b. However, a person or firm that owns the goods throughout the production process, even though some or all of the production work is done by independent contractors, or subcontractors or other producers of goods, cannot be a purchaser in good faith who is removed from the hot goods provisions of section 12(a). For example, a garment manufacturer could not claim that it was a purchaser in good faith, if it owned the product throughout

NOT FOR PUBLIC DISTRIBUTION

the manufacturing process, even though the cutting, sewing, and embroidery work was all performed by independent contractors, contractors, and subcontractors.

c. Detailed instructions for investigating a case that involves hot goods, including how to use the hot goods case to remedy child labor violations and achieve compliance, is contained in FOH 84a. WHIs, DDs, and ADDs should review and follow the guidance in FOH 84a whenever a hot goods situation involving child labor arises.

73c AGE CERTIFICATES AND AGE VERIFICATION OF MINORS

73c00 Purpose of age certificates.

(a) Section 3(l) of the FLSA provides that an employer may protect itself from unintentional violations of the minimum age provisions of the FLSA if it has on file an age certificate issued pursuant to the regulations of the Secretary of Labor (Secretary), showing the minor to be of age for the occupation in which he or she is employed.

(b) 41 CFR 50-201.104 provides that an employer may protect itself from unintentional violation of the minimum age provisions of the PCA if it has on file an age certificate issued pursuant to the regulations of the Secretary, showing the minor to be of age for the occupation in which he or she is employed.

73c01 Availability of age certificates.

(a) Although the WHD issued such certificates in the past upon the request of an employer or minor, it no longer does so. Requests from the public for federal age certificates should be returned to the requester with an explanation that the WHD no longer issues such certificates.

(b) The WHD relies solely on the certificates issued by the states and local public school districts. The name given to certificates issued under state authority is not the same in every state. They may be called age certificates, employment certificates, work permits, or working papers.

(c) The Secretary designates the states in which state certificates are acceptable (*see* 29 CFR 570.9). Information about state age and/or employment certificates is available on the WHD's website, and such information is updated annually.

(d) Not all states issue such documents, and some states issue age certificates for only certain age groups or occupations. Employers located in states that do not issue age certificates, or in states that issue age certificates that do not comport with the requirements contained in 29 CFR 570.5 -12, are unable to take advantage of the potential relief from unintentional violations of the minimum age requirements discussed in section 3(l) of the FLSA.

73c02 Irregular or improperly issued age or employment certificates.

(a) (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

(e) (b) (7)(E) [redacted]

73c03 Age verification of minors.

(a) A person legally attains the age of a birthday on the preceding day. For example, if the 18th birthday falls on January 25, the age of 18 is attained legally at 12:01 a.m. on January 24.

(b) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

(c) (b) (7)(E) [redacted]

- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

(d) (b) (7)(E)

(e) (b) (7)(E)

(f) (b) (7)(E)

(g) (b) (7)(E)

73d INJURIES AND DEATHS OF MINORS

73d00 <u>Reporting requirements.</u>

(a) Occupational injuries to or deaths of minors that come to the attention of WHD staff, through whatever means, must be reported electronically through channels as soon as possible to the NO, OP, DEPP, FLSA/Child Labor Branch Chief. Such information is used for enforcement, CMP tracking, public relations, and planning purposes, as well as to facilitate the efforts of a multiagency task force dedicated to reducing occupational injuries and deaths to young workers (*see* FOH 73d01).

NOT FOR RELEASE OR DISTRIBUTION

(b) Reports of occupational deaths, permanent injuries, or serious injuries of minors will be submitted via e-mail, by the regional enforcement coordinator: child labor or any other individual designated to do so by the regional administrator (RA), to the NO, OP, DEPP, FLSA/Child Labor Branch Chief.

(c) Reporting is required as soon as the WHD becomes aware of the death, permanent injury, serious injury, or non-serious injury of a minor.

(d) Reporting is required even when it is apparent that there is no FLSA coverage or the death or injury did not result from violation of any child labor provision.

(e) Preliminary reporting will be submitted with follow-ups as soon as additional information is available.

(f) The reporting process will provide, as soon as possible, all of the following information:

(1) The name and address of the employer

(2) The WHISARD identification number, if an investigation file has been created

(3) The date of the injury or death

(4) The name of the minor who was injured or killed

(5) The age of the minor at the time of the injury or death

(6) The minor's occupation at the time of the injury or death

(7) A brief description of how the injury or death occurred and what child labor provisions may have been violated (if any)

(8) The nature and extent of the injury suffered by the minor

(9) The amount of time lost from the job

(g) The report required by this section does not satisfy or replace other regional reporting requirements such as the WHD Significant Activities Report.

73d01 **<u>NIOSH Fatality Assessment and Control Evaluation program.</u>**

(a) The Fatality Assessment and Control Evaluation (FACE) program is located in the National Institute for Occupational Safety and Health's (NIOSH) Division of Safety Research. The primary goal of the program is to prevent occupational fatalities across the nation by identifying industries and workers with high risk for fatal injury, investigating work situations where fatalities occur, and formulating and disseminating prevention strategies to those who can intervene in the workplace. The FACE program divides the states and territories into two different groups: one group of states that is directly overseen by NIOSH and one group consisting of those states that conduct their own FACE investigations and oversight.

(b) The WHD and Occupational Safety and Health Administration (OSHA) have participated in the FACE program since at least 1995 by sharing information about occupational injuries and deaths of young workers, normally obtained from the reports required by FOH 73d00, and by

NOT FOR PUBLIC DISTRIBUTION

providing assistance to NIOSH investigators as requested. The WHD is proud to be a partner in this important work.

(c) Upon learning of the occupational death of a minor, the NO, OP, DEPP, FLSA/Child Labor Branch immediately provides information about the event to specific contacts within NIOSH and OSHA. Similarly, both OSHA and NIOSH advise the WHD when they become aware of such fatalities. Regional enforcement coordinators: child labor will routinely be copied on all e-mails to NIOSH and OSHA regarding youth fatalities occurring within their respective regions.

(d) Generally, the NIOSH, or a state partner, will conduct an on-site investigation of the fatality, solely to gather information to be used to prevent future fatalities.

(1) The NIOSH does not have regulatory authority; nor does it levy employer sanctions or penalties.

(2) The NIOSH, or a state designated by the NIOSH, will issue a formal report at the end of the investigation. The report does not reveal the names of the employers or the workers who have died. The report recommendations routinely include an overview of the applicable federal child labor provisions and how compliance with those provisions can reduce occupational deaths.

(3) Occasionally, the NIOSH will request that the WHD or OSHA provide assistance in the form of introduction to the employer. The WHD district offices (DOs) are directed to cooperate with the NIOSH to the fullest extent possible.

(4) Any questions regarding the FACE program or the interaction between the WHD and NIOSH should be addressed to the NO, OP, DEPP, FLSA/Child Labor Branch.

73d02 **<u>Obtaining medical documentation for serious injuries under section 16(e)(1) of the FLSA.</u>**

(a) WHIs will obtain and place in the case file certain medical documentation regarding minors who suffered serious injuries while employed in violations of the federal child labor provisions. This medical documentation will be considered by the WHD, along with other information, as it determines whether to assess child labor CMPs and the amount of the assessment.

(b) As per Wage and Hour Memorandum No. 2009-03 and Field Assistance Bulletin No. 2010-1, the WHD will generally, as part of the child labor CMP assessment process, attempt to place each serious injury suffered by a minor along a continuum of seriousness (*i.e.*, the more egregious or debilitating the injury, the higher ranking it will receive).

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(3) (b) (7)(E) [redacted]

(c) Types of medical documentation to be obtained

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

(3) (b) (7)(E) [redacted]

- [redacted]
- [redacted]

73e CHILD LABOR PROVISIONS OF THE WALSH-HEALY PUBLIC CONTRACTS ACT

73e00 <u>General.</u>

NOT FOR PUBLIC DISTRIBUTION

(a) The minimum age for employment on PCA contracts, for all workers, is 16 years of age. When enacted, the PCA established different minimum age requirements for males and females; no male under 16 years of age was permitted to be employed on a PCA contract and no female under 18 years of age was permitted to be employed on a PCA contract.

(b) Although this language is still contained in the statute, the Department of Labor (DOL) amended the federal procurement regulations at 41 CFR 50.201 on 04/19/1969 (*see* 34 FR 6687) to reflect a single minimum age for employment of 16 years on PCA contracts for both men and women (*see* 41 CFR 50-201.3). This was done in accordance with Executive Order 11375 of 10/13/1967.

(c) Accordingly, the minimum age for employment on a PCA-covered contract is 16 years for both males and females.

73e01 **Knowingly employed under the PCA.**

(a) Section 2 of the PCA provides that an employer who violates its child labor provisions is liable for liquidated damages in the sum of $10.00 for each day that each underage minor is knowingly employed on work subject to the PCA. These damages are assessable only when the employer can be charged with knowledge of the facts regarding the minor's age and employment of the minor on the contract. It must be shown that the employer had either actual or constructive knowledge of the facts.

(b) Whether a minor has been knowingly employed on PCA work is a question of fact. (b) (7)(E) [redacted] It is not necessary that all the pertinent facts be in the possession of the same individual. For example, if a personnel manager knew the underage minor's age and a supervisor knew that the minor worked on the contract, knowledge of both facts is imputed to the employer.

(c) In any investigation that involves the employment of underage minors under the PCA, the file shall contain an explanation of whether the minor was knowingly employed and why, including any necessary supporting documents. In any case where the PCA child labor liquidated damages will be assessed, the date of birth of the underage minors will be verified, and information as to the PCA coverage of the minor will be included.

(d) 41 CFR 50-201.104 provides that an employer will not be deemed to have knowingly employed an underage minor under the PCA if, during the employment of the minor, it has on file for the minor an employment or age certificate showing the minor is at least 16 years of age.

73f **GUIDELINES ON FEDERAL AND STATE CHILD LABOR PROVISIONS**

73f00 **General.**

(a) All states have enacted their own child labor provisions, and when subject to both state and federal provisions, the employer is generally held to the more stringent standard (*i.e.*, the standard that offers the greater protection to the young worker).

NOT FOR PUBLIC DISTRIBUTION

(b) In the administration of the child labor provisions of the FLSA, there are several points at which effective relationships with state and local agencies can aid in improving the administration of the child labor standards and in developing public support for such standards. Field staff are encouraged to develop these relationships to their greatest potential, keeping in mind the necessity for maintaining a balanced program.

(c) Field personnel can perform a valuable service by keeping the NO informed of significant developments in state child labor legislation.

73f01 **Field cooperation with migratory labor committees.**

(a) A number of states have migratory labor committees. The programs of these committees cover all aspects of conditions affecting migratory workers and their families (*e.g.*, housing, wages, transportation, schools, employment of children, child care centers, and other measures) that improve the standards under which migrants work and live. Representing a wide number of interests, these committees can help the WHD program by developing support for child labor standards in agriculture and by following-up on needed action that is beyond the scope of the FLSA (*e.g.*, as providing school facilities for migratory children).

(b) Field personnel in the states with migratory labor committees, if invited, will serve within the limits of time they have available as advisers or resource people. As federal representatives, however, they should not act in the capacity of regular members unless the committee is an interagency federal committee. DDs will keep the RO and NO informed of any significant developments at the local level on migratory labor programs come to their attention.

73g **SPECIFIC ENFORCEMENT PROVISIONS**

73g00 **General.**

FOH 33 provides general information about the federal child labor provisions. This section expands on the guidance provided in FOH 33 by providing WHIs with information that is specific to the administration and enforcement of particular child labor provisions.

73g01 **Investigations involving work experience and career exploration or work-study program participants.**

The NO, OP, DEPP, FLSA/Child Labor Branch will be advised immediately of any investigative activity involving youth participating in a WHD-sanctioned state work experience and career exploration (WECEP) or work-study program (WSP) (*see* FOH 33b02(c) -(d)). Any questions concerning WECEP or WSP should be addressed, through channels, to the NO, OP, DEPP, FLSA/Child Labor Branch.

73g02 **High school graduates, children excused from school on religious grounds, and expelled students.**

29 CFR 570.35(c)(1) provides exemptions from the Child Labor Reg. 3 hours standards limitations contained in 29 CFR 570.35(a)(1), 29 CFR 570.35(a)(3), and 29 CFR 570.35(a)(5) for those 14- and 15-year-olds who, for a variety of reasons, do not or cannot attend school (*see* FOH 33b02(b)).

NOT FOR PUBLIC DISTRIBUTION

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

73g03 **<u>Determining compliance with certain Child Labor Reg. 3 occupation standards.</u>**

(a) **Cleaning of kitchen equipment**

See FOH 33c05(b)(1).

(1) 29 CFR 570.34(i) permits youth 14 and 15 years of age to clean kitchen equipment (not otherwise prohibited), remove oil or grease filters, pour oil or grease through filters, and move receptacles containing hot grease or hot oil, but only when the equipment surfaces, containers, and liquids do not exceed a temperature of 100 degrees Fahrenheit (F).

(2) Questions have been raised as to how an employer and a WHI can ensure that compliance with this provision is achieved and maintained (*i.e.*, that the temperature of equipment, surfaces, containers, and liquids being cleaned, filtered, and/or transported do not exceed 100 degrees F (*see* 69 FR 75399)).

a. In some situations, employer-installed thermometers could ensure that the required temperature has been reached.

b. Cleaning schedules that incorporate adequate cooling down periods, or that are executed before the heating elements of the equipment are activated, can ensure compliance with this provision.

c. As always, the employer's policies addressing this issue, as conveyed to and followed by managers and other employers (b) (7)(E) [redacted] are extremely useful in determining compliance.

(3) The OSHA has advised the WHD that an individual performing such cleaning functions would not normally experience a first degree burn until the equipment, surfaces, containers, and liquids being cleaned, filtered, and/or transported reached a temperature of at least 140 degrees F. Accordingly, the WHD will generally allege a violation of 29 CFR 570.34(i) whenever a covered 14- or 15-year-old employee received at least a first degree burn while performing these named duties.

(4) Child Labor Reg. 3 does not prohibit a minor from performing the normal grill maintenance that an employee routinely does during the actual cooking process, involving the use of water and a spatula to scrape away and remove food particles and grease from the surface of the grill. This position applies only to electric and gas grills that do not involve cooking with open flames (*see* 69 FR 75388).

(b) **High speed ovens**

NOT FOR PUBLIC DISTRIBUTION

See FOH 33c10(b)(1). The WHD's enforcement experience has demonstrated that high speed ovens, the use of which is prohibited to 14- and 15-year-old employees, are often found in such employers as Subway, Hilton Hotels, and Hyatt Hotels.

(c) Toasters

See 33c12(b)(2)a). The model VCT-200 rapid toaster is manufactured exclusively for McDonald's.

(d) Automatic broiler systems

See FOH 33c12(b)(3)b. The WHD's enforcement experience has demonstrated automatic broiler systems, the use of which is prohibited to 14- and 15-year-old employees, are often found in such employers as Burger King and Carl's Jr.

(e) Two-sided grills

See FOH 33c12(b)(8). The WHD's enforcement experience has demonstrated that two-sided grills, the use of which is prohibited to 14- and 15-year-old employees, are often found in the establishments of such employers as McDonald's.

73g04 <u>Guidance concerning enforcement of child labor HOs.</u>

(a) (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

(b) "STOP" stickers

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(3) (b) (7)(E) [redacted]

(c) HO 1: occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components

(1) HO 1 applies to shooters who are hired by various civic organizations and governments to transport fireworks from the manufacturer or wholesaler to the display site, set up the fireworks at the site, load mortars (*i.e.*, tubes from which the shells are fired), and fire shells. Fireworks must be temporarily stored at the site prior to the display. The term "establishments storing explosives" in 29 CFR 570.51(b)(1) is sufficiently broad to cover these storage situations. It may be necessary to establish individual coverage where members of the shooting crew are not employees of a fireworks manufacturer or wholesaler but employed by a firm engaged solely to fire or set off the display.

(2) (b) (7)(E) [redacted]

(d) HO 3: coal mine occupations

Motor-vehicle operator and outside helper.

HO 3 prohibits almost all work in or about a mine, which would include the occupations of motor-vehicle driver and outside helper. HO 2 also specifically prohibits 16- and 17-year-olds from performing the occupations of motor-vehicle driver and outside helper in or about any mine, including an open pit mine or quarry. Child labor violations involving these two occupations in or about a mine should be recorded as violations of HO 2. However, a violation of HO 3 should also be asserted because the minor was employed in a mine.

(e) HO 4, HO 5, and section 13(c)(7) of the FLSA

(1) HO 4 generally prohibits minors under 18 years of age from performing work that entails entering a sawmill. HO 4 does allow 16- and 17-year-olds to perform some work involved with operating power-driven machinery (*e.g.*, pulling lumber from the dry chain) as long as the work is performed outside of the sawmill. In large sawmills, determining what areas are inside a sawmill usually is not difficult because separate departments are located in separate buildings, often considerable distances from the sawmill. This is less clear when dealing with small sawmills or portable sawmills.

(2) Section 13(c)(7) of the FLSA allows certain youth, between the ages of 14 and 17, to be employed inside and outside of places of businesses that use power-driven machinery to process wood and wood products. There are several conditions imposed on such employment, and they may not, under any conditions, operate or assist in the operation of power-driven woodworking machines. This would preclude exempt youth from performing such work as off bearing or pulling of lumber from

NOT FOR PUBLIC DISTRIBUTION

the dry chain, feeding of materials into a machine whether or not equipped with automatic feeding, or cleaning of the machines. This prohibition exists whether that work is performed inside or outside of the saw mill.

(3) When applying the provisions of section 13(c)(7), HO 4, and HO 5 to work in or around sawmills, it may be necessary to determine which areas constitute outside the saw mill.

a. The WHD has opined that different departments or production areas, including planing or remanufacturing departments, can be considered to be outside the sawmill for purposed of HO 4, even if they are part of a single structure and covered by a single roof if they are properly separated from the sawmill.

b. The WHD requires that the areas need to be separated by a physical barrier such as a wall or petition. The guidance provided by FOH 33c02 regarding barriers separating *workrooms* is appropriate, but not sufficient. Because section 13(c)(7) of the FLSA requires that youth be protected from wood particles and flying debris by an appropriate barrier or by maintaining a sufficient distance from machinery, a barrier separating a sawmill from other departments would have to be both solid and high. People and materials could pass through the barrier via a door or opening, but that door or opening would have to be constructed in such a manner, or such a distance from the sawmill, to ensure minors are protected from wood particles and flying debris.

(4) *How HO 4, HO 5, and section 13(c)(7) impact the employment of minors by age group*

a. <u>14- and 15-year-olds</u>

Neither HO 4 nor Child Labor Reg. 3 allows this age group to be employed in sawmilling operations (inside or outside of the sawmill). The only way a 14- or 15-year-old may legally be employed in such work is under the provisions of section 13(c)(7). But this provision severally limits the type of work such youth may do.

1. Such youth may not do any off-bearing, loading, or unloading of materials in or from machines or conveyors, etc.

2. The work they may do outside the sawmill is limited to the same things they may legally do inside the sawmill (*e.g.*, hand sanding and planing of wood, sweeping up saw dust, picking up lumber from the floor and hand carrying it to another location, etc.).

3. They must also be employed in compliance with all the other provisions of section 13(c)(7) regarding proper supervision and safety precautions, and may never perform any work that would be construed as operating or assisting in the operation of power-driven woodworking machines.

NOT FOR PUBLIC DISTRIBUTION

b. 16- and 17-year-olds

HO 4 treats such youth quite differently than their younger counterparts. If such youth are employed in an area that is outside the sawmill but still part of the establishment, it is more advantageous for the employer to not treat them as section 13(c)(7) exempt but to allow them to be subject just to HO 4.

1. Youth who would not qualify for the section 13(c)(7) exemption (*e.g.*, because they were not excused from school attendance or were not supervised by a relative or the a member of the same religious sect as the youth) can, as mentioned above, perform more types of work outside the sawmill under HO 4 and HO 5 than permitted by section 13(c)(7). This would include such tasks as pulling lumber from a dry chain or off-bearing, under certain conditions, from a circular saw.

2. It is essential that such youth performing the work permitted by HO 4 or HO 5 be employed outside the sawmill, as described in FOH 33g04(e)(3), when performing the work or the employment would negate the exemption provided by section 13(c)(7) and violate HO 4 and/or HO 5.

(f) HO 6: exposure to radioactive substances and to ionizing radiations

(1) HO 6 prohibits the employment of minors in any work that involves exposure to ionizing radiation in excess of 0.5 rem per year.

(2) (b) (7)(E) [redacted]

(g) HO 9: occupations in mining other than coal

(1) Many occupations prohibited by HO 9 may also be prohibited by other HOs. Examples include operating motor vehicles (HO 2), using a power-driven chain saw to cut timber (HO 5), and operating some earth moving equipment while working in a tunnel (HO 17). (b) (7)(E) [redacted]

(2) Motor vehicle operator and outside helper

(3) HO 9 prohibits almost all work in or about a mine, which would include the occupations of motor vehicle driver and outside helper. HO 2 also specifically prohibits 16- and 17-year-olds from performing the occupations of motor vehicle driver and outside helper in or about any mine, including open pit mine or quarry.

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

(h) HO 11: power-driven bakery machine occupations

Pizza-dough rollers, a type of dough sheeter, are normally prohibited under HO 11. 29 CFR 570.62(b)(2) contains an exception (*see* FOH 33b11(d)(3)). The exception does not extend to minors who set-up, repair, oil, or clean the assembled machine. Violations will be charged if workers under 18 years of age set-up, repair, oil, or clean this equipment.

(i) HO 15: occupations involved in wrecking, demolition, and shipbreaking operations

(1) HO 15 prohibits the employment of minors in all occupations in wrecking, demolition, and shipbreaking operations.

(2) To be subject to HO 15, demolition work must be extensive, not just in conjunction with remodeling or repair work. Contact the NO, OP, DEPP, FLSA/Child Labor Branch, through channels; for guidance should questions arise as to whether a specific demolition project falls with the scope of HO 15.

73g05 <u>Children employed in agriculture who move into another area.</u>

Children who leave one district where schools have closed for summer vacation and move into and live in another district where schools are still in session may work during the hours schools are in session in this new district. This position applies only during the spring of the year. (b) (7)(E) [redacted]

73g06 <u>WHI child labor tools.</u>

(a) HO "Quick Looks"

The "Quick Looks" found at the end of this chapter provide a brief overview of each HO. They are not intended for public dissemination, nor do they replace 29 CFR 570.70 -.72 or FOH 33e.

(b) Sample letter to request medical documentation from a physician or other health care provider

NOT FOR PUBLIC DISTRIBUTION

NOT FOR PUBLIC DISTRIBUTIO

DATE

Letter to Custodian of Records
Name and Address of Recipient

Dear:

Re: Request for medical treatment records

The Wage and Hour Division, U.S. Department of Labor (WHD), enforces section 12(c) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 212(c), which prohibits the employment of oppressive child labor. WHD is authorized to conduct child labor investigations pursuant to section 212(b) of the FLSA, 29 U.S.C. 212(b), which states that "[t]he Secretary of Labor or any of his authorized representatives, shall make all investigations and inspections under section 211(a) of this title with respect to the employment of minors." WHD is authorized to assess civil monetary penalties up to $50,000 for any child labor violation that causes the death or serious injury of an employee under the age of 18. 29 U.S.C. 216(e). Section 11(a) of the FLSA, 29 U.S.C. 211(a), authorizes WHD to investigate and gather data regarding conditions and practices of employment, and to inspect such records necessary to the enforcement of all provisions of the FLSA.

WHD is conducting a child labor investigation into the employment of _____, a minor who was injured in the course of his/her employment at (name or address of employer**) on (date of accident**), and who was treated at your facility after the occupational accident. WHD is requesting copies of the youth's medical records relevant to this occupational injury as part of this investigation, pursuant to its statutory authority under the FLSA. Section 164.512(d) of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, 45 CFR § 164.512(d), permits covered health care providers to release protected health information to a health oversight agency without individual authorization. WHD is a health oversight agency as defined in the HIPAA regulation because the Agency is charged with administering the FLSA, which is a government program in which health information is necessary to determine compliance. *See* 45 CFR 164.512(d)(1)(iii). As noted above, WHD is requesting the protected health information in conjunction with an ongoing child labor investigation.

This request includes a request for any records, tests including drug tests, studies, medical reports, histories, treatment notes, face sheets, transfer records, EMT or ER notes, ambulance reports, Explanation of Benefits (EOB), UB 92s, HICF's, nursing notes, ~~chest~~ x-rays, and/or any other medical records in your possession for the treatment of (name of minor**) during this period. The information requested is the minimum necessary to carry out the investigation. *See* 45 CFR 164.514(d).

Thank you in advance for your cooperation with this accident investigation.
If you have any questions, please contact (name of WHI**) at ext..

Signed//

NOT FOR PUBLIC DISTRIBUTIO

73g07 **Application of the parental exemption.**

WHD field staff should notify the NO, OP, DEPP, FLSA/Child Labor Branch through proper RO channels of any investigation in which potential application of the parental exemption, whether non-agricultural or agricultural, exists.

NOT FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 1
EXPLOSIVES

Occupations/Machines
PROHIBITED

Any work in plants manufacturing explosives, in plants storing explosives, and in plants manufacturing articles containing explosive components is prohibited.

Work involved in the handling of explosives in plants manufacturing or storing small arms ammunition or blasting caps such as rifle shells (not exceeding .60 caliber), shotgun shells, blasting caps, electric blasting caps.

Work in warehouses (lacking the retail concept) where explosives and/or ammunition (other than small arms ammunition no exceeding .60 caliber) is stored.

Occupations/Machines
PERMITTED

Work that does not involve the handling of explosives when performed in a "nonexplosives area" of a plant which manufactures and/or stores explosives or articles containing explosive components.

All work in small arms manufacturing which is not otherwise prohibited. Examples include; inspector, office work, machine operator (if not prohibited by another HO), packer (except blasting caps), shipping and other work not involving the handling of explosives.

Gun clubs, trap and skeet ranges, turkey shoots, certain armories, police stations, and other such areas where only small arms ammunition (not exceeding .60 caliber) may be stored.

All work in retail establishments selling explosives or explosive components and storage of ammunition in gun shops, sporting goods stores, building supply and hardware stores, retail fireworks stands, and other retail establishments.

FOR PUBLIC DISTRIBUTION

HO 1 -- CONTINUED

Enforcement Positions

Generally, no areas in firework plants would meet the "nonexplosives area" criteria.

Exemptions

HO 1 does not contain an exemption for Apprentices and Student-Learners. There are no other exemptions applicable.

FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 2
DRIVING

Occupations/Machines PROHIBITED	Occupations/Machines PERMITTED
Motor-vehicle driver on a public road or highway, in or about any mine (including open pit, mine or quarry), place where logging or sawmill operations are in progress, or where any excavation covered by HO 17 is being done, except as specifically permitted.	Driver on private property except as specifically prohibited.
Outside helper when riding outside the cab on any public road/highway, in or about any mine (including open pit mine or quarry), place where logging or sawmill operations are4 in progress or where any excavation covered by HO 17 is being done.	Helper riding inside a cab of any motor vehicle regardless of where operated.
Towing a vehicle at any time.	Outside helper when riding outside the cab of any motor vehicle on private property except as specifically prohibited.
Driving a school bus.	

FOR PUBLIC DISTRIBUTION

Enforcement Positions

Ambulance Attendants—EMT's who have completed necessary training are not "outside helpers" under HO 2 and may ride in the rear of ambulances.

Cart Caddy Machines—are not considered "motor vehicles" under HO 2 and 16- and 17-yeaer-olds may operate them.

Golf Carts and Riding Mowers—do fall under HO 2 when used as a means of transportation on a public road. They are not considered "automobiles or trucks" for purposes of the limited exemption described below.

Messengers—fourteen- and 15-year-olds may be employed as messengers and errand boys/girls to pick up and deliver messages or packages by foot, bicycle, or public transportation. They may not ride as passengers in motor vehicles (other than public transportation) when a significant reason for being a passenger is for the purpose of performing work in connection with the transporting—or assisting in the transporting of—other persons or property (*see* Regulations 29 C.F.R. § 570.34(o)).

HO 2 -- CONTINUED

Exemptions

HO 2 does **not** contain an exemption for Apprentices and Student-Learners. Furthermore, none of the limited exemptions applying to HOs 5, 8, 10, 12, 16, and 17 permit Apprentices or Student-Learners to drive motor vehicles as part of their training program.

Limited Exemption for Driving by 17-Year-Olds Which is "**Occasional and Incidental**."
FLSA Section 13(c)(6) Effective October 31, 1998

Seventeen-year-olds **(but not those under 17 years of age**) may drive automobiles and trucks as part of their employment if **all** of the following criteria are met:

1. The automobile or truck does not exceed 6,000 pounds gross vehicle weight.
2. The driving is restricted to daylight hours.
3. The driving is only occasional and incidental* to the minor's employment.
4. The minor holds a State license valid for the type of driving involved in the job performed.
5. The minor has successfully completed a State-approved driver education course.
6. The minor has no records of any moving violations at the time of hire.
7. The vehicle is equipped with a seatbelt for the driver and any passengers and the employer has instructed the youth that the seatbelts must be used when driving;
8. The driving does not involve:
   - Towing vehicles;
   - Route deliveries or route sales;
   - Transportation for hire of property, goods, or passengers;
   - Urgent, time-sensitive deliveries where, because of such factors as customer satisfaction, the rapid deteriation in the quality or temperature of the product, and/or economic incentives, the minor might feel impelled to hurry completion of the pick-up or delivery;
   - Transporting more that 3 passengers, including employees of the employer;
   - Driving beyond a 30-mile radius from the minor's place of employment;
   - More that two trips away from the primary place of employment in any single day to deliver the employer's goods to a customer (other than urgent, time-sensitive deliveries which are prohibited);
   - More than two trips away from the primary place of employment in any single day to transport passengers, other than the employer's employees.

**Driving is "occasional and incidental" when the minor spends no more than one-third of the worktime in any workday and no more than 20 percent of the worktime in any workweek driving.*

FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 3
COAL MINING

Occupations/Machines PROHIBITED	Occupations/Machines PERMITTED
All underground work in coal mines.	Slate or other refuse picking at a picking table or at a picking chute in a tipple or a breaker
All work in open-pit (strip) coal mines.	Work on the surface part of the mining plant **solely** in offices, or repair or maintenance shops.
All work on the surface of the mining plant, unless otherwise permitted by HO 3.	

Enforcement Positions

Stock Clerk - may work solely in warehouse. Work outside of building delivering supplies, crossing railroad tracks, etc., is prohibited.

Motor-Vehicle Operator and Outside Helper – Both HO 2 and HO 3 prohibit minors from performing these occupations in or about a mine. Violations involving these occupations in or about a mine should be charged under HO 2.

Cleaning Under a Coal Tipple or Breaker - is prohibited by HO 3.

Watchman - permitted if work is performed in an area sufficiently removed (one mile or more) from the site of the mining operation.

Surveying - permitted if done well in advance of new mining operations and at least one mile away from current mining operation.

Screening Coal - is prohibited by HO 3.

Exemptions

HO 3 does **not** contain an exemption for Apprentices and Student-Learners.

There are no other exemptions applicable.

FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 4
FOREST FIRE FIGHTING AND FIRE PREVENTION, TIMBER TRACT MANAGEMENT, FORESTRY SERVICES, LOGGING, AND SAWMILLING

Occupations/Machines PROHIBITED

All work in forest fire fighting and forest fire prevention associated with the extinguishing of an actual fire.

Work in forestry services, timber culture, timber tracts, and timber-stand improvement, including timber cruising, surveying, logging-engineering parties, estimating timber, timber valuation, forest pest control, and reforestation. This includes tree planting and thinning.

Most work in logging with few exceptions. Any work—including logging, engineering, and construction—that involves timbering, the collecting or transporting of logs, the operations of power-driven machinery, the handling or use of explosives, and work on trestles.

Maintenance and repair of equipment in places other than in a shop, such as in the sawmill, and millwright and maintenance work in a sawmill. Work in the boilerhouse or powerhouse of a sawmill.

Most work in sawmills and all work that involves entering the sawmill, with few exceptions.

Most work on the green chain.

Handling and shipping of laths and most work in lath mill, shingle mill, or cooperate stock mill.

Occupations/Machines PERMITTED

The following forest fire prevention task *provided* none of these tasks may be performed in support of extinguishing a forest fire: the clearing of fire trails or roads; the construction, maintenance, and patrolling of fire lines; the piling and burning of slash; the maintaining of fire fighting equipment; and acting as a fire lookout, watchman, or patrolman.

Work in the construction, operation, repair, or maintenance of living and administrative quarters, including logging camps and fire fighting base camps *provided* none of the work is prohibited by another HO.

Work related to forest marketing and economics if performed away from the forest, office work, and lumber tallying.

Maintenance and repair of equipment, but only in shops. Most work done in the repair or maintenance shops except the use of power-driven woodworking machines.

Care of animals, stableman and hostler.

Clean-up in the lumberyard.

Most work on the dry chain.

Splitting of shakes manually, except inside a mill. Packing shakes into bundles, except inside the building or cover.

FOR PUBLIC DISTRIBUTION

HO 4 -- CONTINUED

Enforcement Positions

Veneer mills are subject to the prohibitions of HO 4.

The cutting and stacking of firewood is subject to HO 4 because it is "converting timber into cordwood. HO 4 applies even if the work is being done at a retail establishment such as a convenience store or at a restaurant where the logs will be burned to provide ambiance for the diners.

The use of wood chipping machines may be subject to HO 4. The operation of wood chippers is always prohibited by HO 14.

Stump pulling using tractors, clearing land for power lines or road right-of-way is not subject to HO 4.

Exemptions

HO 4 does **not** contain an exemption for Apprentices and Student-Learners.

FLSA sec 13(c)(7) provides a limited exemption for certain youth aged 14 through 17 who, by statute or judicial order, are exempt from compulsory school attendance beyond the eighth grade, that permits their employment—under the conditions listed in FLSA sec 13(c)(7)—inside and outside of establishments which use power-driven machinery to process wood products. Such establishments include sawmills, cabinetry shops, gazebo manufacturers, and carpentry ships. The youth may not, however, operate or assist is the operation of any power-driven woodworking machinery. The provisions of this exemption are detailed 29 CFR §§ 570.34(m)(1) and 570.54(c)(1) and discussed further in FOH Chapter 33.

FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 5
POWER-DRIVEN WOODWORKING MACHINES

In planing mills and other industries

Occupations/Machines PROHIBITTED	Occupations/Machines PERMITTED
Operating or assisting to feed power-driven woodworking machines—fixed or portable—used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening or otherwise assembling, pressing or printing wood, veneer, trees, logs, or lumber.	Off-bearing or tailing from machines other than circular saws.
Off-bearing or tailing from circular saws.	Placing material on moving chain or in a hopper or slide for automatic feeding of machines so equipped.
Setting up, adjusting, repairing, oiling, or cleaning power-driven woodworking machines.	Moving material from one machine to another and arranging material for another person to feed into the machine.
	Work in preparation for shipping and the handling and shipping of lumber.
	Using staple machines in upholstery departments, boat, or car ships.
	Using electric, pneumatic, or battery-powered screwdrivers to only tighten screws

FOR PUBLIC DISTRIBUTION

In the manufacturing of veneer

Operating or assisting the operator to feed veneer lathers, clippers, presses, and any other woodworking machine covered by HO 5.	Work about a veneer soaking pit.
Off-bearing from a guillotine-action veneer clipper when material is not conveyed away.	Off-bearing from a veneer lathe or guillotine clipper when conveyed away by mechanical means.
Setting up, adjusting, repairing, oiling, and cleaning machines.	Operating or assisting to operate veneer-taping machine, glue spreader, and veneer drier.
	Carrying or moving materials, including the shipping of veneer products.

HO 5 -- CONTINUED

Enforcement Positions

Chain Saws – HO 5 prohibits work in occupations in connection with the operation of "power-driven woodworking machines", including chain saws. Chain saws are also prohibited by HO 14 and by HO 4 when used in logging.

Power-driven woodworking machines used to cut materials other than wood or veneer—HO 5 applies to any power-driven machines designed or used for cutting or shaping wood, veneer, trees, logs, or lumber—regardless of what material is cut by it.

Screwdrivers, wood polishing machines, and machines for tightening bolts. These machines/tools are not considered to be "power-driven woodworking machines" by HO 5.

Power-driven wood chippers are now also prohibited by HO 14.

Exemptions

HO 5 **does** contain an exemption for Apprentices and Student-Learners.

There are no other exemptions applicable.

FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 6
RADIOACTIVE SUBSTANCES

Occupations/Machines PROHIBITTED

Any work in any workroom in which:

- radium is stored or used in the manufacture of self-luminous compound:
- self-luminous compound is made;
- self-luminous compound is stored, used, or worked on;
- incandescent mantels are made from fabric and solutions containing thorium salts, or are processed or packaged;

Any other work which involves exposure to ionizing radiation in excess of 0.5 rem per year.

Occupations/Machines PERMITTED

Any work in medical facilities such as X-ray rooms and laboratories where exposure to ionizing radiation is less than 0.5 rem per year.

Any work involving exposure to naturally-occurring radiation such as radiation in soil or sunlight radiation.

OR PUBLIC DISTRIBUTION

Enforcement Positions

(b) (7)(E) [redacted]

Exemptions

HO 6 does not contain an exemption for Apprentices and Student-learners.

There are no other exemptions applicable.

A QUICK LOOK AT HO 7
POWER-DRIVEN HOISTING DEVICES

Occupations/Machines PROHIBITED

Operating, assisting to operating, tending, riding upon, working from, repairing, servicing, or disassembling any crane, derrick, manlift, hoist, or high-lift truck.

Prohibited equipment includes backhoes, fork lifts, front-end-loaders, skid loaders, skid-steer loaders, Bobcat loaders, stacking trucks, scissor lifts, boom-type mobile elevating work platforms, work assist vehicles, cherry pickers, basket hoists, and bucket trucks.

Operating or tending freight and passenger elevators. Operating or tending a combination passenger/freight elevator—also known as service elevators.

Occupations/Machines PERMITTED

Operator or rider on passenger elevators that meet certain specific requirements.

Riding on freight elevators when the elevators are operated by an assigned operator.

May operate a dumbwaiter or conveyor (such as endless belts, chain conveyors, or bucket conveyors. Minors under 16 years of age are prohibited from operating or tending any conveyor whether power-driven or gravity-operated.

FOR PUBLIC DISTRIBUTION

Enforcement Positions

Loaders—such as front-end loaders, Bobcat loaders, skid-steer loaders—retain their "hoisting" capabilities and are prohibited by HO 7 even if the "hoisting apparatus" or "hoisting capabilities" are not activated while being operated by a minor. For instance, a minor under 18 years of age is prohibited by HO 7 from merely moving a loader from one spot to another on the dealer's show room floor because the hoisting apparatus could be engaged.

Chairlifts at ski resorts are covered under HO 7 as manlifts only when they travel a greater distance vertically then they do horizontally.

Patient/Resident lifts/hoists—WH has adopted an enforcement position detailed in FAB 2011-3 which allows certain 16- and 17-year-olds to assist a trained adult in the operation of certain power-driven patient hoists under very specific circumstances.

