APPENDIX D

AGENCY RESPONSE

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington, D.C. 20210

October 6, 2005

The Honorable Gordon S. Heddell
Inspector General
U.S. Department of Labor
Washington, D.C. 20210

Dear Mr. Heddell:

Thank you for the opportunity to comment on the Office of Inspector General's (OIG) audit report concerning the Wage and Hour Division's (WHD) January 11, 2005, settlement agreement with Wal-Mart Stores, Inc.[1]

We fully concur with your determination that WHD did not violate any laws by entering into the Wal-Mart settlement agreement and your implicit finding that no official at the Department of Labor exerted improper influence on the negotiation process. As your report notes, the settlement agreement was negotiated by experienced WHD career professionals in the field rather than non-career officials in Washington. Moreover, by the time the agreement was signed, it was the uniform view of the career staff in both the regional and national offices who were involved in the negotiations and review that it was a good settlement agreement that would substantially strengthen Wal-Mart's future compliance with federal child labor laws.

At the same time, we agree with your conclusion that the process previously employed by WHD in negotiating settlement agreements – both prior to this Administration and including the Wal-Mart settlement – required greater control and oversight. WHD conducted an internal review of its settlement negotiation process in early 2005 to identify areas that could be improved. Final guidance on the coordination of WHD settlement agreements was issued to all WHD Regional Administrators and SOL Regional Solicitors on June 27, 2005. The new review policy:

- establishes procedures for the review and approval of settlement agreements by the National Office of WHD and the Solicitor's Office;
- specifies provisions that must be included in all settlement agreements, as well as provisions that are prohibited in settlement agreements; and
- defines the bounds within which settlement agreements should be negotiated.

We believe you will find from reviewing the attached coordination memorandum that WHD has effectively implemented OIG's recommendations in this regard.[2]

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[1] The agreement that is the subject of the audit will expire in approximately three months, on January 11, 2006.

[2] Pages 6-9 of the coordination memorandum have been withheld because they contain sensitive law enforcement information that is not appropriate for publication.

We strongly disagree, however, with the report's overall characterization of the effectiveness of the Wal-Mart child labor settlement agreement. The agreement succeeded in securing 90 percent of the civil money penalties (CMPs) assessed against Wal-Mart, well in excess of WHD's average settlement result of 78 percent. More importantly, it imposes broad obligations on Wal-Mart that far exceed federal law and regulations, compelling the company during the last six months to, among other things:

- conduct more than 9,000 facility audits "that go beyond the employment of minor restrictions covered under federal law and are designed to audit compliance with Wal-Mart's obligations under the Department of Labor Child Labor Settlement Agreement";
- train more than 160,000 managers and hourly supervisors on compliance with the child labor laws;
- send communications to its stores to verify work permits and work-hour restrictions for all minor associates; and
- update its training programs and its new hire information materials to include additional information about restrictions on the employment of minors.

Most of these measures never would have been implemented in the absence of the agreement.[3] (See Wal-Mart compliance report, attached).

The OIG report also misinterprets and mischaracterizes several of the Wal-Mart agreement's substantive provisions. Specifically, the report:

- erroneously concludes, without any supporting reasoning, that the detailed monitoring and reporting mechanisms imposed on Wal-Mart do not rise to the level of a "self-audit";
- erroneously concludes that advance notice provisions are "inconsistent" with WHD policy, despite the fact that senior managers in WHD and SOL have approved their use in nearly 20 settlement agreements dating back to the previous Administration, and are expressly incorporated into WHD's Field Operations Handbook (FOH); and
- interprets the settlement agreement's provisions without regard to any of the relevant rules governing interpretation of contracts, thereby coming to the erroneous conclusion that the agreement's advance notice provision applies to all WHD investigations, not just those focused on child labor.

There is no question that certain provisions in the agreement would have been drafted more clearly had they been subject to full intradepartmental review and approval. Yet the OIG report inexplicably construes these provisions in a manner that is consistently more pro-employer than even Wal-Mart's own attorneys do. Not only do the WHD professionals who are responsible for enforcing this agreement disagree with OIG's

[3] Significantly, when the Connecticut Department of Labor released its June 2005 report regarding its own investigation of Wal-Mart, it identified only 11 violations of state child labor laws and assessed only $3,300 in fines – less than 3 percent of the fines that the U.S. Department of Labor assessed against Wal-Mart for violations in Connecticut.

interpretations of these provisions, even Wal-Mart has adopted constructions that are more favorable to workers than OIG's view. Contrary to the impression given by the OIG's report, Wal-Mart was not consulted before the Department issued its press release announcing the agreement; advance notice has not been provided to Wal-Mart for WHD investigations involving matters other than child labor; and Wal-Mart has not been permitted to avoid all penalties for violations of federal law simply by bringing its stores into compliance.

I. THE VALUE OF THE WAL-MART CHILD LABOR AGREEMENT

To understand the true value of the Wal-Mart settlement agreement, it is necessary to have a fuller picture of the agreement's negotiating history than the OIG audit report provides.

After identifying child labor violations in several Wal-Mart stores located in Arkansas, Connecticut and New Hampshire in 2001 and 2002, WHD determined that it should pursue a nationwide settlement agreement with Wal-Mart that would help to bring all Wal-Mart facilities into full compliance with the child labor laws. Nationwide settlement agreements allow WHD to maximize the impact of its resources by leveraging the findings of local investigations into sweeping, legally enforceable corporate-wide compliance obligations that go beyond what the law requires. Based on that long-standing policy, WHD's career professionals concluded that it would be particularly valuable to secure such an agreement with the nation's largest retailer. Consistent with this approach, the WHD Administrator formulated the following negotiation strategy in February 2003:

> On the topic of negotiations, we are not interested in a partnership at this point in time. ... We should hold the line on the penalties – little or no reduction.