HO 7 -- CONTINUED

Exemptions

HO 7 does not contain an exemption for Apprentices or Student-Learners.

An exemption that once permitted 16- and 17-year-olds to operate electric or air operated hoists not exceeding a one-ton capacity was eliminated in 2010 when the HO was revised through rulemaking.

No other exemptions apply.

FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 8
METAL WORKING MACHINES

Occupations/Machines PROHIBITED	Occupations/Machines PERMITTED
Operating, helping to operate, setting up, adjusting, repairing, oiling, or cleaning: All rolling machines: All bending machines; All hammering machines; All shearing machines.	Operating and helping to operate punch presses equipped with full automatic feed and ejection and with a fixed barrier guard to protect the operator's hands and fingers. Operating all machine tools.

.

Enforcement Positions

The following machines are covered by HO 8:

Automatic Bulkan Assembler, Hager press, and Metal bottom seamer.

The following machines are not covered by HO 8:

Wheel crusher or rim removing machine, Walco precision roller, Injection molding press, and Elox wire cut electrical discharge machine.

The following machine tools are not covered by HO 8:

Axxess PC key machine, Rigid 535 pipe and bolt threading machine, Landis pipe nipple and automatic pipe nipple machines, brake drum and brake disc lathes.

Exemptions

HO 8 **does** contain an exemption for Apprentices and Student-Learners.

There are no other exemptions applicable.

FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 9
MINING OTHER THAN COAL

Occupations/Machines PROHIBITED

All underground work in mines or underground quarries.

All work in or about opencut mines, open quarries, and sand and gravel operations unless otherwise permitted.

All work at or about placer mining or borehole mining operations unless otherwise permitted.

All work in metal mills, unless otherwise permitted.

All work in washer plants and grinding mills unless otherwise permitted.

Occupations/Machines PERMITTED

Work in offices, in warehouses, or supply houses, in change houses, in laboratories, and in repair or maintenance shops if located above ground.

Work outside of the mine in surveying, in repair and maintenance or roads, and in general cleanup if done above ground.

Work of track crews in metal mines, if the work is done away from haulage and mining activities.

All work at surface placer mines and work at metal mills involving the operation of jigs, sludge table, floatation cells, or drier-filters, handsorting work at picking tables, and general cleanup.

FOR PUBLIC DISTRIBUTION

Enforcement Positions

Peat moss—HO 9 does not apply to cutting, gathering, piling, or any other occupations performed on peat moss.

Weighing trucks—The weighing of trucks filled with gravel, stone, or other minerals is prohibited by HO 9.

Processing stockpiled limestone into lime—Is not subject to HO 9 because it is manufacturing process that involves a chemical change in the limestone.

Track work—Done three miles from the open quarry or mine is not subject to HO 9.

Processing marble into crushed stone—Is subject to HO 9 because there is no chemical change in the marble and the crushed stone is the finished product.

HO 9 -- CONTINUED

Exemptions

HO 9 does **not** contain an exemption for Apprentices and Student-Learners. There are no other exemptions applicable.

FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 10
MEAT AND POULTRY PROCESSING AND MEAT SLICERS

As It Applies to Meat and Poulty Slaughtering, Packing, Processing, or Rendering Plants

Occupations/Machines PROHIBITED

All occupations involved in the operation, setting up, adjusting, repairing, or oiling, of several named power-driven meat processing machines regardless of the materials being processed.

All occupations on the killing floor, in curing cellars, and in hide cellars except those specifically permitted.

All occupations in the recovery of lard and oils, except packaging and shipping of such products and the operation of lard rolling machines.

All occupations involved in tankage or rendering of dead animals, animal offal, animal fats, crap meats, blood, and bones into stock feeds, tallow, inedible grease, fertilizer ingredients, and similar products.

All boning operations.

Occupations that involve the pushing, dropping, handlifting or handcarrying of beef, pork, horse, deer, or buffalo carcasses.

Occupations/Machines PERMITTED

Minors may operate several named power-driven machines and perform several jobs if not performed on the killing floor, curing cellar, or hide cellar.

May work as messengers, runners, and handtruckers if work requires them to enter killing floor, curing cellar, and hide cellar only infrequently.

May perform office and clerical work and occupations concerned with repair and maintenance of buildings and grounds in rendering departments and plants.

May perform all occupations (not prohibited by other HOs) in boiler rooms, engine rooms, laboratories, offices, and the cooperage and box department.

May perform all occupations (not prohibited by other HOs) in rabbit, small game, or egg departments.

FOR PUBLIC DISTRIBUTION

HO 10 -- CONTINUED

Occupations/Machines PROHIBITED	Occupations/Machines PERMITTED
The operating, feeding, setting up, adjusting, repairing, oiling, or cleaning of power-driven meat patty forming machines; meat and bone cutting saws; **meat slicers**; knives (except bacon-slicing machines); headsplitters and guillotine cutters; snout pullers and jawpullers; skinning machines; horizontal rotary washing machines; casing cleaning machines such as crushing, stripping and finishing machines; poultry shears; grinding, mixing, chopping and hashing machines; and presses (except belly-rolling machines.	The use of bacon slicing and belly-rolling machines.
Cleaning the named power-driven meat processing machines, including the individual parts or attachments of such machines.	

As HO 10 Applies to Wholesale, Retail and Food Service Establishments

FOR PUBLIC DISTRIBUTION

Enforcement Positions

HO 10 **allows** the use of the following power-driven machines: meat tenderizers; food processors with attachments used for processing vegetables; Prawnto Shrimp Machines used in deveining and cutting shrimp; Jonsson Shrimp Peeling Machines used to peel shrimp; and vegetable slicers.

Cleaning of Deep Fat Fryers: HO 10 **does not prohibit** minors from cleaning deep-fat fryers, from removing cooking oils, or from screening or filtering the oils. Such work does not constitute the "recovery of lard or the rendering of fat" under the HO.

A meat slicer with a chute attachment for processing hard-to-handle foods is covered by HO 10 as long as the meat-cutting blades are used, even though only non-meat items are being processed. "**Food processors**" are prohibited if used to process meat.

HO 10 -- CONTINUED

Cleaning Power-driven Meat Processing Machines. HO 10 **prohibits** minors from cleaning power-driven meat-processing equipment. This prohibition extends to the hand-washing of individual parts of the machines, even if the machine is dismantled and reassembled by an adult.

Exemptions

HO 10 **does** contain an exemption for Apprentices and Student-Learners.

There are no other exemptions applicable.

FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 11
BAKERY MACHINERY

Occupations/Machines PROHIBITED

Horizontal Doughmixer
Vertical Doughmixer
Battermixer
Bread Dividing, Rounding, Slicing and wrapping machine
Doughbrake and Doughsheeter
Combination Bread Slicing and Wrapping Machine—Wholesale Bakery Type
Cookie/Cracker Machine setup or adjustment
Cake-cutting Bandsaw

Occupations/Machines PERMITTED

Ingredient Preparation and Mixing
Product Forming and Shaping
Finishing and Icing
Doughnut and Pastry Filling Machine
Molding Machine
Bread Slicing and Wrapping Machine—Retail Baker Type
Cookie/Cracker Machine Crewmember
Pan Washing

FOR PUBLIC DISTRIBUTION

Enforcement Positions

Cleaning of bakery machines - no violation if disassembled and reassembled by an adult.

Pie Dough Rollers - are permitted in large wholesale bakeries but the type that operate like pizza dough rollers are prohibited unless they have the roller safeguards, enclosed gears and microswitches that turn off the machine if it is opened.

"D Wire Whip" (used on dough mixers) - are permitted if used to mix vegetables or items other than batter; are prohibited if used to mix batter.

Exemptions

Pizza Dough Rollers - no violation for operators if machine has roller safeguards, enclosed gears and microswitches that turn off the machine if it is opened.

Small capacity, portable counter-top food mixers—minors may operate, set up, adjust, repair, oil, and clean those small, portable mixers that are comparable to those designed for home use. This previous enforcement position is now in the regulations.

HO 11 **does not** contain an exemption for Apprentices and Student-Learners.

A QUICK LOOK AT HO 12
BALERS, COMPACTORS, AND PAPER PROCESSING MACHINES

Occupations/Machines PROHIBITED

Operating, including loading and unloading, of all power-driven balers and compactors, regardless of the materials being processed. As of July 19, 2010, HO 12 covers all balers and compactors

Operate or assist to operate:
- Arm type stitcher or stapler;
- Circular saw or band saw;
- Corner cutting or mitering machine;
- Corrugating and single- or double-facing machine;
- Envelope die-cutting press;
- Guillotine papercutter or shear;
- Horizontal bar scorer;
- Laminating or combing machine;
- Sheeting machine;
- Baler;
- Compactor;
- Vertical slotter.

Operate platen die-cutting press, platen printing press, and punch press which involve hand feeding. May not setup, adjust, repair, oil or clean such equipment, even those not involving hand feeding.

Occupations/Machines PERMITTED

Sixteen and 17-year-olds may load, but not operate or unload, certain scrap paper balers and paper box compactors under the provisions of FLSA 13(c)(5). This exemption applies only to certain scrap paper balers and paper box compactors.

Load platen die-cutting press, platen printing press, and punch press as long as hand feeding is not involved.

Operate rotary and cylinder presses.

FOR PUBLIC DISTRIBUTION

HO 12 -- CONTINUED

Enforcement Position

Paper Shredders—The operation of paper shredders is not prohibited by HO 12. In addition, paper shredders of the type normally used in offices may be operated by minors 14 and 15 years of age.

Pouch Laminators—Laminators designed to encase documents such as ID cards between two pieces of plastic by using a heat process are **not** subject to HO 12.

Exemptions

FLSA 13(c)(5) allows 16- and 17-year-olds to load, but not operate or unload, certain scrap paper balers and paper box compactors under very specific conditions. See FOH Chapter 33.

HO 12 does contain an exemption for Apprentices and Student-Learners.

FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 13
MANUFACTURE OF BRICK AND TILE

Occupations/Machines PROHIBITED	Occupations/Machines PERMITTED
All occupations (unless stated otherwise) in or about establishments engaged in manufacturing clay construction products	Work in offices and in storage and shipping departments in the clay construction products industry.
All occupations (unless stated otherwise) in or about establishments engaged in manufacturing silica brick or other silica refractories.	Work in offices in establishments which manufacture silica brick or silica refractories.

Enforcement Positions

Silica, asbestos, and lime glaze used to coat the inside of cylinders is a silica refractory, and work in or about the area where this process occurs is **prohibited** work under HO 13.

The setting and drawing of tile in **clay drain tile** plants is **prohibited** by HO 13.

Preparing bricks for storage inside the manufacturing building and adjacent to the kilns is work **prohibited** by HO 13.

Removing bricks from **inside the kiln** when loading or moving them to storage is work **prohibited** by HO 13.

Exemptions

HO 13 does **not** contain an exemption for Apprentices and Student-Learners.

There are no other exemptions applicable.

FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 14
CERTAIN NAMED POWER-DRIVEN EQUIPMENT

Occupations/Machines PROHIBITED

Occupations of operator or helper on the following power-driven machines when the machines **are not** equipped with full automatic feed and ejection:

- Circular saw
- Band saws
- Guillotine shears

Occupations of operator or helper on the following power-driven fixed or portable machines:

- Chain saws
- Reciprocating saws
- Wood chippers
- Abrasive cutting discs

Occupations of setting-up, adjusting, repairing, oiling, or cleaning circular saws, band saws, guillotine shears, chain saws, reciprocating saws, wood chippers, and abrasive cutting discs

Occupations/Machines PERMITTED

Occupations of operator or helper on the following power-driven machines when the machines **are** equipped with full automatic feed and ejection:

- Circular saw
- Band saws
- Guillotine shears

FOR PUBLIC DISTRIBUTION

Enforcement Positions

HO 14 does not apply to other power-driven equipment which fail to meet the specific definitions of circular saws, band saws or guillotine shears.

Bagel slicers with circular saw – 16- and 17-year-old minors may operate and clean if blade is enclosed, adjustable guard is in place, and manufacturer's warning signage is in place. All other power-driven bagel slicers are permitted. *See* HO 11.

Exemptions

HO 14 **does** contain an exemption for Apprentices and Student-Learners.

There are no other exemptions applicable.

A QUICK LOOK AT HO 15
WRECKING AND DEMOLITION

Occupations/Machines PROHIBITED	Occupations/Machines PERMITTED
All work in wrecking, demolition and shipbreaking performed onsite (place where a building, bridge, steeple, tower, chimney, ship or other structure is totally or partially razed, demolished, or dismantled).	None.

Enforcement Positions

Demolition work – To be covered by HO 15, demolition work must be extensive and not just in conjunction with remodeling or repair work.

Exemptions

HO 15 does **not** contain an exemption for Apprentices and Student-Learners.

There are no other exemptions applicable.

FOR PUBLIC DISTRIBUTION

A QUICK LOOK AT HO 16
ROOFING OCCUPATIONS AND ALL WORK ON OR ABOUT A ROOF

Occupations/Machines PROHIBITED	Occupations/Machines PERMITTED
Work in connection with the application of weatherproofing materials and substances to roofs of buildings or other structures, including work performed on the ground.	Work in the office or shop not otherwise prohibited.
Work in connection with the installation of roofs, and alterations, additions, maintenance and repair including painting and coating of existing roofs. This includes work performed on the ground.	
Gutter and downspout work and the construction of sheathing or bases of roofs.	
Installation of television antennas, HVAC equipment and other similar appliances attached to roofs.	
Any work that requires the minor to be on the roof, to be in *close proximity to the roof*, or use the roof to access another point or type of work.	

FOR PUBLIC DISTRIBUTION

Enforcement Positions

The **removal of old roof** when done in preparation for the installation of a new roof is **covered** under HO 16.

Roofing work done in connection with the **new construction of metal buildings is covered** by HO 16.

Measuring a roof to estimate the cost of a new roof is work **covered** by HO 16.

Exemptions

HO 16 **does** contain an exemption for Apprentices and Student-Learners. There are no other exemptions applicable.

A QUICK LOOK AT HO 17
EXCAVATION

Occupations/Machines PROHIBITED

Excavating, working in, and backfilling trenches—except certain manual excavating and backfilling as permitted.

Excavating for building or other structures, or working in such excavations, except as permitted.

Driving tunnel and working within tunnels prior to the completion of all driving and shoring operations.

Sinking shafts and working within shafts prior to the completion of all sinking and shoring operations.

Occupations/Machines PERMITTED

Working in operations in site clearing, surface grading, dredging, and borehole drilling operations.

Trenches:

Manual excavating, manual backfilling, and working in trenches that do not exceed four feet in depth at any point.

Excavating Buildings:

Manual excavating to a depth not exceeding four feet below any ground surface adjoining the excavation.

Working in an excavation not exceeding a depth of four feet.

Working in an excavation where the side walls are shored and sloped to the angle of repose.

Enforcement Positions

The use of a road grader in excavation operations is **covered** by HO 17.

Exemptions

HO 17 **does** contain an exemption for Apprentices and Student-Learners.

There are no other exemptions applicable.

NOT FOR PUBLIC DISTRIBUTION

73h IMPLEMENTATION OF CHILD LABOR CMPS UNDER CLEPP AND NON-CLEPP

[01/05/2017]

73h00 General.

The purpose of this section is to discuss the assessment of civil money penalties (CMPs) in cases involving injuries (serious and non-serious) and deaths of young workers under the Child Labor Enhanced Penalty Program (CLEPP) and the assessment of CMPs not under (Non-CLEPP). This section will also detail the responsibilities of the WHI, DD, RA, and the NO in the CMP process.

See FOH 33 for the child labor provisions and FOH 54f02 for information on initial assessments for child labor violations. *See* Field Assistance Bulletin No. 2016-5 and Wage and Hour Memorandum No. 2016-14.

[01/05/2017]

73h01 Child labor CMPs.

It is the policy of the WHD to promote a vigorous and active child labor enforcement program, including the assessment of CMPs in appropriate amounts which are consistent with section 16(e) of the FLSA, and to issue assessments that will serve as an effective deterrent to violations of the child labor provisions of the FLSA.

The FLSA contains two levels of child labor CMPs. Violators of the youth employment provisions may be subject to the first level of CMPs (*i.e.*, Non-CLEPP CMPs, which are described below) for each minor employed in violation. Penalties for violations that cause the death or serious injury of a minor may be increased to the higher level of CMPs (*i.e.*, CLEPP CMPs, also described below), and those penalties may be doubled when the violations are determined to be willful or repeated.

[01/05/2017]

73h02 CLEPP.

(a) What is the CLEPP?

The WHD created the CLEPP to incorporate the 05/21/2008 amendments to section 16(e) of the FLSA made by the Genetic Information Nondiscrimination Act of 2008 (GINA). *See* 29 USC 216(e)(1)(A)(ii). GINA increased the maximum child labor CMP from $11,000.00 to $50,000.00 for any child labor violation that causes the death or serious injury of any employee under the age of 18, and provides that such penalties may be doubled for repeated or willful violations of that section. As of 08/01/2016, the maximum permissible statutory child labor CMPs have been adjusted for inflation in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (IAA). These maximum child labor CMP levels will be annually adjusted for inflation every January. The initial adjustment was implemented through rulemaking, which revised the corresponding regulations at 29 CFR 579.1(a)(1)(i). These regulations will be further revised for each required annual inflation adjustment. The WHD has also updated its child labor CMP guidance to reflect the IAA adjustments. *See* Field Assistance Bulletin No. 2016-5.

NOT FOR PUBLIC DISTRIBUTION

However, the IAA adjustments are not reflected in the FLSA statutory provisions themselves. For example, the United States Code still reflects the $50,000.00 amount for CLEPP assessments. *See* 29 USC 216(e)(1)(A)(ii). For all current child labor CMP levels, visit http://www.dol.gov/whd/flsa/index.htm#cmp.

(b) Serious injury under the CLEPP

(1) A CLEPP serious injury is an injury that occurred after 05/20/2008 that was caused by a child labor violation(s) and involves:

a. a permanent loss or substantial impairment of one of the senses (*i.e.*, sight, hearing, taste, smell, tactile sensation); or

b. a permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty, including the loss of all or part of an arm, leg, foot, hand, or other body part; or

c. a permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand, or other body part.

29 USC 216(e)(1)(B)

(c) Permanent loss or substantial impairment

(1) The WHD's assessment of whether the injury caused by a child labor violation resulted in *permanent loss, permanent paralysis, or substantial impairment* takes into account the prognosis issued by medical practitioners and therapists. It also considers evaluations of the degree of loss or paralysis pursuant to sources such as the American Medical Association's *Guide to the Evaluation of Permanent Impairment* (AMA *Guide*) or state workers' compensation offices. The WHD's assessment of whether the injury caused by a child labor violation resulted in a *substantial impairment* as defined by the CLEPP takes into account the totality of the injury, which may include:

a. the potential for recovery;

b. the recovery time;

c. the impact of the injury on the minor's daily life, both during the recovery period and after;

d. the nature of the treatment required;

e. the prognosis issued by medical practitioners and therapists; and

f. evaluations of the degree of loss, paralysis, or substantial impairment pursuant to sources such as the AMA *Guide* or state workers' compensation officers.

(2) The NO works with the DOs, ROs, and SOL to determine the seriousness of an injury and/or degree of loss or impairment prior to the assessment of child labor CMPs.

NOT FOR PUBLIC DISTRIBUTION

(3) Even if an injury is expected to eventually heal with no lasting effects, it may qualify as a *substantial impairment* under the CLEPP if the impairment lasts for a significant period of time, or has a significant, albeit temporary, impact. Although the WHD utilizes the AMA *Guide* to determine the degree of impairment, it is important to note that the AMA *Guide* only addresses *permanent* loss and *permanent* impairment. Therefore, the WHD also takes into consideration the length of time needed for the injury to heal. *As the degree of impairment increases, the duration that is necessary for the impairment to qualify as substantial decreases*, and vice versa.

a. An injury that results in the significantly diminished use of a youth's leg for 3 months, for example, particularly if the youth is not able to work or attend school for that period of time, will be deemed to be a *substantial impairment* under section 16(e) of the FLSA. Likewise, a puncture or laceration that results in numbness and curtailed use of a youth's hand for several months may be deemed to have substantially impaired the youth's sense of touch. Scarring that significantly curtails a youth's ability to use the affected body part for a significant period of time will be considered a substantial impairment of that bodily member. A cut or abrasion that impairs a youth's ability to bend his or her knee for 1 week, on the other hand, does not rise to the level of *substantial impairment* because the injury is neither significant nor long-lasting.

(4) A total body impairment rating of less than 5 percent, in most cases, in and of itself, will not place the injury within the parameters of a *CLEPP serious injury*, even if the impairment is permanent. However, an injury may still be classified as a *CLEPP serious injury*, even when it does not rise to a 5 percent rating, if it results in a long recovery period. Impairment ratings can either be obtained from the employee's workers' compensation file and/or through the NO.

(d) Causation

(1) Section 16(e) of the FLSA states that CLEPP assessments may be made for each child labor violation "that *causes* [a young employee's] death or serious injury." *See* 29 USC 216(e)(1)(A)(ii). This statutory language requires a *particular relationship* between the violation that occurred and the serious injury or death of the minor employee. Specifically, the CLEPP causation standard will be met if the death or CLEPP serious injury would not have occurred if the child labor violation had not occurred, and the death or CLEPP serious injury was a foreseeable, or predictable, result of the child labor violation. Non-CLEPP cases, on the other hand as explained below, require only that the violation contributed to the injury.

(2) *Hazardous workplace*

For violations of child labor regulations that prohibit minors from being employed in a workplace that has been specifically found by the Secretary to be hazardous, such as a manufacturing plant (Child Labor Regulation No. 3), a saw mill (HO 4), or a coal mine (HO 3), the second prong of the CLEPP causation standard will be met for a death or CLEPP serious injury that is related to any of the reasons supporting the Secretary's regulatory determination that the workplace is hazardous. These reasons could include environmental factors, the presence of power-driven equipment, the presence of toxic materials, or industry-specific occupational death and injury

NOT FOR PUBLIC DISTRIBUTION

statistics. These workplaces tend to involve multiple hazards and potential sources of injuries for all workers, routinely requiring a heightened level of safety-consciousness that, because of their youth and inexperience, young workers are generally unable to maintain.

Scenario:

If a 16-year-old youth falls to his or her death while employed in a coal mine, for example, the CLEPP causation standard is met because the minor would not have died if he or she had not been in the coal mine, and the risk of falls is among the reasons the Secretary has concluded that work in a coal mine is inherently dangerous for youth of that age (*i.e.*, it is a foreseeable result of working in the hazardous workplace).

(3) *Prohibited equipment*

For violations of child labor orders that prohibit the use of certain types of equipment, a death or CLEPP serious injury that results from the dangers inherent in that equipment (*e.g.*, a sharp object cutting body parts or a crash of a vehicle) will meet the two-part causation standard mentioned above. But a death or CLEPP serious injury that is not a foreseeable result of using the equipment will not meet this standard because regardless of whether it meets the first part of the causation standard, it will not meet the second part of the standard.

a. Scenarios for which CLEPP causation standard has been met

Scenario 1:

A 16-year-old minor is killed when the fork lift he or she is operating overturns and crushes him or her. The CLEPP causation standard is met because the youth's death would not have occurred if he or she hadn't been operating the high-lift truck, and the death was a foreseeable consequence of using the prohibited equipment.

Scenario 2:

If a minor is killed while operating the fork lift in a plant manufacturing explosives, the WHD could assert that two violations caused his or her death or met the two part causation standard (*i.e.*, violations involving HO 7 (operating a fork lift) and HO 1 (employment in a plant manufacturing explosives)). The violation of HO 1 would occur because the Secretary has specifically found that the employment of a youth under 18 years of age in an establishment that manufactures explosives is particularly hazardous to his or her health or well-being and therefore prohibited. *See Administrator, Wage and Hour Div. v. Progressive Protein, LLC*, ALJ No. 2010-CLA-00005 which upheld the WHD's assessment of $100,000.00 for violations of two HOs (HO 7 (operating a forklift) and HO 10 (working in a rendering plant)) that caused the death of a minor employee.

Scenario 3:

NOT FOR PUBLIC DISTRIBUTION

A 15-year-old employee's hand is crushed, such that is must be amputated, while unloading a power-driven compactor that continuously operated during the loading process. The injury is a CLEPP serious injury because it is a permanent loss of a body part. The CLEPP causation standard is met because if the minor had not been unloading the compactor in violation of HO 12 (power-driven balers, compactors, and paper products machines), he or she would not have been injured and having a body part caught in the machinery is a foreseeable result of using a compactor.

b. Scenarios for which CLEPP causation standard has not been met

Scenario 1:

A 16-year-old minor is standing in a particular spot on the first floor of a worksite to affix a baseboard to the wall with a power-nail gun when he or she is hit by a tool kit accidentally dropped by an employee working on the second floor, which causes permanent paralysis of the minor's right arm. The minor was employed in violation of HO 5 (operating power-driven woodworking equipment) and the injury is a CLEPP serious injury, but the CLEPP causation standard is *not* met because even if the CLEPP serious injury would not have occurred if the minor had not been operating the power-nail gun, a heavy object falling from above is not a foreseeable result of that particular violation.

Scenario 2:

A 15-year-old minor employed by a quick service restaurant operates an open-flame grill in violation of Reg. 3 (a cooking activity not permitted by 29 CFR 570.34(c)). As the minor exits the restaurant to start his or her mid-shift meal break, he or she slips on a wet floor outside the kitchen, and hits his or her head, causing permanent brain damage. Although the injury qualifies as a CLEPP serious injury, the CLEPP causation requirement is *not* met because even if the minor would not have fallen if he or she had not previously been operating the open-flame grill, slipping on a wet floor is not a foreseeable result of working over an open-flame grill in the kitchen.

(4) *Hours and times standards*

The causation standard may be met when a 14- or 15-year-old minor is injured or killed after working in excess of the hours and times of day standards established by 29 CFR 570.35 if it can be demonstrated that the injury would not have occurred if not for the violation and that the injury was a foreseeable result of the violation. The injury might be a foreseeable result of the violation, if, for example, the time of day or the number of hours worked by the minor employed in violation jeopardized the minor's health, safety, alertness, or mental acumen.

[01/05/2017]

73h03 What is non-CLEPP?

(a) A non-CLEPP injury may be serious or nonserious

NOT FOR PUBLIC DISTRIBUTION

(1) *Serious injury (non-CLEPP)*

A serious injury (non-CLEPP) means any injury which does not meet the definition of CLEPP serious injury because it does not fall within one of the three categories of "serious injuries" defined by CLEPP or fails to meet the level of causation required by CLEPP, and which does not meet the definition of a *nonserious injury* (*see* below) because it requires the care of a medical practitioner beyond the initial treatment or curtails the youth's normal activities (*e.g.*, school, work, sports) for at least 5 days.

Serious injuries include situations where a minor is required to return to a medical practitioner after an accident to have stiches removed or for an evaluation of the healing process.

(2) *Nonserious injury*

Nonserious injury means any injury that requires treatment no more extensive than first aid and results in the youth missing school or work, or having their normal activities curtailed, for less than 5 days. The term "first aid" means any one-time treatment, even if it is provided by a physician or other licensed or registered medical professional, and even if it is performed at the place of employment.

(b) Causation

(1) The amount of a non-CLEPP assessment (for a violation involving a non-CLEPP injury or violation involving a death or CLEPP serious injury but as to which the CLEPP causation standard is not met) turns in part on whether a violation "contributed to" a death or injury. "Contributed to" means the violation was a factor that played a part in the death or serious injury. Under the "contributed to" causation standard, the violation does not have to be the only factor or even the primary factor that caused the death or injury to occur, and it does not have to be a foreseeable outcome of the violation.

(2) The non-CLEPP standard is significantly easier to meet than the CLEPP causation standard. Even though the "contributed to" standard is so broad, the WHD should exercise care in determining when to assess higher penalties in injury cases under the non-CLEPP provision when the death or injury is only remotely connected to the violation. Even if the WHD decides not to assess higher non-CLEPP penalties for a death or injury because the causal link is too weak, it can still assess a base CMP for the child labor violation.

(3) *Non-CLEPP assessment based on death or injury appropriate*

a. In the following scenarios, the child labor violation "contributed to" the young employee's death or injury. The WHD would, therefore, assess a higher non-CLEPP penalty based on the death or injury rather than the base CMP.

<u>Scenario 1:</u>

A 16-year-old minor is standing in a particular spot on the first floor of a worksite to affix a baseboard to the wall with a power-nail gun when he or

NOT FOR PUBLIC DISTRIBUTION

she is hit by a tool kit accidentally dropped by an employee working on the second floor, which causes permanent paralysis of his or her right arm. The minor was employed in violation of HO 5 (operating power-driven woodworking equipment) and the injury is a CLEPP serious injury, but the CLEPP causation standard is not met because, as explained earlier, a heavy object falling from above is not a foreseeable result of that particular violation. Because the minor was standing in the location where he or she was injured in order to perform a task with a power-nail gun, the use of the power-nail gun was a factor in the injury, and therefore the "contributed to" standard is met.

Scenario2:

A 14-year-old working a 10-hour shift delivering food orders for a restaurant on his or her bicycle permanently loses use of his or her legs when he or she is hit by a car while making a delivery in the last hour of his or her shift. This is a CLEPP serious injury, and the two-part CLEPP causation standard is likely met because the minor would not have been injured if he had not been working during his long shift and because the accident partly resulted from the minor's fatigue; reduced alertness and the corresponding ability to prevent accidents is among the foreseeable results of a minor's working in excess of the hours and times of day standards. Even if the CLEPP causation standard is not met, the "contributed to" causation standard will be met if it can be shown that the minor's work in excess of the hours standard was among the factors that led to the injury.

Scenario 3:

A 15-year-old minor suffers a deep cut on his or her arm when he or she loads a power-driven compactor requiring an initial and follow-up medical appointment. The injury is a non-CLEPP injury because, even though the injury requires stitches and a follow-up medical appointment, the cut heals in 3 weeks. The "contributed to" causation standard is met because the minor's loading the compactor in violation of HO 12 (power-driven balers, compactors and paper products machines) was a factor in the injury.

[01/05/2017]

73h04 Examples of non-CLEPP and CLEPP injuries.

(a) Examples of non-CLEPP serious injuries

Scenario 1:

A 14-year-old fry-cook who is operating a deep-fat fryer that is not equipped with mechanisms that automatically raise and lower the baskets out of the hot oil, in violation of Reg. 3 (*i.e.*, cooking activities not permitted by 29 CFR 570.34(c)), suffers a first degree burn that covers a significant portion of his or her forearm. The burn requires a physician's care for at least 1 week and/or the minor loses a week of work. This injury is a *serious injury (Non-CLEPP).*

NOT FOR PUBLIC DISTRIBUTION

Scenario 2:

A 16-year-old minor loses the very tip of one finger of his or her non-dominant hand while cleaning a power-driven meat slicer in violation of HO 10. The recovery period was less than 3 weeks long and the injury constituted less than 5 percent of total body impairment. This injury would be classified by the WHD as a *serious injury (non-CLEPP)* because the severity of the injury, even though it involves the permanent loss of a body part, does not rise to the seriousness contemplated by the GINA and because the recovery period was brief.

(b) A non-permanent injury that might qualify as a CLEPP serious injury

A non-permanent injury that might qualify as a *CLEPP serious injury* is one that, although it receives a low impairment rating because it is not a permanent injury, takes 6 months of medical treatment and physical therapy to resolve and is thus considered a *substantial impairment* under the CLEPP.

(c) Example of a CLEPP serious injury

Scenario:

A 16-year-old minor's arm is crushed by heavy machinery, severely damaging the muscles and ligaments in his or her right arm. Although the medical provider believes that the youth will eventually recover from this injury and have full use of his or her arm, the recovery period (*i.e.*, medical treatment and physical therapy) takes 6 months. This injury would be classified by the WHD as a *CLEPP serious injury* based on the length of the recovery period.

[01/05/2017]

73h05 Rules for death and serious injury cases.

(a) After the new CLEPP provisions were enacted into law, the WHD set out the following guidance for the assessment of CLEPP and non-CLEPP CMPs for death and serious injury cases.

(1) For each child labor violation that causes the death of a minor employee, the WHD will generally assess the maximum CLEPP CMP (prior to 08/01/2016, this maximum was $50,000.00). Although the WHD will typically conclude that a penalty reduction based on the size of the business or any other factor listed in 29 CFR 579.5 is not appropriate where a violation resulted in a youth's death, the WHD will consider the facts of each individual case before making such a determination. The CLEPP statutory provisions provide for the maximum CLEPP CMP assessment for each violation "that causes the death… of *any* employee under 18." The maximum CLEPP CMP, therefore, can be assessed for a death even if the minor employed in violation was not the minor employee that suffered the death, provided that the violation caused the death. *See* 29 USC 216(e)(1)(A)(ii). As discussed above, the maximum permissible child labor CMPs have been adjusted for inflation in accordance with the IAA and will annually be adjusted for inflation every January. The IAA adjustments are not reflected in the FLSA statutory provisions themselves. Therefore, for current child labor CMP levels, including the maximum CLEPP CMP, please visit https://www.dol.gov/whd/flsa/index.htm#cmp.

NOT FOR PUBLIC DISTRIBUTION

Scenario:

A 16-year-old minor driving a truck in violation of HO 2 is involved in an accident that kills his or her 17-year-old coworker who is a passenger in the vehicle. Although it is the driver, not the passenger, whose employment is in violation of the child labor provisions, an assessment under the CLEPP is proper since the violation caused the death of an employee under the age of 18, because the death of the 17-year-old coworker would not have occurred if the HO 2 violation had not occurred and the death was a foreseeable result of the HO 2 violation. The 16-year-old was prohibited from driving the vehicle by HO 2. The assessment is proper even when, as in this scenario, the employment of youth who died was not in violation of the child labor provisions. The assessment would also be appropriate even if the employment of the minor who was killed was not covered under the provisions of the FLSA, for example, if the 17-year-old is not individually covered and there is no enterprise coverage for the employer.

(2) The initial assessment amount may be doubled if the violations are determined to be willful or repeated (*e.g.*, prior to the IAA adjustments in 08/01/2016, the initial assessment could be doubled up to $100,000.00).

(3) The CLEPP requires causation. Therefore, for each child labor violation that contributes to, but does not cause, the death of a minor employee, the WHD will generally assess the maximum Non-CLEPP CMP (prior to 08/01/2016, this maximum was $11,000.00). The WHD will typically conclude that a non-CLEPP violation contributing to a youth's death does not warrant any reductions based on the size of the business or any other factor listed in 29 CFR 579.5, although the WHD will consider the facts of each case when making that determination. The statutory language addressing non-CLEPP deaths and injuries permits assessments of the maximum Non-CLEPP CMP "for each employee who was the subject of such violation." *See* 29 USC 216(e)(A)(i). Therefore, in a non-CLEPP context, the minor employed in violation must be the minor employee that suffers the death for the maximum Non-CLEPP CMP to be assessed for each violation that contributed to the death of the minor.

(4) For each child labor violation that causes a *CLEPP serious injury* of a minor, as defined in section 16(e)(1)(B) of the FLSA, has assigned an initial, baseline child labor CMP amount that corresponds to the severity of the injury. The three "tiers" of CLEPP serious injury CMPs are reflected in the chart below. These are expressed as percentages of the maximum CLEPP CMP. For current maximum child labor CMP amounts, including the maximum CLEPP CMP, please visit https://www.dol.gov/whd/flsa/index.htm#cmp.

Note: the amount reflected in each tier may be adjusted: the ultimate appropriateness of a CLEPP penalty will be considered by the assessing official, in part by applying the regulatory factors in 29 C.F.R. 579.5, before the final assessment is issued.

As explained above, when evaluating the seriousness of an injury, the WHD will consider:

a. the totality of the injury, including such factors as:

NOT FOR PUBLIC DISTRIBUTION

1. the potential for recovery;

2. the recovery time;

3. the impact of the injury on the minor's daily life, both during the recovery period and after; and

4. the nature of the treatment required;

b. the prognosis issued by medical practitioners and therapists; and

c. evaluations of the degree of impairment pursuant to sources such as the AMA *Guide* or state workers' compensation offices.

(b) Generally, the following chart can be used to determine the initial CLEPP serious injury CMP assessments, which may be modified by the assessing official. As noted above, *as the degree of impairment increases, the duration that is necessary for the impairment to qualify as substantial under CLEPP decreases.*

Tier	Impairment rating	Recovery period	CMP assessment
Tier I	35 percent or more	More than 9 months	80 percent of maximum CLEPP CMP
Tier II	20 - 34 percent	More than 6 and up to 9 months	50 percent of maximum CLEPP CMP
Tier III	5 - 19 percent	3 to up to 6 months	30 percent of maximum CLEPP CMP
	Less than 5 percent	With significant recovery period (*i.e.*, at least 6 weeks but less than 3 months)	May meet CLEPP serious injury standard
	Less than 5percent	Without significant recovery period (*i.e.*, less than 6 weeks)	Generally will not meet CLEPP serious injury standard

(1) If the injury to the youth does not meet the definition for a CLEPP serious injury, but is very close to meeting the standard for that highest level of injury, the assessing official should use his or her discretion to determine whether the assessment of a CLEPP Serious Injury Tier III CMP for the lowest level serious injury (CLEPP) violation is warranted.

(2) All factors relating to the seriousness of the injury will be considered. For example, if a minor has to undergo one or more surgeries and physical therapy for several months in order to regain the use of a limb, a CLEPP serious injury has occurred even if the permanent impairment rating is less than 5 percent. Similarly a minor

NOT FOR PUBLIC DISTRIBUTION

who suffers a head injury that severely restricts the minor's normal daily activities for several months has suffered a CLEPP serious injury, even if there is ultimately a full recovery.

(3) These initial assessments can be doubled if the violations are determined to be willful or repeated. The WHD will continue to consider the regulatory factors in 29 CFR 579.5 to decide if the initial child labor CMP amount should be reduced based on the facts of each individual case.

(c) For child labor violations resulting in *serious injuries (Non-CLEPP)*, the WHD has assigned an initial child labor CMP amount that corresponds to the severity of the injury. The three tiers of Non-CLEPP serious injury CMPs are reflected in the chart below. These are expressed as percentages of the maximum Non-CLEPP CMP. For current maximum child labor CMP amounts, including the maximum Non-CLEPP CMP, please visit https://www.dol.gov/whd/flsa/index.htm#cmp.

Note: the amount reflected in each tier may be adjusted: the ultimate appropriateness of a Non-CLEPP penalty will be considered by the assessing official, in part by applying the regulatory factors in 29 C.F.R. 579.5, before the final assessment is issued.

Serious injuries (Non-CLEPP) may include injuries that are serious enough to qualify under CLEPP, but do not meet all the CLEPP requirements (*i.e.*, the injury was not *caused* by the child labor violation). When evaluating the seriousness of an injury, the WHD will look at:

(1) the totality of the injury, including such factors as:

a. the potential for recovery;

b. the recovery time;

c. the impact of the injury on the minor's daily life, both during the recovery period and after; and

d. the nature of the treatment required;

(2) the prognosis issued by medical practitioners and therapists; and if relevant, and

(3) evaluations of the degree of loss, paralysis, or substantial impairment pursuant to sources such as the AMA *Guide* or state workers' compensation offices.

(d) Generally, the following chart can be used to determine *serious injury (Non-CLEPP)* CMP assessments:

Tier	Impairment rating	Recovery period	CMP assessment
Tier I	35 percent or more	More than 6 months	91 percent of maximum Non-CLEPP CMP
Tier II	20 - 34 percent	3 - 6 months	73 percent of maximum Non-CLEPP CMP

NOT FOR PUBLIC DISTRIBUTION

Tier III	Less than 20 percent	Less than 3 months	55 percent of maximum Non-CLEPP CMP

(1) If the injury to the youth does not meet the definition for a *non-serious injury* (*see* below), but is very close to meeting the standards for that lowest level of injury, the assessing official should use his or her discretion to determine whether the assessment of a Non-CLEPP Serious Injury Tier III CMP for the lowest level serious injury (non-CLEPP) violation is warranted. On the other hand, these initial assessments can be increased to up to the maximum Non-CLEPP CMP per violation if the violations are determined to be willful or repeated, the employer failed to provide credible assurances of future compliance, or the employer concealed or falsified the child labor violations. The WHD will continue to consider the regulatory factors in 29 CFR 579.5 to determine if the initial child labor CMP amount should be reduced because of the small size of the employer's business based on the facts of each individual case.

(2) The WHD will typically conclude that a non-CLEPP violation contributing to a youth's death or the highest level of a serious injury does not warrant any reductions based on the size of the business or any other factors listed in 29 CFR 579.5, although the WHD will consider the facts of each case when making that determination.

(e) For every violation that causes the *non-serious injury* of a minor employee, the WHD will generally determine an initial assessment amount based on the table of predetermined amounts discussed earlier in this document. Because the violation resulted in an injury, the WHD will then apply a multiplier of 3.0 to that base amount. Such amounts may be reduced when the employer and the violation comport with the criteria established for reductions for small businesses. The total child labor CMP assessed for the employment of a minor who suffered a *non-serious injury*, and not a death or a serious injury, may not exceed the maximum Non-CLEPP CMP.

(f) For violations of the child labor record keeping provisions, the WHD will generally assess an initial child labor CMP according to these charts: http://www.dol.gov/whd/CL/CLCMP_TableNonAG.pdf and http://www.dol.gov/whd/CL/CLCMP_TableAG.pdf. For violations of the hot goods provisions of section 12(a) of the FLSA, the WHD also will generally assess an initial child labor CMP according to the same charts, depending upon when the shipment of the hot goods occurred and whether other aggravating factors were present. These initial assessment amounts may be doubled if any of the employer's child labor violations were willful or repeated, the employer falsified or concealed child labor violations, or the employer failed to provide credible assurances of future compliance.

(g) The WHD sets initial penalty amounts to be assessed when a youth is employed below the legal age, at amounts according to these charts: http://www.dol.gov/whd/CL/CLCMP_TableNonAG.pdf and http://www.dol.gov/whd/CL/CLCMP_TableAG.pdf. These penalties apply to both agricultural and nonagricultural employment. An assessment involving the illegal employment of a worker under the age of 14 would be in addition to any other assessments made for child labor violations involving that same youth. In addition, such assessments may be increased based on the established aggravating factors, but the total CMPs involving the

NOT FOR PUBLIC DISTRIBUTION

employment of that minor may not exceed the maximum Non-CLEPP CMP unless the violations caused or contributed to the serious injury or death of the minor.

[01/05/2017]

73h06 **Considerations for reductions in CMP assessments.**

(a) The initial child labor CMP amounts used by the WHD are differentiated by type of child labor violation. Those amounts, as well as *most of* the regulatory factors in 29 CFR 579 that reflect the agency's statutory obligation to consider the size of the business and gravity of the violation when determining the child labor CMP amount, *see* 29 USC 216(e)(3), have been programmed into WHISARD. Therefore, the penalty generated by WHISARD in any particular case reflects the preselected base CMP amounts for a particular child labor violation and the information entered by the WHI, which reflects most of the 29 CFR 579 factors. *See* FOH 54f02 and Wage and Hour Memorandum No. 2016-14 for additional information on the consideration of a reduction of the child labor CMP based on mitigating factors and the size of the business.

(b) This section explains which regulatory factors are taken into account in the WHISARD-generated amounts, the regulatory factors that are not taken into account in those initial WHISARD assessments, and how the WHD incorporates the remaining regulatory factors into its child labor CMP assessment process.

(c) **Factors for consideration**

(1) The regulations at 29 CFR 579.5(b) provide for consideration of the following factors with regard to the size of the business:

a. Number of employees

b. Dollar volume of sales or business done

c. Amount of capital investment and financial resources

d. Other available information relative to the size of the business

(2) WHISARD is programmed to reduce the initial CMP amount when the employer qualifies as a small employer, meaning that its annual volume of sales or business done does not exceed $1,000,000.00 and it employs fewer than 100 employees, but only when all of the following criteria are met:

a. Violations are not willful or repeated

b. Employer did not conceal or falsify the violations

c. None of the employer's child labor violations caused or contributed to the death of a minor employee or a serious injury that resulted in an initial assessment amount of CLEPP Serious Injury Tier I or of Non-CLEPP Serious Injury Tier I

d. Employer gave credible assurances of future compliance

NOT FOR PUBLIC DISTRIBUTION

e. If a child labor violation caused or contributed to the serious injury, there was only one such violation and only one such injury

(3) Although WHISARD will not automatically reduce CMPs for cases that do not meet these criteria based on small business size, the assessing official must consider in each case whether the facts and circumstances might warrant a reduction applying the 29 CFR 579 factors. WHISARD is not programmed to take into account the amount of capital investment and financial resources, or other available information relative to the size of the business. Therefore, the assessing official must consider in particular the employer's amount of capital investment and financial resources, and any other information relative to the size of the business, as well as any mitigating factors that may be present (*see* FOH 73h06(e) below for a discussion of mitigating factors).

(d) Gravity of the violation

(1) With regard to the gravity of the violation, the regulations at 29 CFR 579.5(c) provide for consideration of:

a. Any history of prior violations

b. Any evidence of willfulness or failure to take reasonable precaution

c. Number of children illegally employed

d. Age of the children and records of the required proof of age

e. Occupations in which the children were employed

f. Exposure of children to hazards and any resultant injury

g. Duration of illegal employment

h. Hours when the violation occurred and whether it was during or outside school hours (where applicable)

(2) Several of the regulatory factors relating to the gravity of the violation are taken into account in the assigned baseline CMPs for each type of child labor violation. For example, the initial CMP amount assigned to a Reg 3 violation takes into account the age of the child, the occupation in which the child was employed, and the time of day that the violation occurred. The initial, baseline CMP amounts assigned to each type of child labor violation assume that the violations are not willful or repeated, and do not take into account any resultant injury. However, WHISARD takes into account whether the violations are willful and/or repeat, as well as the severity of any injury, based on the investigator's entries into the system. *See* Wage and Hour Memorandum No. 2016-14.

(3) WHISARD does not take into account the duration of illegal employment. Therefore, the assessing official must consider the duration of the violative employment in determining the ultimate assessment. If the violative employment lasted only 1 day and there are other extenuating circumstances that resulted in the

NOT FOR PUBLIC DISTRIBUTION

youth being employed in violation of the FLSA only on that 1 day, the assessing official may consider reducing the penalty. Extended violative employment, on the other hand, may be an indicator of willfulness.

(e) Mitigating circumstances

(1) The regulations at 29 CFR 579.5(d) further provide for the assessing official to consider, where appropriate, the following sets of mitigating circumstances:

a. whether the violation is *de minimis*; and

b. the employer has given credible assurances of future compliance; and

c. whether a CMP is necessary to achieve the objectives of the Act;

OR

d. whether the employer has no prior history of child labor violations; and

e. that the violations involved no intentional or heedless exposure of any minor to any obvious hazard and were inadvertent; and

f. that there are credible assurances of future compliance; and

g. whether a CMP is necessary to achieve the objectives of the act.

(2) WHISARD does not take into account these mitigating factors. Therefore, they must be independently considered by the assessing official. The WHD considers a child labor violation to be *de minimis* in very limited situations, such as a Reg. 3 hours violation that involves the employment of no more than one minor; the hours standard is violated by no more than 15 minutes; there are no more than three such violations during that minor's employment with that employer; and the hours violations are the only child labor violations found in the investigation. Generally, the WHD has concluded that the assessment of a CMP is not necessary to achieve the objectives of the FLSA when the violations are truly *de minimis* and the employer has given credible assurances of future compliance. *See* 29 CFR 579.5(d)(1). If either set of mitigating factors in 29 CFR 579.5(d)(1) or 29 CFR 579.5(d)(2) is present, the assessing official must consider, based on the facts of the case, whether it is appropriate to adjust the initially assessed penalty.

[01/05/2017]

73h07 <u>Responsibilities of assessing official.</u>

The WHD assessing official (*i.e.*, DD or ADD) shall review every child labor CMP case to ensure the investigation findings are accurate and that each child labor violation is adequately documented and entered into WHISARD, determining whether any of the additional factors outlined above are applicable, and ultimately, whether adjustment of the child labor CMP is necessary to achieve the objectives of the act.

NOT FOR PUBLIC DISTRIBUTION

As in the past, the WHD will continue to use a table that assigns a predetermined "initial assessment amount" to each type of violation for which a child labor CMP may be assessed (*see* 29 CFR 579.3 for a list of violations) when the violation does not cause or contribute to the death of serious injury of a minor employee (*i.e.*, any injury that does not qualify as "serious" under CLEPP or non-CLEPP, or a violation that does not result in any injury). *See* the tables at http://www.dol.gov/whd/child labor/CLCMP_TableNonAG.pdf and http://www.dol.gov/whd/child labor/CLCMP_TableAG.pdf for the initial CMP assessment amounts.

WHIs and, particularly, DDs and ADDs must have a firm understanding of the CMP grid, and all other factors that are considered in the assessment of CMPs. They must be able to explain the assessment in testimony to an ALJ. It is not enough to say "I just filled out the form or hit the button in WHISARD."

[01/05/2017]

73h08 **Investigative procedures.**

(a) The following section details the procedures that must be followed in the investigation, assessment, reassessment, negotiating, and collection of CMPs. This will include the responsibilities of the WHI, DD, and RA.

(1) For purposes of child labor CMP collection actions only, a 5-year statute of limitations applies instead of the normal 2 or 3 years.

(2) The guidelines stated below should be followed to maintain uniformity and consistency in assessing CMPs pursuant to section 16(e) of the FLSA and 29 CFR 579.

(3) Give consideration for CMPs, in accordance with these procedures, to all investigations in which child labor violations (*see* 29 CFR 579.3) during the investigation period (*see* FOH 51a05) have been established and for which the employer has been given a WH-103: Notice to Employer Employment of Minors Contrary to the Fair Labor Standards Act (WH-103).

(b) Do not recommend CMPs for hot goods shipments (*see* 29 CFR 579.3(a)(1)) and violations of sections 12(a) and 15(a)(4) of the FLSA in investigations which do not meet the criteria for child labor litigation. Thus, in investigations which will be closed administratively, the WHI will not need to develop information regarding hot goods shipments. If child labor violations are found which meet the criteria for potential litigation, consult the RSOL regarding the development of evidence concerning hot goods shipments as soon as possible so that the necessary evidence may be secured while the WHI is at the establishment.

(c) **WHI action**

(b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC RELEASE

(b) (7)(E) [redacted]

- [redacted]

- [redacted]

- [redacted]

- [redacted]

  - [redacted]

  - [redacted]

  - [redacted]

NOT FOR PUBLICATION

(d) DD action

- [redacted] (b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

- [redacted]

[redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
    - [redacted]
    - [redacted]
      - [redacted]
      - [redacted]
      - [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(e) RA action

NOT FOR PUBLIC DISTRIBUTION

(1) *Review of case file*

As RA, you must obtain approval of the NO before assessing child labor CMPs in an investigation that involves WHISARD-generated child labor CMPs in excess of $50,000.00 (applied on an enterprise basis) and child labor CMPs involving any serious injury or death (CLEPP or Non-CLEPP violations), or violations involving youth who are too young to legally work. In all other cases, the assessing official in determining the pre-assessment adjustment of a child labor CMP, after reviewing all the statutory and regulatory considerations, has the authority to reduce an initial penalty assessment amount by 25 percent. For a post-assessment adjustment to a child labor CMP, after reviewing all the statutory and regulatory considerations the assessing official has the authority to reduce the initial penalty assessment amounts by using the regulatory factors found in 29 CFR 579 with respect to any case. Note: no reductions to initial penalty assessment amounts are permitted for serious injury, death (CLEPP or Non-CLEPP), or violations involving youth who are too young to legally work without NO approval. You may, of course, discuss any case with the RSOL. Review child labor and/or CMP case files submitted by the DD under FOH 73h08(d)(3). When appropriate, refer cases to the RSOL for an expedited review.

For those cases involving employers who currently hold Full-Time Student Certificates, so advise the Certification Team. It has been determined, based on the fact that there may have been serious violations of the FLSA (including Reg. 3 and the HOs) which provide reasonable grounds to conclude that the terms of the certificate may not be complied with, if issued, that the granting of authority to employ full-time students at subminimum wages under 29 CFR 519 prior to the resolution of the CMP assessment will prejudice the proceedings under 29 CFR 580. Those establishments holding Full-Time Student Certificates should be so alerted, including direction to 29 CFR 519.9 relating to reconsideration and review.

(2) *Prior to assessment*

a. Possible injunction

If the investigation indicates that the RSOL might give consideration to a section 17 action on the basis of violations of any standard (whether or not the child labor violations meet the criteria for potential litigation), refer the files to the RSOL for a determination as to whether the evidence is sufficient to sustain such litigation. If the child labor violations will not be included in the injunctive action, request the RSOL to give a determination as to further appropriate action.

b. Close questions of law or fact

If the investigation reveals a situation which poses a close question of law which has not previously been resolved, refer the file to the RSOL for resolution.

(3) *Assessment*

a. Assessing officials require the approval of both the RO and NO before assessing child labor CMPs in an investigation that involves child labor

NOT FOR PUBLIC DISTRIBUTION

CMPs in excess of $50,000.00 (applied on an enterprise basis) and child labor CMPs involving any serious injury or death (CLEPP or Non-CLEPP violations). The following provides a summary of child labor CMP guidance related to 29 CFR 579 and 29 CFR 580 (*see* the special rules above for child labor CMP assessments involving relatives):

1. The maximum penalty per violation is double the maximum statutory CLEPP CMP amount. This amount will be annually adjusted for inflation. For current child labor CMP levels, visit https://www.dol.gov/whd/flsa/index.htm#cmp

2. Computation worksheet: WH-266 (*see* 29 CFR 579.5)

3. Pre-assessment adjustment: plus or minus 25 percent by DD and/or ADD (except assessments involving serious injury or death (CLEPP or non-CLEPP) or initial child labor CMPs in excess of $50,000.00 which require RA and NO approval)

4. Assessment requiring RO approval and NO notification: $50,000.00

5. Post-assessment adjustments: 50 percent limitation for DD and/or ADD. RA approval for anything more than 50 percent, including those of more than 50 percent for settlement authority purposes (no reductions for serious injury, death, or violations involving youth too young to legally work permitted without RA and NO approval).

6. Number of days to file exception: 15 (*see* 29 CFR 580.6 and 29 CFR 580.8)

b. In terms of the discretion of the assessing official in determining the pre-assessment adjustment of a child labor CMP, after reviewing all the statutory and regulatory considerations, the assessing official has the authority to reduce or increase an initial penalty assessment amount by 25 percent. For a post- assessment adjustment to a child labor CMP, after reviewing all the statutory and regulatory considerations, the assessing official has the authority to reduce penalty assessment amounts by 50 percent using the factors already discussed in this document. Note: RA approval is required for any reduction greater than 50 percent, including any reduction greater than 50 percent the assessing official intends to use to settle the case, and no reductions are permitted (pre-or post-assessment) for serious injury, death (CLEPP or Non-CLEPP), or violations involving youth who are too young to legally work without RA and NO approval). The assessing official should always be cognizant of their obligation to independently assess whether a CMP is appropriate in those cases noted above, where RA and NO approval is needed for a possible reduction in the CMP. Finally, the assessing official shall document the reasons for any type of CMP reductions in the respective case file.

c. After you have made the final determination as to the penalty to be assessed, return the case file to the DD who will assess the penalty in accordance with FOH instructions.

NOT FOR PUBLIC DISTRIBUTION

(4) *After assessment*

a. Exceptions

1. Review cases in which an exception has been filed to determine whether or not the exception is timely. In order to determine timeliness, count the 15-day filing period from the day following the date the "Child Labor Assess Individual and Business" or "Child Labor Assess Business Only" form letter was received by the employer, as shown on the return receipt, until the postmarked date on the envelope in which the exception letter was mailed (retain the postmarked envelope in the case file). When the 15th day is on a Saturday, Sunday, or holiday, count the following day which is not one of these as the 15th day. It has been the practice to accept exceptions filed within 16 days, in order to allow for delays from the time the letter is deposited in the mail box to the time it is collected for postmarking.

b. Timely exceptions

Timely exception cases may be formally referred to the RSOL or informally discussed with the RSOL. You may recommend alternatives to submission to the chief ALJ in such appropriate cases as those where the CMP is not substantial; where there are possible extenuating circumstances; or a parallel section 17 action is contemplated. In some cases it may be agreed that you undertake negotiations.

c. Negotiating procedures

1. When a reduction in the amount of the CMP assessed is deemed appropriate, make arrangements for negotiation with the employer. If the employer is represented by an attorney, direct all communications concerning the matter to the attorney. Inform the RSOL of the time set for the conference, in order to protect the DOL in the event no agreement is reached and an ALJ hearing is later scheduled to resolve the matter.

2. A personal conference is preferred but not required. The conference should be handled at the RO level and not delegated to DOs. Use the "Child Labor CMP Follow-up Appointment" form letter in WHISARD to schedule such a conference.

3. When an agreement on the amount of the CMP to be paid is reached, request the employer to submit a certified check payable to "Wage and Hour Division - Labor," by a date which you should specify.

4. If settlement cannot be reached, prepare an addendum to the narrative outlining the attempts at settlement. Prepare and mail to the employer, or his or her attorney, "Child Labor Adjusted Penalty" form letter or "Child Labor Adjusted Penalty to Person Assessed" form letter in WHISARD amending the original CMP to the amount

NOT FOR PUBLIC DISTRIBUTION

you have determined to be appropriate for purposes of negotiation. After the 15-day response time has elapsed, send the file to the RSOL for appropriate action.

d. Untimely or no exception

1. Where the exception has been deemed untimely or where no exception has been filed and the CMP is substantial and has not been paid, take one of the following actions:

A. Send the collection letter

B. Withdraw the CMP

C. Negotiate as set forth in "Negotiating Procedures" above

D. Refer to the RSOL for collection

2. When the CMP is not substantial, you may:

A. withdraw the CMP or

B. send the collection letter as usual but not refer the case to the RSOL for collection unless:

i. the violations have resulted in serious injury or death,

ii. section 17 action may be contemplated, or

iii. other factors are present which in your view warrant referral to the RSOL.

3. Untimely files or those in which no exception has been filed which are referred to the RSOL may be returned to the RA for suggested further action.

e. Recording final action

1. Keep a record of CMPs referred to the RSOL for collection.

2. Make a final determination in each CMP case and notify the employer as to this final action, in order that a record of the employer's child labor activities may be established. Every exception request must be acted upon. In no event may an exception request be kept pending for an indefinite period of time. If no hearing is to be scheduled, the firm must be advised and the CMP withdrawn.

f. Collection

NOT FOR PUBLIC DISTRIBUTION

1. CMP collections (*i.e.*, payments) are processed by the RO. Any CMP payments received by the DO should be forwarded to the RO for processing.

2. CMP payments are received by the RO in the form of checks, money orders, and electronic fund transfer payments. The RO should log in payments to the RO and then out to the NO lockbox. The checks and/or money orders, along with the "CMP Deposit Sheet" (generated from the CMP application) should then be mailed to the WHD lockbox at:

   US Department of Labor
   Wage and Hour Division
   Room S-3502 – HOLD FOR WHD
   200 Constitution Avenue, NW
   Washington, DC 20210

   Checks are electronically processed by the NO FMB Accounting Team and funds are confirmed in the CMP application.

3. Any CMP checks received at the WHD for cases that are in Treasury Debt Collection must be deposited through the Treasury Debt Collection Lockbox at:

   US Bank
   P.O. Box 979101
   St. Louis, MO 63197-9000

[01/05/2017]

73h09 **Child labor violations by state and local government entities and private employers in connection with JTPA-funded projects.**

The assessment of child labor CMPs for violations found during investigations of state and local government entities and private employers with Job Training Partnership Act (JTPA)-funded contracts shall be handled in the same manner as any other investigation of a private or public sector employer.

[01/05/2017]

NOT FOR PUBLIC DISTRIBUTION

Chapter 76

ENFORCEMENT OF H-2B

Table of Contents

76a GENERAL

76a00 Enforcement authority.
76a01 Employer.

76b INVESTIGATION INITIATION PROCESS

76b00 Authority.
76b01 Directed investigations.
76b02 Complaints.
(b) (7) [redacted]

76c INVESTIGATION PROCEDURES

76c00 Investigation overview and objectives.
76c01 Concurrent FLSA and other investigations.
(b) [redacted]
76c03 Investigation period.
(b) [redacted]
76c05 Documents authorizing employment.

76d ENFORCEMENT ISSUES

(b) (7) [redacted]
76d01 Displacement and/or layoff of U.S. workers and failure to properly hire or rehire.
76d02 Compliance with other laws.
76d03 Effect of multiple law investigations.
76d04 Back wages for H-2B workers: required wage and offered wage.
76d05 Back wages for U.S. workers.
76d06 Kickbacks and/or fees.
76d07 Separation from employment notifications and return transportation.
76d08 Area of intended employment.
76d09 Displacement inquiries: secondary and/or other employers.
76d10 Recordkeeping.
(b) (7)(E) [redacted] (b) (7)(E) [redacted]
(b) (7)(E) [redacted]
76d13 Reforestation and the MSPA: concurrent investigations.
76d14 Employment and Training Administration (ETA) authority.
(b) (7)(E) [redacted] (b) (7)(E) [redacted]

76e VIOLATIONS AND REMEDIES

76e00 Delegated authority.
76e01 Willful.
76e02 Misrepresentation of a material fact.

76e03 Substantial failure.
(b) (7)(E) [redacted]
76e05 Remedies.
(b) (7)(E) [redacted]
76e07 Civil money penalties.
76e08 Debarment.

76f (b) (7)(E) [redacted] **DISPOSITION**

(b) (7)(E) [redacted]
76f01 Disposition.

(b) (7) (E) [redacted]

76h POST-DETERMINATION LETTER ISSUES

76h00 Request for hearing.
76h01 Handling of investigation findings that became a final agency action.
76h02 Unfulfilled performance of remedies.
(b) (7) (E) [redacted]
(b) (7)(E) [redacted]

76a GENERAL

76a00 Enforcement authority.

(a) Employers who applied for certification prior to 01/18/2009 for H-2B workers completed the Employment and Training Administration (ETA) Form 750: Application for Alien Employment Certification (Form 750). The Wage and Hour Division (WHD) has no enforcement authority for workers whose petitions were supported by Form 750, but the WHD may enforce compliance with other programs within its jurisdiction (*e.g.*, the Fair Labor Standards Act (FLSA), McNamara-O'Hara Service Contract Act (SCA), Davis-Bacon Act (DBA), and Migrant and Seasonal Agricultural Worker Protection Act (MSPA)). The filing of the Form 750 may be used to establish an employment relationship.

(b) Employers seeking H-2B workers on or after 01/18/2009 complete the ETA Form 9142: Application for Temporary Employment Certification (Form 9142). The WHD has the authority to investigate an employer that has an approved Form 9142, including Appendix B.1. S*ee* FOH 46a.

(c) The WHD has no enforcement authority in the Territory of Guam under the H-2B program, but will determine compliance with other programs under its jurisdiction for H-2B workers.

(d) The H-2B provisions of the Immigration and Nationality Act (INA) provide no private right of action for United States (U.S.) and H-2B workers. The employer does have a right to request a hearing where the WHD Administrator determines, after investigation, that the employer has committed violations. *See* 20 CFR 655.71.

76a01 Employer.

(a) The definition of employer under H-2B is different from the FLSA definition (*see* 20 CFR 655.4. The INA does not define the terms "employ" or "employee." For this reason, the courts have generally held that the terms shall have as their meaning those generally accepted common-law meanings (as opposed, for example, to the FLSA definition that includes suffer or permit). Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; the permanency of the relationship; whether the opportunity for profit or loss is controlled by the hiring party; and whether the work is part of the regular business of the hiring party.

(b) (7)(E)

[redacted]

(b) (7) (E)

[redacted]

(b)
(7)
(E)

[redacted]

(d) A corporate employer may experience changes in corporate structure as a result of an acquisition, merger, spin-off, or other action. The following criteria will apply where an H-2B employer changes its corporate identity or structure:

(1) The new corporate entity may continue to employ the predecessor entity's existing H-2B workers without filing new Form 9142, regardless of whether or not there is a change in the federal employer identification number, provided that the new entity explicitly agrees to assume the predecessor entity's obligations and liabilities under the Form 9142. If such an agreement has occurred, the WHD would hold the new employer liable for all violations found, including those occurring prior to the change in corporate identity.

(2) The new corporate entity cannot use the predecessor entity's existing Form 9142 to employ new H-2B workers.

(e) Successor-in-interest

See FOH 46a03(a)(2)

New management or ownership of the same business operation, one in which the former management or owner does not retain a direct or indirect interest, will not be deemed to be a successor in interest for purposes of debarment. *See* 20 CFR 655.4.

(f) Joint employment

See 20 CFR 655.4.

Where two or more employers each have sufficient indicia of employment to be considered the employer of an employee, those employers may be considered to jointly employ that employee. An employer in a joint employment relationship to an employee may be considered a joint employer of that employee, regardless of whether that employer is listed on

the Form 9142. Joint employment must also be based on the definition of employee found in 20 CFR 655.4, rather than the FLSA definition. (b) (7)(E) [redacted]

(g) Job contractors

See 20 CFR 655.4.

For the purposes of H-2B, a job contractor is an employer who lends H-2B workers on a temporary basis to other employers who are not affiliated with the H-2B employer. The job contractor employer does not exercise day to day control over the employees. Effective 04/05/2011, the ETA has revised its procedures so that a job contractor may only receive H-2B certification if it and the end employer are joint employers and the Form 9142 clearly identifies their joint employment relationship. The job contractor submits the Form 9142, and both employers must sign Appendix B.1 attesting to their obligations under the program. (b) (7)(E) [redacted]

76b INVESTIGATION INITIATION PROCESS

76b00 Authority.

See FOH 46d00 and 20 CFR 655.50.

The WHD may conduct directed or complaint-based investigations.

76b01 Directed investigations.

(a) The WHD may initiate a directed investigation to ensure compliance has been achieved under the H-2B program.

(b) (7) (E) [redacted]

76b02 Complaints.

(a) Complainants include but are not limited to H-2B workers; U.S. workers; prospective employees; local, state, or government agencies; interest groups; and/or competitors. (b) (7) (E) [redacted]

(b) (7) (E) [redacted]

[redacted]

[redacted]

[redacted]

(e) Confidentiality rules are applied in the H-2B program as in other enforcement programs. (b) (7) (E) [redacted]

(b) (7) (E) [redacted]

[redacted]

(b)
(7)
(E)

[redacted]

[redacted]

76c INVESTIGATION PROCEDURES

76c00 Investigation overview and objectives.

Investigations are conducted to determine if employers are in compliance and to protect covered workers. (b) (7)(E) [redacted] Note: under the statute, a violation exists only if there is either a willful misrepresentation of a material fact or a substantial failure to meet a condition of employment. The statute defines a substantial failure as a "willful failure to comply with the requirements of this section that constitutes a significant deviation from the terms and conditions of a petition." *See* 8 USC 1184(c)(14)(D) (b) (7)(E) [redacted]

76c01 Concurrent FLSA and other investigations

See FOH 46c02 (b) (7)(E) [redacted]

(a) Typically, an H-2B investigation will involve a concurrent compliance review under the FLSA and potentially under the MSPA, SCA, DBA, or other acts enforced by the WHD. (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

(b)(7)(E) [redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]
- [redacted]

76c03 **Investigation period.**

(a) No H-2B-specific statute of limitations applies to H-2B violations except for the effective date of the H-2B enforcement authority (*i.e.*, 01/18/2009). The WHI also must remember that such authority extends only to petitions supported by the Form 9142. Additionally, there are inherent limitations imposed by the validity period of the Form 9142 and applicable pre-filing recruitment period (120 days prior to the date of need of H-2B workers). (b)(7)(E) [redacted]

[redacted]

(c) The investigation examines the employer's compliance with the H-2B employer obligations, including the attestations in Appendix B.1.

(1) If a complainant alleges a violation of a particular H-2B matter that occurred during employment under an H-2B petition supported by the Form 750 (the certification used *prior* to 01/18/2009), an investigation may be conducted *only* under the provisions of other affected WHD programs (*e.g.*, the FLSA). Such complaints also may be referred to the Department of Homeland Security's (DHS's) U.S. Citizenship and Immigration Services (USCIS). *See* Field Assistance Bulletin 2007-1.

(2) If a complainant alleges a violation of a particular H-2B matter that occurred during employment under a petition supported by the Form 9142 (effective on or after 01/18/2009), an investigation may be conducted under the H-2B provisions *and* other affected WHD programs.

(b)(7)(E) [redacted]

[redacted]

[redacted]

(b) Non-cooperation by the employer

(b) (7)(E) [redacted] The INA does not provide the WHD with subpoena powers. (b) (7)(E) [redacted]

(b) (7) (E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

76c05 <u>Documents authorizing employment.</u>

(b) (7) (E) [redacted]

(b) (7)(E) [redacted]

(b) Form 9142

See FOH 46b.

While the Form 9142 does not by itself authorize employment, it contains the employer's H-2B obligations and is the basis for WHD enforcement. (b) (7)(E) [redacted]

(c) USCIS forms I-129, I-797, and I-94)

(1) The Form I-129 is the employer's petition for an alien or group of aliens to come to the U.S. temporarily to perform services or labor, or to receive training. Employers seeking H-2B workers for temporary non-agricultural labor or services file the Form I-129 with the USCIS, which adjudicates the petition and grants or denies the status. The Form 9142 is the primary supporting document for the Form I-129 petition. The Form I-129 must be obtained from the employer. (b) (7)(E) [redacted]

(2) The Form I-797: Notice of Action (Form I-797) is a notice of action issued by the USCIS informing the employer of the approval of the Form I-129 petition and the period of time that the H-2B classification will be valid. Upon the employer's receipt of the Form I-797, the visa application process for entry into the U.S. can proceed.

(3) The Form I-94: Arrival/Departure Record (Form I-94) is the arrival and departure record. This form is issued by the U.S. Customs and Border Protection officer to the H-2B worker at the port of entry and indicates the H-2B worker's classification and period of authorized stay in the U.S. This form is also updated by the USCIS as a work authorization document if the H-2B worker is already in the U.S. when the Form I-129 is approved. The Form I-94's date stamp by U.S. border officials shows the date of entry by the potential H-2B worker into the U.S.

(d) An H-2B worker may only begin working for a new H-2B employer after the USCIS completes the adjudication of the Form I-129 and approves the transferred status.

76d ENFORCEMENT ISSUES

76d00 (b) (7)(E)

[redacted]

76d01 <u>Displacement and/or layoff of U.S. workers and failure to properly hire or rehire.</u>

(a) No strike or lockout

See FOH 46b04(a)(2).

(b) (7) (E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

[redacted]

- [redacted]

(b) (7) (E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(h) The H-2B employer must retain records of any U.S. job applicants rejected for lawful job-related reasons for a period of 3 years. (b) (7)(E) [redacted]

76d02 **<u>Compliance with other laws.</u>**

(a) During the period of employment that is the subject of the Form 9142, the employer must comply with applicable federal, state, and local employment-related laws and regulations, including employment-related health and safety laws. *See* FOH 46b04(c).

(b) (b) (7)(E) [redacted]

(b)(7)(E) [redacted]

[redacted]

76d03 **Effect of multiple law investigation.**

(a) (b) (7)(E) [redacted] the investigation of a particular employer may involve determining compliance with multiple statutes enforced by the WHD. (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted] The statute and the USCIS regulations require the employer to pay such reasonable transportation costs, so any such violation is an H-2B violation. *See* 8 USC 1184(c)(5)(A) (b) (7)(E) [redacted]

(c) FLSA overtime is computed at time and one-half the worker's regular rate. Employers must pay the required or offered wage finally and unconditionally (free and clear). Deductions for board, lodging, and other facilities that qualify under section 3(m) of the FLSA and deductions specifically allowed under the H-2B program are permissible and may be taken in overtime weeks. *See* FOH 32j08 (b) (7)(E) [redacted]

76d04 **Back wages for H-2B workers: required wage and offered wage.**

See FOH 46c.

(a) The WHI must determine whether the H-2B worker has received the highest of the offered wage, including any offered overtime wage rates, stated on the Form 9142 or the prevailing

wage in the location for the occupation or the federal, state, or local minimum wage for all work time. *See* 20 CFR 655.22(e). The wages must be paid free and clear. (b) (7)(E) [redacted]

(b) Employers may make deductions not required by law, even if it brings the employees below the H-2B required wage, if the deductions were identified in the job offer and are reasonable. *See* FOH 46b04(b). Deductions other than those required by law (*e.g.*, transportation, housing and subsistence, costs of tools, equipment, and damages) must be specified in the job offer. (b) (7)(E) [redacted]

(c) The employer is not permitted to seek or receive any fees associated with obtaining the labor certification, including agent fees, attorney's fees, or recruitment costs. If such fees are paid, whether through up-front payment by the worker, payroll deduction, or though reimbursement by the H-2B worker, violations of the wage requirement indicated in (b) (7)(E) [redacted] violations of 20 CFR 655.22(j) (either willful misrepresentation or substantial failure or both) (b) (7)(E) [redacted]

(d) The employer must pay for the return transportation of an H-2B worker it has terminated prior to the end of the certified period. *See* 8 USC 1184(c)(5)(A). The failure to pay the transportation results in a violation under the statute and 20 CFR 655.22(m).

(e) (b) (7)(E) [redacted]

(b)(7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(g) Allowances for facilities furnished to H-2B workers

(1) An employer may take a wage credit (*i.e.*, may reduce or make a deduction from the cash payment of the required and offered wage) for the reasonable cost of facilities provided to the H-2B worker if the facilities are primarily for the benefit of the H-2B worker.

(2) Housing and food allowances are generally considered to be for the primary benefit of the worker.

(3) The wage credit (*i.e.*, deduction) for facilities cannot exceed the fair market value or the actual cost to the employer of the facility (whichever is lower) and must be documented by the H-2B employer. *See* 29 CFR 531.

76d05 **Back wages for U.S. workers.**

(a) Back wages for U.S. workers may be computed for:

(1) Any U.S. workers hired in response required recruitment (*i.e.*, the 10-day state workforce agency job order posting, newspaper ads, union referrals, or recall of laid-off U.S. workers) who are not paid the H-2B required wage, had impermissible deductions taken, or were not offered the same terms and working conditions as the H-2B workers. *See* 20 CFR 655.22(e), 20 CFR 655.22(g)(1), and 20 CFR 655.22(a).

(2) Any qualified U.S. worker who applied for the job opportunity during the 10-day recruitment period and was not hired for reasons other than lawful, non-discriminatory reasons. *See* 20 CFR 655.22(c).

(3) Any qualified U.S. worker who was laid off from the job opportunity during the 120-day period and was not rehired. *See* 20 CFR 655.22(i).

(4) Any qualified U.S. worker of a secondary employer who was laid off from the job opportunity and the H-2B employer failed to receive proper assurances that there would be no displacement of U.S. workers. *See* 20 CFR 655.22(k).

(b) All U.S. workers who were hired in response to required recruitment (*i.e.*, the 10-day state workforce agency job order posting, newspaper ads, recall of laid-off workers, union referrals) are eligible for back wages if they were not paid the offered wage rate, impermissible deductions were made, or their terms and working conditions were less favorable than the H-2B workers (*e.g.*, the H-2B workers in the same occupation were paid a higher rate). (b) (7)(E) [redacted]

(c) Back wages for U.S. applicants not properly hired and laid-off U.S. workers not rehired are computed to ensure make whole relief. (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) (7)(E) [redacted]

76d06 **Kickbacks and/or fees.**

See FOH 46b04(e).

(a) Workers may not be required to assume costs associated with obtaining the labor certification. Prohibited fees include any costs incurred in filing the Form 9142 with the ETA, the employer's attorney or agent fees, and any fees related to their recruitment for the job opportunity. (b) (7)(E) [redacted]

(b) Fees associated with filing the petition with the USCIS generally are an employer business expense; however, there is no attestation on Appendix B.1 relating to the USCIS fees, and a misrepresentation to the USCIS is not listed as a violation in 20 CFR 655.60. (b) (7)(E) [redacted] Petition fees include:

(1) *Basic filing fee*

An employer filing a Form I-129 petition with the USCIS must submit a filing fee, currently $320.00. This fee is considered to be a business expense for the H-2B employer.

(2) *Premium processing fee*

The H-2B employer may obtain expedited processing of the Form I-129 by filing a Form I-907: Request for Premium Processing, and by paying an additional special fee of $1,000.00. (b) (7)(E) [redacted]

(3) *Save Our Small and Seasonal Business Act of 2005*

The Save Our Small and Seasonal Business Act of 2005 authorizes a fraud prevention and detection fee of $150.00 to be paid by all employers filing an H-2B petition. This fee is considered a business expense of the employer.

(c) Job placement fees

Pursuant to the DHS regulations at 8 CFR 214.2(h)(6)(i)(B) and Department of Labor (DOL) regulations at 20 CFR 655.22(g)(2), H-2B workers cannot be required to pay a job placement fee or other compensation to an employer's agent, facilitator, recruiter or similar employment service to obtain H-2B status. The employer must contractually forbid payment of such fees to any foreign recruiter it uses to employ H-2B workers.

In section 2.8 of the Form I-129 H Supplement (b) (7)(E) [redacted] the employer attests that it has not sought and will not seek payment of such fees; that if fees have been paid, the H-2B worker has been reimbursed; and if fees are pending by agreement, such agreement has been terminated.

(d) Form 9142 fees

The ETA imposes no fee for processing the Form 9142. The employer may not recover costs incurred in fulfilling its pre-filing recruitment costs (*e.g.*, newspaper advertising). Any fees paid to attorneys, agents or recruitment services engaged by the employer to file the Form 9142 are also business expenses and may not be recovered from the H-2B worker.