(See February 20, 2003 e-mail from Dallas Regional Administrator (RA) Cynthia Watson, paraphrasing WHD Administrator Tammy McCutchen, to the Main Office District Office District Director (MODO DD) Barlow Curran). The MODO DD replied by e-mail on the same date: "I understand your message below, I think. Our approach is enforcement not partnership."

In all of its discussions with Wal-Mart, WHD insisted that it would not agree to settle the child labor violations unless Wal-Mart signed a corporate-wide settlement agreement. Wal-Mart, by contrast, strongly resisted the idea of entering into a corporate-wide settlement, arguing that any agreement should be confined to the states in which the underlying child labor violations were found. (See pg. 11: "The new Wal-Mart attorneys each contended that since the alleged violations had been found in only three states, a national agreement was too broad in scope."). By persevering, WHD convinced Wal-Mart in September 2003 to agree in principle to a nationwide settlement agreement. (See pg. 11).

Negotiations over the exact language of the agreement continued for over a year. The MODO DD remained concerned that "Wal-Mart would simply pay the CMPs of $150,600 that had been assessed, without any written promise to make proactive child labor compliance activities a priority." (See pg. 11). This fear was well-founded precisely because WHD was insisting that Wal-Mart pay at least 90 percent of the assessed CMPs – well more than the WHD settlement agreement average of 78 percent. Thus, it would have cost Wal-Mart only an additional $15,000 to pay the fine in full, walk away from the negotiating table, and refuse to adopt any corporate-wide compliance measures.

When Wal-Mart first agreed to pursue a nationwide settlement agreement in September 2003, the MODO DD again forwarded Wal-Mart "a template of a child labor agreement that could be used as a starting point to develop the agreement." (See pg. 11). Because of their concern that Wal-Mart might back out, the MODO DD and the Dallas RA were both pleased when Wal-Mart suggested revisions to the template agreement in February 2004. In his e-mail to the Dallas RA reporting receipt of Wal-Mart's proposed changes, the MODO DD stated:

> The very good news is that Wal-Mart has agreed to enter into [a] settlement agreement which includes a corporate wide compliance agreement. … I had earlier provided Wal-Mart with a proposed settlement and compliance agreement … . They have made some modifications and submitted a proposed agreement. Their offer comports in large part with our own though it does have variations. In general I think this is a pretty good settlement and compliance agreement and am encouraged that our positions seem to be drawing quite close together.

(See February 20, 2004 e-mail from MODO DD Barlow Curran to Dallas RA Cynthia Watson). In forwarding this message to the WH Administrator, the Dallas RA added that "I think this is encouraging and hope that you feel the same." (See February 20, 2004 e-mail from Dallas RA Cynthia Watson to WH Administrator Tammy McCutchen).

Negotiations on the agreement continued, though the MODO DD continued to be concerned that Wal-Mart might back out of signing the agreement. (See, e.g., March 18, 2004 e-mail from MODO DD Barlow Curran to Deputy Administrator Al Robinson, stating reluctance to modify the agreement too much because "there is at least the possibility that adding this language will delay and possibly prevent concluding an agreement."). When the terms of the agreement were finalized, it received the unanimous support of all WHD career staff that reviewed it. (See December 22, 2004 e-mails between Dallas RA Cynthia Watson and MODO DD Barlow Curran.). When it was signed by Wal-Mart on January 7, 2005, the MODO DD announced: "Today, I received the executed, nationwide, child labor compliance agreement (and CMP settlement agreement) from Wal-Mart. Hallelujah!" The Dallas RA replied on January 10, 2005, stating, "Thanks! We are getting the New Year started out right! Congratulations."

The OIG report states that WHD signed the agreement despite the fact that it was "not favored by at least some WHD management staff." (See pg. 20). That statement is incorrect. While WHD's Director of External Affairs expressed some concerns in September 2004 about two changes that Wal-Mart had made to the agreement, she concluded in November 2004 that the agreement should be signed:

> Also, speaking of WalMart, can we please just say 'yes' at this point to the CL Agreement with WalMart. The agreement is not going to get any better. Lets just get this one behind us. The agreement is of short duration. If violations persist or reappear at the end of a year, we can deal fresh with WalMart, if necessary. Cynthia [the Dallas RA] and I talked about this when I was in Dallas.

(See pg. 20). It is significant that the Director of External Affairs came to this conclusion after speaking to the Dallas RA, who directly supervised the negotiation process and is the WHD signatory to the agreement. As this e-mail demonstrates, by the time the Wal-Mart settlement agreement was concluded, all members of the WHD career staff who reviewed the agreement thought it should be signed. This contradicts a key finding of the OIG report.

More seriously, however, the OIG report inaccurately states that by entering into the agreement, "WHD gave significant concessions to an employer … in exchange for little commitment from the employer beyond what they were already doing or required to do by law." (See pp. 3, 32). This conclusion appears to be founded on OIG's view that "[w]ith few exceptions, the commitments Wal-Mart made in the agreement represented either measures already being taken by the company, or assurances that Wal-Mart would adhere to existing laws." (See pp. 9, 31). That view is demonstrably false. By signing the agreement, Wal-Mart obligated itself to:

- "designate a member of its corporate office to generally supervise compliance with the agreement," which Wal-Mart was not already doing and was not required to do by existing laws;
- "provide new store manager training on child labor law compliance and its Employment of Minors policy during orientation, and through its online reference," which it also was not already doing or required to do by existing laws;
- flatly prohibit minors from "loading, operating or unloading cardboard balers," even though some uses of balers by minors are legally permissible;
- bolster its quarterly Store Total Activity Reviews (STARS) and annual store file reviews by adding additional monitoring for child labor compliance, specifically promising that "[d]uring these reviews, all hazardous equipment in the store areas where minors work, including, but not limited to, balers and compactors, will be reviewed for proper signage clearly informing associates under age 18 that they must not operate such equipment."

- file a report with WHD at the expiration of the agreement detailing all child labor violations identified by the internal reviews and the actions taken to achieve compliance – which it was not already doing and was not required to do by existing laws; and
- make "[c]ompliance with the child labor laws and regulations … an important factor in evaluating the performance of managers," and further promised that "[t]here will be consequences for managers who are responsible for violations of the child labor laws … up to and including termination."

Wal-Mart had not already implemented these measures, nor was it required to do so by existing laws. In fact, the Wal-Mart agreement secured, with some small modifications, each and every one of the compliance measures found in the standard template agreement used by WHD. (See pg. 12). The OIG report is therefore entirely incorrect in this regard.

Moreover, this list does not include any of the proactive compliance measures that Wal-Mart had voluntarily implemented before the agreement was signed but that the agreement converted into enforceable legal obligations.[4] The list does make clear, however, that by entering into the settlement agreement, WHD obtained far-reaching, corporate wide contractual obligations from Wal-Mart. The value of those obligations is confirmed by the numerous steps that WHD has held Wal-Mart to during the nine months since the agreement was signed to ensure compliance with the child labor laws.

II. WHD'S OBLIGATIONS UNDER THE CHILD LABOR AGREEMENT

The OIG report's analysis of provisions in the Wal-Mart agreement that impact WHD's enforcement authority is neither balanced nor objective. The report consistently construes every provision, even provisions that the report acknowledges are facially ambiguous, in a manner that is more favorable to the employer than either WHD or Wal-Mart has construed them.

We will address each of these substantive provisions in turn.[5]

[4] Examples include Wal-Mart's promise to continue declining to employ minors under the age of 16 and to continue posting warning and age-restriction stickers on hazardous equipment.

[5] The report states that several provisions in the Wal-Mart agreement were authored by Wal-Mart attorneys. (See pp. 4-5, 13-14). Although it is true that Wal-Mart attorneys did author some provisions, the report exaggerates the extent of their influence on the final agreement's language. Thus, after reviewing the modifications Wal-Mart attorneys made to the text of WHD's standard agreement template, the MODO DD wrote to the Dallas RA that "[t]hey have made some modifications and submitted a proposed agreement. Their offer comports in large part with our own though it does have variations." (See e-mail from Barlow F. Curran, District Director, to Cynthia Watson, Regional Administrator, dated February 20, 2004). At any rate, the authorship of the provisions in the agreement is irrelevant. The value of each provision must be assessed on the basis of its individual merits.

A. SELF-AUDITS

The report's finding that the Wal-Mart settlement agreement does not require self-audits is patently incorrect. (See pp. 27, 32). In fact, the agreement requires Wal-Mart to "continue monitoring its compliance with child labor laws as part of its quarterly STARS reviews and annual store file reviews." The agreement expressly provides that "[d]uring these reviews, all hazardous equipment in the store areas where minors work, including, but not limited to, balers and compactors, will be reviewed for proper signage clearly informing associates under age 18 that they must not operate such equipment." Furthermore, Wal-Mart informed the MODO DD in November 2004 that it had revised its onsite review policy "to include confidential/no-fault interviews with at least five minors." (See November 22, 2004 memorandum to file by MODO DD Barlow Curran). Finally, the agreement requires Wal-Mart to file a corporate-wide report at the expiration of the agreement detailing "any non-compliance with the child labor laws as discovered by Wal-Mart in its internal reviews, the actions taken to achieve compliance, and consequences to managers and supervisors for any non-compliance with the child labor laws under Wal-Mart's regular disciplinary system."

In sum, during the one-year period covered by the agreement, Wal-Mart is required (1) to conduct four quarterly STARS reviews at each of its stores, each of which includes a review of all hazardous equipment in store areas where minors work, as well as, interviews with at least five minors; (2) to perform an annual store file review at each of its stores for the purpose of verifying that all required proof-of-age certificates are on file; and (3) to file a report with WHD detailing all child labor violations identified by the internal reviews and the actions taken to achieve compliance. This detailed and rigorous scheme unquestionably qualifies as a self-audit.

The only explanation the OIG report offers in support of its conclusion that the Wal-Mart agreement does not require self-audits is the bald statement that the agreement "does not provide for audits, but rather provides monitoring procedures to be performed." However, the OIG is making a distinction without a difference. The terms "audit" and "monitoring" are used interchangeably in WHD documents to describe self-auditing activity. The standard template agreement referred to in the report, for example, contains an optional provision that requires a settling employer to "include in its regular inspections of all its establishments internal audits/monitoring of child labor compliance." (See pg. 31) (emphasis added). As this language implies, there is no difference in practice between "auditing" and "monitoring" for child labor compliance – at least not where, as in the case of the Wal-Mart agreement, the employer is expressly required to identify violations, correct them, and then report them to WHD. The interchangeability of the two terms is further confirmed by several WHD settlement agreements that use both terms to describe the same self-auditing activity, requiring the settling employer to "monitor" for child labor compliance through "audits." *See, e.g.,* Big Y agreement (December 1999) ("Big Y's internal audit team from the Loss Prevention Department will monitor compliance with the programs on an ongoing basis during their regularly scheduled audits in their stores…") (emphasis added); Rainbow Foods, Inc. agreement (August 2000) ("Rainbow's audit team shall include in its regular

audits of all stores internal audits/monitoring of child labor compliance.") (emphasis added); Toys "R" Us agreement (October 1999) ("Toys "R" Us will monitor enforcement of its child labor law compliance program by use of an audit team.") (emphasis added); Klosco, Inc. agreement (May 2000) ("Klosco shall include in its regular inspections of its establishment internal audits/monitoring of child labor compliance.") (emphasis added).