(e) Since a passport can be used for personal reasons and is not restricted to employment purposes, the costs associated with a passport are not primarily for the benefit of the employer. Employers may require H-2B workers to pay government required passport fees. The H-2B regulations also allow employers to require H-2B workers to pay their visa-related fees, although there would be an FLSA violation if such visa fees bring the worker below the minimum wage. *See* Field Assistance Bulletin 2009-2 (b) (7)(E) [redacted] in the Fifth Circuit. Employers also may make deductions not required by law, even if it brings the H-2B workers below the H-2B required wage, if they were identified in the job offer and are reasonable. *See* 20 CFR 655.22(g).

76d07 <u>Separation from employment notifications and return transportation.</u>

See FOH 46b04(f).

(a) The investigation may reveal that an H-2B worker ceased employment prior to the end date of employment specified on the Form 9142. Pursuant to 20 CFR 655.22(f), the employer must report the separation to the ETA and USCIS not later than 2 work days after it has discovered the H-2B worker is gone. Note: attestation 11 describes the notification period as within 48 hours. (b) (7)(E) [redacted] Abandonment is deemed to have occurred when an H-2B worker has failed to report to work, without the employer's consent, for 5 consecutive working days. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) If dismissed prior to the end of the authorized stay, the employer will be liable for the H-2B worker's return transportation. Additionally, if part of the pilot program in 20 CFR 655.35, the employer must inform the H-2B workers that they must leave the U.S. at the end of their authorized employment or separation from the employer unless their status has been extended or changed, or they are otherwise authorized to stay in the country by the USCIS. (b) (7)(E) [redacted]

76d08 **Area of intended employment.**

See FOH 46b04(g).

(b) (7) (E) [redacted]

[redacted]

76d09 **Displacement inquiries: secondary and/or other employers.**

See FOH 46b04(i) and 20 CFR 655.22(k).

(b) (7) (E) [redacted]

[redacted]

(b) (7)(E) [redacted]

- [redacted]
- [redacted]

76d10 **Recordkeeping.**

(a) There are specific recordkeeping requirements under the H-2B regulations. *See* FOH 46d01. Most employers will be covered by the FLSA and subject to recordkeeping provisions under that statute as well. (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) (7) (E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(c) The regulations at 20 CFR 655.50(c) require that the employer cooperate in the investigation. Such cooperation includes the provision of records that the WHD considers necessary to determining compliance. (b) (7)(E) [redacted] (b) (7)(E) [redacted]

(d) It is a condition of the Form 9142 that the employer retains documentation of U.S. job applicants and application disposition. *See* 20 CFR 655.15(c) and 20 CFR 655.22(c). (b) (7) (E) [redacted]

[redacted]

[redacted]

(b) (7) (E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

76d13 **Reforestation and the MSPA: concurrent investigations.**

(a) A Ninth Circuit Court of Appeals decision (*Bresgal v.Brock*, 833 F.2d 1163 (9th Cir. 1988) ruled that the MSPA applies to recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker for all predominately manual forestry work, including but not limited to tree planting, brush clearing, pre-commercial tree thinning, and forest firefighting. The WHD has adopted this policy and applies the MSPA to reforestation and other forestry workers. *See* FOH 36 (b) (7)(E) [redacted] Since this type of work is not within the scope of agricultural labor and services under H-2A, temporary nonimmigrant workers performing such manual reforestation work as described in this paragraph come under the H-2B program.

(b) (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

(d) The SCA generally applies to reforestation contracts with the U.S. Government (*e.g.*, U.S. Forest Service or Bureau of Land Management) the principal purpose of which is to furnish services (*e.g.*, tree planting, brush clearing, pre-commercial thinning, and forest fire-fighting) through the use of service employees. The Contract Work Hours and Safety Standards Act (CWHSSA) applies to service contracts in excess of $100,000.00.

(b) (7) (E) [redacted]

[redacted]

76d14 **<u>Employment and Training Administration (ETA) authority.</u>**

(a) The ETA is responsible for approving an employer's Form 9142 (*see* FOH 46b). (b) (7)(E) [redacted]

(b) The ETA is responsible for determining a valid prevailing wage determination and certifying that the offered wage on the Form 9142 is at least the prevailing wage rate in the area of intended employment. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(c) The ETA may seek debarment of an employer from participation in the H-2B program pursuant to its authority at 20 CFR 655.31. (b) (7)(E) [redacted]

(d) The ETA may also debar agents. The WHD has no enforcement authority for agents; (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

76e VIOLATIONS AND REMEDIES

76e00 Delegated authority.

Under its delegated authority and pursuant to 20 CFR 655.60 and 20 CFR 655.65(c), the WHD may determine whether an employer willfully misrepresented a material fact or substantially failed to meet a condition on Form 9142 and Appendix B.1 and/or Form I-129. S*ee* FOH 76d13(a). A substantial failure is defined as being a willful failure. Only willful violations may be cited in a determination. (b) (7)(E) [redacted]

76e01 Willful.

(a) Willful failure means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to section 214(c) of the INA or 20 CFR 655.1 -.99. *See McLaughlin v. Richland Shoe* Co., 486 U.S.128 (1988) and *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). (b) (7)(E) [redacted]

(b) Form 9142 (*see* Appendix B.1) contains the following declarations, which the employer must sign:

"By virtue of my signature below, *I hereby certify* the following conditions of employment…";

"*I hereby designate* the agent or attorney identified in Section D (if any) of the ETA Form 9142 to represent me for the purpose of labor certification and, by virtue of my signature in Block 3 below, *I take full responsibility* for the accuracy of any representations made by my agent or attorney"; and

"*I declare* under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a felony punishable by a $250,000 fine or 5 years in the Federal penitentiary or both (18 USC 1001).*"

By its submission of, and signature on, Form 9142, the employer represents that the statements on Form 9142 are accurate and acknowledges and accepts the obligations of the H-2B program.

(c) The employer's acceptance of these obligations is reaffirmed by and restated on Form I-129, which is supported by Form 9142. The Form I-129 contains the following declarations:

"I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it is all true and correct."

See Form I-129, part 6 (signature).

"By filing this petition, I agree to conditions of H-2A/H-2B employment and agree to the notification requirements."

See Form I-129, Supplement H.

If the employer has designated a representative to complete the Form I-129, it must sign and declare the following:

"I certify that I have authorized the party filing this petition to act as my agent in this regard. I assume full responsibility for all representations made by this agent on my behalf and agree to the conditions of H-2A/H-2B eligibility."

See Form I-129, Supplement H.

(d) A compliance assistance package is sent by certified mail (with a return receipt requested) or by UPS to each employer that has an approved Form 9142 from the ETA and a subsequently adjudicated Form I-129 authorizing employment of H-2B workers. This package includes an H-2B Fact Sheet; H-2B worker information card summarizing the employer's obligations and H-2B worker's rights; sample notification letters; and internet and telephone contact information for the WHD. (b) (7)(E) [redacted]

[redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

76e02 **Misrepresentation of a material fact.**

A material fact is a significant item of information on Form 9142 and/or Form I-129. Misrepresentation means that the employer made a statement on Form 9142 and/or Form I-129 that was false at the time of filing. The employer must exercise reasonable care and diligence to ensure the accuracy of its petition (*i.e.*, Form 9142 and Form I-129) statements.

(b) (7)(E)

[redacted]

76e03 **Substantial failure.**

A substantial failure is a willful failure that constitutes a significant deviation from the terms and conditions of the Form 9142. Generally, a substantial failure involves action by the employer after Form 9142 has been filed (*e.g.*, the employer fails to provide notice to ETA and/or USCIS of an H-2B worker's termination of employment).

(b) (7)(E)

[redacted]

76e05 **Remedies.**

(a) The regulations authorize the WHD to impose back wages, CMPs, reinstatement of displaced U.S. workers, and other appropriate legal or equitable remedies, for such willful violations. The performance of any remedy ordered will follow procedures established in the determination letter, the ALJ decision, or the Administrative Review Board's (ARB's) decision, whichever is applicable. *See* 20 CFR 655.70, and 20 CFR 655.75 -.76.

(b) (7)(E)

[redacted]

(b) (7)(E) [redacted]

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

76e07 **Civil money penalties.**

See 20 CFR 655.65.

(b) (7) (E) [redacted]

(b) The WHD may assess CMPs in an amount not to exceed $10,000.00 per violation. (b) (7)(E) [redacted]

[redacted]

(b) [redacted]

See 20 CFR 655.65(g).

(d) The WHD may assess CMPs in an amount not to exceed $10,000.00 per violation for any substantial failure to meet the conditions provided in Form 9142; any willful misrepresentation in Form 9142; or a failure to cooperate with a WHD investigation. *See* 20 CFR 655.65(c). (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

76e08 **Debarment.**

(a) Pursuant to 20 CFR 655.80, the WHD will, as appropriate, recommend that the ETA and/or USCIS debar the employer for a period of no less than 1 year, and no more than 3 years when the employer has committed a willful misrepresentation of a material fact or a substantial failure to meet any conditions of Form 9142 or Form I-129. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

- [redacted]
- [redacted]

(d) The ETA and/or USCIS debarment means that the employer will not be able to sponsor any future nonimmigrant under the H-2B program for the specified period. Any nonimmigrants already employed under the sponsorship of the debarred employer are not affected by the employer's debarment; existing visas are not revoked and workers are not deported. For the length of the debarment period the ETA and/or USCIS will not approve the employer's Form 9142 or Form I-129 under the H-2B nonimmigrant program.

76f (b) (7)(E) **DISPOSITION**

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

76f01 **Disposition.**

(b) (7)(E)

[redacted]

(c) The WHD's delegated authority does not permit citing non-willful violations in its determination. If there are non-willful failures (*e.g.*, the employer failed to retain copies of newspaper advertisements or there was a minor wage deficiency that was not a significant deviation from the offered wage), the employer will be advised of these failures. (b) (7) (E) [redacted]

76g WRITTEN NOTIFICATION OF INVESTIGATION FINDINGS

76g00 Determination letter.

See 20 CFR 655.70.

(b)
(7)
(E)

[redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

76h POST-DETERMINATION LETTER ISSUES

76h00 Request for hearing.

See 20 CFR 655.71.

(a) An employer that wants to appeal the WHD determination letter must file a timely request in writing for an administrative hearing within 15 calendar days of the date of the determination letter. *See* 20 CFR 655.65 and 20 CFR 655.70 -71. Should a request for hearing be submitted to the DO (rather than to the ALJ, as directed in the determination letter), the request must be forwarded immediately to the ALJ. It is the ALJ who will make the determination whether a request for a hearing is properly filed and timely.

(b) The employer should send a copy of the appeal request to the DO official who sent the determination letter and to the representatives of the SOL identified as receiving copies of the determination.

(b)(7)(E) [redacted]

76h01 Handling of investigation findings that become a final agency action.

(a) The investigation findings become a final agency action of the Secretary upon the earliest of the following events:

(1) Pursuant to 20 CFR 655.71, where the Administrator issued the determination letter and no timely request for hearing is made by the employer.

(2) Pursuant to 20 CFR 655.75, where, after a hearing, the ALJ issues a decision and order, and no timely petition for review (within 30 calendar days of the date of the decision and order) is filed with the ARB.

(3) Pursuant to 20 CFR 655.76, where, after a review, the ARB either declines within 30 days to entertain the appeal or the ARB reviews and affirms the ALJ's determination. To determine whether a timely request for an ALJ hearing or a petition to the ARB has been filed or granted, the WHI may inquire of the RSOL, ALJ, or ARB (ALJ: 202-693-7300; ARB: 202-693-6200).

(b)(7)(E) [redacted]

(b) (7) (E) [redacted]

76h02 **Unfulfilled performance of remedies.**

(b) (7) (E) [redacted]

[redacted]

[redacted]

[redacted]

(e) Under the INA, there is no individual private right to file suit against an employer for back wages as there is under the FLSA and MSPA. However, H-2B workers may have rights of action under contract law or other laws in the state courts. The WHD has no authority or responsibility with regard to any such remedies available under state law.

(b) (7) (E) [redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

August 18, 1995

WAGE AND HOUR MEMORANDUM NO. 95-33

MEMORANDUM FOR REGIONAL SOLICITORS
WAGE AND HOUR REGIONAL ADMINISTRATORS

FROM: THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

MARIA ECHAVESTE
Administrator of the Wage and Hour Division

SUBJECT: Joint Regional WH/SOL Quarterly Meetings

At the National Wage and Hour and Solicitor's Office Conference, a number of issues and concerns were raised about the communication between the two agencies on information and enforcement/litigation priorities, as well as the coordination of the processing of cases.

A decision was made at the conference for the Wage and Hour Regional Administrator and the Regional Solicitor to hold quarterly meetings. Attached are proposed agenda items to be discussed at each quarterly meeting which was prepared by the WH/SOL Committee designated to coordinate the implementation of the working group recommendations made at the conference.

Attachment

NOT FOR PUBLIC DISTRIBUTION

Proposed Agenda Items for Joint Regional WH/SOL Quarterly Meetings

I. At initial quarterly meeting or as necessary as time and circumstances dictate:

1. Jointly develop factors to determine litigation priorities such as target industries, low-wage workers, kinds of violations, investigation history (repeat violators), new programs (e.g. FMLA), new developing issues (e.g. joint employment), refusal to comply.

2. Jointly establish, or reiterate, in some cases, regional declination standards based on regional and national priorities such as compliance, resources, amount of back wages, history of employer, legal merits (e.g. facts, evidence, witnesses, law of the circuit).

3. RSOL will provide appropriate parts of the SOLAR manual to Wage and Hour and explain how to interpret SOLAR reports and what information on reports cannot be disclosed to the public.

II. At each quarterly meeting:

1. Advise RSOL of any change in national and regional enforcement and litigation priorities.

2. RSOL should advise WH of any significant court decisions and discuss effect on enforcement strategy, and on pending and future investigation actions, if any (e.g. trying to develop favorable case law on "joint employment" because of an adverse decision in another circuit).

3. Discuss status of unfiled cases in RSOL and NSOL. Discussion should include whether case should be pursued in light of current national and regional enforcement and litigation priorities and resource availability, and when the case is likely to be filed or decision made not to file. Substantial latitude may be given to settle unfiled low priority cases.

4. With respect to aged, unfiled cases in RSOL inventory, which would require further significant WH investigative activity, discuss whether WH will commit the necessary resources to such activity and litigation, if not, return to WH. In appropriate cases, the RSOL and RA may agree that further discussion on such cases will occur between the WH district director and a representative of the RSOL.

NOT FOR PUBLIC DISTRIBUTION

5. In conjunction with SOLAR report, review status of pending filed cases. RSOL will advise of significant changes in status of filed cases set for trial, or anticipated need for significant expenditure of WH resources. Additional discussions will take place between the WH district director and the representative of RSOL.

6. Discuss cases in WH field offices and RSOL which are considered sensitive and which may need to be called to the attention of the national offices of WH and SOL.

7. Provide specific information on dates, places and purpose of upcoming strike forces. Discuss role SOL will have in planning and support of strike forces, (for example, subpoenas, TRO's, and training for WH). Plan for subsequent meetings to discuss in more detail.

8. Invite RSOL to WH meetings and discuss RSOL's role in such meetings.

NOT FOR PUBLIC DISTRIBUTION

February 2, 1996

WAGE AND HOUR MEMORANDUM NO. 96-6

MEMORANDUM FOR REGIONAL SOLICITORS
WAGE AND HOUR REGIONAL ADMINISTRATORS

FROM: THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

MARIA ECHAVESTE
Administrator of the Wage and Hour Division

SUBJECT: Joint Review Conference (JRC) Procedures

NOT FOR PUBLIC DISTRIBUTION

Introduction

At the joint Wage and Hour and Solicitor's Office Conference, one of the most important issues addressed was the need to improve the Joint Review Conference (not "Committee") procedures. While the JRC was originally created to encourage the development of cases for litigation, over the years its primary emphasis has been transformed into a process for screening and selecting cases for litigation. Given our continuing need for effective caseload management, improvements to the JRC process are essential for effectively utilizing our resources and furthering the agency's enforcement priorities.

Operating Principles for Joint Review Conferences

1. The individuals who perform the JRC functions are the Regional Wage and Hour Administrator and the Regional Solicitor, or their designated representatives, and in addition, a manager from the District Office, and the Wage and Hour Investigator conducting the investigation.

A representative of the Wage and Hour Regional Office will participate in every JRC unless the Regional Office and the District Office have had a discussion about the case immediately prior to the JRC and the Regional Office elects not to participate. In such cases, the District Office has been given the authority to represent the

Regional Office. We note that any decisions made by the designated regional representatives during the JRC process are the decisions of their regional offices. Any disagreements within WH or RSOL during the JRC process are to be addressed separately by the individual organization. It is not the function of the JRC participants to resolve such controversies.

The formality of the process may vary from region to region and should be decided by those responsible for conducting the JRC's in each region.

2. Every file that may be referred for possible litigation must be JRC'd prior to formal referral to RSOL.

Except as discussed below, no program area is exempt from the JRC process. This includes some matters that traditionally have not been subject to the JRC, e.g., government contract cases and civil money penalty cases. The use of the JRC in all WH programs is essential for preserving our limited resources and assuring that appropriate cases are selected for litigation.

In certain narrow and exceptional circumstances, the Regional Solicitor and the Wage and Hour Regional Administrator may agree at the quarterly meeting that certain cases do not need the formal JRC process. Any such agreement should be reviewed periodically and may be rescinded by either party at any time. In all such cases, the regional office and the district office must consult before the case is transferred to RSOL. Furthermore, in some programs such as H-1A (INRA) and H-1B (IMMACT90) and criminal cases, alternative JRC procedures have been established which should be followed.

The JRC process does not replace or substitute for preparation, after the case has been referred to RSOL, of a written legal analysis that includes a formal recommendation regarding the suitability of a case for litigation. The decision to accept a case at the conclusion of the JRC process does not assure that a case will be accepted for litigation.

3. The JRC process should start as soon as Wage and Hour recognizes it will be seeking a commitment from RSOL to consider the file for litigation and adequate information is available to make such a determination.

Early identification of cases likely to proceed to litigation is critical both to effective litigation strategy as well as to the conservation of resources of Wage and Hour and RSOL. It is especially important to initiate the JRC process promptly and seek RSOL input in the following potential litigation cases:

NOT FOR PUBLIC DISTRIBUTION

--cases involving employers who may be part of a national enterprise;

--cases presenting novel or complex legal issues;

--cases likely to require substantial DOL resources;

--cases presenting "sensitive" enforcement issues;

--any matters requiring immediate legal action (e.g., subpoena, TRO, warrant, bankruptcy filing, etc.); or

--major cases resulting from strike forces.

Such cases may require multiple discussions before a case is formally referred for consideration of litigation. Such cases may also require coordination or authorization by the National Office by Wage and Hour and SOL.

4. The Regional Solicitor is obligated to make a timely decision to approve or decline a case for litigation; and to notify regional WH of that decision as well as the reasons for it.

Once an investigation file is referred by agreement to the RSOL, the analysis and recommendation should be completed in a timely fashion. During the quarterly meetings, the parties will discuss those cases that have been JRC'd and referred but not yet filed.

Other Communication between WH and SOL

Establishing these uniform operating principles for JRC's does not imply that this process provides the only opportunity for communication between Wage and Hour and RSOL. Indeed, throughout the investigation there can and should be a continuing dialogue between RSOL and Wage and Hour concerning case development. These ongoing points of contact may be described as "case development conferences" and are to be distinguished from the "joint review conferences". As noted, the JRC's limited purpose is to determine whether a file will be referred to SOL for litigation consideration.

In contrast, case development conferences provide an opportunity to obtain early guidance on any matters, such as recent case law, evidence acquisition, coverage questions, exemption issues, etc., that may impact on the ultimate decisionmaking about whether to refer a case for litigation consideration. By engaging in these

NOT FOR PUBLIC DISTRIBUTION

ongoing discussions, the parties not only hope to conserve their respective resources, but also to prevent the "surprise" or disappointment that may be a source of morale problems for enforcement personnel in the event that a fully-investigated case is rejected for litigation. Such early communications are especially important in cases which are likely to require substantial resources from Wage and Hour and SOL.

NOT FOR PUBLIC DISTRIBUTION

Chapter 80

POTENTIAL LITIGATION

This chapter contains information that is out of date. Litigation questions should be referred to the RSOL through proper channels.

Source: FOH Modernization revision 717, published 12/05/2016. Substantive revisions made *after* 12/05/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 12/05/2016 can be found here: http://esa/whd/LawsRegs/FOH/revisionchart.

NOT FOR PUBLIC DISTRIBUTION

Table of Contents

80a DEFINITIONS AND CRITERIA

80a00 Litigation and other legal terms defined.
80a01 Potential litigation defined.
80a02 Purpose of potential litigation criteria.
80a03 Criteria for potential litigation.
80a04 Exceptions.
80a05 Falsification or concealment defined.
80a06 Serious child labor violations defined.
80a07 Reasonable excuse defined.

80b COMPLIANCE TYPE ACTIONS

80b00 Nature of compliance type investigations.
80b01 Procedure.

80c CRIMINAL AND BLACKLIST TYPE OF ACTIONS (JOINT REVIEW PROCEDURE)

80c00 Nature of criminal and blacklist type investigations.
80c01 Basic considerations.
80c02 Categories of potential criminal litigation investigations.
80c03 General procedure.
80c04 Procedure: category I investigations.
80c05 Procedure: category II investigations.
80c06 Procedure: category III investigations.

80d THE JOINT REVIEW COMMITTEE

80d00 Composition of the JRC.
80d01 JRC functions and procedure.
80d02 Special litigation criteria exceptions for the consideration of the JRC.
80d03 Action when the JRC disagrees.
80d04 Action by the RA and RSOL.
80d05 Records of the JRC.

80a DEFINITIONS AND CRITERIA

80a00 Litigation and other legal terms defined.

(a) "Litigation," as used in this chapter, means any kind of court or hearing action authorized by the Fair Labor Standards Act (FLSA), the Walsh-Healey Public Contracts Act (PCA), or the McNamara-O'Hara Service Contract Act (SCA) to be initiated by the government, or open to the government pursuant to these acts, except under section 16(b) of the FLSA. It includes:

(1) FLSA criminal action,

(2) FLSA civil action,

(3) criminal contempt action for FLSA violations,

(4) civil contempt action for FLSA violations,

(5) PCA and SCA hearing actions,

(6) administrative subpoena enforcement action, and

(7) defensive action.

(b) "*Amicus curiae*" literally means a friend of the court; hence, in practice, it is a person who although not a party to the action, by leave of court suggests, states and argues, or briefs some matter of law for the court's assistance.

(c) "Bona fide" is defined as in or with good faith, without fraud or deceit, authentic, genuine, and as a bona fide transaction.

(d) "Defendant" or "respondent" is the person defending or denying, and the party against whom relief or recovery is sought in an action or suit.

(e) "Hearsay evidence" is evidence not proceeding from the personal knowledge of the witness, but from the mere repetition of what he or she has heard others say. Such evidence does not derive its value solely from the credit given to the witness, but rests in part on the veracity and competence of some other person; it is, with a few exceptions, inadmissible as testimony.

(f) "Plaintiff" is one who brings a personal action or suit to obtain a remedy for an injury to his or her rights. He or she is the complaining party in any litigation. An employee whom we represent in an action under section 16(c) is not a plaintiff. He or she is, however, in his or her relation to us a complainant or claimant.

(g) "*Prima facie* evidence" is evidence sufficient to raise a presumption of fact or establish the fact in question unless rebutted.

(h) *See* FOH 86b01.

(i) *See* FOH 86b01.

"Stipulation" is the name given to any agreement made by the attorneys engaged on opposite sides of a cause (especially if in writing), regulating any matter incidental to the proceedings

NOT FOR PUBLIC DISTRIBUTION

or trial, which falls within their jurisdiction. Such, for instance, are agreements to extend the time for pleading, take depositions, waive objections, admit certain facts, and/or continue the cause.

80a01 **Potential litigation defined.**

Potential litigation investigations are those which, pursuant to the instructions in this chapter, shall be considered for civil, which includes PCA hearings action, or criminal litigation.

(b) (7)(E) [redacted]

80a02 **Purpose of potential litigation criteria.**

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]

80a03 **Criteria for potential litigation.**

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]

  [redacted]

  - [redacted]
  - [redacted]

    [redacted]
  - [redacted]

    [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

- [redacted]

  [redacted]

  - [redacted]
  - [redacted]
  - [redacted]

    (b) (7)(E)

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

80a04 **Exceptions.**

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

80a05 **Falsification or concealment defined.**

Falsification or concealment is deemed to be present when it is found that the employer has used any practice or device to create a false impression as to the wages paid, hours worked, children employed, or other aspects of compliance, or has misrepresented a material fact in obtaining a certificate under section 14 of the FLSA. Examples of falsification or concealment are:

(1) Recording wages as paid that in fact have been returned or kicked back to the employer

(2) Recording, causing, or permitting an employee to record hours or wages incorrectly

(3) Presenting false receipts or other false evidence of wage payment

(4) Concealing underage minors or omitting their names from the payroll and personnel records

(5) Misrepresentation of the facts as to the availability of experienced workers

(6) Concealing or misrepresenting facts regarding coverage or non-exemption

(7) Other types of entries concealing monetary or child labor violations

(8) Attempting as to any material fact to mislead a WHI or cause others to mislead him or her during the course of an investigation

(b) Falsification is more than mere inaccuracy in the records. To constitute falsification that could provide the willfulness for legal action for FLSA and/or PCA violations, the incorrect records must be coupled with an intention to create a false impression as to compliance with the monetary or child labor provisions of these laws and regulations issued thereunder. Where the WHI finds that inaccurate entries were not made for the purpose of creating such a false impression, but simply through carelessness or because the employer honestly did not realize the importance of accurate records, falsification is not present.

(c) Where a practice or device is used to create a false impression for other purposes and substantial violations of the monetary or child labor provisions of the FLSA or the PCA are thereby obscured, the investigation will be considered and handled as if there was a deliberate attempt to mislead as to compliance with the FLSA or the PCA. Examples of such situations are attempts to mislead as to compliance with state labor laws or regulations, or the terms of a union contract.

80a06 **Serious child labor violations defined.**

(a) The types of FLSA and/or PCA child labor violations considered to be serious are set forth below:

(1) The oppressive or knowing employment of extremely young minors.

(2) Widespread oppressive or knowing employment of underage minors. Ordinarily, such employment will be considered to be widespread if more than five underage minors are currently employed, or during the year preceding the investigation, the employer has employed more than seven underage minors.

(3) Any employment of an underage minor with knowledge, either actual or constructive, of the minor's age if the employer also actually knew or reasonably should have known the legal requirements.

80a07 **Reasonable excuse defined.**

NOT FOR PUBLIC DISTRIBUTION

Reasonable excuse depends upon the facts found in each individual investigation and the employer's explanation as to the cause or reasons for the violations. Consideration must be given to the educational level and business experience of the employer, and from the standpoint of the length of time the FLSA and the PCA have been in effect, and the extent of the employer's efforts to acquaint himself or herself with his or her responsibilities. Generally, a reasonable excuse will be deemed to exist if the employer has made an honest mistake as to the coverage of his or her employees, application of an exemption, what constitutes hours worked or the regular rate, nature of the employment relationship, or application of a special order or regulation, such as any section of Child Labor Reg. 3 or the provisions of a hazardous order. For example, an employer whose violations resulted from his or her reliance on advice from an attorney or labor relations consultant, obtained in good faith, may have a reasonable excuse.

80b COMPLIANCE TYPE ACTIONS

80b00 Nature of compliance type investigations.

(a) Compliance type investigations are potential litigation investigations that do not contain any of the elements indicating criminal action, such as:

(1) Refusal cases, where the employer either will not agree to comply in the future or will not agree to pay the back wages and liquidated damages required by the PCA. These are the cases that meet the criteria in FOH 80a03(e)(1) -(3).

(2) Investigations involving unreliable future compliance promises where the employer's course of conduct, while not showing he or she should be punished criminally, does indicate his or her promise of future compliance cannot be accepted at face value.

80b01 Procedure.

(a) The investigations described in FOH 80b00 are compliance type investigations in which FLSA civil action or PCA hearing action is indicated. (b) (7)(E) [redacted]

[redacted]

80c CRIMINAL AND BLACKLIST TYPE ACTIONS (JOINT REVIEW PROCEDURE)

80c00 Nature of criminal and blacklist type investigations.

Criminal and blacklist type investigations are those that have criminal aspects, where the employer's past course of conduct indicates he or she should be punished (*i.e.*, investigations meeting the criteria of FOH 80a03(d)).

NOT FOR PUBLIC DISTRIBUTION

80c01 **Basic considerations.**

The development and consideration of investigations for legal action involve many problems that are the purpose of this joint review procedure to solve or minimize. The problems concern the efficient use of time at all levels, saving of travel and other costs, availability of needed evidence, and satisfactory disposition of investigations. In attempting to solve these problems, (b) (7)(E) [redacted]

80c02 **Categories of potential criminal litigation investigations.**

- [redacted] (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

80c03 **General procedure.**

- [redacted] (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

- (b) (7)(E)
-
-
-
  -
  -
  -

80c04 **Procedure: category I investigations.**

- (b) (7)(E)
-

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

80c05 **Procedure: category II investigations.**

(b) (7)(E) [redacted]

80c06 **Procedure: category III investigations.**

(b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

80d THE JOINT REVIEW COMMITTEE

80d00 Composition of the JRC.

The JRC shall consist of two members, one of whom shall be designated by the RA and one by the RSOL.

80d01 JRC functions and procedure.

(a) The JRC shall consider, either in an informal clearance or contact or by a formal review of the investigation file, every investigation that meets the criteria for potential criminal litigation. Any special litigation procedure ends if and when, in the informal clearance authorized in FOH 80c, the JRC rejects the investigation for any type of litigation. All other investigations that meet the potential litigation criteria must be submitted for the formal consideration of the JRC, and are subject to the procedures prescribed in the following sections.

(b) The joint review is not to be a rough screening process, and the JRC shall not merely decide whether the investigation has the minimum requirements for litigation. The duty of the JRC is to review and analyze the investigation, and based upon all the facts, make a definite recommendation to the RA as to the procedure (*i.e.*, administrative, civil, or criminal) that will best effectuate the purposes of the applicable act in the particular instance. Where there are multiple remedies available, the JRC shall indicate that fact to the RA. It shall then indicate its order of preference as to the election of the remedies, and shall set forth its reasons for so deciding, because ordinarily, no more than one remedy will be pursued in a particular investigation. The JRC shall indicate which remedy it considers most likely to promote enforcement of the law in the region. It may also make such specific recommendations concerning the further development of the investigation as it may deem appropriate.

80d02 Special litigation criteria exceptions for the consideration of the JRC.

(a) As stated in FOH 80d01(b), the JRC shall make its recommendations in the light of all the facts revealed by the investigation. However, investigations shall not be approved for litigation when:

(1) litigation would be contrary to the policy of the DOL;

(2) it appears from the investigation report that the available evidence is insufficient to present a reasonable probability of successful litigation; or

(3) in the case of contemplated criminal action, the investigation raises a question of law so doubtful as to be improper for testing in a criminal prosecution.

NOT FOR PUBLIC DISTRIBUTION

(b) Whether a potential litigation investigation comes within one of the categories under FOH 80d02(a) above shall be determined by the JRC, and not by the WHI or his or her DD.

80d03 **Action when the JRC disagrees.**

If the members of the JRC are unable to agree upon the disposition of a particular potential litigation investigation, they will report the matter to the RA for decision.

80d04 **Action by the RA and RSOL.**

(a) After the JRC has considered an investigation, it shall refer the investigation file by formal memorandum to the RA with appropriate recommendations and the reasons therefor. The RA shall then decide what procedure, administrative, civil, or criminal, he or she believes should be followed in disposing of the investigation. In the event his or her decision is not in agreement with the JRC's recommendations, he or she shall insert a memorandum in the investigation file giving his or her reasons for disagreement, in order that the basis for his or her decision shall be a matter of record. In any such case where the JRC has recommended litigation and the RA feels litigation is not appropriate, he or she shall consult with the RSOL before reaching his or her decision. Copies of his or her memorandum shall be furnished to the RSOL and the JRC for its future guidance, and two copies shall be forwarded to the Office of Policy. These shall be referred to the Administrator of the WHD (Administrator) and the solicitor of labor (SOL) for informational purposes.

(b) When the RA determines that litigation is desirable, he or she shall forward the investigation file by formal memorandum to the RSOL. If the RSOL is of the opinion that the investigation file is legally sufficient, he or she will retain it for handling, or will furnish guidance and advice, if any further preparation is required, in accordance with the SOL's instructions. If he or she is of the opinion that the investigation file is not legally sufficient and that the defects cannot be cured through reasonable further development, he or she shall return it to the RA with a formal memorandum stating his or her reasons. In investigations so rejected for litigation, a copy of the RSOL's memorandum shall be furnished to the JRC for its future guidance, and for informational purposes, two copies shall be forwarded to the SOL (one of which will be referred by the SOL to the Administrator). In the event of disagreement between the RA and the RSOL, the RA shall refer the investigation file to the Administrator for joint consideration by the Administrator and the SOL.

80d05 **Records of the JRC.**

The JRC shall designate a secretary to keep records showing the investigations referred to or considered by it, and their disposition, and such other records as the JRC may direct or as are required for statistical reports.

NOT FOR PUBLIC DISTRIBUTION

August 18, 1995

WAGE AND HOUR MEMORANDUM NO. 95-33

MEMORANDUM FOR REGIONAL SOLICITORS
WAGE AND HOUR REGIONAL ADMINISTRATORS

FROM: THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

MARIA ECHAVESTE
Administrator of the Wage and Hour Division

SUBJECT: Joint Regional WH/SOL Quarterly Meetings

At the National Wage and Hour and Solicitor's Office Conference, a number of issues and concerns were raised about the communication between the two agencies on information and enforcement/litigation priorities, as well as the coordination of the processing of cases.

A decision was made at the conference for the Wage and Hour Regional Administrator and the Regional Solicitor to hold quarterly meetings. Attached are proposed agenda items to be discussed at each quarterly meeting which was prepared by the WH/SOL Committee designated to coordinate the implementation of the working group recommendations made at the conference.

Attachment

NOT FOR PUBLIC DISTRIBUTION

Proposed Agenda Items for Joint Regional WH/SOL Quarterly Meetings

I. At initial quarterly meeting or as necessary as time and circumstances dictate:

1. Jointly develop factors to determine litigation priorities such as target industries, low-wage workers, kinds of violations, investigation history (repeat violators), new programs (e.g. FMLA), new developing issues (e.g. joint employment), refusal to comply.

2. Jointly establish, or reiterate, in some cases, regional declination standards based on regional and national priorities such as compliance, resources, amount of back wages, history of employer, legal merits (e.g. facts, evidence, witnesses, law of the circuit).

3. RSOL will provide appropriate parts of the SOLAR manual to Wage and Hour and explain how to interpret SOLAR reports and what information on reports cannot be disclosed to the public.

II. At each quarterly meeting:

1. Advise RSOL of any change in national and regional enforcement and litigation priorities.

2. RSOL should advise WH of any significant court decisions and discuss effect on enforcement strategy, and on pending and future investigation actions, if any (e.g. trying to develop favorable case law on "joint employment" because of an adverse decision in another circuit).

3. Discuss status of unfiled cases in RSOL and NSOL. Discussion should include whether case should be pursued in light of current national and regional enforcement and litigation priorities and resource availability, and when the case is likely to be filed or decision made not to file. Substantial latitude may be given to settle unfiled low priority cases.

4. With respect to aged, unfiled cases in RSOL inventory, which would require further significant WH investigative activity, discuss whether WH will commit the necessary resources to such activity and litigation, if not, return to WH. In appropriate cases, the RSOL and RA may agree that further discussion on such cases will occur between the WH district director and a representative of the RSOL.

NOT FOR PUBLIC DISTRIBUTION

5. In conjunction with SOLAR report, review status of pending filed cases. RSOL will advise of significant changes in status of filed cases set for trial, or anticipated need for significant expenditure of WH resources. Additional discussions will take place between the WH district director and the representative of RSOL.

6. Discuss cases in WH field offices and RSOL which are considered sensitive and which may need to be called to the attention of the national offices of WH and SOL.

7. Provide specific information on dates, places and purpose of upcoming strike forces. Discuss role SOL will have in planning and support of strike forces, (for example, subpoenas, TRO's, and training for WH). Plan for subsequent meetings to discuss in more detail.

8. Invite RSOL to WH meetings and discuss RSOL's role in such meetings.

NOT FOR PUBLIC DISTRIBUTION

February 2, 1996

WAGE AND HOUR MEMORANDUM NO. 96-6

MEMORANDUM FOR REGIONAL SOLICITORS
WAGE AND HOUR REGIONAL ADMINISTRATORS

FROM: THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

MARIA ECHAVESTE
Administrator of the Wage and Hour Division

SUBJECT: Joint Review Conference (JRC) Procedures

NOT FOR PUBLIC DISTRIBUTION

Introduction

At the joint Wage and Hour and Solicitor's Office Conference, one of the most important issues addressed was the need to improve the Joint Review Conference (not "Committee") procedures. While the JRC was originally created to encourage the development of cases for litigation, over the years its primary emphasis has been transformed into a process for screening and selecting cases for litigation. Given our continuing need for effective caseload management, improvements to the JRC process are essential for effectively utilizing our resources and furthering the agency's enforcement priorities.

Operating Principles for Joint Review Conferences

1. The individuals who perform the JRC functions are the Regional Wage and Hour Administrator and the Regional Solicitor, or their designated representatives, and in addition, a manager from the District Office, and the Wage and Hour Investigator conducting the investigation.

A representative of the Wage and Hour Regional Office will participate in every JRC unless the Regional Office and the District Office have had a discussion about the case immediately prior to the JRC and the Regional Office elects not to participate. In such cases, the District Office has been given the authority to represent the

Regional Office. We note that any decisions made by the designated regional representatives during the JRC process are the decisions of their regional offices. Any disagreements within WH or RSOL during the JRC process are to be addressed separately by the individual organization. It is not the function of the JRC participants to resolve such controversies.

The formality of the process may vary from region to region and should be decided by those responsible for conducting the JRC's in each region.

2. Every file that may be referred for possible litigation must be JRC'd prior to formal referral to RSOL.

Except as discussed below, no program area is exempt from the JRC process. This includes some matters that traditionally have not been subject to the JRC, e.g., government contract cases and civil money penalty cases. The use of the JRC in all WH programs is essential for preserving our limited resources and assuring that appropriate cases are selected for litigation.

In certain narrow and exceptional circumstances, the Regional Solicitor and the Wage and Hour Regional Administrator may agree at the quarterly meeting that certain cases do not need the formal JRC process. Any such agreement should be reviewed periodically and may be rescinded by either party at any time. In all such cases, the regional office and the district office must consult before the case is transferred to RSOL. Furthermore, in some programs such as H-1A (INRA) and H-1B (IMMACT90) and criminal cases, alternative JRC procedures have been established which should be followed.

The JRC process does not replace or substitute for preparation, after the case has been referred to RSOL, of a written legal analysis that includes a formal recommendation regarding the suitability of a case for litigation. The decision to accept a case at the conclusion of the JRC process does not assure that a case will be accepted for litigation.

3. The JRC process should start as soon as Wage and Hour recognizes it will be seeking a commitment from RSOL to consider the file for litigation and adequate information is available to make such a determination.