In fact, even the OIG counts each of the four above-referenced agreements as requiring self-audits, despite the fact that they use the term "monitoring" to describe the employer's obligation. Further, there are several places within the report where OIG itself uses the terms "audit" and "monitoring" interchangeably. (See pp. 30 (discussing "audit/monitoring activities" and "employer-conducted audit/monitoring"), 31 ("audit/monitoring activities"), 32 (using the heading "Employer-conducted audit/monitoring.")).

Notably, the report provides no analysis whatsoever regarding what OIG considers to be the essential elements of a self-audit, nor any analysis regarding which of those elements it considers to be missing from the Wal-Mart agreement. This omission is particularly troubling because the report automatically counts every settlement agreement that uses the term "self-audit" as requiring one, even if the agreement provides no further description of what the self-audit should entail. For example, the report accepts both the 1999 Sears agreement and the 2000 Foot Locker agreement as requiring self-audits (see pg. 27), even though those agreements merely state, without elaboration, that the respective employers are required to "conduct child labor self-audits" at their stores. The Wal-Mart agreement, by contrast, is considerably more detailed, explicitly requiring that "[d]uring these reviews, all hazardous equipment in the store areas where minors work, including, but not limited to, balers and compactors, will be reviewed for proper signage clearly informing associates under age 18 that they must not operate such equipment." As noted previously, WHD was also aware at the time the agreement was signed that Wal-Mart had revised its onsite review policy "to include confidential/no-fault interviews with at least five minors."

Not only is the Wal-Mart agreement's internal review mechanism more demanding than the mechanisms in the Sears and Foot Locker agreements, but its reporting requirement is also considerably more rigorous. Unlike the Wal-Mart agreement, the Sears and Foot Locker agreements do not require the filing of a corporate-wide report detailing child labor violations identified by the self-audits and the actions taken to achieve compliance. Instead, they merely provide that if WHD initiates an investigation at a store where a self-audit has already been completed, WHD can require the employer to disclose the self-audit's results at the beginning of the investigation. The more rigorous corporate-wide report required by the Wal-Mart agreement will assist WHD in determining whether systemic problems exist across Wal-Mart stores and in identifying specific stores that should be targeted for investigation, whereas the reports required by the Sears and Foot Locker agreements are available only after an investigation has been initiated and only on a store-specific basis. Given the Wal-Mart agreement's detailed internal review requirements and its robust requirement mandating that a corporate-wide report be filed,

no objective observer could fairly conclude that the Sears and Foot Locker agreements impose a self-audit regime but that the Wal-Mart agreement does not.

In sum, the plain text of the Wal-Mart agreement requires Wal-Mart to undertake extensive internal reviews that clearly qualify as self-audits. The report's finding that the agreement does not require self-audits is simply incorrect.

B. ADVANCE NOTICE (PRE-NOTIFICATION)

1. Advance Notice Provisions Are Plainly Not "Inconsistent" With WHD Policy

The OIG report is flatly wrong in asserting that the Wal-Mart agreement's advance notice provision is inconsistent with WHD policy. (See pp. 4, 13-16). As the report notes, at least 19 WHD settlement agreements contain provisions restricting the timing or initiation of WHD investigations. Many of those agreements, including the 1999 Sears agreement and the 2000 Foot Locker agreement, were extensively reviewed by WHD and SOL and approved at the highest levels. In fact, the Sears agreement was used by WHD as a "model agreement" in its July 2000 training materials. As those agreements set WHD policy, they can hardly be said to be inconsistent with it.

OIG bases its conclusion that advance notice provisions are inconsistent with WHD policy on the slender reed of statements in WHD Fact Sheet #44 and FOH 52a01(d) to the effect that WHD investigators "shall exercise a practical judgment on a case-by-case basis as to whether the appointment procedure is appropriate." From this statement, OIG infers that "the decision [whether] to announce investigations [must] remain[] with the investigator" and that any settlement agreement provision that prevents WHD investigators from making "'case-by-case' determination[s] as to whether notification is appropriate" violates FOH 52a01(d). If OIG's inference were correct, the 1999 Sears agreement, the 1999 Genesis Health Ventures agreement, and the 2000 Foot Locker agreement, among others, would all be inconsistent with WHD policy, because all of those agreements impose blanket advance notice requirements on some subset of WHD investigations, thereby depriving WHD investigators of the opportunity to make case-by-case determinations as to whether advance notification is appropriate.

OIG's inference, however, is completely unwarranted. The statements in the Fact Sheet and the FOH represent default instructions that WHD investigators are expected to follow in the absence of other considerations or circumstances, not an iron-clad rule that investigators must solely direct every case, free from direction by management or the terms of a settlement agreement. Thus, a manager could, consistent with WHD policy, issue instructions that investigations of a particular employer should always be conducted pursuant to an appointment because the employer was located at a great distance from the field office and the manager did not want to waste time and resources sending investigators who might ultimately not be permitted to enter the premises or to meet with company officials and review company documents. Conversely, a manager could disagree with an investigator's decision to schedule an appointment in a particular case, and could instead order that the investigation be conducted unannounced. Management

decisions and settlement agreement provisions that provide specific directions to investigators may supersede the general guidance in the FOH without being inconsistent with it.

The statements in the Fact Sheet and the FOH reflect WHD policy that investigators should make case-by-base determinations whether to schedule an appointment unless they are provided further, more specific guidance. The statements do not by any means indicate that providing further guidance by establishing employer-specific rules in a settlement agreement is inconsistent with WHD policy. This principle is confirmed by FOH Chapter 59, which sets forth a variety of employer-specific "scheduling limitations or special handling procedures" that are derived from WHD settlement agreements. Section 59a09 of the FOH, for example, provides that when WHD wishes to investigate the Tennessee Valley Authority, "[t]he Nashville DD will give the TVA headquarters in Knoxville advance notice of any investigation." Section 59b14 prohibits directed investigations of Hardee's Food Systems for a one-year period, and section 59a07 states that "no useful purpose would be served" by directed investigations of Orkin Exterminating Company. Although the FOH has not been revised since 1999 to incorporate further employer-specific instructions, it is simply not the case that all intervening settlement agreements containing advance notice provisions are inconsistent with WHD policy. Rather, as the internal structure of the FOH makes clear, settlement agreements may supersede the general guidance that is provided to investigators by FOH 52a01(d).[6]

In sum, it is entirely permissible for a manager tasked with negotiating a settlement agreement to determine that it is worth providing advance notice of WHD investigations for a certain period of time in order to secure employer commitments to implement a variety of proactive compliance measures going beyond what the law requires. OIG's conclusion that the advance notice provision in the Wal-Mart settlement agreement is inconsistent with WHD policy is simply incorrect.

2. The Advance Notice Provision Applies Only To Child Labor Investigations

The OIG report states in several places that the Wal-Mart agreement's advance notice provision applies to all WHD investigations, (See pp. 13-14, 19) ignoring the reality that both Wal-Mart and WHD have consistently and correctly interpreted the provision as applying only to child labor investigations. In fact, the entire agreement focuses on enforcement of child labor laws, and paragraph 6 of the agreement, in which the advance notice provision appears, governs "future investigations under the Act," which is defined in the agreement's preamble to mean "the child labor provisions of the Fair Labor Standards Act, as amended, 29 U.S.C. Section 201 *et seq.*" (emphasis added).[7]

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[6] WHD's investigative support and reporting database contains additional employer-specific instructions.

[7] Although the OIG report's conclusion that the Wal-Mart agreement's advance notice provision applies to all WHD investigations is clearly incorrect, it would hardly be unprecedented for the Department to agree to such a provision. The 1999 Genesis Health Ventures agreement, for example, requires WHD to provide Genesis with 90 days advance notice of investigations whenever WHD "receives a complaint alleging violations of the statutes that they enforce" (emphasis added). Virtually identical provisions are included in the December 2004 agreement with Apple Health Care, Inc., the February 2003 agreement with Mariner

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Moreover, the actions of both Wal-Mart and WHD have at all times reflected the fact that the advance notice provision applies only to child labor investigations. Since the agreement was signed, WHD initiated five investigations of Wal-Mart stores – four FMLA cases and one FLSA case involving a late paycheck conciliation. Because none of the investigations involved a child labor matter, the MODO DD did not give the Wal-Mart Point of Contact 15 days' advance notice about any of the cases.

The OIG report suggests that WHD and Wal-Mart adopted this interpretation of the agreement only after "the release of the New York Times article in February 2005." (See pg. 14). Once again, the OIG report is contradicted by the factual record. On January 12, 2005 – the day after the agreement was signed – Assistant District Director Diane Koplewski e-mailed the MODO DD to report that she "just spoke with Gwen Burgess of Wal-Mart legal and she indicated to me that it is her understanding (and that of her supervisor, who assisted in the WH agreement) that FMLA would not fall under the definition of 'investigations'…." In sum, both parties to the agreement have, from the moment the agreement was signed, applied the advance notice provision only to child labor investigations.

The OIG bases its assertion on an early draft of the settlement agreement in which the advance notice provision included the words "child labor," and the fact that those words were later removed from the provision during the course of the negotiations. The report concludes that "[t]he effect of this change, on its face, is that Wal-Mart must receive a 15-day notice prior to WHD initiating an audit or investigation that relates to any law enforced or administered by WHD, not just child labor investigations." (See pp. 13-14, 19). The problem with the report's analysis is that while it purports to interpret a contract, it ignores every relevant principle of contract interpretation. Under the law of contracts, a court attempting to interpret an agreement is not permitted to look beyond the agreement's "four corners." Specifically, the parol evidence rule precludes the use of negotiating history or prior inconsistent statements to add to or vary the terms of a written contract. *See Union National Bank of Little Rock v. Federal National Mortgage Association*, 860 F.2d 847, 855 (8th Cir. 1988) (applying governing Arkansas law). The mere fact that the language of the advance notice provision was changed during the course of the negotiations is not apparent on the face of the agreement, and the rules of contract interpretation therefore would bar a reviewing court from considering it. Based on the structure, scope, and other provisions of the final agreement, a reviewing court

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Health Care Management Company, the March 2002 agreement with Alterra Health Care Corporation, and the January 2003 agreement with Sunrise Assisted Living Management, Inc. Other types of restrictions on WHD investigations also frequently apply to all WHD investigations. The 2000 Stop & Shop agreement provides that "during the period of the self-audits conducted by Stop & Shop, any investigations of its stores will be limited to those arising from complaints and/or those involving any injury to an employee under 18 years of age" (emphasis added). The December 1999 agreement with Big Y Foods, Inc. provides that "during the period of the self-audits conducted by Big Y, any investigations of any Big Y stores will be limited to those arising from complaints and/or those involving any injury to an employee under 18 years of age as a result of his/her use of equipment prohibited by the Secretary of Labor's hazardous order regulations" (emphasis added). And the September 1994 City of Jacksonville agreement provides that "[i]n return for their compliance efforts, CJAX will not ordinarily be subject to an investigation by WH."

would reach the same conclusion as Wal-Mart and WHD: its scope is limited to child labor investigations.

Two additional principles of contract law settle the issue of whether the provision applies only to child labor investigations. First, the fact that both parties to the agreement have consistently treated the provision as applying only to child labor investigations bars either party from now asserting a contrary interpretation. *See Brown v. Winland*, 249 Ark. 6, 457 S.W. 2d 840, 845 (Ark. 1970) (longstanding acquiescence of one party to a contract in the other party's interpretation settles the contract's meaning). Second, to the extent that the language of the advance notice provision could be considered ambiguous, ambiguous contract language is construed against the drafter. *See Hennessy v. Daniels Law Office*, 270 F.3d 551, 553-54 (8th Cir. 2001); *Capital City Mortgage Corp. v. Habana Village Art and Folklore, Inc.*, 747 A.2d 564, 567 (D.C. 2000) (ambiguities in the contract are construed "strongly" against the drafter). Excepting the OIG report's point that it was Wal-Mart, not WHD, which drafted the language of the advance notice provision, (see pg. 13) any ambiguity in the language of the provision should be construed against Wal-Mart, and not, as the OIG report does, against WHD.