Early identification of cases likely to proceed to litigation is critical both to effective litigation strategy as well as to the conservation of resources of Wage and Hour and RSOL. It is especially important to initiate the JRC process promptly and seek RSOL input in the following potential litigation cases:

NOT FOR PUBLIC DISTRIBUTION

--cases involving employers who may be part of a national enterprise;

--cases presenting novel or complex legal issues;

--cases likely to require substantial DOL resources;

--cases presenting "sensitive" enforcement issues;

--any matters requiring immediate legal action (e.g., subpoena, TRO, warrant, bankruptcy filing, etc.); or

--major cases resulting from strike forces.

Such cases may require multiple discussions before a case is formally referred for consideration of litigation. Such cases may also require coordination or authorization by the National Office by Wage and Hour and SOL.

4. The Regional Solicitor is obligated to make a timely decision to approve or decline a case for litigation; and to notify regional WH of that decision as well as the reasons for it.

Once an investigation file is referred by agreement to the RSOL, the analysis and recommendation should be completed in a timely fashion. During the quarterly meetings, the parties will discuss those cases that have been JRC'd and referred but not yet filed.

Other Communication between WH and SOL

Establishing these uniform operating principles for JRC's does not imply that this process provides the only opportunity for communication between Wage and Hour and RSOL. Indeed, throughout the investigation there can and should be a continuing dialogue between RSOL and Wage and Hour concerning case development. These ongoing points of contact may be described as "case development conferences" and are to be distinguished from the "joint review conferences". As noted, the JRC's limited purpose is to determine whether a file will be referred to SOL for litigation consideration.

In contrast, case development conferences provide an opportunity to obtain early guidance on any matters, such as recent case law, evidence acquisition, coverage questions, exemption issues, etc., that may impact on the ultimate decisionmaking about whether to refer a case for litigation consideration. By engaging in these

NOT FOR PUBLIC DISTRIBUTION

ongoing discussions, the parties not only hope to conserve their respective resources, but also to prevent the "surprise" or disappointment that may be a source of morale problems for enforcement personnel in the event that a fully-investigated case is rejected for litigation. Such early communications are especially important in cases which are likely to require substantial resources from Wage and Hour and SOL.

NOT FOR PUBLIC DISTRIBUTION

Chapter 80

POTENTIAL LITIGATION

This chapter contains information that is out of date. Litigation questions should be referred to the RSOL through proper channels.

Source: FOH Modernization revision 717, published 12/05/2016. Substantive revisions made *after* 12/05/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 12/05/2016 can be found here: http://esa/whd/LawsRegs/FOH/revisionchart.

NOT FOR PUBLIC DISTRIBUTION

Table of Contents

80a DEFINITIONS AND CRITERIA

80a00 Litigation and other legal terms defined.
80a01 Potential litigation defined.
80a02 Purpose of potential litigation criteria.
80a03 Criteria for potential litigation.
80a04 Exceptions.
80a05 Falsification or concealment defined.
80a06 Serious child labor violations defined.
80a07 Reasonable excuse defined.

80b COMPLIANCE TYPE ACTIONS

80b00 Nature of compliance type investigations.
80b01 Procedure.

80c CRIMINAL AND BLACKLIST TYPE OF ACTIONS (JOINT REVIEW PROCEDURE)

80c00 Nature of criminal and blacklist type investigations.
80c01 Basic considerations.
80c02 Categories of potential criminal litigation investigations.
80c03 General procedure.
80c04 Procedure: category I investigations.
80c05 Procedure: category II investigations.
80c06 Procedure: category III investigations.

80d THE JOINT REVIEW COMMITTEE

80d00 Composition of the JRC.
80d01 JRC functions and procedure.
80d02 Special litigation criteria exceptions for the consideration of the JRC.
80d03 Action when the JRC disagrees.
80d04 Action by the RA and RSOL.
80d05 Records of the JRC.

80a DEFINITIONS AND CRITERIA

80a00 Litigation and other legal terms defined.

(a) "Litigation," as used in this chapter, means any kind of court or hearing action authorized by the Fair Labor Standards Act (FLSA), the Walsh-Healey Public Contracts Act (PCA), or the McNamara-O'Hara Service Contract Act (SCA) to be initiated by the government, or open to the government pursuant to these acts, except under section 16(b) of the FLSA. It includes:

(1) FLSA criminal action,

(2) FLSA civil action,

(3) criminal contempt action for FLSA violations,

(4) civil contempt action for FLSA violations,

(5) PCA and SCA hearing actions,

(6) administrative subpoena enforcement action, and

(7) defensive action.

(b) "*Amicus curiae*" literally means a friend of the court; hence, in practice, it is a person who although not a party to the action, by leave of court suggests, states and argues, or briefs some matter of law for the court's assistance.

(c) "Bona fide" is defined as in or with good faith, without fraud or deceit, authentic, genuine, and as a bona fide transaction.

(d) "Defendant" or "respondent" is the person defending or denying, and the party against whom relief or recovery is sought in an action or suit.

(e) "Hearsay evidence" is evidence not proceeding from the personal knowledge of the witness, but from the mere repetition of what he or she has heard others say. Such evidence does not derive its value solely from the credit given to the witness, but rests in part on the veracity and competence of some other person; it is, with a few exceptions, inadmissible as testimony.

(f) "Plaintiff" is one who brings a personal action or suit to obtain a remedy for an injury to his or her rights. He or she is the complaining party in any litigation. An employee whom we represent in an action under section 16(c) is not a plaintiff. He or she is, however, in his or her relation to us a complainant or claimant.

(g) "*Prima facie* evidence" is evidence sufficient to raise a presumption of fact or establish the fact in question unless rebutted.

(h) *See* FOH 86b01.

(i) *See* FOH 86b01.

"Stipulation" is the name given to any agreement made by the attorneys engaged on opposite sides of a cause (especially if in writing), regulating any matter incidental to the proceedings

NOT FOR PUBLIC DISTRIBUTION

or trial, which falls within their jurisdiction. Such, for instance, are agreements to extend the time for pleading, take depositions, waive objections, admit certain facts, and/or continue the cause.

80a01 **Potential litigation defined.**

Potential litigation investigations are those which, pursuant to the instructions in this chapter, shall be considered for civil, which includes PCA hearings action, or criminal litigation.

(b) (7)(E) [redacted]

80a02 **Purpose of potential litigation criteria.**

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]

80a03 **Criteria for potential litigation.**

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]

  [redacted]

  - [redacted]
  - [redacted]

    [redacted]
  - [redacted]

    [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

- [redacted]

  [redacted]

  - [redacted]
  - [redacted]
  - [redacted]

    (b) (7)(E)

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

80a04 **Exceptions.**

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

80a05 **Falsification or concealment defined.**

Falsification or concealment is deemed to be present when it is found that the employer has used any practice or device to create a false impression as to the wages paid, hours worked, children employed, or other aspects of compliance, or has misrepresented a material fact in obtaining a certificate under section 14 of the FLSA. Examples of falsification or concealment are:

(1) Recording wages as paid that in fact have been returned or kicked back to the employer

(2) Recording, causing, or permitting an employee to record hours or wages incorrectly

(3) Presenting false receipts or other false evidence of wage payment

(4) Concealing underage minors or omitting their names from the payroll and personnel records

(5) Misrepresentation of the facts as to the availability of experienced workers

(6) Concealing or misrepresenting facts regarding coverage or non-exemption

(7) Other types of entries concealing monetary or child labor violations

(8) Attempting as to any material fact to mislead a WHI or cause others to mislead him or her during the course of an investigation

(b) Falsification is more than mere inaccuracy in the records. To constitute falsification that could provide the willfulness for legal action for FLSA and/or PCA violations, the incorrect records must be coupled with an intention to create a false impression as to compliance with the monetary or child labor provisions of these laws and regulations issued thereunder. Where the WHI finds that inaccurate entries were not made for the purpose of creating such a false impression, but simply through carelessness or because the employer honestly did not realize the importance of accurate records, falsification is not present.

(c) Where a practice or device is used to create a false impression for other purposes and substantial violations of the monetary or child labor provisions of the FLSA or the PCA are thereby obscured, the investigation will be considered and handled as if there was a deliberate attempt to mislead as to compliance with the FLSA or the PCA. Examples of such situations are attempts to mislead as to compliance with state labor laws or regulations, or the terms of a union contract.

80a06 **Serious child labor violations defined.**

(a) The types of FLSA and/or PCA child labor violations considered to be serious are set forth below:

(1) The oppressive or knowing employment of extremely young minors.

(2) Widespread oppressive or knowing employment of underage minors. Ordinarily, such employment will be considered to be widespread if more than five underage minors are currently employed, or during the year preceding the investigation, the employer has employed more than seven underage minors.

(3) Any employment of an underage minor with knowledge, either actual or constructive, of the minor's age if the employer also actually knew or reasonably should have known the legal requirements.

80a07 **Reasonable excuse defined.**

NOT FOR PUBLIC DISTRIBUTION

Reasonable excuse depends upon the facts found in each individual investigation and the employer's explanation as to the cause or reasons for the violations. Consideration must be given to the educational level and business experience of the employer, and from the standpoint of the length of time the FLSA and the PCA have been in effect, and the extent of the employer's efforts to acquaint himself or herself with his or her responsibilities. Generally, a reasonable excuse will be deemed to exist if the employer has made an honest mistake as to the coverage of his or her employees, application of an exemption, what constitutes hours worked or the regular rate, nature of the employment relationship, or application of a special order or regulation, such as any section of Child Labor Reg. 3 or the provisions of a hazardous order. For example, an employer whose violations resulted from his or her reliance on advice from an attorney or labor relations consultant, obtained in good faith, may have a reasonable excuse.

80b COMPLIANCE TYPE ACTIONS

80b00 Nature of compliance type investigations.

(a) Compliance type investigations are potential litigation investigations that do not contain any of the elements indicating criminal action, such as:

(1) Refusal cases, where the employer either will not agree to comply in the future or will not agree to pay the back wages and liquidated damages required by the PCA. These are the cases that meet the criteria in FOH 80a03(e)(1) -(3).

(2) Investigations involving unreliable future compliance promises where the employer's course of conduct, while not showing he or she should be punished criminally, does indicate his or her promise of future compliance cannot be accepted at face value.

80b01 Procedure.

(a) The investigations described in FOH 80b00 are compliance type investigations in which FLSA civil action or PCA hearing action is indicated. (b) (7)(E) [redacted]

[redacted]

80c CRIMINAL AND BLACKLIST TYPE ACTIONS (JOINT REVIEW PROCEDURE)

80c00 Nature of criminal and blacklist type investigations.

Criminal and blacklist type investigations are those that have criminal aspects, where the employer's past course of conduct indicates he or she should be punished (*i.e.*, investigations meeting the criteria of FOH 80a03(d)).

NOT FOR PUBLIC DISTRIBUTION

80c01 **Basic considerations.**

The development and consideration of investigations for legal action involve many problems that are the purpose of this joint review procedure to solve or minimize. The problems concern the efficient use of time at all levels, saving of travel and other costs, availability of needed evidence, and satisfactory disposition of investigations. In attempting to solve these problems, (b) (7)(E) [redacted]

80c02 **Categories of potential criminal litigation investigations.**

- [redacted] (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

80c03 **General procedure.**

- [redacted] (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

- (b) (7)(E)
-
-
-
  -
  -
  -

80c04 **Procedure: category I investigations.**

- (b) (7)(E)
-

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

80c05 **Procedure: category II investigations.**

(b) (7)(E) [redacted]

80c06 **Procedure: category III investigations.**

(b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

80d THE JOINT REVIEW COMMITTEE

80d00 Composition of the JRC.

The JRC shall consist of two members, one of whom shall be designated by the RA and one by the RSOL.

80d01 JRC functions and procedure.

(a) The JRC shall consider, either in an informal clearance or contact or by a formal review of the investigation file, every investigation that meets the criteria for potential criminal litigation. Any special litigation procedure ends if and when, in the informal clearance authorized in FOH 80c, the JRC rejects the investigation for any type of litigation. All other investigations that meet the potential litigation criteria must be submitted for the formal consideration of the JRC, and are subject to the procedures prescribed in the following sections.

(b) The joint review is not to be a rough screening process, and the JRC shall not merely decide whether the investigation has the minimum requirements for litigation. The duty of the JRC is to review and analyze the investigation, and based upon all the facts, make a definite recommendation to the RA as to the procedure (*i.e.*, administrative, civil, or criminal) that will best effectuate the purposes of the applicable act in the particular instance. Where there are multiple remedies available, the JRC shall indicate that fact to the RA. It shall then indicate its order of preference as to the election of the remedies, and shall set forth its reasons for so deciding, because ordinarily, no more than one remedy will be pursued in a particular investigation. The JRC shall indicate which remedy it considers most likely to promote enforcement of the law in the region. It may also make such specific recommendations concerning the further development of the investigation as it may deem appropriate.

80d02 Special litigation criteria exceptions for the consideration of the JRC.

(a) As stated in FOH 80d01(b), the JRC shall make its recommendations in the light of all the facts revealed by the investigation. However, investigations shall not be approved for litigation when:

(1) litigation would be contrary to the policy of the DOL;

(2) it appears from the investigation report that the available evidence is insufficient to present a reasonable probability of successful litigation; or

(3) in the case of contemplated criminal action, the investigation raises a question of law so doubtful as to be improper for testing in a criminal prosecution.

NOT FOR PUBLIC DISTRIBUTION

(b) Whether a potential litigation investigation comes within one of the categories under FOH 80d02(a) above shall be determined by the JRC, and not by the WHI or his or her DD.

80d03 **Action when the JRC disagrees.**

If the members of the JRC are unable to agree upon the disposition of a particular potential litigation investigation, they will report the matter to the RA for decision.

80d04 **Action by the RA and RSOL.**

(a) After the JRC has considered an investigation, it shall refer the investigation file by formal memorandum to the RA with appropriate recommendations and the reasons therefor. The RA shall then decide what procedure, administrative, civil, or criminal, he or she believes should be followed in disposing of the investigation. In the event his or her decision is not in agreement with the JRC's recommendations, he or she shall insert a memorandum in the investigation file giving his or her reasons for disagreement, in order that the basis for his or her decision shall be a matter of record. In any such case where the JRC has recommended litigation and the RA feels litigation is not appropriate, he or she shall consult with the RSOL before reaching his or her decision. Copies of his or her memorandum shall be furnished to the RSOL and the JRC for its future guidance, and two copies shall be forwarded to the Office of Policy. These shall be referred to the Administrator of the WHD (Administrator) and the solicitor of labor (SOL) for informational purposes.

(b) When the RA determines that litigation is desirable, he or she shall forward the investigation file by formal memorandum to the RSOL. If the RSOL is of the opinion that the investigation file is legally sufficient, he or she will retain it for handling, or will furnish guidance and advice, if any further preparation is required, in accordance with the SOL's instructions. If he or she is of the opinion that the investigation file is not legally sufficient and that the defects cannot be cured through reasonable further development, he or she shall return it to the RA with a formal memorandum stating his or her reasons. In investigations so rejected for litigation, a copy of the RSOL's memorandum shall be furnished to the JRC for its future guidance, and for informational purposes, two copies shall be forwarded to the SOL (one of which will be referred by the SOL to the Administrator). In the event of disagreement between the RA and the RSOL, the RA shall refer the investigation file to the Administrator for joint consideration by the Administrator and the SOL.

80d05 **Records of the JRC.**

The JRC shall designate a secretary to keep records showing the investigations referred to or considered by it, and their disposition, and such other records as the JRC may direct or as are required for statistical reports.

NOT FOR PUBLIC DISTRIBUTION

Chapter 81

GENERAL LITIGATION INVESTIGATION PROCEDURES

This chapter contains information that is out of date. Litigation questions should be referred to the RSOL through proper channels.

Source: FOH Modernization revision 718, published 12/05/2016. Substantive revisions made *after* 12/05/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 12/05/2016 can be found here: http://esa/whd/LawsRegs/FOH/revisionchart.

NOT FOR PUBLIC DISTRIBUTION

Table of Contents

81a THE NATURE AND REQUIREMENTS OF LITIGATION

81a00 Potential litigation development: an extension of general investigation procedures.
81a01 Evidence in general.
81a02 Rules of evidence.
81a03 Enforcement remedies available to the Wage and Hour Division.

81b LITIGATION POLICY

81b00 (Reserved.)
81b01 Criminal prosecution policy.
81b02 Good faith defense.
81b03 Civil injunction policy.

81c THE POTENTIAL LITIGATION INVESTIGATION REPORT

81c00 Elements of the potential litigation investigation report.
81c01 Coverage.
81c02 Additional coverage information in child labor investigations.
81c03 Violations.
81c04 Additional violation information in child labor investigations.
81c05 Willfulness.
81c06 Additional willfulness information in child labor investigations.

81d GENERAL LITIGATION INVESTIGATIONS REPORT

81d00 General content.
81d01 Information common to all litigation investigation reports.
81d02 Employer conference at the close of potential litigation investigations.

81a THE NATURE AND REQUIREMENTS OF LITIGATION

81a00 Potential litigation development an extension of general investigation procedures.

(a) The development of potential litigation investigations is based upon an elaboration of the general investigation procedures. The reporting of potential litigation investigations is based

upon the same four major portions of a regular investigation report, namely: coverage, exemptions, status of compliance, and disposition. It is true that these four topics will undoubtedly be expanded where necessary; yet, if the potential litigation activity is ruled out, the investigation report will be ready for disposition in accordance with FOH 53.

(b) All of the discussions that follow in this chapter and the succeeding chapters on litigation are not to be regarded as rigid requirements for each and every potential litigation report. These chapters contain many guides and suggestions that may be followed whenever problems arise. It is readily recognized that oftentimes only one or two of the guides need be followed, and the basic information will be obtained for potential litigation. In other cases, several guides or suggestions may have to be tried in order to obtain the necessary data.

81a01 **Evidence in general.**

(a) No one can tell in advance whether a trial will become necessary in a litigated matter. Potential litigation investigations must be developed on the assumption that a trial will result.

(b) Close contact between the Wage and Hour Investigator (WHI) and a member of the office of the solicitor of labor (SOL) is desirable in connection with all investigations developed for litigation. After completion of the investigation, an attorney must decide whether the investigation has been sufficiently developed to justify the filing of some form of litigation. Discussion of problems in potential litigation investigations will eliminate investigation time that may be spent in obtaining unnecessary data, and will also assure the filing and successful conclusion of court actions.

(c) During the course of a trial, the alleged violations must be proved. This is accomplished by producing evidence, including testimony of witnesses and documentary matters. The nature of the evidence required may vary from case to case, which again reveals the need of close liaison between the WHI and the SOL. While the evidence requirements will vary among cases, certain basic rules of evidence are applicable to all types of litigation. The WHI, during the course of his or her investigation, is cautioned to keep in mind the rules of evidence discussed below. Not all evidence may be usable during a trial. In some instances, it may be decided not to use certain evidence. Moreover, other evidence, although desirable to support the claim of violations, may be excluded because it is contrary to the rules of evidence.

81a02 **Rules of evidence.**

(a) **Hearsay**

A witness normally may testify to what he or she knows himself or herself and not what he or she has heard from others. With limited exceptions, all other evidence is regarded as hearsay and is not introducible into evidence over the objection of opposing counsel. For example, a witness may testify that in a conversation that he or she had with his or her employer, the employer advised him or her that he or she paid only straight-time for overtime hours. If the witness had no conversations of this nature, but attempted to testify that another employee told him or her that the employer had stated that he or she paid only straight-time, that testimony could be objected to as hearsay evidence. The employee may testify only to conversations he or she had with the employer, or to statements made by or to the employer in the employee's presence. Interview statements in which the employee refers to what other employees told him or her are of limited value. They may serve to indicate others whom the

NOT FOR PUBLIC DISTRIBUTION

WHI may attempt to interview, but they have no evidentiary value. Non-evidentiary matter should be kept to a minimum in interview statements.

(b) Best evidence

The contents of books and similar documents can best be established at the trial by the examination of the books of original entry and the original of other records themselves. Thus, under the best evidence rule, transcripts from books and records (*i.e.*, secondary evidence) may not over objection be offered into evidence at a trial unless it is first established that the originals cannot be obtained. It is, therefore, essential that the investigation file clearly indicate the nature and type of pertinent records, their location, and probable custodian. The WHI should always obtain clear, complete transcripts as required on a per case basis. If the original records are not available at the time of the trial, the transcripts made by the WHI can be used in lieu of the originals.

(c) Employer admissions

If an employer in discussions with a WHI makes any admission with respect to violations, willfulness, and the like, such admissions may be introduced into evidence at a trial. If admissions are obtained, diary entries or memoranda to the file covering the details should be made as soon as possible after the conversation with the employer or employee. A permanent record will then be available from which the WHI can refresh his or her recollection, if called upon to testify at the trial.

(d) Husband and wife communications

Certain communications between husband and wife are privileged, and neither husband nor wife may testify with respect thereto. Note, however, that no such privilege exists between other relations, such as children, uncles and aunts, etc.

(e) Relevancy

Evidence offered at a trial must be relevant and material to the alleged violations. Extraneous matters, wherever possible, should be kept to a minimum in interview statements. Unless the information appears to be relevant and material to the issues involved in the investigation, the interview statements should not be encumbered with them.

(f) Discovery procedures

In all cases, it is necessary to establish the alleged violations. In civil cases, it is possible to obtain certain additional information by use of discovery procedures after the litigation has been undertaken. No comparable procedure is available with respect to criminal cases. For example, if coverage becomes an issue in a pending civil injunction action, the defendant's deposition may be taken before trial by an attorney in an attempt to establish coverage through the testimony of the defendant. This cannot be done in a criminal case. All aspects of the investigation should be fully developed before the investigation is submitted to the SOL.

81a03 <u>Enforcement remedies available to the Wage and Hour Division.</u>

(a) Criminal prosecution

NOT FOR PUBLIC DISTRIBUTION

Section 16(a) of the Fair Labor Standards Act (FLSA) provides for the enforcement of the act by criminal prosecution as follows:

"Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than 6 months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under the subsection."

(b) Civil action

Section 17 of the FLSA provides for enforcement of the act by civil action as follows:

"The district courts…shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947)."

(c) Other remedies available to the Wage and Hour Division

The Wage and Hour Division (WHD) has recourse to various other forms of legal action through such proceedings as criminal contempt, civil contempt, and conspiracy actions. Under the Walsh-Healey Public Contracts Act (PCA), the enforcement measures are provided in sections 2, 3, and 5.

81b LITIGATION POLICY

81b00 (Reserved.)

81b01 Criminal prosecution policy.

(a) It is the WHD's policy to treat all inexcusable or willful violations of the FLSA and the PCA as criminal or potential blacklist. *See* FOH 80a. The joint review committee (JRC) will not accept an investigation for criminal prosecution unless the evidence is such that there is a reasonable probability that a conviction will be obtained. (b) (7)(E) [redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

81b02 **Good faith defense.**

The WHD will consider violations excusable if the employer can establish that he or she relied upon or acted in good faith, and in conformity with information given to him or her by a WHI, other responsible representative, or the Federal Government, even though the representative is not an agency within the meaning of section 10 of the Portal-to-Portal Act of 1947 (PA) and may have misinformed the employer.

81b03 **Civil injunction policy.**

- [redacted] (b) (7)(E) [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

81c **THE POTENTIAL LITIGATION INVESTIGATION REPORT**

81c00 **Elements of the potential litigation investigation report.**

A potential litigation investigation report shall cover the elements of coverage, exemptions, violations, and willfulness. (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted] The report shall be complete enough to be closed without further investigation work in the event that legal action is not taken.

81c01 **Coverage.**

(a) The discussion of coverage in a potential litigation report shall show:

(1) The employees involved in the violations are engaged, and the manner and extent to which they are engaged in interstate commerce, in the production of goods for interstate commerce, or in a closely related process or occupation directly essential to the production of goods for interstate commerce.

(2) The employer's estimate of the extent of the establishment's engagement in interstate commerce or the production of goods for interstate commerce. (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

(3) Whether segregation of interstate from intrastate work is possible, and, if so, in what manner.

81c02 **Additional coverage information in child labor investigations.**

(a) In investigations in which child labor violations are found that meet the criteria for potential litigation, or in which civil action is to be taken, where coverage is based on the fact that the minors have been employed in or about an establishment from which goods have been shipped in interstate commerce, and not on the fact that the minors have engaged in interstate commerce or in the production of goods for interstate commerce, (b) (7)(E) [redacted]

- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

81c03 **Violations.**

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

81c04 **Additional violation information in child labor investigations.**

(a) In child labor potential criminal as well as civil action investigations, (b) (7)(E) [redacted]

- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

81c05 **Willfulness.**

- (b) (7)(E) [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

81c06 **Additional willfulness information in child labor investigations.**

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]

81d **GENERAL LITIGATION INVESTIGATION REPORT**

NOT FOR PUBLIC DISTRIBUTION

81d00 **General content.**

Investigations developed for litigation usually require more detailed materials, evidence, and reports than investigations that are to be closed administratively. The evidence that may be required in a particular litigation investigation, and the manner of presenting it, will be determined in conferences between the attorney responsible for litigating the investigation and the district director (DD) or the WHI. The following subsections, therefore, are only indicative of the types of evidence the WHI may be expected to develop in preparing the investigation for litigation.

81d01 **Information common to all litigation investigation reports.**

(a) There is certain information that is required in all legal cases, no matter what specific form it is to take. It establishes definitely the persons or entities against whom the action is being taken, and further supplies the attorneys with a general picture of the establishment, its operations, and its business status. (b) (7)(E) [redacted]

(1) (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

- (b) (7)(E)
  - [redacted]
  - [redacted]
  - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]
    - [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

- (b) (7)(E)
  -
  -
  -
  -
  -
  -
-
  -
  -

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

81d02 **Employer conference at the close of potential litigation investigations.**

(b) (7)(E)

NOT FOR PUBLIC DISTRIBUTION

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

Chapter 82

CRIMINAL LITIGATION PREPARATION

This chapter contains information that is out of date. Litigation questions should be referred to the RSOL through proper channels.

Source: FOH Modernization revision 725, published 12/05/2016. Substantive revisions made *after* 12/05/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 12/05/2016 can be found here: http://esa/whd/LawsRegs/FOH/revisionchart.

Table of Contents

82a ADDITIONAL INFORMATION REQUIRED

82a00 Proof beyond a reasonable doubt.

82b COVERAGE

82b00 Interstate commerce.
82b01 General evidence of interstate commerce.
82b02 Specific evidence of interstate commerce.
82b03 Proof of interstate commerce in child labor litigation investigations.
82b04 Other required information.

82c EXEMPTIONS

82c00 Exemptions in general.

82d STATUS OF COMPLIANCE

82d00 Status of compliance in general.
82d01 Reporting of FLSA violations.
82d02 FLSA section 6(a)(1) violations.
82d03 FLSA section 7(a) violations.
82d04 FLSA sections 12(a) and 12(c) violations.
82d05 Certified copy of birth certificate and authentication.
82d06 FLSA sections 11(c) and 15(a)(5).
82d07 Employee interviews and statements.
82d08 Technique of interviewing witnesses.
82d09 Interview statement content.
82d10 Compensability of activities.
82d11 Transcripts and records.
82d12 FLSA section 15(a)(1) violations.
82d13 Willfulness.
82d14 Employer explanations or excuses.
82d15 General evidence of willfulness.
82d16 Specific evidence of willfulness.
82d17 Willfulness in child labor litigation investigations.
82d18 Good faith defenses.
82d19 Summarization.

NOT FOR PUBLIC DISTRIBUTION

82d20 Witness chart.
82d21 Trial assistance.

82e OTHER CRIMINAL TYPE LITIGATION INVESTIGATIONS

82e00 Additional investigation information required for criminal contempt action.
82e01 Additional investigation information required for conspiracy action.
82e02 Additional investigation information required for joint criminal action and blacklist hearing investigation report.
82e03 Additional investigation information required for false receipt cases.
82e04 False information.

82a ADDITIONAL INFORMATION REQUIRED

82a00 Proof beyond a reasonable doubt.

(a) (b) (7)(E) [redacted] The courts require that the Wage and Hour Division (WHD) prove beyond a reasonable doubt that violations occurred, and that they were serious and willful in nature. It is for this reason that criminal cases must be painstakingly prepared and must be complete in all respects.

82b COVERAGE

82b00 Interstate commerce.

(a) (b) (7)(E) [redacted] For criminal action, it is necessary to establish that the employees are engaged either in the production of goods for interstate commerce, or in interstate commerce, as an essential element in establishing the jurisdiction of the court.

(b) The information contained in the litigation investigation report under the heading of "Interstate Commerce" should not be confused with the heading labeled "15(a)(1) Violations." Under section 15(a)(1) of the Fair Labor Standards Act (FLSA), specific counts are selected as particular examples of shipment, delivery, or sale in interstate commerce of hot goods to be included in the criminal information or indictment. These counts must be proved beyond a reasonable doubt.

(c) Under the heading of "Interstate Commerce" shall be included all information regarding coverage as a whole. The term "interstate commerce" in the following sections includes also the production of goods for interstate commerce.

82b01 General evidence of interstate commerce.

(a) Certain evidence showing the overall percentage of interstate commerce will constitute general proof that the establishment is covered by the FLSA. (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

82b02 **Specific evidence of interstate commerce.**

(a) In addition to the general picture of interstate commerce obtained through the overall percentage, it may be necessary to obtain such additional facts as would indicate that coverage is clear and not subject to any variation or segregation, such as:

(b) (7)(E)

[redacted]

NOT FOR

(b) (7)(E)

[redacted]

(b) Where exhibits have been prepared as sustaining evidence, they should be listed under the particular item they verify.

82b03 **Proof of interstate commerce in child labor litigation investigations.**

(b) (7)(E)

[redacted]

82b04 **Other required information.**

(b) (7)(E)

[redacted]

82c **EXEMPTIONS**

82c00 **Exemptions in general.**

(b) (7)(E)

[redacted]

NOT FOR DISTRIBUTION

(b) (7)(E) [redacted]

82d STATUS OF COMPLIANCE

82d00 Status of compliance in general.

(b) (7)(E) [redacted]

82d01 Reporting of FLSA violations.

(a) The information about violations should be included in the following manner and form. All of the FLSA provisions violated should be listed in the captions as: 6(a)(1), 7(a), 12(a), 12(c), 15(a)(1), 15(a)(3), and 15(a)(5) (including 11(c)). Thereafter, using each specific section as a subheading, the exact manner in which that section was violated should be described.

(b) All of the violations shall be treated individually by type, qualified as to employees affected, described as to period of time over which they are spread, and explained as to seriousness. It is important for the WHI to indicate the earliest and the latest date of violations as to each section violated. The sustaining evidence, both documentary and employees' statements, shall likewise be listed under each type in the form of properly numbered exhibits.

82d02 FLSA section 6(a)(1) violations.

(a) Under this heading each specific type of violation shall be separately described as follows:

(1) Hourly rate employees whose fixed rates were less than the required minimum

(2) Salaried employees working for fixed wages which, when divided by the actual hours worked, yield hourly rates below the required minimum

(3) Pieceworkers who are paid for only what they produce at the set piecework rates, and whose earnings, when divided by the actual hours worked, result in hourly rates which are below the minimum

(4) Activities which are performed before or after the normal work day, such as pasting work tickets, correcting mistakes, and the like, which is time that when added to regular productive work results in minimum wage violations

(5) Any other way in which the minimum wage provisions were violated (*e.g.*, illegal deductions and so forth)

The above examples are simply meant to be suggestions and are not meant to be all-inclusive.

(b) Where the required minimum is affected by learner certificates, wage orders, and the like, the violations arising therefrom shall be treated as separate types under section 6(a)(1) of the FLSA and referred to specifically.

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

82d03 **FLSA section 7(a) violations.**

(a) Under this heading, each specific type of violation shall be separately described as follows:

(1) Hourly rate employees who worked in excess of the statutory maximum straight-time hours, and were paid only their fixed hourly rates of pay for the overtime hours or at rates less than statutory overtime

(2) Salaried employees working in excess of the statutory maximum with no extra compensation or at rates less than statutory overtime

(3) Pieceworkers who have worked over 40 hours for straight piecework rates

(4) Production bonuses and other guaranteed bonuses not included in computing statutory overtime

(5) Invalid fixed workweek salary arrangements or invalid Belo or Belo-type salary arrangements

(6) Where the employer claims to have given prior or subsequent time off for overtime work

(7) Other specific type of violations, such as not including all hours considered under the FLSA or Walsh-Healey Public Contract Act (PCA) as hours worked, etc.

The above examples are simply meant to be suggestions and are not meant to be all-inclusive.

(b) (7)(E)

[redacted]

82d04 **FLSA sections 12(a) and 12(c) violations.**

(a) Under the heading of FLSA sections 12(a) or 12(c), whichever is the section being proceeded under, the violations should be described as follows:

(1) Violations of the basic *16-year minimum*, involving the employment of persons under 16 years of age in manufacturing, processing, or mining; in workrooms or workplaces where goods are manufactured, processed, or mined; as public messengers; in operating power driven machinery; or in hazardous occupations.

(2) Violations of Child Labor Reg. 3, involving the employment of persons under 16 years of age, in permissible occupations, beyond the daily or weekly limits specified.

(3) Violations of a hazardous occupations order (HO), involving the employment of persons under 18 years of age in prohibited occupations; also setting forth the name of the minor, the specific HO violated, a description of the minor's occupation involved in the HO violated and the specific periods of violations under each HO.

NOT FOR PUBLIC DISTRIBUTION

(b) If the violations are of section 12(a) of the FLSA, it will be necessary to correlate the information as to oppressive employment with data concerning production, removal from the establishment, and illegal shipment or delivery for shipment.

82d05 **Certified copy of birth certificate and authentication.**

(a) The sustaining documentary evidence in a section 12(a) or section 12(c) violation is a certified copy of the minor's birth certificate. When, at the request of the attorney handling the litigation, it is necessary to buy a certified copy of a birth certificate for an underage minor involved in a violation, the WHI shall purchase the copy from the appropriate bureau of vital statistics and claim reimbursement for the purchase on a voucher, Standard Form 1034. This voucher shall be submitted to the RSOL through the administrative assistant in the regional office.

(b) Likewise, in those rare instances where such authentication is required, the WHI shall be responsible for obtaining authentication from the appropriate secretary of state that the official who issued the certified copy of the birth certificate has been authorized so to do.

(c) In a few cases in the past, authentication from the secretary of state has been required when the minors, whose births were being verified, were born in a state other than the state where the violations took place. In order to have the certified copy of a birth certificate authenticated, the copy of the birth certificate shall be sent with an explanatory covering letter to the secretary of state of the state where the birth certificate was issued.

(d) Authentication of certified copies of birth certificates shall not be obtained unless expressly requested by the attorney handling the litigation. If it is necessary to have the copy of any birth certificate authenticated, the following letter may be used. The price for authentication varies from state to state, and therefore, the letter provides for payment after billing from the secretary of state.

(e) **Sample letter requesting authentication**

NOT FOR PUBLIC DISTRIBUTION

(*e*) *Sample letter requesting authentication.*

The Honorable
The Secretary of State
State of ----------

DEAR SIR:

Enclosed is a certified copy of birth certificate No. ---------- (are certified copies of birth certificates Nos. ----------) which we desire to have authenticated for use as evidence in Federal court proceedings now pending in another State.

We desire that you authenticate this document (these documents) by stating that it is (they are) certified by an officer of the State having custody of the records in question.

We will appreciate receiving the above at your earliest convenience and shall be glad to arrange payment of any charges which are made for this service. For your convenience, we are enclosing an addressed envelope, which requires no postage, for a reply.

Very truly yours,

Regional Director.

(f) When writing a secretary of state, the WHI shall enclose a return envelope addressed to the regional administrator (RA) or to the official designated by the RA to be responsible for this correspondence.

82d06 **<u>FLSA sections 11(c) and 15(a)(5).</u>**

(a) Section 15(a)(5) of the FLSA makes it unlawful for any person "to violate any of the provisions of Section 11(c)..., or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect." Evidence concerning false records must be accurate, explicit, and conclusive in all respects.

(b) In criminal cases, there are often found violations of the record-keeping provisions which should be treated as violations of section 11(c) of the FLSA rather than section 15(a)(5). These are generally excusable omissions rather than deliberate manipulations. Any excusable recordkeeping violations shall be listed under section 11(c).

(c) There shall be included under the heading of section 15(a)(5) (b) (7)(E) [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

82d07 **Employee interviews and statements.**

(a) The manner of obtaining employee interviews, the content thereof, and the need for such interviews have already been discussed in FOH 52d and are equally applicable here. However, to establish violations and willfulness in litigable matters, the detail and content of the employee interview becomes much more important. (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

(b) It is suggested that the WHI, wherever possible and before recording an employee's statement, develop the prospective content of the interview statement that the employee will be asked to sign. In that way, a more orderly chronology of facts, dates, and events can be secured.

82d08 **Technique of interviewing witnesses.**

(a) When interviewing witnesses in the preparation of an investigation for litigation, the WHI shall keep in mind the following:

(1) The witness should be put at his or her ease before the actual questioning is begun.

(2) Information should be obtained tactfully.

(3) The pay or time records, or any abstract therefrom made for the witness, may be used in obtaining statements from him or her as to specific hours worked, wages received, and dates.

(4) The facts sought should be approached from the general to the specific, laying the groundwork first, and then covering the detailed points.

(b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

(8) The witness shall be given his or her statement to read before he or she is requested to sign it.

(9) The witness, when signing his or her statement, should also affix the date in his or her own handwriting.

(10) If the statement takes more than one page, each page should be signed and dated separately.

(11) Wherever a correction is made on the statement, the witness should initial the change.

(12) The WHI and the stenographer, if one is present, should witness the witness' reading of the statement and his or her signature.

(13) The witness' own language and vernacular should be followed as closely as possible in setting down the statement.

(14) Pertinent personal records of the witness should be incorporated by reference into his or her statement.

(15) All personal records, or a copy thereof, of value to the investigation that the witness may have should be attached to his or her statement.

(16) The witness should be shown every courtesy and his or her constitutional rights carefully respected.

(17) Language or tactics toward the witness that will discredit the WHD should never be used, no matter what the provocation.

(18) No reward or promise of any back wages or other material benefits should be offered or made.

(19) The locale of the interview should be such that the WHI will not be subject to criticism.

(b) (7)(E)

[redacted]

82d09 **Interview statement content.**

(a) It is suggested that the employee interviews be broadened in a litigated investigation, in accordance with the following outline, to obtain specific information:

(1) Name and address of employee

(2) Occupation or occupations during violation periods

(3) Period or periods of employment

NOT FOR PUBLIC DISTRIBUTION

(4) Method of payment and amount earned, indicating any variations during violation periods

(5) Daily and weekly hours during non-violation weeks

(b) (7)(E)

[redacted]

c. If possible, the employee should identify some specific violation weeks. For example, the employee may recall a special event that firmly fixed in the employee's mind a particular week during which violations can be established.

d. The foregoing technique is equally useful in establishing monetary violations, as well as falsification, if present.

e. If minors were employed in violation of sections 12(a) and/or 12(c), obtain all specific data on age, employment periods, and occupations.

f. Incorporate references to any corroborative evidence that the employee may have, such as his or her own personal records.