For all of these reasons, a WHD official reviewing the agreement would not have needed to know the agreement's negotiating history to determine what the Department's obligations would be under the agreement. Rather, a reviewing WHD official could confidently rely on the context and structure of the agreement to supply the advance notice provision's meaning. WHD has properly interpreted the provision as applying only to child labor investigations.

3. The Wal-Mart Agreement's Advance Notice Provision Is Not Unique, But Rather Is Tied To Wal-Mart's Self-Audit Obligation

The OIG report states that the Wal-Mart agreement "was the only agreement [with an advance notice provision] that neither had factors that removed the restriction nor tied the time restriction to the employer's self-audits." (See pg. 27). That statement is incorrect. In fact, as we have explained, the Wal-Mart agreement requires all Wal-Mart stores to conduct quarterly self-audits for the entire one-year period covered by the agreement. The agreement's advance notice provision applies only during the one-year period that the self-audits are being performed. Thus, the Wal-Mart agreement's advance notice provision is not unique, but rather employs the same self-audit/advance notice model contained in at least three other settlement agreements, including the 1999 Sears and 2000 Foot Locker agreements.

Indeed, the Wal-Mart agreement's advance notice provision may be similar to advance notice provisions from an even wider array of settlement agreements. The OIG report differentiates between the Wal-Mart agreement's advance notice provision and provisions from other settlement agreements that specify that advance notice will not be given to employers who are "not in substantial compliance with the agreement." (See pp. 26-27). Although the Wal-Mart agreement does not contain language expressly stating this condition, a material breach of the agreement by Wal-Mart would, under basic

principles of contract law, release WHD from its advance notice obligation. Thus, the Wal-Mart agreement is comparable to other settlement agreements that require WHD to provide advance notice of child labor investigations unless the employer is "not in substantial compliance with the agreement."

4. The Wal-Mart Agreement's Advance Notice Provision Allows WHD To Make Unannounced Interventions

The OIG report incorrectly speculates that the Wal-Mart agreement may bar WHD from taking action to immediately correct hazardous situations which could result in serious injuries to youths. (See pp. 16-17). This incendiary suggestion, however, betrays a fundamental lack of understanding by the OIG of the difference between investigations and interventions – the latter of which is not covered by the Wal-Mart agreement. The agreement requires advance notice of child labor investigations, which involve the collection and review of evidence for the purpose of assessing penalties. Interventions, on the other hand, are initiated for the purpose of immediately correcting a hazardous situation. Nothing in the settlement agreement prevents WHD from conducting unannounced interventions. Moreover, if Wal-Mart failed to immediately correct a hazardous situation of which it was made aware, it would thereby materially breach the agreement, freeing WHD to conduct even child labor investigations without providing advance notice.

Both Wal-Mart and WHD have publicly stated that they read the agreement to permit unannounced interventions. Indeed, even the OIG acknowledges that the agreement is "silent" on this point. In light of the mutual understanding of the parties and the agreement's express reservation of WHD's enforcement authority, any suggestion that WHD surrendered its ability to immediately intervene to correct hazardous situations is simply incorrect.[8]

5. The Information That WHD Provides Wal-Mart When Giving Advance Notice Of Investigations Does Not Violate WHD Policy

The OIG report inaccurately speculates that the information conveyed to Wal-Mart when WHD provides advance notice of investigations might violate WHD's policy not to "reveal the existence of a complaint or disclose the identity of a complainant." (See pp. 15-16). There is nothing in the agreement that requires WHD to provide information to Wal-Mart in a manner that would violate WHD's non-disclosure policy. In fact, WHD has successfully implemented nearly identical advance notice provisions found in several other settlement agreements without furnishing information in contravention of the policy. The report offers no reason whatsoever for its assertion that the Wal-Mart agreement would be implemented differently.

Our greater concern, however, is that the OIG report appears to deliberately take out of context certain remarks that are edited, paraphrased and attributed to the Dallas Regional

[8] In fact, paragraph 6 of the agreement expressly reserves WHD's authority and right to "take appropriate enforcement action."

Director of Enforcement on page 15. The Dallas Regional Director was asked whether he believed it would compromise WHD enforcement authority if a WHD investigator revealed the name of a complainant. He replied that it could. He did not, as the report claims, say that by agreeing to the Wal-Mart agreement's advance notice provision WHD "abdicated enforcement authority by agreeing to the 15-day prior notification provision." We believe this is a serious misrepresentation of the Dallas Regional Director's remarks and it raises further questions about the overall quality of the report.

6. The Report Fails To Acknowledge The Benefits To WHD Of Providing Advance Notice Of Investigations

The FOH has long encouraged WHD investigators to initiate child labor investigations by first setting up an appointment. For example, FOH 52a01(d) provides:

> In the interest of effective planning and better time utilization, it is good practice for the CO [compliance office/investigator] to arrange an appointment with an employer to begin the investigation at a particular time on a certain day. This saves time for the CO and the employer in that both have a definite commitment to be ready. . . . Further it gives the employer an opportunity to examine the firm's compliance status objectively and to be knowledgeable about the requirements of the Act.

The FOH's reference to the fact that appointments save time is particularly important. WHD investigators do not have legal authority to enter an employer's non-public property without first securing the employer's consent or a court order. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1984) ("[T]his Court held that an administrative warrant was required before such a search could be conducted without the consent of the owner of the premises."). Unannounced investigations thus may waste considerable time and resources because employers can refuse to allow them to proceed. By setting up an appointment, investigators can ensure that they will have immediate access to employee records and, where necessary, that employees will be available for interviews.

That is not to say that unannounced investigations are never appropriate; at times they are. Because of the many advantages of scheduling investigations in advance, however, providing advance notice of investigations is the norm. Thus, it was appropriate for WHD's career staff to conclude, as is related in the report, that by agreeing to provide Wal-Mart with advance notice of investigations for a one-year period they "gave up little." (See pg. 14). That is particularly true because the agreement reserves WHD's authority to conduct unannounced interventions for the purpose of immediately remedying dangerous or hazardous situations.

The OIG report suggests that the advance notice provision will impair WHD's ability to identify child labor violations by surveilling employee activities from "parking lots or shopping aisles." (See pg. 15). This once again reveals a fundamental misunderstanding on the part of the OIG of how WHD child labor investigations work. Almost without

exception, WHD investigators identify violations by reviewing employee records and interviewing employees. Of the 87 violations identified by WHD's investigation of Wal-Mart, not one was personally observed by a WHD investigator. Moreover, WHD was able to identify the violations despite the fact that it provided Wal-Mart with advance notice of the initial investigations it conducted in both Arkansas and Connecticut. By contrast, because virtually all of the violations involved the improper use of paper balers by minors – violations that occurred in non-public spaces – unannounced surveillance from parking lots and shopping aisles would not have identified any of the violations at issue.

C. TEN DAY COME-INTO-COMPLIANCE PROVISION

We agree that settlement agreements should not permit employers to completely avoid fines and penalties for violations discovered by WHD through its own investigations, simply by coming into compliance. In fact, provisions of this sort are expressly prohibited by the June 2005 coordination memorandum. We do not agree, however, that the Wal-Mart agreement allows the employer to escape all liability for fines and penalties in such instances. On the contrary, WHD interprets the ten day come-into-compliance provision in paragraph 6B only as permitting Wal-Mart to avoid penalty multipliers for repeat and willful violations, by bringing its facility into compliance within ten days. WHD has informed Wal-Mart of its interpretation of the provision.

CONCLUSION

The Wal-Mart settlement agreement is a strong agreement that has significantly advanced compliance on a nationwide basis with the federal child labor laws. The Department strengthened its process for reviewing WHD settlement agreements in June 2005, by issuing a coordination memorandum imposing greater management controls and oversight, including more clearly defined standards and provisions for review of agreements by the Solicitor's Office. Through the June 2005 coordination memorandum, WHD has effectively implemented the OIG report's recommendations.

Respectfully submitted,

Victoria A. Lipnic

Victoria A. Lipnic

Attachments

Attachment 1

(Pages 6-9 have been withheld because they contain sensitive law enforcement information)

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U.S. Department of Labor

Solicitor of Labor
Washington, D.C. 20210

JUN 27 2005

MEMORANDUM FOR SOL REGIONAL SOLICITORS
WAGE & HOUR REGIONAL ADMINISTRATORS

FROM: HOWARD M. RADZELY
Solicitor of Labor

VICTORIA A. LIPNIC
Assistant Secretary for Employment Standards

ALFRED B. ROBINSON, JR.
Acting Administrator, Wage and Hour Division

SUBJECT: Coordination of Wage & Hour Settlement Agreements

Over the last 15 years, administrative settlement agreements have come to play an increasingly important role in the Wage and Hour Division's (WHD) strategy to obtain future compliance from employers. Settlement agreements can maximize the impact of WHD resources by securing employer promises to adopt compliance measures that go beyond what the law requires and ensuring that employees receive back wages they are owed as quickly as possible.

For purposes of the RSOL review requirements described in this memo, an "administrative settlement agreement" is any supervised agreement under Section 16(c) of the FLSA or any agreement that resolves a civil money penalty assessment, regardless of whether such an agreement includes specific compliance measures. Thus, for example, the review provisions apply to back wage settlements accomplished by a signed WH-56. On the other hand, the required and optional provisions specified in this memo apply only to those agreements that include written commitments by an employer to take proactive steps to assure compliance.

Recently, the Solicitor's Office has reviewed dozens of WHD settlement agreements, both past and present. First, the Solicitor's Office has successfully defended a number of lawsuits challenging settlement agreements.[1] These challenges were brought by employees who had pursued private cases under section 16(b) of the Fair Labor Standards Act after they had accepted a back wage award under the terms of a settlement agreement. The plaintiffs alleged, as a part of those cases, that WHD had not fulfilled its statutory obligation to properly supervise the determination and payment of back wages owed employees that had been agreed to between the employer in the case and WHD.

[1] *See, e.g., Niland v. Delta Recycling Corp.*, 377 F.3d 1244 (11th Cir. 2004); *Solis v. Hotels.Com Texas, Inc.*, 2004 WL 1923754 (N.D. Tex.).

Because of the diligent efforts of the investigators and the district directors involved in those cases in arriving at fair and reasonable settlements, we were able to prevail in court. Second, press attention to WHD's recent child labor settlement agreement with Wal-Mart Stores, Inc. generated public comparisons of that agreement to other similar WHD settlement agreements. Again, thanks to the hard work of the district directors (and, occasionally, regional solicitors) who were involved in negotiating those agreements, the agency was able to present to the public a solid product that clearly demonstrated its dedication to ensuring employer compliance with the law.

Nevertheless, the broad-based review of settlement agreements that was occasioned by these developments identified a wide degree of variation, both between regions and between individual agreements within regions, in the types of provisions included in agreements and in the language used to express those provisions. While variation between agreements is to be expected and indeed is desirable given the myriad of circumstances encountered by district directors, we have determined that a more formal degree of coordination is appropriate to ensure that the Department is handling certain FLSA settlements in a consistent manner. To that end, we have established the following guidelines for referral of administrative settlement agreements to be reviewed by the Regional Solicitor's Offices.