(7) Willfulness

(b) (7)(E)

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

(8) All discrepancies in statements or between statements should be resolved

(9) Give an evaluation of the employee as a prospective witness, but attach the evaluation as a separate sheet

The above examples are suggestions and are not meant to be all-inclusive.

82d10 Compensability of activities.

(a) Violations upon which legal action is predicated must be considered in connection with section 4 of the Portal-to-Portal Act of 1947 (PA). Generally, cases involving real questions of PA activities are not prosecuted criminally.

82d11 Transcripts and records.

(a) Whenever possible, full transcripts of time and payroll records should be obtained for all employees who are found to be in substantial violation, as well as those who will be used to show the nature and extent of the violations. The WHI should not make any notations or in any other manner mark up the transcripts, since they may be used in the place of the books of original entry, if such books are not available.

(b) (7)(E)

[redacted]

82d12 FLSA section 15(a)(1) violations.

DISTRIBUTION

(a) Usually included among the counts in the criminal indictment or information is a so-called commerce count designed to show that the establishment shipped in interstate commerce in violation of section 15 (a)(1) of the FLSA goods that were produced in violation of the FLSA.

(b) If a trial results, it may become necessary to prove coverage throughout the alleged violation periods. In addition, the attorney preparing the criminal information may desire to use violation periods different than those suggested by the WHI. Where the interstate commerce is direct, a representative number of larger shipments to customers in other states of the type of goods produced in violation should be listed covering the entire period of violation. It is desirable to obtain a record of one such shipment during each week of violation. (b) (7)(E) [redacted]

[redacted]

(d) Records pertaining to shipment, that can be located in the usual business establishment, are listed below. These sources are not all-inclusive, and the (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

NOT FOR PUBLIC RELEASE

(b) (7)(E)

[redacted]

(e) Where coverage exists by virtue of the receipt of goods from extra-state sources, the records listed below are of particular interest, but may not be the only records useful in the particular investigation in establishing interstate commerce.

- [redacted] (b) (7)(E)

  [redacted]

- [redacted]

  [redacted]

- [redacted]

  [redacted]

- [redacted]

- [redacted]

- [redacted]

- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

82d13 **Willfulness.**

Since criminal actions require proof of deliberate intent, it is necessary for the WHI to prepare and include in his or her litigation investigation report evidence to demonstrate this fact. The proof of willfulness is vital to the successful prosecution of all criminal actions. The sustaining evidence should, therefore, be comprehensive and accurate. The WHI should review and consolidate the information discussed in principals and investigation history in FOH 81d01.

82d14 **Employer explanations or excuses.**

(a) The difficulties involved in the ascertainment from external evidence of what amounts to a state of mind are very great, and as to this phase of the investigation work, the WHI will be called upon for the utmost in judgment, discretion, tact, and diplomacy.

(b) At the close of the investigation, in connection with the general discussion of violations with the employer, inquiry should be made as to what, if any, excuse or explanation the employer has to offer. He or she should be given a chance to tell his or her side of the story. Once the opening has been made, however, (b) (7)(E) [redacted] In other words, the employer should be allowed to present all of the extenuating circumstances that he or she can think of, but the (b) (7)(E) [redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E) [redacted]

82d15 **General evidence of willfulness.**

(a) Under the heading of "General, willfulness" shall be included all evidence showing that the establishment or its principals had knowledge of the provisions of the FLSA, such as:

(b) (7)(E) [redacted]

82d16 **Specific evidence of willfulness.**

(a) Under the heading "Specific willfulness" should be included all evidence that would prove that a specific individual either directed the committing of violations, or had definite knowledge of them. This would include:

(b) (7)(E) [redacted]

82d17 **Willfulness in child labor litigation investigations.**

(b) (7)(E) [redacted] Any inquiries by, and discussions with, the employer during the investigation as to the employment of the minors in question shall be reported.

82d18 **Good faith defenses.**

(a) The types of investigation of good faith defenses that must be made will necessarily vary greatly in each particular investigation in which the defenses exist. Some of the factors involved will be:

(1) Precise identification or reconstruction or verification of the erroneous advice

(2) Establishment of the date on which the advice was given and the dates violations occurred, in order to determine whether the reliance was retroactive

(3) Establishment of whether the employer actually proceeded in conformity with the advice

(4) Investigation as to whether any subsequent advice was received from the same or other sources that would have revealed the incorrect nature of the original instruction, or at least should have occasioned an inquiry from the employer to clarify the contradiction

Obviously, some of these factors will not exist in many litigation investigations involving good faith questions, and there may be many other problems encountered that are not suggested in the foregoing.

82d19 **Summarization.**

(a) Under the general heading of "Status of Compliance," the WHI shall bring together all of the factual information for his or her narrative report to show the extent and nature of the violations, as well as the basis for which criminal action is being recommended. This part of the narrative report shall include the discussion of the violations; willfulness; employee interviews; and time, payroll, and shipping transcripts.

All of the violations shall be treated individually by type, qualified as to employees affected, described as to period of time over which they are spread, and explained as to seriousness. It is important for the WHI to indicate the earliest and latest date of violation for each FLSA section violated. The sustaining evidence, both documentary and employees' statements,

NOT FOR PUBLIC DISTRIBUTION

shall likewise be listed under each type of violation in the form of properly numbered exhibits.

82d20 **<u>Witness chart.</u>**

(a) If the RA so requires, (b) (7)(E) [redacted]

[redacted]

[redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

(b) (7)(E) [redacted]

82d21 **Trial assistance.**

It is of valuable assistance to the attorney to have a summary of certain portions of the evidence, particularly with respect to the employees' statements. If it can be shown that these statements have been carefully taken, analyzed for their content, and correlated with other proof in the investigation, it may not be necessary for the attorney to re-interview such employees. In addition, a fully descriptive list of the material that will have to be subpoenaed for trial is also of great help to him or her in that he or she does not have to examine the records himself or herself before making out a subpoena *duces tecum*.

82e **OTHER CRIMINAL TYPE LITIGATION INVESTIGATIONS**

82e00 **Additional investigation information required for criminal contempt action.**

(a) Where an establishment is bound by the terms of an injunction, and a subsequent investigation shows serious and willful violations continuing, legal recourse is open to the WHD in one of two ways: criminal action or criminal contempt action.

(b) Experience in court has shown that the same elements of proof required for a criminal action are necessary in criminal contempt actions. The attorneys will decide which form of legal proceedings will be instituted. As far as the WHI is concerned, his or her preparation of the investigation will be practically the same in each instance.

(c) One point, however, is to be stressed in the preparation of a criminal contempt action, which may be slightly different from a criminal prosecution. The WHI must show by evidence that the principals who signed the decree, were bound by its provisions, or had knowledge of its existence were responsible for the subsequent violations. This means that the willfulness must be directly tied to a principal in any of these categories. Otherwise the categories to be included in a criminal contempt action investigation report are the same as for a criminal litigation investigation.

82e01 **Additional investigation information required for conspiracy action.**

(a) In some investigations, where there is evidence to show collusion among persons to commit serious violations of the FLSA, actions for conspiracy may be necessary. (b) (7)(E) [redacted]

(b) In all cases it is necessary to prove both a conspiracy and overt acts. (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

(d) It is, of course, impossible to list all the conceivable items of evidence that are necessary to prove a conspiracy. They will vary in the extreme with the particular situation. Frequent consultations with the attorney on the case will be necessary to work out a method of investigation, so as to include both the legal objectives and the specific sustaining facts. The conspiracy evidence may involve each and every category of the litigation investigation report. The special emphasis in this sort of investigation will be to draw on whatever facts will fit together into a clear-cut picture of joint intent.

NOT FOR

82e02 **Additional investigation information required for joint criminal action and blacklist hearing investigation report.**

(a) The criminal litigation investigation report should be prepared in accordance with FOH 82a - d. With respect to the potential PCA hearing aspects of the investigation, it is suggested that the following additional information be obtained:

(1) *Contract information*

a. Name of the primary contractor

b. The qualifications of the primary contractor as a manufacturer or regular dealer

c. The articles to be supplied to the government

d. A chart of the contracts

e. Whether it is possible to segregate employees working on government contract materials and those working on other items, and, if so, upon what basis

(2) *Wage determination*

a. The wage determination for the industry

b. The definition of auxiliary workers, if provided for in the wage definition

c. The tolerance or percentage of auxiliary workers permitted

d. Workers with disabilities

(3) *Exempt employees*

Those employees exempt from the PCA as well as those exempt from sections 6(a) and 7(a) of the FLSA shall be set forth in the exemptions part of the report

(4) *Violations*

a. If the violations under the PCA are concurrent, appropriate subheadings should be used (*e.g.*, "Section 7(a) and overtime provisions of the PCA" or "Section 15(a)(5) and record-keeping provisions of the PCA")

b. To the extent that the violations are not concurrent, appropriate additional subheadings should be used (*e.g.*, "Minimum wage determinations" (PCA), "Section 6(a)" (FLSA), "Section 7(a)" (FLSA), "Daily overtime provisions of the PCA," "Section 12(a) or 12(c)" (FLSA), "Knowing employment of minors" (PCA), or "Safety and sanitary provisions of the PCA")

(5) *Representative transcriptions*

Representative transcriptions of the violations and complete computations of the liquidated damages due

(6) *Willfulness*

The facts shall be detailed clearly to indicate intent to violate the provisions of both the FLSA and PCA or either act

(7) *Principals*

NOT FOR PUBLIC DISTRIBUTION

The name and address of each surety covering each public contract involved or a statement there is no surety

(8) *Recommendation*

The transmittal memorandum should include a recommendation covering the PCA violations

(9) *Witness chart*

A witness chart showing whether the testimony of a particular witness covers violations of both the FLSA and PCA or either act

82e03 **<u>Additional investigation information required for false receipt cases.</u>**

(a) In the past, the SOL has recommended title 18, section 1001 action following the submission to the WHD of signed back wage receipts representing that the proper payment of restitution approved by the WHD was made, whereas, in truth, payment was either not made, or was returned to the employer or his or her representative. Violations involving submission of false receipts are no longer treated as violations of title 18, section 1001. (b) (7)(E) [redacted]

(b) It is suggested that in any situation falling under section 15(a)(5) of the FLSA that involves knowingly and willfully falsifying or concealing a material fact, or making any false statement or representation, the facts shall be fully reported and submitted for consideration for appropriate criminal action. (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

82e04 **False information.**

(b) (7)(E)

[redacted]

NOT FOR PUBLIC DISTRIBUTION

Chapter 83

CIVIL LITIGATION PREPARATION

This chapter contains information that is out of date. Litigation questions should be referred to the RSOL through proper channels.

Source: FOH Modernization revision 715, published 12/05/2016. Substantive revisions made *after* 12/05/2016 are noted at the end of affected provisions below. Historical information on revisions published *prior to* 12/05/2016 can be found here: http://esa/whd/LawsRegs/FOH/revisionchart.

NOT FOR PUBLIC DISTRIBUTION

Table of Contents

83a CIVIL LITIGATION INVESTIGATIONS

83a00 Bases for civil litigation.
83a01 The civil issue.
83a02 Additional information required for civil litigation.

83b COVERAGE

83b00 Development of coverage.
83b01 Interstate commerce.

83c EXEMPTIONS

83c00 Determination of exemptions.

83d STATUS OF COMPLIANCE

83d00 Developing and reporting violations.
83d01 Witness chart.
83d02 Other charts.
83d03 Records to be subpoenaed.
83d04 Recommendation.
83d05 Civil contempt action.
83d06 FLSA section 17 actions that include prayer for back wages: computations in reinvestigations.

83a CIVIL LITIGATION INVESTIGATIONS

83a00 Bases for civil litigation.

(a) As a general rule, the remedy of civil action is used only as a means of securing current compliance when voluntary compliance is refused, or is agreed to with obvious reservation or under such circumstances as to raise doubts as to future compliance. Most contested civil actions arise from a difference of opinion between the Wage and Hour Division (WHD) and the employer on some specific provision of the Fair Labor Standards Act (FLSA) itself, or on the interpretations and regulations issued by the Administrator of the WHD. Questions of coverage, method of payment, recordkeeping regulations, or exemptions are a few of the

many issues which may be in dispute. They are brought to the fore when the Wage and Hour Investigator (WHI) makes the investigation, finds violations, and thereafter requests that the employer pay restitution and come into compliance. If the employer agrees, there is no issue. If the employer, however, says that he or she will not accede to the WHI's request because he or she feels that his or her employees are not covered or because he or she feels that his or her practices do not constitute a violation, ground for civil action is present. In any event, violations must first be found before there is a case. It is conceivable that an employer who has been in compliance all along may dispute coverage. In such instances, the question, of course, is academic and no action is necessary.

(b) Another situation in which civil action cases may arise is through continuance of violations by an establishment after the initial investigation, where the continued violations are not of a clearly willful nature. The WHD may then seek to enjoin further violations.

(c) Civil action often comes about in an investigation which meets one or more of the criteria for criminal prosecution but which for some reason is not suitable therefor. This is because the character of the violations is such as to reflect upon the employer's good faith and, as noted above, raises reasonable doubt as to future compliance.

(d) Cases involving questions of compensability or good faith defenses will usually form the basis for civil litigation.

83a01 **The civil issue.**

Many civil issues have particular circumstances surrounding them which are material and yet cannot be adequately treated under any single category or heading of the litigation investigation report. In such cases, (b) (7)(E) [redacted]

83a02 **Additional information required for civil litigation.**

The WHI should consult FOH 81d01. For successful civil litigation, additional development is required. In many instances, the procedures suggested in FOH 82 may be helpful.

83b **COVERAGE**

83b00 **Development of coverage.**

In developing coverage, the WHI will find FOH 82b helpful.

83b01 **Interstate commerce.**

(a) Proof of coverage of employees in the establishment is necessary in civil litigation as well as in other forms of litigation. Even in investigations where the employer does not dispute coverage, *prima facie* evidence of coverage still must be obtained. However, where coverage is denied, and thus becomes a primary issue, the data and evidence collected must be exhaustive and explicit. Generally, the same sources of information used in preparing the interstate commerce part of the criminal litigation investigation report can be drawn upon.

(b) It is necessary to remember that commerce includes:

NOT FOR PUBLIC DISTRIBUTION

(1) the production of goods for interstate commerce or intended for interstate commerce, or

(2) engagement directly in interstate commerce.

The WHI must use his or her ingenuity in obtaining the required proof. At all times the regional solicitor of Labor (RSOL) on the case should be consulted to make certain that time is not spent in developing information which is not material, and to be certain that all the required facts are being gathered.

(c) The following are some of the means through which evidence of interstate commerce can be obtained:

(b) (7)(E) [redacted]

83c EXEMPTIONS

83c00 <u>Determination of exemptions.</u>

The WHI shall follow the regular investigation procedure by listing and explaining the various properly allowable exemptions. (b) (7)(E) [redacted] Questions of proper application of exemptions are one of the major bases for civil litigation. It is, therefore, recommended that close liaison be maintained between the WHI, his or her supervisor, and a member of the RSOL's staff.

83d STATUS OF COMPLIANCE

83d00 <u>Developing and reporting violations.</u>

(a) There are many guides and suggestions on developing and reporting violations in FOH 82d that will assist the WHI in developing and reporting the violations in a civil case.

NOT FOR PUBLICATION

(b) Under the heading "status of compliance," the WHI shall list each of the sections and subsections of the FLSA violated. Thereafter, using each specific section and subsection as a subheading, the exact manner in which each type of violation under the subsection occurred shall be described.

(c) The number (and in child labor cases, the ages) of the employees involved in each type of violation, the particular group affected, the period over which violations are spread, and the extent of the underpayment involved shall be shown.

(d) Any special circumstances, events, conversations, or practices that have a bearing on the violations committed shall be reported. These may include such items as the existence of contracts fixing the hourly rate, the payment of bonuses as extra earnings, the sale of goods to employees at a profit, the continuance of child labor violations because FLSA section 12(a) or 12(c) coverage is disputed, etc.

(e) Where the statutory requirements of sections 6(a) and 7(a) of the FLSA are affected by learner certificates, industry exemptions, and the like, the relevant violations shall be treated as separate items.

(f) Under each type of violation shall be listed the sustaining evidence contained in the investigation file, in the form of properly numbered exhibits, both documentary and factual, and employee statements.

(g) Most civil litigation investigations will not involve false records. However, where they are found, proof of falsification shall be developed in exactly the same manner as described for criminal cases.

(h) If, in the course of developing an investigation for civil litigation, serious falsification or other material that would have caused the case to be regarded as criminal is unearthed, it should be brought to the attention of the investigation supervisor and RSOL for possible change in action from civil to criminal.

(i) In situations where the civil issue concerns practices involving the hours of work, wages paid, and records kept, and the WHD charges violations as a result, it naturally follows that this portion of the report will be the most voluminous and contain the most detail. For example, in the Belo case there was a question on the true hourly rate, which in turn affected the overtime pay and the recordkeeping practices. If the rate contracted for was not the true one, then violations of both sections 7(a) and 11(c) of the FLSA resulted. Similarly, it is conceivable that violations of sections 6(a), 7(a), and 11(c) may all be involved in a single manipulated wage rate scheme, as in a misapplication of a constant wage plan.

(j) All details concerning the violations shall be carefully explained.

83d01 **Witness chart.**

Where necessary, the same type of witness chart as provided for criminal litigation in FOH 82d20 can be made up, eliminating those headings not applicable (*e.g.*, willfulness, etc).

83d02 **Other charts.**

NOT FOR PUBLIC DISTRIBUTION

(a) Wherever possible, comparisons should be made between records, wages, rates, and hours of work in order to sustain graphically the allegations in the narrative report. Such graphic representation can often be offered in evidence as exhibits to support the WHI's testimony.

(b) Where the civil issues involve questions of interstate commerce, exemptions, bona fide retail establishments, and the like, the proof can be presented in a much more forceful manner through the use of charts and tables. In addition to the assistance provided the WHI and the RSOL, experience has shown that the court welcomes such a summarization of the evidence, since it often aids the attorneys and the court in following intelligently the references to highly complicated and technical records.

83d03 **Records to be subpoenaed.**

See FOH 86b.

83d04 **Recommendation.**

The WHI shall make his or her recommendation of action in the transmittal memorandum.

83d05 **Civil contempt action.**

The preparation of an investigation for civil contempt action, insofar as the WHI is concerned, is the same as the preparation of an investigation for criminal contempt action.

83d06 **FLSA section 17 actions that include prayer for back wages: computations in reinvestigations.**

Where FLSA section 17 action, including a prayer for the payment of back wages, is contemplated in a reinvestigation, and the previous investigation was closed without the payment of back wages, the back wages considered due shall include the unpaid back wages found due in the previous investigation that are within the statutory 2-year period. Where practicable, these amounts shall be determined by reference to the previous investigation report. A concise explanation shall be included in the investigation report.

NOT FOR PUBLIC DISTRIBUTION

Chapter 84

OTHER FLSA LEGAL ACTIONS

Table of Contents

84a HOT GOODS ACTIONS

84a00 Introduction to hot goods violations.
84a01 Statutory basis: sections 15(a)(1) and 12(a) of the FLSA.
84a02 Key terms.
84a03 Appropriate uses of hot goods actions.
84a04 Investigating a hot goods case.
84a05 Essential information for the investigation file in hot goods actions.
84a06 Identifying actions needed to remedy violations and maintain compliance.
84a07 Hot goods inquiries and notifications.
84a08 Defenses.
84a09 Remediation.
84a10 Template letters.
84a11 Narrative and WHISARD reporting.
84a12 Legal remedies.

84b FLSA SECTION 15(a)(3) DISCRIMINATORY ACTION

84b00 Statutory basis.
84b01 Information required in discriminatory action.

84c FLSA SECTION 16(c) ACTIONS

84c00 Investigation proof of section 16(c) claims.

NOT OR PUBLIC DISTRIBUTION

NOT OR PUBLIC DISTRIBUTION

84a HOT GOODS ACTIONS

84a00 Introduction to hot goods violations.

Sections 15(a)(1) and 12(a) of the Fair Labor Standards Act (FLSA) are often referred to as the hot goods provisions. The hot goods provisions prohibit the shipment of goods in commerce that were produced in violation of the FLSA's minimum wage or overtime requirements, or any regulation or order of the Secretary of Labor (Secretary) issued under section 14, or that were produced in or about an establishment where a child labor violation occurred in the past 30 days. The production of goods in violation of sections 6 (minimum wage), 7 (overtime), 12 (child labor), or 14 (subminimum wage certificates) is not in itself a violation of the hot goods provisions (sections 15(a)(1) or 12(a)); it is the subsequent shipping or delivering, and in the case of section 15(a)(1), the transporting or selling of such tainted goods in interstate or foreign commerce that violates sections 15(a)(1) or 12(a).

The FLSA hot goods provisions are a distinct enforcement tool that the Wage and Hour Division (WHD) may utilize to secure compliance. Hot goods is a very effective and potentially powerful tool because it prohibits goods that are produced by employees who were not properly paid or produced in an establishment where a child labor violation has recently occurred from entering the stream of commerce. Producers and buyers in the stream of commerce have a strong interest in remedying the FLSA violations so that the goods can be shipped for sale.

A hot goods action is resource intensive. It is therefore critical that when the WHD commits to a hot goods action, it does so strategically and with a specific plan for how to use the hot goods action to achieve the broadest and most lasting impact.

The WHD's informing the employer that the FLSA prohibits the shipment of goods produced in violation of the statute's minimum wage, overtime, and/or child labor violations may be enough for the employer or interested party to make an informed decision to remedy the violations and agree to future compliance. However, in some cases it is not enough. Only a court may stop the movement of goods because the FLSA does not provide the WHD authority to seize or confiscate the goods. Consequently, each hot goods case should be developed with the expectation that the case will be presented to a federal judge within days of initiating the hot goods action. The evidence gathered should support the court's determination that a temporary restraining order (TRO) or preliminary injunction should be issued to stop the shipment of the hot goods. Accordingly, hot goods cases require close coordination with the regional office (RO) and the office of the regional solicitor of labor (RSOL) from the beginning of the case. *See* FOH 84a04.

84a01 Statutory basis: section 15(a)(1) and section 12(a) of the FLSA.

(a) Hot goods resulting from minimum wage or overtime violations (section 15(a)(1))

The WHD can use the section 15(a)(1) hot goods provision in situations where goods have been produced in violation of the minimum wage and overtime requirements of the FLSA. Section 15(a)(1) of the FLSA makes it unlawful for *any person*:

(1) to transport, offer for transportation, ship, deliver, or sell in commerce; or

NOT FOR PUBLIC DISTRIBUTION

(2) to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended

any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Secretary issued under section 14. *See* FOH 84a02.

(b) Exceptions to section 15(a)(1)

The section 15(a)(1) prohibition on the shipment or sale of such goods extends to all persons *except*:

(1) a common carrier transporting goods in the regular course of its business, provided the common carrier did not produce the goods;

(2) a purchaser who acquired the goods in good faith, for value, without notice of the violations, and in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the FLSA (referred to as *good faith purchasers*); or

(3) ultimate consumers (*e.g.*, the person buying clothes or food from a retail establishment).

(c) Hot goods under section 15(a)(1)

When evidence supports a finding that goods are hot under section 15(a)(1), the WHD will treat them as hot goods until:

(1) the WHD lifts its objection to the shipment of the hot goods (*see* FOH 84a09);

(2) a court rejects the Department of Labor's (DOL) request for a TRO or preliminary injunction (*see* FOH 84a12(a));

(3) the goods come to rest, which breaks the flow of interstate commerce (*see* FOH 84a02(d) and 84a02(g));

(4) the goods are sufficiently processed as to break the flow of interstate commerce (*see* FOH 84a02(g)); or

(5) the goods reach their final destination on the retailer's shelves for sale to the ultimate consumer (*see* FOH 84a01(b) and FOH 84a02(g)).

(d) Hot goods resulting from section 12 child labor violations

The WHD can use the hot goods provision in section 12(a) in situations where goods have been produced in or about an establishment where a child labor violation occurred within the past 30 days.

(1) *FLSA section 12(a)*

"No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment in the United States in or about which within

NOT FOR PUBLIC DISTRIBUTION

thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed…" *See* FOH 33a02 and FOH 73b01(a).

(2) *FLSA section 12(c)*

"No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce."

Note: the only hot goods provision in section 12 is in 12(a). It is possible that 12(c) violations also constitute 12(a) violations and therefore support a hot goods action, but the hot goods action is not brought under 12(c).

(e) (b) (7)(E) [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

(f) Exceptions to section 12(a)

The section 12(a) prohibition on the shipment or delivery for shipment of such goods does not apply to:

(1) a purchaser who acquired the goods in good faith, for value, without notice of the violations and in reliance on written assurance from the producer, manufacturer, or

NOT FOR PUBLIC DISTRIBUTION

dealer that the goods were produced in compliance with the requirements of the FLSA (*i.e.*, a good faith purchaser); or

(2) ultimate consumers (*e.g.*, the person buying clothes or food from a retail establishment).

(g) Distinction between sections 12(a) hot goods and section 12(c) child labor coverage

Section 12(c) coverage for oppressive child labor violations requires that a minor be employed in commerce, the production of goods for commerce, or an enterprise engaged in commerce or in the production of goods for commerce, regardless of whether there is a removal of goods or a shipment or delivery for shipment in commerce.

Section 12(a) coverage does not require that the minor whose employment constitutes *oppressive child labor* be covered on an enterprise or individual basis. Thus, it does not require that the minor be involved in the production of goods themselves if somewhere in the establishment in or about which the minor is employed goods are produced which are subsequently shipped or delivered for shipment in commerce. Thus, section 12(a) coverage is often said to apply on an establishment basis rather than on an individual or enterprise basis. *See* FOH 84a02(k).

Section 12(a) does not directly prohibit the employment of oppressive child labor. Instead, it prohibits the shipment or delivery for shipment in interstate commerce of goods produced in or about an establishment where oppressive child labor occurred within 30 days before removal of the goods. Section 12(c), on the other hand, directly prohibits the employment of oppressive child labor in commerce or in the production of goods for commerce. *See* FOH 33a03, FOH 73b00, and FOH 73b01.

Therefore, even if there is no coverage under section 12(c), the fact that the goods will move in interstate commerce gives the WHD the authority to request that the employer refrain from moving the goods in commerce when the employer is a producer, manufacturer, or dealer under section 12(a). *See* FOH 73b01(c)(1)(b). However, because there is no coverage under section 12(c), the WHD may not assess a civil money penalty (CMP) regarding the employment of the minor.

<u>Scenario:</u>

A 15-year-old works as a cashier in a small retail bakery that makes cakes and pies, some of which are shipped, or delivered for shipment, in commerce. The minor sometimes works until 10:00 pm. The minor does not handle checks or credit card transactions, so he or she is not *employed in commerce* or in the *production of goods for commerce;* the annual dollar volume of the enterprise is under $500,000.00.

Consequently, the minor is not covered by the FLSA on an individual or enterprise basis and therefore there is no coverage under section 12(c). But since the minor is employed in an establishment where cakes and pies are produced and shipped or delivered for shipment in commerce, and the minor sometimes works until 10:00 p.m. in violation of Child Labor Reg. 3, the WHD can assert 12(a) coverage.

The goods produced by the baker during the period of the oppressive child labor, and 30 days thereafter, are hot goods under section 12(a). In this scenario, the WHD cannot cite a

NOT FOR PUBLIC DISTRIBUTION

violation or assess a CMP against the baker as an employer (since there is no individual or enterprise coverage of the minor). Nonetheless, the WHD may request that the baker refrain from moving any of his or her cakes or pies in the stream of commerce on the basis that the baker is a producer, manufacturer, or dealer within the scope of section 12(a).

The WHD may seek immediate compliance to cease the oppressive child labor and negotiate an enhanced compliance agreement. If the baker indicates that he or she intends to ship his or her pies and cakes, the Wage and Hour Investigator (WHI) should immediately consult with RSOL and seek a TRO and consider contacting downstream purchasers. *See* FOH 84a04 and FOH 84a07(b).

84a02 <u>Key terms.</u>

(a) Any person (applicable to section 15(a)(1))

The application of the section 15(a)(1) hot goods provision is not limited to the employer of the employee(s) who produced the hot goods or to the owner of the hot goods. The section 15(a)(1) hot goods provision applies to *any person*. The FLSA defines "person" as any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons engaged in the movement of the hot goods. *See* 29 USC 203(a).

(b) Producer, manufacturer, or dealer (applicable to section 12(a))

Unlike section 15(a)(1), which applies to *any person*, the section 12(a) hot goods provision bars only a *producer*, *manufacturer*, or *dealer* from shipping hot goods or delivering hot goods for shipment. The regulations at 29 CFR 570.105 define these terms:

(1) A "producer" is someone engaged in "producing, manufacturing, handling, or in any other manner working on goods in any [s]tate."

(2) A "manufacturer" is engaged in the "transformation of raw materials or semi-finished goods into new or different articles." It includes retailers that also engage in manufacturing activities, such as baking bread.

(3) A "dealer" refers to "anyone who deals in goods (as defined in section 3(i) of the FLSA), including persons engaged in buying, selling, trading, distributing, delivering, etc. It includes middlemen, factors, brokers, commission merchants, wholesalers, retailers and the like."

(c) Factor (applicable to both sections 15(a)(1) and 12(a))

A factor is a business organization that provides day-to-day financing of a producer's operations, usually in exchange for an assignment of the producer's accounts receivable. Many times when the producer defaults, the factor takes the goods for sale to recover some portion of the loans provided to the producer. Factors are subject to the prohibitions in sections 15(a)(1) and 12(a) of the FLSA. Secured creditors can be and often are factors. A secured creditors is not a factor when, for example, it is passive and simply loans money and takes a secured interest in something such as equipment or inventory without day-to-day operating advances.

NOT FOR PUBLIC DISTRIBUTION

(d) In commerce (applicable to both sections 15(a)(1) and 12(a))

The goods in question must have come from out of state or be going out of state to be in commerce. An intrastate movement can be a part of a hot goods shipment if it can be shown that the intrastate movement was, is, or will be part of an interstate flow of goods in commerce.

For example, intrastate distribution from a person's and/or firm's warehouse to its retail outlets in the same state on an as-needed basis will commonly be a movement *in commerce* where the goods were received at the warehouse from out-of-state sources for such distribution, even if the shipper to the warehouse is not the same entity that shipped from the warehouse to the retail outlet.

Conversely, goods transported from the producer to the wholesaler *generally* come to rest in the wholesaler's warehouse *if* the wholesaler has purchased the goods and will eventually resell them to yet-to-be determined buyers.

Goods that are shipped directly to a retailer generally come to rest when the retailer makes them available for sale to the ultimate consumer. Other factors may impact this analysis. *See* FOH 11i15 (intrastate distribution of goods received from outside of the state), FOH 11w07 (wholesaling: where out-of-state goods come to rest), and FOH 11w08 (wholesaling: prior orders, pre-existent understandings, and anticipation of needs).

Goods in the hands of the ultimate consumer after their delivery into the actual physical possession of that consumer, other than the "producer, manufacturer, or processor thereof" (*see* 29 USC 203(i)) are no longer within the statutory definition of goods.

Congress did not intend to permit an employer to avoid the FLSA requirements for wages (or child labor) by making actual delivery (*i.e.*, the actual physical possession) of the goods to the ultimate consumer within the state, who then transports or ships the goods outside the state.

For example, employees engaged in building a boat for delivery to the commercial purchaser at the boatyard are considered within coverage of the act if the employer at the time the boat is being built intends, hopes, or has reason to believe that the purchaser will sail it outside the state for commercial purposes. *See* 29 CFR 776.20(d).

See FOH 84a05 on documenting goods in commerce.

<u>Scenario 1:</u>

A producer in Pennsylvania ships hot goods to a retailer's distribution center in New Jersey where the goods are held for further distribution to the retailer's outlets throughout New Jersey on a just-in-time basis. Since the goods did not come to rest in the distribution center, the goods can still be restrained before they reach the retail outlets. Similarly, merchandize shipped from a retailer's distribution center to a customer is a good in commerce until delivered to the customer.

However, if the New Jersey warehouse is owned by a wholesaler who purchases the goods from the producer in Pennsylvania (who produced the goods in violation of the FLSA) for eventual resale to other buyers (yet to be identified), the goods come to rest at the warehouse and they are no longer considered hot goods. As such, assuming the wholesaler is complying

NOT FOR PUBLIC DISTRIBUTION

with the FLSA minimum wage, overtime, and child labor provisions, the wholesaler may transport the goods to a new owner (*i.e.*, a retailer) in state or out of state. On the other hand, if the wholesaler purchased the goods from the producer pursuant to a specific order, contract, or understanding with specific buyers, the goods have not come to rest in the wholesaler's warehouse (*i.e.*, there has been no break in the flow of interstate commerce), and therefore the goods are still hot when in the wholesaler's possession.

Scenario 2:

Although the following example describes a supply chain that is now rare, the circumstances described come from a 1940s court case concerning the in-commerce concept. While it is unlikely that WHIs will investigate a case with this type of supply chain, the WHIs should be familiar with the concept.

A producer in New York fails to pay his or her employees overtime. The goods that these employees produce are purchased by a wholesaler and shipped to the wholesaler's warehouse (a location where raw materials or manufactured goods may be stored before their shipment to a manufacturer or distribution to retailers for sale) in Connecticut. Assuming the goods are not purchased by the Connecticut wholesaler pursuant to specific orders, contracts, or an understanding with the wholesaler's clients, the goods have come to rest. So long as the wholesaler in Connecticut pays his or her employees in compliance with the FLSA minimum wage and overtime requirements, as well as meets the child labor requirements, then when the wholesaler ships the goods to retailers both in Connecticut and Massachusetts, the goods are not considered hot goods. If, however, the Connecticut wholesaler purchased the goods to fulfill a specific order from one of its clients, the goods are still hot when in the wholesaler's possession.

Note: if the wholesaler was not in compliance with the FLSA minimum wage, overtime, or child labor requirements, then the goods that are shipped to Massachusetts would be considered hot goods.

(e) With knowledge that shipment or delivery or sale in commerce is intended (applicable to section 15(a)(1))

Under section 15(a)(1), it is possible to restrain goods which are traveling from one part of a state to another part of the same state, provided that the goods are in the flow of interstate commerce and it can be shown that the person had knowledge or reason to know that future shipment across state lines is intended.

Scenario:

Company A sells hot goods to Company B, which is located in the same state knowing that Company B intends to ship the goods across state lines to Company C. In this situation, if the WHI found minimum wage or overtime violations, such as Company A missed a payroll, then Company A's shipment of hot goods to Company B can be restrained. If Company B already received the hot goods, then Company B's shipment of the hot goods can also be restrained, unless Company B can demonstrate that it purchased the goods in good faith, relying on written assurance from Company A that the goods were produced in compliance with the requirements of the FLSA. *See* FOH 84a08 and *Mitchell v. Sunshine Dept Stores, Inc.*, 292 F.2d 645, 648 (5th Cir. 1961). However, if Company B is only handling the goods,

NOT FOR PUBLIC DISTRIBUTION

and does not purchase the goods, Company B would be unable to avail itself to the good faith defense, and the WHD could restrain the further shipment of goods.

(f) Produced (applicable to both sections 15(a)(1) and 12(a))

Section 3(j) of the FLSA defines "produced" as "produced, manufactured, mined, handled, or in any other manner worked on in any [s]tate…." and considers an employee to be engaged in the production of goods if the employee was employed "in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods."

The definition of "produced" also includes activities that are closely related and directly essential (CRADE) to the production of goods in any state. The WHD regulations identify factors to be considered when determining whether an activity or occupation is CRADE. *See* 29 CFR 776.17.

Note: administrative personnel, including individuals who handle payroll, accounts payable, receiving clerks, and other supportive staff have sometimes been deemed to be closely related and directly essential to the production of goods for commerce.

Scenario 1:

A janitorial contractor provides cleaning services for the production operations at the plant and the contractor's employees have been paid in violation of the FLSA. The producer can be restrained from shipping goods in commerce because the cleaning services are closely related and directly essential to the plant's production operations.

Scenario 2:

Mechanics who maintain and repair machines used to produce goods for interstate commerce are paid in violation of the FLSA. The producer of the goods can be restrained from shipping the goods because the maintenance and repair of the machines are closely related and directly essential to the production of the goods.

Scenario 3:

Watchmen who provide security at a plant producing goods for interstate commerce were not properly paid minimum wage and/or overtime. The WHD can object to the manufacturer's shipment of the goods because the watching and securing of the goods by the watchmen are closely related and directly essential to the production of the goods.

Under section 15(a)(1), transportation activities conducted in violation of the FLSA minimum wage or overtime requirements can make the goods hot. For example, goods are hot if, in the production process, underpaid employees transport garments ultimately intended for out-of-state shipment from contractor to contractor within the state of origin.

Scenario 4:

Company A produces cotton textile that will be sewn into shirts by Company B. Company A ships the material to Company B within the same state, and after Company B completes the manufacture of the shirts, the shirts will be sent out of state. Company A contracts with Company Z to transport the cotton textile to Company B. Company Z missed two payrolls

NOT FOR PUBLIC DISTRIBUTION

and its employees have not been paid. Since Company Z is in violation of the FLSA, the cotton textile that it is transporting for Company A is considered a hot good because the cotton textile is intended to be sewn into shirts that will be shipped out of state. In this scenario, the goods are not hot while in Company A's possession. They become hot once in Company Z's possession because Company Z's transportation of the goods is part of the production process and Company Z has violated the FLSA's minimum wage and overtime requirements.

Generally, however, the production of goods in violation of the FLSA's minimum wage or overtime requirements is not in itself a violation of section 15(a)(1) or section 12(a). Only the subsequent shipping or delivering, and in the case of section 15(a)(1), transporting or selling of such goods in interstate commerce violates the FLSA's hot goods provisions.

(g) Goods (applicable to both sections 15(a)(1) and 12(a))

Section 3(i) of the FLSA defines "goods" as it is used under sections 15(a)(1) and 12(a), "[g]oods means goods…wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof..."

(1) *Goods encompasses a wide variety of items, including*:

a. Written materials such as newspapers, magazines, brochures, pamphlets, bulletins, and announcements; written reports; fiscal and other statements and accounts; correspondence; legal briefs and other documents

b. Advertising, motion picture, newspaper and radio copy; artwork and manuscripts for publication; sample books; letterheads; envelopes; shipping tags; labels; check books; blank books; book covers; advertising circulars and candy wrappers

c. Insurance policies; bonds; stocks; bills of exchange; bills of lading; checks; drafts; negotiable notes and other commercial paper

d. Gold; livestock; poultry and eggs; vessels; vehicles; aircraft; garments being laundered or rented; ice; containers, as, for example, cigar boxes or wrapping paper and packing materials for other goods shipped in commerce; electrical energy or power, gas, etc.; and by-products (see 29 CFR 776.20)

e. Electronic goods such as software and website design, whether physically shipped or transmitted electronically

Questions regarding whether certain items may be considered goods under the FLSA should be discussed early in the process with the RO and RSOL and elevated to the National Office (NO) if necessary.

(2) *Any part or ingredient thereof*

The definition of goods includes any part or ingredient of goods. *See* 29 USC 203(i). This means that goods that are not final products can still qualify as goods under the statute. Therefore, the inclusion of a hot good (or goods) as an ingredient, component, or part of another untainted good will make that entire good hot.

NOT FOR PUBLIC DISTRIBUTION

This is true even if an employer ships component pieces to another manufacturer in the same state, so long as the employer intended, hoped, expected, or had reason to believe that his or her goods would be taken or sent out of state by the other manufacturer or another person into whose possession his or her goods would come. If that is the case, then the component pieces and the resulting goods are hot. *See* 29 CFR 776.21(d).

Scenario:

A button manufacturer sells his or her products within the state to a shirt manufacturer, who then ships the shirts in interstate commerce. The employees of the button manufacturer are engaged in the production of goods for commerce as their employer intended, hoped, expected, or had reason to believe that the buttons would be taken or sent out-of-the state by the shirt manufacturer. If the button manufacturer failed to pay overtime to some of its workers, the buttons are hot. When the shirt manufacturer receives the hot buttons and sews them onto shirts, the final shirts produced by the shirt manufacturer are also considered to be hot goods. The same would be true if, instead of manufacturing buttons, the first manufacturer produced cotton textile that the shirt manufacturer used to sew into shirts.

a. Processing

The fact that goods are processed or changed in form by several employers before going into interstate commerce generally does not affect the character of the original product as "goods" produced for commerce. *See* 29 CFR 776.20(c).

Scenario 1:

A lumber manufacturer sells his or her lumber locally to a furniture manufacturer. The furniture manufacturer uses the lumber to make furniture and then sells it out of state. So long as the lumber manufacturer intended, hoped, expected, or had reason to believe that the furniture manufacturer would send the furniture out of state, the employees of the lumber manufacturer are engaged in the production of goods for commerce. However, the operation of processing may mark the coming to rest *within* the state of materials received from *outside* the state. Whether processing terminates the prior interstate movement of goods, as opposed to operations that are merely incidental to interstate distribution, which does not stop the flow of interstate commerce, is a matter of degree. The test of what constitutes such processing involves a number of factors, including the complexity of the operation, the change that is made to the goods, and the time required. *See* FOH 11p05.

Scenario 2:

Employees in State A produce goods that are shipped to State B. Employees in State B work on those goods in a manner that involves processing. If the processing by State B's employees is merely incidental, the goods are still moving in interstate commerce within State B. If the goods were determined to be hot when they were produced in State A, the WHD may request any

NOT FOR PUBLIC DISTRIBUTION

entity in State B that handles the goods prior to the goods being made available for sale to the ultimate customers to voluntarily refrain from further shipping. On the other hand, if the processing of the goods within State B is complex and/or results in the type of change exemplified in FOH 11p05, the flow of these goods in interstate commerce may have ceased. Only if the employer in State B fails to comply with the FLSA minimum wage, overtime, and/or child labor provisions, will these goods become hot again.

Scenario 3:

XYZ company collects scrap metals, including metal from out-of-state, and engages in the minor processing of the scrap metal to separate different kinds of metal before shipping the separated metal out-of-state. Even though the metal is undergoing minor processing, the metal does not come to rest as the processing is incidental to the movement of the goods.

If a hot goods action is being considered and goods received outside the state are then to be processed, the RO and RSOL need to consult with the Director of the Division of Enforcement Policy and Procedure in the NO to determine if the processing has been sufficient to break the flow of goods in interstate commerce.

b. Commingling

Commingling of hot goods with other goods that are not hot in a warehouse, for example, makes all of the goods hot. Any entity that wishes to move the non-hot goods in commerce must clearly show that the hot items can be definitively separated from the rest of the items that are not hot. Note: this is a high burden for the party to meet because produced is defined broadly under FLSA section 3(j).

Scenario:

The WHD determines that apples produced by a particular grower were produced in violation section 6 of the FLSA. These apples have been moved to a packing house owned by another party, but the apples are still owned by the grower. The hot apples remain hot and the packing house is subject to section 15(a)(1) which applies to any person. The WHD requests that the owner of the packing house voluntarily refrain from shipping the hot apples he or she received that were produced in violation. If the packer would like to proceed with shipment of the non-hot apples, he or she must be able to identify and segregate the hot apples from other apples not produced in violation. If the packing house cannot clearly identify and segregate the hot apples from non-hot apples, then the request to the packer to voluntarily refrain from shipping must include all of the apples in the packing house since the apples have been commingled. If the packer does not agree to voluntarily refrain from shipping, any further action by the WHD and the RSOL must address all the apples in this packing house.

Conversely, if the packing house purchased the apples from the grower for resale, then the apples generally come to rest at the packing house and are no

NOT FOR PUBLIC DISTRIBUTION

longer considered hot goods, which makes any commingling irrelevant. Assuming the packing house is in compliance with the FLSA minimum wage, overtime, and child labor requirements, the packing house may ship the apples to the next party without any repercussions stemming from the grower's failure to comply with the FLSA.

(3) *Goods do not include:*

a. items in the hands of the ultimate consumer after their delivery into the actual physical possession of that consumer, other than the "producer, manufacturer, or processor thereof" (*see* 29 USC 203(i)); and

b. items determined by case law not to be considered goods within the meaning of the FLSA, *including* dams, highways, railroad lines, internal daily reports prepared only to monitor employee activity, and accounts receivable. For how goods travel in interstate commerce, *see* FOH 84a02(d).

(h) 90-day presumption (FLSA section 15(b)) (applicable to section 15(a)(1))

There is a presumption under section 15 of the FLSA that an employee was employed in the production of hot goods when the employee was employed in a workplace where the hot goods were produced within 90 days prior to the removal of hot goods. *See* 29 USC 215(b). When using the 90-day presumption, the WHD seeks back wages for the employee covering the period of the previous 90 days.

In certain situations, the WHD might prefer to rely on the 90-day presumption rather than provide specific evidence linking the goods in question to particular employees. For example, in cases where it is difficult to trace particular goods to particular employees, but there is clear evidence of minimum wage and/or overtime violations, the 90-day presumption allows the WHD to pursue compliance by using the hot goods provisions. Thus, for example, when a garment contractor works with several manufacturers, it may be difficult to tie particular employees to particular garments (the manufacturer that is the subject of the hot goods action is responsible only for the back wages associated with the garments sewed for that manufacturer). Before relying on the presumption, however, it is necessary to determine whether proof to the contrary (*i.e.*, identifying specific employees who were not engaged in the production of the hot goods) is available because the 90-day presumption can be defeated by specific information from a defending party. On the other hand, there may be circumstances where there is a basis for seeking up to 2 years of back wages instead of only 90 days of back wages. If it can be clearly substantiated that minimum wage and/or overtime violations have been on-going for the entire 2-year standard investigative period, the WHD can demonstrate that current goods have been produced in violation, and the WHD can determine that the workers who were not properly paid produced the goods over the 2-year period, the WHD may seek recovery of the unpaid wages for the entire 2-year period before lifting objections to shipment. The WHD should seek to have the back wages remedied for the earliest periods first if the entire amount cannot be paid at once.

For example, a company produces computer hard drives. The WHD investigation of this company indicates that the employer has not been in compliance with the FLSA minimum wage and/or overtime requirements for the past two years. The investigation further indicates that the computer hard drives were being produced during this entire period. From the evidence that the WHD gathered, the WHD can determine that the workers who were not

NOT FOR PUBLIC DISTRIBUTION

properly paid produced the hard drives over the 2 year period. Based on these circumstances, it may be appropriate to seek two years of back wages.

The decision regarding the period of time for which back wages are sought is at the discretion of the district office (DO) in consultation with the RO and RSOL. Both options should be considered.

(i) Removal within 30 days (applicable to section 12(a))

Section 12(a) applies to any goods produced in an establishment in or about which *oppressive child labor* was employed at any time within 30 days prior to the removal of the goods from the site. It does not matter whether oppressive child labor was used in the production of the goods in question. *See* FOH 84a01(g).

An employer does not commit a hot goods violation if he or she does not ship until 30 days passes since termination of all oppressive child labor. The goods cool 30 days after the last instance of oppressive child labor.

(j) Oppressive child labor (applicable to section 12(a) and 12(c))

Oppressive child labor includes the employment of minors under 16 years of age and the employment of minors between 16 and 18 in certain hazardous occupations. *See* 29 USC 203(l).

(k) In or about an establishment (applicable to section 12(a))

(1) *In an establishment*

A minor is employed in an establishment when he or she performs his or her job duties on the premises of the producing establishment. A minor is also considered employed in an establishment where he or she performs most of his or her duties off of the premises but is regularly required to perform certain occupational duties in the establishment, such as loading or unloading a truck, checking in or out, or washing windows. Note that this is true in cases even where the minor is employed by someone other than the owner or operator of the particular establishment. For example, a driver's helper is employed by a firm that prints books for a publishing company. The helper regularly assists the driver in the unloading of the books at the publishing company's main warehouse; thus, he or she is employed in the establishment. A minor is not considered employed in the establishment where the minor visits the establishment for brief periods of time or for the sole purpose of picking up or dropping of messages or other small articles. *See* 29 CFR 570.110(a) and FOH 33a02(c)(4).

(2) *About an establishment*

A minor is employed about an establishment when for example, the minor performs his or her job duties sufficiently close in proximity to the actual place of production to fall within the commonly understood meaning of the term about and the minor's duties are directly related to the activities carried on in the producing, manufacturing, or dealing establishment. *See* FOH 33a02(c)(4).

NOT FOR PUBLIC DISTRIBUTION

This is not a bright line test as to what constitutes about an establishment. Each case must be determined on its own merits, with consideration of the following factors:

a. Actual distance between the producing establishment and the minor's place of employment

b. Nature of the establishment

c. Ownership or control of the premises involved

d. Nature of the minor's activities in relation to the establishment's purpose

e. Identity of the minor's employer and the establishment's owner

f. Extent of control by the producing establishment's owner over the minor's employment. *See* 29 CFR 570.110(b).

For example, a driver's helper who is employed to assist in the distribution of the products of a bottling company regularly boards the delivery truck immediately outside the premises of the bottling plant is employed in or about the establishment, without regard to whether he or she ever enters the plant him or herself.

Whereas, employees working entirely within one establishment are not considered to be employed in or about a wholly different establishment occupying separate premises and operated by another employer. This would be true even though the two establishments are contiguous. *See* 29 CFR 570.110(b).

84a03 <u>Appropriate uses of hot goods actions.</u>

Hot goods actions should be used strategically in situations that either result in owed FLSA back wages and/or involve child labor violations. When determining whether a hot goods action is appropriate in an investigation, the factors discussed below should be considered. The use of hot goods, however, is not limited to the factors presented below (there is not a bright line test). As with any enforcement tool, hot goods actions should be considered in all investigations in which its use would have an effective impact on achieving compliance. Consultation with the RO and RSOL as early as possible is necessary before determining a course of action.

(a) History of prior violations

An employer with similar or identical prior violations where prior compliance efforts have not been successful.

(b) Missed payrolls and/or signs of financial instability

Employers who have missed payroll(s) or who have financial problems and may be unable to pay back wages, such as in the instance where an employer has filed or has indicated that it will file for bankruptcy. Hot goods actions may also be appropriate where a secured creditor has become involved due to the employer's financial instability because a secured creditor may be a party in the case. *See* FOH 84a12(c)(1) and FOH 52a06. The magnitude of the violations in relation to the financial operations of the company should be examined.

NOT FOR PUBLIC DISTRIBUTION

(c) Concealment or falsification of records

The employer's records do not reflect the hours, wages, and/or piecework units of each employee. For example, the employer fabricated records in an attempt to show overtime premium as being paid when it was not paid; or workers who are paid in cash but are not on the employer's records or records that show hours worked up to 40 hours and paid by check, but hours worked over 40 that are not recorded in the records and are paid in cash. In the agricultural and garment contexts this can arise when employees are paid on a piece-rate basis and piecework units produced by multiple workers are recorded on a single ticket.

(d) Temporary and/or transient workers

Violations affecting a transient or temporary group of workers; in these instances, the WHD must have a plan in place to distribute back wages when deciding to move forward with a hot goods action. *See* FOH 84a09(c).

Whenever violations affect a transient or temporary group of workers (in a hot goods situation or otherwise), the WHD should be sensitive to whether its presence may inadvertently encourage the workers to leave the place of employment. The WHD should also be aware of the timing of the investigation in relation to the end of a contract or a season. For example, if the WHD commences an investigation of a farm near the end of the growing season, workers may leave the farm prior to the conclusion of the investigation and the disbursement of any back wages that may be owed. In these circumstances, the WHD should make an extended effort to gather worker contact information and have the workers identify another person that the WHD can contact to reach them to enable effective distribution of back wages.

(e) Systemic violations

An employer fails to pay all or a significant portion of its workforce in accordance with the FLSA's minimum wage and overtime obligations during the period of investigation.

(f) Child labor

Use of the hot goods provision in section 12(a) should be given consideration in any investigation in which goods are produced and oppressive child labor is found. Factors to consider include those listed in FOH 84a03(a) and FOH 84a03(c) -(e) above, as well as the totality of the circumstances, including but not limited to the egregious nature of the violation, the number of minors employed in violation, the reason for the violation, and steps taken by the employer to immediately remedy the violation. *See* FOH 84a01(d) and FOH 84a01(f).

When any of the above factors is encountered in an FLSA investigation, WHIs must consult with the assistant district director (ADD) and/or district director (DD), RO and RSOL about the use of hot goods, and must do so before engaging in any communication with the employer or other parties regarding potential use of the hot goods provisions.

84a04 <u>Investigating a hot goods case.</u>

(a) Pre-investigation and/or beginning of investigation

If the potential for hot goods actions is anticipated during regional enforcement planning or Strategic Enforcement Approach to Compliance (SEAC) planning, the DO should consider timely notification to the RO and RSOL prior to initiating the investigation.

It is essential that the DO, RO, and RSOL begin to coordinate efforts as soon as there is the possibility that an investigation may involve a hot goods action. Working with the DO, RO, and RSOL helps to ensure that a plan is in place so that when the WHI formally begins the investigation, he or she is prepared to ask the appropriate questions and gather the necessary documents from the employer, as it may become more difficult to obtain answers and documents as the case proceeds. Such coordinated planning should include such matters as back wage distribution and potential media strategies.

The company's supply chain should be studied and the parties involved in it should be identified. The information that is gained through these efforts will help the WHD identify which downstream purchasers may eventually need to be contacted, and help develop a plan for doing so. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) Development of the case

In many ways hot goods cases are conducted in the same manner as any other FLSA case. (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

(d) Responsibilities of the WHI include, but are not limited to:

(1) Consulting with DO managers after identifying a potential hot goods case

(2) Providing the Hot Goods Fact Sheet (Fact Sheet No. 80) and the appropriate objection to shipment letter (*see* FOH 84a10) to the employer after receiving approval from the ADD and/or DD, RO, and RSOL

[redacted] (b) (7)(E) [redacted]

[redacted]

(5) Determining prospective and previous movements in interstate commerce

[redacted] (b) (7)(E) [redacted]

(7) In consultation with DO managers, giving the employer a timely back wage computation and an explanation of the investigative findings, as well as an opportunity to provide any evidence or information the employer deems appropriate

(8) In consultation with DO managers, identifying how the employer can come into compliance and ship goods free of any objection from the WHD.

(e) (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

84a05 **<u>Essential information for the investigation file in hot goods actions.</u>**

A hot goods investigation file must include all of the information contained in a typical FLSA case, such as employer history and description of the violations found in the case. *See* FOH 54b01(e)(4). The following items are unique to hot goods cases, and the investigation file must also contain the following information.

(a) Determining who owns the goods

It is possible that the company that is producing the goods does not actually possess title to the goods. This may arise in situations where the owner of the goods contracted out to a separate company to perform a service, such as manufacturing the goods or portions of the goods. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

[redacted]

(b) Relating goods to violations

(1) *Segregation of goods*

If most of the goods are regularly shipped in interstate commerce and no segregation of goods is possible, all the goods are subject to an injunction prohibiting shipment in commerce. (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E)

[redacted]

(c) Documenting movement in interstate commerce

(b) (7)(E)

[redacted]

Records that may relate specifically to the shipment of goods in interstate commerce include any records that document:

(1) *Production activities*

a. Location(s) where the goods were produced, worked on, packed, stored, shipped from, and shipped to

b. Location of the goods specifically worked on by people paid in violation or minors illegally employed

c. Work processes by which the goods were produced

(2) *Description of goods*

a. Physical description of the goods worked on in the timeframe in which the violations occurred and the containers they are in

b. Documents identifying the goods (*e.g.*, stock number, batch and lot numbers, invoices, sales records, shipping information, bills of lading, and order numbers)

c. Value of the goods

d. Whether or not the goods are perishable, if so, their shelf life and how their shelf life can be prolonged

e. Contracts between the manufacturer and/or shipper and the anticipated recipient of the goods

(3) *Movement of the goods*

a. Whether tainted goods are commingled with untainted ones and the circumstances by which the commingling occurred

b. Circumstances related to the interstate shipment (*e.g.*, how it happens, who is involved, what route they take, and what vehicles they take)

[redacted] (b) (7)(E) [redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

(d) Employee interviews

(b) (7)(E) [redacted]

84a06 <u>Identifying actions needed to remedy violations and maintain compliance.</u>

(a) Factors for consideration by WHI in cooperation with DO management

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

[redacted]

(b) Conditions for remedying violations

(b) (7)(E) [redacted]

The compliance terms should be reviewed and agreed upon by the ADD and/or DD with concurrence from the RO and RSOL before the WHI communicates them to the employer. The terms will be included as part of a compliance agreement or consent judgment prepared by WHD and RSOL. Additional terms and conditions relating to the WHD investigation (apart from the hot goods action) outside of a consent judgment cannot be required as a condition of lifting the objection to the shipment of goods.

Note: with perishable goods such as fresh produce, periodicals, print advertisements, or other time-sensitive goods, just a few days delay in shipment can result in the goods losing much, if not all, of their value. The WHD needs to be prepared to inform the person being asked not to ship the goods of what it will take for the objection to shipment to be lifted at the time the objection is communicated to the holder of the hot goods (not days later).

84a07 <u>Hot goods inquiries and notifications.</u>

(a) Securing agreement not to ship and to maintain future compliance

(b) (7)(E) [redacted] The employer (or producer, manufacturer, or dealer) must also be provided an opportunity to respond and provide evidence or any other documentation to address violations or back wage computations. If the employer (or producer, manufacturer, or dealer) does not agree to voluntarily refrain from shipping the goods, then the WHI must immediately contact RSOL in order to obtain a TRO and begin to prepare downstream notification letters. *See* FOH 84a07(b).

Only a court may stop the movement of goods; the FLSA does not provide the WHD authority to seize or confiscate the goods. See FOH 84a04(d).

(1) *Employer voluntarily agrees not to ship*

When the employer has voluntarily committed to refrain from shipping the goods, DO management will secure the employer's signed commitment to refrain from shipping the goods. At the end of the objection to shipment letter, there is a statement that the employer agrees not to ship the goods without providing advance notice to the WHD; if the employer agrees to refrain from shipping, it should sign this statement. If the employer agrees not to ship, and goods are not in transit, downstream purchasers will not be contacted. Nonetheless, the DO and/or RO must preserve the right to communicate with downstream purchasers later in the investigation.

The objection to shipment letter informs the employer of the violation(s) and the FLSA's general prohibition on the shipment of hot goods in interstate commerce. The letter also informs the employer that if he or she refuses to voluntarily agree to withhold shipment of the goods, the WHD may:

a. seek a federal court order to stop the movement of the goods and seek other remedies available under the law, and

b. notify downstream parties that it may be a violation of the FLSA to ship or move the identified hot goods. The letter should also inform the employer that he or she has the option to participate in downstream contacts should the WHD decide to make them.

If the employer agrees to voluntarily withhold the shipment of the goods, the employer (or his or her representative) should sign the statement at the end of the letter and return it to the district office within the time specified in the letter.

If the WHD will, within a couple of days, complete its investigation and determine what would be required to remedy the violation, the objection to shipment letter may be issued before the WHD has completed the investigation and determined what is necessary to remedy the violation. The WHD should, on a regular basis, confirm that goods have not been shipped or moved in any way. The DO and/or RO and RSOL should consult to determine if the employer is engaging in good faith negotiations and quickly estimate back wages. The DO must consult with the RO and RSOL if considering holding estimated back wages. *See* FOH 84a09(f).

In cases where an employer has already shipped some of the goods that were produced in violation of the FLSA's requirements, but agrees to comply with the WHD's request not to ship any remaining goods that were also produced in violation of the FLSA, DO management will issue a modified objection to shipment letter (*see* FOH 84a10) and secure the employer's signed commitment to refrain from shipping the remaining goods. If the employer does not agree to pay back wages and/or refrain from shipment, consideration should be given to contacting the downstream purchaser(s) to whom the goods were already shipped. If contact is made the WHD must provide the employer an opportunity to participate in that contact. The objection to shipment letter may need to be modified accordingly.

In cases where the entity that committed the FLSA violations is in possession of the hot goods but is not the owner of the goods (*see* FOH84a05(a)), two objection to shipment letters should be sent (one to the entity in possession of the hot goods and one to the owner of the hot goods). *See* FOH 84a10 (list of various objection to shipment letters).

(2) *Employer does not agree to refrain from shipment of goods*

Even if an employer refuses to voluntarily withhold the shipment of goods, the WHD should give the employer an objection to shipment letter along with the Hot Goods Fact Sheet (Fact Sheet No. 80).

As soon as the WHD has a reasonable belief that the employer (manufacturer, producer, or dealer) will not comply with the WHD's request to refrain from shipping the hot goods, the WHI, ADD, and/or DD should take several steps in anticipation of the employer's (or manufacturer, producer, or dealer's) refusal.

The WHI should contact RSOL to inform the office of the employer's (or producer's, manufacturer's, or dealer's) expected or stated refusal to refrain from shipment. This will alert RSOL to evaluate the case and, where appropriate, prepare a request for a TRO so that it can be filed upon the employer's (or producer's, manufacturer's, or dealer's) refusal to refrain from shipping the goods. RSOL will seek to file the TRO request within two business days of the employer's refusal to comply with the WHD's request to refrain from shipment. The DO must be prepared to assist RSOL in preparing the TRO request or a request for the relevant type of injunction against the employer.

The WHI should continue to gather information on downstream contacts, including names and contact information. At the same time, the necessary downstream notification letters should be prepared. *See* FOH 84a07(b).

(3) *Employer fails to provide downstream information*

If the employer does not voluntarily provide the identity and other relevant information regarding downstream purchasers or manufacturers, RSOL will consider drafting a subpoena.

If the WHD has not been able to capture the downstream information, the WHI should immediately begin surveying and tracking the goods. Note: the WHI should ask for downstream information in each investigation for mapping purposes. However, as soon as the possibility of hot goods is discovered in a case, the WHI should ask the employer for downstream information, if it has not already been obtained. The WHI must make a complete inventory of the goods produced in violation through a review of production and shipping records. If this is not possible, describe the nature and quantity of the goods. The WHI must immediately consult with the DD and RSOL if he or she is unable to obtain this information. The WHI may not tag goods, but may photograph or video-record them. *See* FOH 84a05(c).

(b) Downstream letters and third-party contacts

In certain circumstances outlined below, the WHD should contact downstream purchasers or manufacturers of the owner of the goods to put them on notice that goods that they already have received, or will soon receive, were produced in violation of the FLSA, and to request that the downstream purchasers or manufacturers not move the goods any further in the stream of interstate commerce. Note: prior to determining whether contacting downstream purchasers or manufacturers is appropriate, the WHI must consider whether any of the defenses listed in FOH 84a08 are applicable.

There are three circumstances when it may be appropriate to contact by phone, and later send downstream notice letters (*see* FOH84a10)), to downstream purchasers or manufacturers. First, as soon as the WHI, DD, and/or ADD has a reasonable belief that the employer (or producer, manufacturer, or dealer) will not comply with the WHD's request to refrain from shipping the goods, the WHD may gather information on downstream purchasers or manufacturers and contact the downstream purchasers or manufacturers and subsequently send the downstream notice letter(s). If, after consulting with DO management and RSOL, the employer refuses to comply with the WHD's request to refrain from shipping the goods or refuses to respond by a reasonable deadline, the WHI should inform the employer (or producer, manufacturer, or dealer) that the WHD will contact the business's downstream purchasers or manufacturers by phone and subsequent letter, informing them that the goods they will receive were produced in violation of the FLSA and should not be shipped further. The employer (or producer, manufacturer, or dealer) should be afforded the opportunity to participate in making the downstream contacts. Regardless of whether the employer (producer, manufacturer, or dealer) agrees or refuses to participate, the WHD, with RSOL agreement, should, after having contacted the downstream purchasers by phone, issue the downstream notice letters to the intended recipients of the goods.

If it does not appear reasonably likely that the employer will ship the goods but the employer nonetheless refuses to agree to voluntarily refrain from shipping the goods, the WHD will not issue the downstream letters until RSOL is ready to file a request for a TRO.

The second instance where it is appropriate to contact the downstream purchasers or manufacturers and subsequently send downstream notice letters is when the employer indicates that it will refrain from shipping the goods, *but* payrolls have not been paid or there is otherwise an indication that the employer is financially unstable. DO management, with RSOL agreement, may contact the downstream purchasers or manufacturers and issue downstream notice letters after the employer has been notified and given an opportunity to participate in downstream contacts as explained below. This may be appropriate, for example, if there is an indication that the employer is likely to be unable to pay back wages or if the employer has not paid its employees for several pay periods. In this scenario, the downstream recipient(s) may seek to post the necessary funds so that the WHD will withdraw its objection to the shipment of goods. *See* FOH 84a09(f).

The third instance where it may be appropriate to contact the downstream purchasers or manufacturers and subsequently send downstream notice letters is when the employer has already shipped some of the goods produced in violation of the FLSA, but agrees to comply with the WHD's request to refrain from shipping any remaining goods produced in violation of the FLSA. DO management, with RSOL agreement, may contact the downstream purchasers or manufacturers to whom the goods have been shipped and send them

downstream notice letters after the employer has been notified and given an opportunity to participate in downstream contacts as explained below.

In all scenarios, the downstream recipients should also be notified that commingling hot goods with other goods will make them all hot goods. *See* FOH 84a02(g)(3) and 29 USC 203(i) (goods include *any part or ingredient thereof*).

(1) Before contacting the downstream purchasers or manufacturers, the DD or other appropriate WHD official should assure that the person and/or firm responsible for the violations (*i.e.*, the employer) has been given:

a. notice of the WHD findings,

b. an opportunity to voice objections and to provide relevant input before the WHD's contact with the third party, and

c. the option of participating in the contact of the downstream parties.

(2) Upon each third party contact, the DD or other appropriate WHD official should:

a. discuss the prohibitions of sections 15(a)(1) or 12(a), as appropriate, and potential defenses;

b. explain in detail the nature and extent of the violations found as a result of the investigation, making clear that there has been no adjudication, explaining whether the findings are contested and identifying the goods;

c. request assurance of future compliance with the hot goods provisions;

d. if appropriate, request cessation of movement of the goods and inform the party that shipping the goods constitutes a distinct violation of the FLSA for which it may be liable, and that the goods may be shipped if violations are remediated, such as by payment of back wages;

e. direct the party to notify the WHD if it believes that the good faith defense may apply (note: where a party may have a good faith defense, a request not to ship cannot be made until there is a determination that the good faith defense is not applicable, *see* FOH 84a08);

f. request, as directed, any further assurance specific to a particular industry or situation;

g. address any other subject deemed necessary by the DD or other appropriate WHD official; and

h. obtain, if possible, a written acknowledgment that contains an expression of the notified person's and/or firm's intent regarding agreement not to ship.

(3) *Contacting third-parties by the DD or other appropriate WHD official(s)*

a. All contacts should be documented and a file maintained on each party contacted in order to facilitate future reference for enforcement purposes.

Documentation should include information regarding other contacts or investigations of the party contacted or of other persons and/or firms that ship hot goods to it.

b. Cross-references to include the names of each contacted party should be included in the investigation file of the person and/or firm found to have violated the FLSA. A similar cross-reference should also be prepared in the file for each contacted party.

c. If there are repeat or willful violations by the person and/or firm under investigation, or a history of prior contacts by the WHD with an upstream (earlier) person and/or firm which has been contacted in connection with this investigation, consultation with the DD is necessary to determine whether and to what extent contact should be maintained with witnesses who may aid in establishing hot goods violations by any upstream person and/or firm.

d. The DD must be consulted to determine whether emergency court relief may be sought, in which case the necessary file preparation should be done. *See* FOH 84a12.

84a08 <u>Defenses.</u>

(a) Application of the good faith purchaser defense

Under the statutory provisions at sections 15(a)(1) and 12(a), a purchaser who acquires goods for value, in good faith, without notice that the goods were produced in violation of the FLSA, and in reliance on written assurance from the producer that the goods were produced in compliance with the FLSA is not subject to the prohibition against shipment of such goods. Each element of the test must be met in order for the purchaser to prevail on this defense. *See* 29 CFR 789.

The good faith defense, which relieves an entity from liability under the FLSA, is to be narrowly construed and is limited to claims that come fully within its terms and spirit. A promise to produce goods in compliance in the future does not satisfy the defense's requirements, since written assurances must cover events that have already occurred. Factors (*see* FOH 84a02(c)) and other persons and/or firms that acquire an interest in goods by means other than purchase (*e.g.*, foreclosure on property obtained as security for a loan) are not eligible for the good faith defense.

(1) *Purchaser*

In situations where the producer owned the goods throughout the production process, the producer-owner is not eligible for the good faith defense, as it is not a purchaser. *See* FOH 84a02.

In situations where the violations are committed by a separate CRADE employer, the producer is not eligible for the good faith defense, since the producer has not acquired goods from the CRADE employer. *See* FOH 84a02(f).

(2) *Written assurance*

A written statement from the producer that the goods were produced in compliance with the FLSA is required to qualify for the good faith defense (*e.g.*, a bill of lading with language indicating the goods were produced in compliance with the FLSA).

If a purchaser has fully qualified for the good faith defense, the defense is not defeated by the failure of an upstream (earlier) seller or previous purchaser to obtain written assurances or to follow other reasonable means (*see* FOH 84a08(a)(3)) to gain knowledge of violations. However, notwithstanding the potential availability of the good faith defense to a purchaser along the chain of acquisition, the goods are hot goods if they have been produced in violation, and the applicability of the good faith defense to one purchaser does not alter the requirement that a downstream purchaser meet all the eligibility requirements in order to qualify for the defense.

(3) *In good faith*

Where a purchaser received the required written assurances from a producer and, in relying on the written assurances, purchased goods from the producer who in fact committed violations, the purchaser may assert the good faith defense.

When the purchaser asserts the good faith defense, the WHD can seek to restrain shipments by the purchaser only if the WHD shows violations by the producer *and* that the purchaser knew, or had reason to know, that the goods worked on by the producer were tainted. This knowledge may be established by the following:

a. Prices paid by the purchaser are so low that the WHD can show that the purchaser would have reason to know that the producer could not meet its monetary obligations

b. The purchaser had control over the producer's payroll through financing of the payroll, raw materials, or equipment purchases, etc.

c. Visits by the purchaser's agents or principals to the producer's plant where conditions resulting in violations were observed

d. Conversations and/or correspondence between the purchaser and producer involving such violations

e. Any other circumstances which would show knowledge on the part of the purchaser that violations have likely been committed by the producer

(4) *For value*

The goods in question must have been paid for by the purchaser. There must be an arm's length transaction to support this requirement, and not merely a transfer of the goods to evade legal sanctions. For example, there must be a bona fide sale of the goods rather than a reshuffling of inventory between organizations.

(5) *Without notice of any such violation*

If the seller or the WHD notifies the purchaser that the goods are hot before the purchaser obtains the written assurance, the good faith defense is not applicable. Such circumstances eliminate the defense where the goods were already identified as hot.

Scenario:

ABC Growers, Inc. has not yet shipped lot #3500 of apples to produce distributor, Yum Yum Fruits. WHI Jones contacts Yum Yum Fruits to advise that lot #3500 is considered hot goods under the FLSA. Yum Yum Fruits (also a purchaser in this example) has now received notice of the violation and, therefore, cannot claim a *good faith* defense in the future for lot #3500.

(6) Where the goods have already been purchased, notification to the purchaser by the WHD in the form of a conference or letter at the conclusion of an investigation of the producer does not constitute knowledge by the purchaser of violations found in the instant investigation. Such notification may, however, provide a basis for showing knowledge by the purchaser in *future* investigations in which the producer is found in violation, especially when the producer is repeatedly found in violation, and the purchaser has not taken any steps to assure producer compliance. *See* FOH 84a05(e).

(b) Application of the good faith purchaser defense to retailers

(1) *Common difficulties of subjecting retailers to the hot goods provision*

It is common for a retailer to be a good faith purchaser. There are two chief difficulties in overcoming a retailer's good faith purchaser defense and subjecting the retailer to the hot goods provisions of the FLSA:

a. Identifying the goods

b. Establishing knowledge that specific goods were produced in violation of FLSA section(s) 6, 7, 12(a), or 14 despite having the written assurances stating otherwise

(2) *In order to overcome the difficulties, so as to hold retailers subject to the hot goods provisions of the FLSA, it may be necessary:*

a. to establish (if the usual assurances were provided) actual or constructive knowledge that the goods were produced in violation. For example, constructive knowledge for the future might be established by informing a retailer that all or a significant portion of a producer's goods were produced in violation; this should put the retailer on notice to be careful in future dealings with that producer. Under those circumstances, if the retailer has not taken action sufficient to assure itself that the goods were made in compliance with FLSA requirements, it may lose its good faith defense.

b. to identify goods that are hot before their shipment and distribution. The availability of the good faith defense to a retailer which has a contractual

relationship with the producer depends on when the retailer gains actual or constructive knowledge that the goods were produced in violation. For example, if the retailer learns of the violations prior to acquiring the goods, the good faith defense is not available. However, if the retailer does not know, or have reason to know, of the violations until after the goods have been acquired, the retailer is eligible for the good faith defense.

Scenario:

If the retailer raises the good faith defense, and if it could be established that a retailer had placed an order for women's coats at such a price level that it could be shown that the retailer knew or should have known that the coats could not be produced at that price in compliance with the minimum wage and overtime pay requirements of the FLSA, a hot goods case against the retailer may be established.

84a09 Remediation.

(a) Resolving hot goods actions: compliance agreements

(b) (7)(E)

[redacted]

[redacted]

[redacted]

(b) Consent judgments

In some situations, the DD, RO, and RSOL may choose to file a consent judgment in federal court. Failure to comply with a consent judgment subjects the employer to contempt proceedings.

(c) Transient workers

When transient workers are involved, the WHD must act quickly to distribute back wages. There are several strategies available to locate workers who are due back wages, including seeking addresses for as many workers as possible in the interviews when workers are not

identified in the records; contacting advocacy organizations, community organizations, and/or churches to help locate workers; working with the appropriate consulates and conducting targeted media outreach. *See* FOH 53c22.

(d) Lifting objections in child labor

In cases involving child labor violations, the RO, RSOL, and NO must discuss terms under which the WHD will lift objections to shipment of goods. In the proposed compliance agreement, DO management should not only require payment of the full amount of CMPs assessed and a commitment to future compliance, but also consider commitments from the employer to monitor compliance and train employees on child labor requirements. The DO should consult with the RO and RSOL for terms for enhanced compliance agreements.

There may be other actions to propose for consideration for settling child labor violations, such as having minors wear brightly colored t-shirts or baseball style hats so they can be readily seen; or the employer posting additional signs along the perimeters of fields informing workers that minors cannot work in the field; or placing statements on workers pay stubs informing them that minors cannot work.

Note: if the employer is disputing its liability for a child labor violation and seeks a hearing on its liability (and will not refrain from shipping in the meantime,) then the DO should consult with the RO and RSOL, so that a request for a TRO can be filed.

(e) Perishable goods

In cases involving perishable goods where the employer has agreed to take the appropriate actions for remediation, the employer may, where appropriate, be given the opportunity to provide interim assurances. These assurances must be determined by DO management in conjunction with the RO and RSOL, and may include holding estimated back wages until a final amount is determined (discussed below). When arrangements have been made to the WHD's satisfaction, the goods may be shipped.

(f) Holding estimated back wages

In certain situations, the WHD can agree to hold estimated back wages and allow the goods produced in violation to be shipped while the exact amounts are being resolved. Such an arrangement may be considered only when the employer has assured future compliance, is not disputing the existence of violations or its liability for any of the violations, and is clearly negotiating in good faith.

Under these circumstances, holding estimated back wages can be a useful tool in industries where the goods are highly perishable, since the employer (or producer, manufacturer, or dealer) may continue to ship his or her goods while assuring future compliance and negotiating the precise amount of back wages owed.

Holding estimated back wage amounts is not to be used in all cases. It is not appropriate to use such an arrangement when the employer disputes the existence of violations or its liability for the violations, there is a refusal to immediately come into compliance, there is evidence of employer interference in the investigation, or the employer has a history of violations that suggests that the employer may not comply with the agreement. It is also not

appropriate to hold back wages in minimum wage and overtime cases where a hearing before an administrative law judge or in district court is pending.

The WHD will hold such amounts following RO protocols. The terms under which the WHD will hold estimated back wages should be reduced to writing, through either a written agreement between the WHD and the employer (or producer, manufacturer, or dealer) that is signed by both parties or a letter from the WHD to the employer (or producer, manufacturer, or dealer). The amount of back wages that will be held by the WHD should be the estimated amount of back wages owed. When determining this amount, remember that the relief sought is for all workers who worked on the production of the hot goods (including CRADE workers), including those workers who may not appear on the records. Such sums will be paid by the employer or other responsible party to the WHD by certified or cashier's check or wire transfer within the timeframe agreed upon in the amount the WHD has presented approximating the back wages due as part of the hot goods action until actual amounts due have been determined. The conditions of the use or return of such sums (*e.g.*, if actual back wages turn out to be less the estimated amounts) need to be agreed upon by the parties involved in the arrangement. Funds will not accumulate any interest while held by WHD. Such an arrangement provides an opportunity for the employer or other responsible party to obtain and submit additional information to the WHI regarding the calculation of back wages while retaining the ability to ship its goods prior to a complete resolution of the hot goods action. Such an arrangement is not required by statute or regulation and is at the discretion of the WHD in consultation with the RSOL. It should establish reasonable written time frames for each step of the process, and it should clearly communicate, in writing that, if the parties are not able reach an agreement as to the precise amount of back wages owed, the WHD will have the ultimate authority to determine the amount of back wages owed.

If it is the case that the parties are unable to reach an agreement as to the precise amount of back wages owed, the WHD should confirm in writing to the employer (or producer, manufacturer, or dealer) that an agreement cannot be reached and, pursuant to the terms explained at the outset, the amount of back wages that the WHD has determined as the final amount of back wages to be paid.

84a10 **Sample letters.**

Examples of letters and other relevant notices listed below can be found on the WHD intranet for use in investigations:

(a) Objection to shipment (owner in possession, section 12(a) violations)

(b) Objection to shipment (possessor without title to goods, section 12(a) violations)

(c) Objection to shipment (owner not in possession, section 12(a) violations)

(d) Objection to shipment (owner in possession, section 15(a)(1) violations)

(e) Objection to shipment (possessor without title to goods, section 15(a)(1) violations)

(f) Objection to shipment (owner not in possession, section 15(a)(1) violations)

(g) Downstream notice (section 12(a) violations)

NOT FOR PUBLIC DISTRIBUTION

(h) Downstream notice (section 15(a)(1) violations)

(i) Lifting objections (section 12(a) violations)

(j) Lifting objections (section 15(a)(1) violations)

(k) Hot Goods Fact Sheet (Fact Sheet No. 80)

84a11 Narrative and WHISARD reporting.

(a) Narrative reporting

If the DO conferred with the RO and RSOL on whether or not to use hot goods, it must be discussed in the case narrative, regardless of whether or not additional action is taken. For specific instructions on how to report a hot goods action, *see* FOH 54b01(e)(4). (b) (7)(E) [redacted]

(b) WHISARD reporting

(1) *Hot goods in WHISARD*

There are two screens in WHISARD where hot goods can be tracked: the employer findings screen and the litigation and SOL activities screen. On the employer findings screen hot goods can be indicated as a violation either in association with section 15(a)(1) (minimum wage and overtime) or in association with section 12(a) (child labor). On the litigation and SOL action screen, hot goods can be indicated in association with a joint review committee meeting (JRC) and injunctive actions (*e.g.*, TRO).

(2) *Tracking hot goods in WHISARD*

These existing data fields should continue to be used in WHISARD. However, particular data fields should be used to indicate specific actions were taken in the case, allowing the WHD to distinguish the various stages of a hot goods case based on the way the data is coded in WHISARD. It is important to follow this guidance and consistently enter the data following these procedures in order to ensure the integrity of the data.

[redacted] (b) (7)(E) [redacted]

NOT FOR PUBLIC DISTRIBUTION

(b) (7)(E)

[redacted]

[redacted]

- [redacted]

[redacted]

[redacted]

- [redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

[redacted]

84a12 Legal remedies.

The WHD does not have the administrative authority to prohibit the shipment or movement of hot goods. Only a court has that authority. If the WHD is not able to remedy the problem through administrative efforts, then the DOL will have to file a civil action pursuant to section 17 of the FLSA in federal court to stop the movement of the goods and remedy the violations.

(a) Injunctions

An injunction is a court order requiring a person to do or cease doing a specific action. If the WHI receives information that the responsible employer and/or person is shipping or will ship hot goods despite our request to the employer and/or person that it refrain from doing so, it is essential to notify the RSOL immediately. In these circumstances, the WHD and RSOL may seek an injunction in U.S. District Court. The three forms of injunctions are TROs, Preliminary Injunctions, and Permanent Injunction:

(1) *TROs and preliminary injunctions*

TROs and PIs are temporary and used when time is of the essence and irreparable injury may result if the actions are not immediately restrained. WHIs in consultation with DO management must establish four elements to warrant the issuance of a TRO or a preliminary injunction:

a. Irreparable injury

Because Congress specifically prohibited the movement of hot goods in commerce, the irreparable injury in a hot goods action is the pollution of commerce that occurs when hot goods are moved in commerce, which injures the public interest that Congress sought to protect with the hot goods provisions.

b. No adequate remedy at law

A TRO is appropriate to prevent the shipment of hot goods produced by child labor or underpaid labor because the ongoing or potential hot goods violation threatens the public interest.

The TRO promotes the strong public policies of preventing tainted goods from entering the stream of commerce and of protecting employers who pay a lawful wage from unfair competition. There is no adequate remedy at law to protect these public interests from the section 15(a)(1) or section 12(a) violation.

c. Likelihood of success on the merits

The WHD must show likelihood that FLSA violations will be established at the Permanent Injunction hearing by compiling documentation and/or testimonial evidence to present at a hearing.

d. Balance of the hardships among the parties

The court is required to consider the balance of hardships of the parties before issuing a TRO or a preliminary injunction.

The purpose of restraining orders in hot goods cases is to protect the public interest by preventing a violation of the law; therefore, the hardship will generally be weighted toward the Secretary in such cases.

However, in some cases the goods in question may be perishable or likely to lose value if not immediately shipped, or the employer may not have the funds to correct the underlying FLSA violations. In such cases, a court may utilize its inherent powers to craft a remedy that balances the equities among the parties.

(2) *Permanent injunction*

A permanent injunction is not ordered until the violations have been fully established before the court. A permanent injunction restrains the defendant from committing a future violation of the statute. In the event a WHI discovers similar violations in a future investigation of the same employer, the Secretary may pursue a contempt action against the defendant for the violations that are subject to the permanent injunction.

(b) (7)(E)

(b)(7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(d) Special remedies

Section 17 of the FLSA empowers the Secretary to seek full equitable relief. Two equitable remedies available to address prior FLSA violations that are committed against the public interest are disgorgement and receivership.

(1) *Disgorgement*

Disgorgement is the act of giving up something, such as profits illegally obtained. Disgorgement can be ordered by the court. In hot goods cases when employers or other persons have already shipped goods in violation of the FLSA hot goods provisions, a court can order the back wages attributable to the illegally shipped or sold hot goods be disgorged, or given up, to "cure" the harm to the public interest caused by their shipment or sale.

Disgorgement should be considered in hot goods actions particularly where goods were shipped prior to the issuance of a TRO. Disgorgement can apply to any person or company that has benefited from the hot goods violation. It can be used with

banks, creditors, bankruptcy trustees, factors, finance companies, and others whether or not they are employers of the employees involved in the underpayments.

Disgorgement may be useful when the goods are so far disseminated that it is not feasible to track them or they have reached the ultimate consumer.

If the WHD is considering the disgorgement remedy in a case, DO management must consult with RSOL as soon as possible.

(2) *Receivership*

An equity receiver is a non-interested qualified third party appointed by the court to take control, possession or management of the property or business of a designated individual or business for purposes of preserving the property, collecting income, operating the business or other appropriate purposes set forth by the court in its orders. Receivership is considered an extraordinary remedy and a strong showing of necessity and of emergency conditions is required. In cases involving the FLSA it might involve extraordinary attempts to avoid payment of wages or injunctions or court orders. It could also involve chronic hot goods violations, attempts to hide goods, fraudulent transfer of goods, or attempts to intentionally ship or sell on a scale and in such a manner that an injunction alone cannot provide a full remedy.

N

84b FLSA SECTION 15(a)(3) DISCRIMINATORY ACTION

84b00 Statutory basis.

(a) Section 15(a)(3) provides that it shall be unlawful for any person "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." When it is decided that a discriminatory action has occurred, court action may be instituted.

(b) It should be noted that section 15(a)(3) forbids any person from discharging or otherwise discriminating against any employee. Thus, the protection against retaliation provided by section 15(a)(3) extends in many circumstances to former employees as well as those presently on the job. For example, it would be unlawful for an employer to blacklist a former employee or in any way to jeopardize his future employment because he or she engaged in any of the activities protected under section 15(a)(3).

84b01 Information required in discriminatory action.

(a) The categories of information required in a discriminatory action under section 15(a)(3) are:

(1) *Identity*

The identity of the establishment must be established affirmatively through official documents as in any other type of litigation.

(2) *Principals*

Established in the usual way

(3) *Section 15(a)(3) violations*

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(4) *Willfulness*

(b) (7)(E)

[redacted]

(5) *Interstate commerce*

It may not be necessary to establish that the employees of the establishment are covered by the FLSA before a section 15(a)(3) action can be instituted. However, if coverage exists, proof should be established in the same manner as in any other litigation investigation, unless otherwise directed by the RSOL's staff.

(6) *Violations: section 15(a)(3)*

Where a section 15(a)(3) violation occurs along with other violations involving court action, whether it be criminal or civil, the salient factors should be included under the heading of section 15(a)(3) in its proper place under "Violations" in the litigation investigation report.

(7) *Recommendation*

The WHI's recommendations should be included in the transmittal memorandum.

84c FLSA SECTION 16(c) ACTIONS

84c00 Investigation proof of section 16(c) claims.

(a) In any investigation in which he or she is authorized to arrange restitution and in which he or she is unable to obtain the voluntary payment of restitution to employees who have filed requests for suit under section 16(c), and in any investigation in which he or she is not authorized to arrange restitution, the WHI shall obtain for the investigation file for each employee who has filed a request to sue under section 16(c) and to whom the employer has not paid restitution:

(1) Proof of the coverage of the employee by the FLSA for each workweek for which back wages are due the employee

(2) Proof that the employee is not fully or partially exempt

(3) Proof of the violations affecting the employee

(4) A statement from the employee and statements, corroborative or otherwise, from other persons who have knowledge of the facts

(5) In the event that no time records or accurate records were maintained, the basis upon which hours of work have been established

(6) Complete transcriptions by workweeks of the violations involving the employee, although this shall not preclude showing the similarity of any of the workweeks

(7) Computation of the back wages due the employee, the facts upon which the computation is based, and the method of computation

(8) An evaluation of each witness (*see* FOH 81d01(a)(1)c)

N

Chapter 85

PUBLIC CONTRACTS ACT HEARING CASES

Table of Contents

85a HEARING PROCEDURE

85a00 Purpose and nature of hearing.
85a01 Procedure following completion of hearing.

85b POTENTIAL HEARING REPORT

85b00 Preparation of potential hearing report.
85b01 Joint review of potential blacklist hearing investigations.

85c HEARING INVESTIGATION REPORT

85c00 Development of investigations approved for hearing action.
85c01 Non-blacklist cases.
85c02 Blacklist cases.
85c03 Guides for the development of hearing investigation reports.
85c04 Disposition of investigation file.

NOT FOR DISTRIBUTION

NOT FOR DISTRIBUTION

85a HEARING PROCEDURE

85a00 Purpose and nature of hearing.

Under the Walsh-Healey Public Contracts Act (PCA), administrative hearings are conducted by a trial examiner for the purpose of determining the facts concerning sums due as liquidated damages resulting from underpayments to employees, the extent of the child labor penalties to be imposed, and whether the invocation of the blacklist sanction is warranted. The hearings are formal in nature, open to the public, and conducted in accordance with the rules of evidence applicable to administrative proceedings. Both the Wage and Hour Division (WHD) and the respondents (*i.e.*, employers) are normally represented by counsels who present their respective cases through testimony under oath, briefs, formal motions, etc. The trial examiner possesses the subpoena power and can subpoena records and individuals for examination. All witnesses are subject to direct and cross-examination. Broadly speaking, the hearings are similar to court actions. The decisions, including the computation of damages, must be based on the evidence introduced at the hearing.

85a01 Procedure following completion of hearing.

(a) Following the hearing and upon completion of the record, the trial examiner issues an order and a decision embodying his or her findings of fact and conclusions of law on all issues as to whether the respondent has violated the representations and stipulations of the PCA, and the amount of damages due therefor. This order and decision become final unless a petition for review is filed.

(b) If the respondent is found to have violated the PCA, the trial examiner in his or her decision makes a recommendation to the Secretary of Labor (Secretary) as to whether the respondent should be relieved from the application of the blacklist provisions of section 3.

(c) Within 20 days after service of the trial examiner's decision, any interested party upon whom such decision has been served may file a petition for review of the decision by the Administrator of the WHD (Administrator). In the discretion of the Administrator, review may be denied unless adequate cause for such review is present.

(d) The order denying review, or the decision of the Administrator, whichever is entered, is served upon the parties who were served with a copy of the trial examiner's decision.

(e) If the respondent is found to have violated the PCA, the Administrator in his or her decision makes a recommendation to the Secretary as to whether the respondent shall be relieved from the application of the blacklist provisions of section 3.

(f) Application for relief from the blacklist provisions of section 3 may be filed by the respondent with the Secretary within 20 days from the date of service of the trial examiner's decision or the Administrator's decision, as the case may be.

(g) Notice of the determination of the Secretary on the application of the blacklist provisions of section 3 is served upon the interested parties.

(h) When a decision in a hearing case has become final, the Secretary notifies the Comptroller General by letter of that decision and of his or her determination concerning the application of the blacklist provisions of section 3. If the Secretary has not relieved the respondent or

NOT FOR DISTRIBUTION

respondents of that sanction, the Comptroller General notifies all contracting agencies that the respondent or respondents are ineligible to receive the award of government contracts subject to the provisions of the PCA for a period of 3 years.

NOT FOR DISTRIBUTION

85b POTENTIAL HEARING REPORT

85b00 Preparation of potential hearing report.

When a Wage and Hour Investigator's (WHI's) findings reveal a situation that indicates a potential PCA blacklist hearing, he or she shall (b) (7)(E) [redacted]

85b01 Joint review of potential blacklist hearing investigations.

PCA investigations prepared for possible blacklist hearing are to be submitted to the joint review committee in the same manner as Fair Labor Standards Act (FLSA) potential litigation investigations.

NOT FOR DISTRIBUTION

NOT FOR DISTRIBUTION

85c HEARING INVESTIGATION REPORT

85c00 Development of investigations approved for hearing action.

Investigations destined for hearing action will fall into general categories that are broadly comparable to civil and criminal actions under the FLSA, namely, non-blacklist and blacklist cases.

85c01 Non-blacklist cases.

(a) Non-blacklist cases include those investigations that do not fall within the criteria for potential criminal or blacklist action. Generally, they concern a legal or administrative issue, and arise as a result of contest by the employer. Examples include investigations involving questions of coverage, classification as substitute manufacturer, applicability of a wage determination, inclusion of a bonus in the regular rate of pay, or refusal by the employer to make voluntary restitution or pay liquidated damages in investigations that might otherwise be closed administratively.

85c02 Blacklist cases.

Blacklist cases include those investigations that fall within the criteria for blacklist actions.

85c03 Guides for the development of hearing investigation reports.

(a) Non-blacklist hearing investigation reports shall be developed generally in accordance with the instructions for civil action cases in FOH 83.

(b) Blacklist hearings investigation reports shall be developed generally in accordance with the instructions for criminal cases in FOH 82. The violations must be clearly established and falsification and/or willfulness on the part of the principals must be demonstrated.

(c) The following guides are suggested in the development of PCA hearing investigation reports, whether blacklist or non-blacklist:

(1) *Contract information*

It is necessary to include certain basic information with respect to the contracts under investigation, which will clearly define the coverage of the employees under the PCA, and the periods for which they are subject to the act. The following information shall be included:

a. Name of the contractor and whether he or she is the primary or secondary contractor

b. If the primary contractor, his or her qualifications as a manufacturer or regular dealer

c. A chart of the contracts with the following information:

1. Contract number

NOT FOR PUBLICATION

2. Date awarded, or date of letter of intent or other official notice of award

3. Date work started

4. Date of final delivery

5. To whom delivery is made

6. Articles supplied

7. Quantity and value actually supplied

8. Total dollar value of contract

d. Whether the establishment has been engaged on civilian work at the same time, and whether it is possible to segregate between the employees working on government contract materials and those working on civilian materials. [redacted]

(b) (7)(E)

[redacted]

(2) *Necessity of adequate proof*

Each violation must be adequately proved, and the sustaining evidence assembled. The WHI must pay particular attention to the provisions, interpretations, and regulations of the PCA that differ from those of the FLSA.

(3) *Wage determination violations*

Certain industries are subject to wage determinations made by the Secretary. Such determinations may include the definition of the industry; the determination of the wage rate applicable and the localities affected; the definitions of auxiliary workers, learners, apprentices, superannuated, and workers with disabilities; and the tolerance or percentage that the number of such workers is not to exceed. Not all wage determinations contain each of these features. Some have several, and others make no provision except for the definition of the industry and the setting of a minimum rate. The WHI must be careful, whenever establishments subject to wage determinations are investigated, to ascertain whether violations of any portions of the determination have occurred. If any such violations are found, they shall be treated separately, and sustaining evidence to prove the violations shall be listed under each type of violation.

NOT FOR DISTRIBUTION

(4) *Overtime violations*

The PCA differs, in part, from the FLSA in that it requires the payment of time and one-half after 8 hours a day, or 40 hours a week, whichever is greater. The WHI must be careful to include all violations of this requirement.

(5) *Falsification of records*

The recordkeeping provisions of the PCA are very similar to those of the FLSA. Where falsification is involved, the evidence shall be assembled and prepared in the same fashion.

(6) *Child labor violations*

The PCA provides for liquidated damages, in addition to damages for any other breach of contract, of $10.00 per day for each person under 16 years of age knowingly employed on work covered by the PCA. The facts shall be sufficiently developed to prove affirmatively the *knowing* employment of each minor in violation of the PCA on specific days on government work.

(7) *Convict labor violation*

The PCA provides for liquidated damages, in addition to damages for any other breach of contract, of $10.00 per day for each convict laborer knowingly employed on work covered by the PCA. The facts shall be developed in a manner similar to the development suggested for child labor knowingly employed.

(8) *Employment of homeworkers*

a. The use of homeworkers on government contract work subject to the PCA is not permitted. (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

NOT FOR RELEASE

(9) *Computation of back wages and liquidated damages*

In all investigations submitted for hearing action under the PCA, the investigation file shall contain complete computations of all back wages due and a tabulation of the days and liquidated damages due for the knowing illegal employment of minors and/or convict labor.

(10) *Safety and health violations*

Where serious and flagrant violations of the safety and health provisions of the PCA are disclosed, including those flagrant violations disclosed by the Federal Bureau of Mines in coal mines as provided for in the cooperative agreement, they are generally included among the charges made in the complaint. In such cases, the violations shall be described in the greatest detail. The safety and health report shall be made a part of the potential hearing report and included as an exhibit. Whenever possible, the WHD safety engineer shall verify the serious and flagrant violations so as to supply expert testimony, if required, at the hearing.

85c04 <u>Disposition of investigation file.</u>

When the investigation file has served its purpose (this will usually be upon completion of the hearing, since any subsequent action will be based upon the hearing record), the attorney for the government will return the investigation file through the RSOL to the regional administrator. It will be the responsibility of the RO to include information concerning all subsequent action in the file, such as a copy of the decision, a copy of the collection letter, notations concerning payment of the liquidated damages, and the final closing action.

NOT FO RIBLA I

Chapter 86

ENFORCEMENT TOOLS

Table of Contents

86a OBTAINING INFORMATION

86a00 Background.
86a01 WHD authority to ask for and obtain information.
86a02 Typical process for obtaining records and evidence.

86b SUBPOENAS

86b00 WHD policy on the use of subpoenas.
86b01 Subpoenas.
86b02 Criminal cases.
86b03 Issuing a subpoena without a prior written request.
86b04 Use of third party subpoenas.
86b05 Requesting, serving, and enforcing subpoenas.

86c SEARCH WARRANTS

86c00 WHD policy on the use of search warrants.
86c01 Administrative search warrants.
86c02 Statutory authority to obtain search warrants.
86c03 When is a warrant appropriate?
86c04 Warrants in child labor cases.
86c05 Warrants are not required in MSPA investigations.
86c06 What does the WHD need to show in order to obtain a warrant?
86c07 Scope of the warrant.
86c08 Anticipatory warrants.
86c09 Obtaining a warrant.
86c10 Specific warrant information based on investigation type.
86c11 Serving a warrant.
86c12 Second warrant.
86c13 Refused entry or interference (only applicable when a U.S. Marshal is unavailable).
86c14 Enforcing a warrant.
86c15 Other considerations.

86a OBTAINING INFORMATION

86a00 Background.

(a) (b) (7)(E) [redacted]

(b) All WHIs should understand the Wage and Hour Division's (WHD's) legal authority to use these tools so that they are able to identify when and how to use them to obtain compliance.

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

86a01 WHD authority to ask for and obtain information.

(a) The WHD's authority to investigate and gather information *is not limited* to the records identified in the FLSA recordkeeping regulations at 29 CFR 516. Section 11(a) of the Fair Labor Standards Act (FLSA) authorizes the WHD to (emphasis added):

"Investigate and gather data regarding the wages, hours, *and other conditions and practices of employment in any industry* subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters *as he may deem necessary* or to determine whether *any person* has violated *any provision* of this chapter, or which *may aid in the enforcement* of the provisions of this chapter."

(b) This statutory language is quite broad. Pursuant to section 11 of the FLSA, WHIs may make reasonable requests for information that is relevant, or may lead to information relevant to the investigation. Further, given the language of the statute, the WHD's authority to request and obtain information from any person is not limited to the employer under investigation.

See FOH 86b01 for the WHD's authority to seek information under other statues (*e.g.*, the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), Family and Medical Leave Act (FMLA), Employee Polygraph Protection Act (EPPA), and Occupational Safety and Health Act (OSH Act)).

(b) (7)(E) [redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

  [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

86a02 **<u>Typical process for obtaining records and evidence.</u>**

(a) **Initial efforts by the district office (DO)**

(1) (b) (7)(E) [redacted]

a. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

b. (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

a. (b) (7)(E) [redacted]

b. (b) (7)(E) [redacted]

(b) Making additional requests or allowing additional time to provide information

(1) In order to conduct effective investigations, it is very important that the WHD not permit too much time to lapse if an employer is not providing the requested information. (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(3) (b) (7)(E) [redacted]

(4) The amount of time allowed in an appointment letter or a 72 hour letter to provide requested information should take into consideration factors such as: whether the employer is required to maintain the requested information, the amount and type of information being requested, whether information can be provided electronically, and the location of the information.

(5) (b) (7)(E) [redacted]

(6) Consideration should also be given to whether all relevant information is sought in one request, or whether certain critically needed information is sought in an initial request with a shorter time period to comply with the request, and less critical information sought in a subsequent request or requests.

(c) Unannounced visits

(b) (7)(E) [redacted]

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(d) Appointment letters

(b) (7)(E)

[redacted]

(b) (7)(E)

[redacted]

(5) Appointment letters should state the purpose of the investigation, the scope of the WHD's authority to ask for and obtain information, and include a list of documents and information that the employer will need to provide on the date of the appointment. *See* the intranet templates page (b) (7)(E) [redacted] for sample appointment letters. The appointment letter constitutes the first written request for information and begins the process that may ultimately lead to a subpoena, if necessary.

(b) (7)(E)

[redacted]

(b) (7)(E) [redacted]

(e) 72 hour letter

(1) (b) (7)(E) [redacted] It is commonly called a 72 hour letter because it usually requests that the employer provide certain documents within 72 hours. The timeframe of 72 hours has been commonly adopted because the regulations at 29 CFR 516.7 state that, "[w]here the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within 72 hours following notice from the Administrator or a duly authorized and designated representative."

(2) It is important to note, however, that *the 72 hour timeframe refers only to records maintained at a central recordkeeping office*, "other than in the place or places of employment." Therefore, an employer is not automatically entitled to 72 hours to produce records. (b) (7)(E) [redacted]

(3) *Requirements for 72 hour letters*

a. (b) (7)(E) [redacted]

b. (b) (7)(E) [redacted]

c. (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(f) Surveillance

(1) Surveillance consists of obtaining information about an employer's practices from a public place, often without notifying the employer.

(2) (b) (7)(E) [redacted]

(3) (b) (7)(E) [redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
  [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]

[redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
    - [redacted]

- (b) (7)(E) [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

- [redacted]

  [redacted]

  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

- [redacted]

  [redacted]

86b SUBPOENAS

86b00 WHD policy on the use of subpoenas.

(a) Based on the WHD's experience, in the majority of situations, it will not be necessary to issue and serve a subpoena to obtain information needed to conduct an effective investigation. WHIs are encouraged to use good judgment and to identify ways to obtain information without the use of a subpoena. WHIs should make reasonable efforts to work cooperatively with persons from whom they are requesting information.

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

(e) The Administrator of the WHD (Administrator) or RA may issue subpoenas. If the position of Administrator or RA is vacant, the Deputy Administrator or Deputy RA may issue subpoenas.

86b01 Subpoenas.

Subpoenas are formal requests to employers to provide documents or to make an employer or his or her agents available for testimony. Unlike 72 hour letters or other requests from the WHD, subpoenas can be enforced in U.S. district courts. Note: subpoenas cannot be used to gain access to a workplace; search warrants are required to gain access to physical property. (b) (7)(E) [redacted]

(a) Statutory authority

The Supreme Court has upheld the Administrator's authority to issue subpoenas enforceable in federal district court. *See Donovan v. Lone Steer Inc.*, 464 U.S. 408 (1984) and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

The Secretary has delegated specific authority to issue administrative subpoenas to the Administrator and the RAs under the following: Secretary's Order 5-2010, 75 FR 55354; or the most recent Secretary's Order.

(1) *The FLSA*

a. Section 11(a)

"The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof)... as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter." *See* 29 USC 211(a) and 29 CFR 516.7(a) -(b).

b. Section 9

"For the purpose of any hearing or investigation provided for in this chapter, the provisions of Sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator…." *See* 29 USC 209.

Section 49 of Title 15 gives the Federal Trade Commission "power to require by subpoena the attendance and testimony of witnesses and the production of *all* such documentary evidence *relating to any matter under investigation*" (emphasis added), and section 50 imposes penalties for failing to cooperate with an investigation or for making a false statement or falsifying records.

(2) *The MSPA*

The Secretary may issue subpoenas requiring the attendance and testimony of witnesses, or the production of any evidence in connection with such investigations (*see* 29 USC 1862(b)).

(3) *The FMLA*

Section 16: "To ensure compliance with the provisions of this title, or any regulation or order issued under this title, the Secretary shall have, subject to subsection (c), the investigative authority provided under Section 11(a) of the Fair Labor Standards Act of 1938." *See* 29 USC 211(a) and 29 USC 2616(a).

For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 209 of this title. *See* 29 USC 2616(d).

Subsection 2616(c) of the FMLA generally limits the WHD to requesting documents no more than once in a 12-month period, unless: 1) the Secretary has reasonable cause to believe a violation may exist, or 2) the WHD is investigating a charge pursuant to section 2617(b) of the FMLA.

(4) *The EPPA*

Subpoena Authority: "For the purpose of any hearing or investigation under this Act, the Secretary shall have the authority contained in Sections 9 and 10 of the Federal Trade Commission Act." *See* 29 USC 2004(b).

(5) *The OSH Act (as it relates to field sanitation and certain temporary labor camps)*

"In making his inspections and investigations under this Act the Secretary may require the attendance and testimony of witnesses and the production of evidence under oath. ...In case of a contumacy, failure, or refusal of any person to obey such an order, any district court... upon the application by the Secretary, shall have jurisdiction to issue to such person an order requiring such person to appear to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question...." *See* 29 USC 657(b).

Remember that subpoenas may only be used as appropriate to the statute under which you are investigating. (b) (7)(E) [redacted] For example, a WHI cannot use an FLSA subpoena for an H-1B investigation, *unless* the WHI is also investigating an overtime violation, and then the subpoena may only be used for the overtime part of the investigation. Or, an MSPA and H-2A case may have common facts, but the WHD cannot exceed the scope of its subpoena authority under the MSPA to investigate the H-2A portions of the case.

In addition, necessary documents in DBA cases may be obtained, when back wages have been withheld and the employer has made a claim against the Department of Labor (DOL) for the withheld funds, by application to a federal district court pursuant to 5 USC 304.

(b) Types of subpoenas

(1) *Subpoena duces tecum*

Subpoenas are generally issued for records. A subpoena *duces tecum* is a command to an individual or corporation to appear at a specified time and place and bring certain records, produce the records, and testify concerning them.

a. Examples:

Subpoenas have been issued to employers to require them to produce records such as:

1. (b) (7)(E) [redacted]

2. (b) (7)(E) [redacted]

3. (b) (7)(E) [redacted]

4. (b) (7)(E) [redacted]

5. (b) (7)(E) [redacted]

- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]

Several examples of subpoenas *duces tecum* can be found on the intranet.

b. <u>What can be obtained with a subpoena *duces tecum*?</u>

1. The WHD is entitled to existing documents that are relevant to the investigation. If certain documents are necessary to determine compliance with the statute being enforced, and the WHD can explain why those documents are necessary, the WHD is entitled to that information.

2. (b) (7)(E) [redacted]

3. Basic information, such as payroll records and documents relevant to establishing coverage, may always be requested. However, we cannot ask an employer to create new documents.

(2) *Third party subpoena*

A third party subpoena refers to a subpoena *duces tecum* that is issued to a third party (*i.e.*, someone other than the employer being investigated) who has information that is relevant to the investigation. (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Examples of these third party subpoenas can be found on the intranet.

b. Subpoenas to banks and other large record custodians

1. Subpoenas to banks can be the source of valuable investigative leads. (b) (7)(E) [redacted]

2. (b) (7)(E) [redacted]

3. (b) (7)(E) [redacted]

A. a complete copy of the subpoena,

B. a specific notice explaining what the subpoena's purpose is, and

C. a sample declaration to be filed in district court by the customer if the customer wishes to have the subpoena quashed.

4. (b) (7)(E) [redacted]

5. (b) (7)(E) [redacted]

[redacted]

(b) (7)(E) [redacted]

6. (b) (7)(E) [redacted]

A. Large institutions often have special units for handling subpoenas. Make sure that the subpoena is specifically addressed to the right office so it does not get lost.

B. Banks often assign specific employees to a particular subpoena (often with a case number or reference number). (b) (7)(E) [redacted]

C. Banks often cannot release information electronically, only by paper. (b) (7)(E) [redacted]

D. (b) (7)(E) [redacted]

E. (b) (7)(E) [redacted]

F. Records received in response to a subpoena should be separately tabbed or marked in the investigation file, and kept with a copy of the subpoena. (b) (7)(E) [redacted]

(3) *Subpoena ad testificandum*

Subpoenas may also be issued to compel testimony. A subpoena *ad testificandum* is an order requiring a named individual or corporation to appear at a particular time and place and give oral testimony. (b) (7)(E) [redacted]

a. Examples of when a subpoena *ad testificandum* may be appropriate.

1. To preserve employee testimony

A. (b) (7)(E) [redacted]

B. (b) (7)(E) [redacted]

2. To preserve employer testimony

A. (b) (7)(E) [redacted]

B. (b) (7)(E) [redacted]

C. (b) (7)(E) [redacted]

86b02 **Criminal cases.**

(a) Section 49 of the Federal Trade Commission Act, which has been incorporated into the FLSA, MSPA, EPPA and the FMLA, grants immunity from criminal prosecution to any natural person who has been compelled to testify or produce evidence under the compulsion of the subpoena. (b) (7)(E) [redacted] However, there is no objection to issuing a subpoena to an employee of the business. Where only civil action is contemplated, there is no bar to the issuance of the subpoena. This restriction does not apply to the PCA, SCA or OSH Act.

(b) In connection with a court action, including a court subpoena under 5 USC 304, as distinguished from an investigation or administrative proceeding, a subpoena may be issued by the court to produce documentary evidence even though the employer is engaged in business in an individual capacity or as a partnership and criminal action is anticipated. Therefore, although such documents are not available in response to an administrative subpoena, (b) (7)(E) [redacted]

86b03 **Issuing a subpoena without a prior written request.**

(a) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

(b) (b) (7)(E) [redacted]

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(3) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

[redacted]

[redacted]

86b04 **Use of third party subpoenas.**

(a) The WHD has the authority to ask for and obtain information relevant to the enforcement of the law from parties other than the employer under investigation (*e.g.*, third parties such as banks, contractors, etc.). (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(d) A subpoena may be required to obtain data from certain persons, such as a banking institution, and a request for information without a subpoena may not be honored. (b) (7) (E) [redacted]

For further information about third party subpoenas, *see* FOH 86b01(b)(2).

86b05 **<u>Requesting, serving, and enforcing subpoenas.</u>**

(a) **When and how to request a subpoena**

(1) (b) (7)(E) [redacted]

- [redacted]
- [redacted]
- [redacted]

(2) (b) (7)(E) [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

(3) (b) (7)(E) [redacted]

(b) How to serve subpoenas

(1) Subpoenas should be served in the most efficient way that minimizes the cost and time burden on the WHD. (b) (7)(E) [redacted]

(2) In rare instances, a subpoena may be served by a U.S. Marshal (to be coordinated with RSOL). U.S. Marshals can be engaged to assist if there is a concern that the employer will be difficult or resistant to service. In those instances, the RSOL can assist with contacting the U.S. Marshals and developing the strategy for service.

(c) Who to serve

(1) *Individuals*

(b) (7)(E) [redacted]

(2) *Corporation*

(b) (7)(E) [redacted]

a. Every corporation must have a registered agent, that is, a person or company who resides within the state and is designated to receive legal papers on behalf of the corporation.

b. The secretary of state's office in most states has records of the name of each corporation's registered agent, and these records can usually be found online.

c. Small to mid-sized corporations often have individuals, such as the owners or the company's outside legal counsel, as their registered agents.

d. Larger companies use established registered agent companies.

e. (b) (7)(E) [redacted]

(d) How to serve

(1) The WHD may enlist process servers to serve subpoenas if it is determined that doing so would be the most efficient and cost effective way to serve the subpoena. Process servers will handle all the steps outlined below, including providing the WHD with completed return of service forms. *See* FOH 86b05(b).

(2) If a WHD representative serves the subpoena, the guidelines below should be followed.

(3) (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

(4) (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

e. (b) (7)(E) [redacted]

f. (b) (7)(E) [redacted]

(e) What to serve

Serve the original, signed subpoena. The WHI should also bring a copy of the subpoena, with an attached return of service form.

(f) After service

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(g) Enforcement of subpoenas

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(3) (b) (7)(E) [redacted]

(4) (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(5) (b) (7)(E) [redacted]

N

N

86c SEARCH WARRANTS

86c00 WHD policy on search warrants.

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted] to determine with DO and RO management and the RSOL whether to seek a search warrant.

86c01 Administrative search warrants.

(a) An administrative search warrant is a court order authorizing a WHI to enter and inspect an employer's private property over the employer's objections.

(b) A warrant may be appropriate when:

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(3) (b) (7)(E) [redacted]

(4) (b) (7)(E) [redacted]

86c02 Statutory authority to obtain search warrants.

(a) The WHD has statutory authority to obtain a search warrant under section 11(a) of the FLSA. The need for a warrant will most commonly arise under the FLSA (*e.g.*, during a child labor, hot goods, or another high priority investigation). There may also, on occasion, be the need for a warrant during a MSPA investigation (although not required, a warrant is often the most expeditious course of action in a MSPA case). *See* FOH 86c06.

(b) Section 11(a) provides (emphasis added):

"The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry

subject to this chapter, and *may enter and inspect such places and such records* (and make such transcriptions thereof), *question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate* to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter."

(c) This is the same statutory basis for the WHD's authority to issue administrative subpoenas. (b) (7)(E) [redacted]

86c03 **When is a warrant appropriate?**

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

[redacted]

[redacted]

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

(e) (b) (7)(E) [redacted]

(f) (b) (7)(E) [redacted]

(b) (7)(E)

(b) (7)(E)

86c04 **Warrants in child labor cases.**

(a) **Child labor**

(b) (7)(E)

(b) (b) (7)(E)

(b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

86c05 Warrants are not required in MSPA investigations.

(a) MSPA inspections facility

If the property on which a WHI is attempting to access is an open field in a MSPA investigation, the farmer has no expectation of, or a right to, privacy. Therefore, there is no need for a warrant in order for a WHI to enter such open field. *See* FOH 57h05. Where aggravated safety and health hazards are disclosed that represent imminent danger to the occupants, correction shall be sought immediately and additional steps should be taken to contact and report these hazards to the appropriate federal, state, and local agency having jurisdiction in such matters.

As for an investigation of migrant housing, the farmer or landlord has no privacy expectation either, which makes a warrant unnecessary as to the farmer or landlord. Note, however: the tenants and/or migrant workers who are residing in the housing *do* have an expectation of privacy. If, for some unusual reason the tenant and/or migrant occupant objected to entry, a warrant would be required. In such a situation, the legal standard for obtaining a warrant would be different because there is a higher expectation of privacy for private living spaces.

(b) (b) (7)(E) [redacted]

86c06 What does the WHD need to show in order to obtain a warrant?

(a) To obtain a warrant, the WHD must show that reasonable legislative or administrative standards for conducting an area inspection are satisfied. In other words, the WHD would need to show *administrative probable cause*, which can be met with either:

(1) specific evidence of a violation; or

(2) a showing that the place to be inspected was selected on the basis of a neutral, general plan (discussed in greater detail later).

Probable cause in the criminal law sense (*i.e.*, reason to believe a violation had occurred and that evidence of a crime would be recovered as a result of the search) is not required in order for the WHD to obtain a search warrant. This higher standard is generally used in criminal

cases where life and liberty may be at stake, or where there is a request to search one's home, which carries a very high expectation of privacy.

(b) In order to meet the administrative probable cause standard needed to obtain a warrant, the WHI could base his or her warrant application on the following:

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

[redacted]

86c07 **Scope of the warrant.**

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

(b) (7)(E) [redacted] il the kind of information that the WHD should provide to RSOL for the warrant application.

86c08 **<u>Anticipatory warrants.</u>**

(a) Anticipatory warrants are warrants that are obtained at the outset of an investigation (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) An anticipatory warrant would allow for an unannounced investigation in such a situation. The WHD's administrative probable cause standard is the same for anticipatory warrants. (b) (7)(E) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) (7)(E) [redacted]

86c09 **Obtaining a warrant.**

(b) (7)(E) [redacted]

- [redacted]
  - [redacted]
  - [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

(b) (7)(E)

[redacted]

86c10 **Specific warrant information based on investigation type.**

(b) (7)(E) [redacted]

(a) **Child labor allegations**

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(3) (b) (7)(E) [redacted]

(b) **Complaint or referral**

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(3) (b) (7)(E) [redacted]

(4) (b) (7)(E) [redacted]

(c) **Directed**

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(d) **Reinvestigation and/or follow-up**

(1) (b) (7)(E) [redacted]

(2) (b) (7)(E) [redacted]

(3) (b) (7)(E) [redacted]

(4) (b) (7)(E) [redacted]

(5) (b) (7)(E) [redacted]

86c11 **Serving a warrant.**

(a) (b) (7)(E) [redacted]

(b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

(c) (b) (7)(E) [redacted]

(d) (b) (7)(E) [redacted]

(e) (b) (7)(E) [redacted]

86c12 **Second warrant.**

Under certain circumstances, a second warrant may be sought to expand an inspection based on a records review, observations, or other evidence discovered during the initial inspection.

86c13 **Refused entry or interference (only applicable when a U.S. Marshal is unavailable).**

(a) (b) (7)(E) [redacted]

(b) (b) (7)(E) [redacted]

[redacted]

[redacted]

86c14 Enforcing a warrant.

Should a WHI be unable to execute a warrant due to refused entry or interference, the RSOL may bring a contempt action in federal district court, asking that the court rely on its inherent civil contempt powers to enforce its own judgments and orders.

86c15 Other considerations.

Successfully securing a warrant requires early and frequent consultation with DO managers, the RO, and the RSOL. Also, the fact that the WHD can seek a warrant in appropriate circumstances should not negate other common sense approaches to access. Although warrants are rare to the WHD, employer resistance is not. It has been the experience of the WHD that, in the vast majority of instances, experienced WHIs are able to use their training, experience, and investigative techniques to conduct a thorough investigation without relying on a warrant.

N