For settlement agreements that resolve child labor violations, the Regional Solicitor's Offices must review:

1. all agreements that apply to five or more facilities;
2. all agreements settling violations that resulted in a serious injury or fatality;
3. all agreements that involve an initial cmp assessment in excess of $50,000; and
4. all agreements in which any changes are made to the language of required provisions (attached) or optional provisions (attached) involving the Department's enforcement discretion.

For settlement agreements that resolve minimum wage or overtime violations, the Regional Solicitor's Offices must review:

1. all corporate-wide, multi-state settlement agreements;
2. all agreements that settle for an amount in excess of $100,000 or that provide back wages to 100 or more employees; and
3. all agreements in which any changes are made to the language of required provisions (attached) or optional provisions (attached) involving the Department's enforcement discretion.

For settlement agreements that resolve any FLSA violations the Regional Solicitor's Office must review:

1. all agreements arising from investigations in which the employer was found to have engaged in producing fraudulent documents, destroying documents, kickbacks, or retaliation;
2. all agreements settling repeat violations by recidivist employers; and
3. all agreements cutting off the right of 10 or more employees to join existing private lawsuits brought as collective actions under section 16(b) of the Fair Labor Standards Act (WHD should inquire whether there are any pending lawsuits against the employer).

Finally, all press releases concerning settlement agreements must be shared with the Regional Solicitor's Office and the Office of Public Affairs, whether or not the above guidelines require that the settlement agreement itself be reviewed.

When none of the factors identified by the above guidelines are present, WHD is not required to consult with RSOL before entering into an administrative settlement. When WHD does refer a case to RSOL for its review, RSOL will advise WHD of its opinion as to the propriety of an administrative settlement within five (5) working days. RSOL and WHD then jointly will evaluate whether a settlement is appropriate based upon all the circumstances and facts revealed by the WHD investigation and the posture of any related private litigation.[2] If RSOL and WHD agree that it is appropriate to enter into a settlement, then WHD shall proceed. If RSOL receives an inquiry from an attorney representing an employer or an employee, then RSOL shall work with WHD in responding. The consultation with RSOL described herein does not constitute referral of a case to SOL for potential litigation. Any disagreement between regional WHD and RSOL over any matters addressed in this memorandum shall be elevated to the respective national offices for resolution. Except as specified in this memorandum and its attachment, the standard practices for elevation of issues to the national office for its review will remain in effect.

We recognize that it will often be necessary for provisions in settlement agreements to be adapted to an employer's individual circumstances. However, it is important that changes to particularly sensitive settlement agreement provisions – especially provisions relating to the Department's enforcement discretion -- be reviewed by attorneys. Fundamentally, these guidelines are designed to maintain consistency across administrative settlement agreements while preserving the flexibility necessary to tailor individual agreements to the facts of each case.

We understand that many offices are already engaged in this type of coordination on an informal basis in significant cases. We encourage such further coordination at the discretion of RSOL and Regional WHD office, and this memorandum is not intended to

[2] The rule that all agreements that cut off the right of 10 or more employees to join existing private collective actions must be referred to the Regional Solicitor's Office is intended to serve as an initial guideline only. Once these guidelines are put into effect, experience may indicate that establishment of a higher threshold is appropriate. A memo will be distributed in the near future that will identify factors that should be considered, including the number of employees affected, in reviewing settlements in which there is a pending private lawsuit.

preclude WHD from consulting with the RSOL about any settlement for which review is not required. In the interim, WHD will review the FOH instructions concerning WHD supervision to determine whether any clarification is necessary.

TYPES OF PROVISIONS

I. Required provisions (each agreement must include these provisions)[3]

1. An employer certification that it is currently in compliance with the provisions of the FLSA that are covered by the agreement, and that it intends to remain in compliance.

2. A reservation of all Wage and Hour authority to conduct investigations and assess civil money penalties as allowed by the FLSA. The following language must be used:

- By entering into this agreement, WHD does not waive its right to conduct future investigations under the Fair Labor Standards Act and to take appropriate enforcement action, including assessment of civil money penalties, with respect to any violations disclosed by such investigations.

3. If an agreement is the result of a WHD investigation, the agreement should clearly state the existence of the underlying investigation and the resolution thereof. Where an installment agreement has been entered into, appropriate Debt Collection Act language must be included.

- Example:
  1. WHD conducted investigations under the [list FLSA type] provisions of the Fair Labor Standards Act, as amended, 29 U.S.C. § 201 et seq., covering the period of approximately [date] through [date], with respect to [company/specific locations], resulting in various findings of violations of the [list FLSA type] provisions of the Act, and in assessment by the Wage and Hour Division on [date] of civil money penalties [and/or findings of unpaid back wages].

  2. Child Labor: WHD hereby agrees to accept $_____ in settlement of the assessed civil money penalties, and [company] hereby withdraws any and all exceptions to the assessed civil money penalties, as modified, and agrees to pay the amended sum of $_____ in full satisfaction of the violation findings. Such payments shall be made within _____days [or pursuant to the following schedule] in the form of a cashier's check or certified check made payable to "Wage and Hour, US Department of Labor."

  AND/OR

  3. Minimum Wage & Overtime: [Company] agrees to pay $___ in back wages and WHD agrees to accept this amount in full satisfaction of the violation findings.

[3] This is not intended to be a comprehensive list of all standard or required settlement agreement provisions. Model child labor and back wage settlement agreements containing additional standard language may be distributed later.

IV. Other compliance measures (the provisions in this list, which are intended to be illustrative only, are subject to modification, inclusion or exclusion by WH based upon the compliance problems found, the size of the business, and other relevant factors)

Suggested Child Labor Compliance Measures

1. Posting stickers or warnings

   - [Company] agrees to request and post DOL-supplied warning/age-restriction stickers on all company-owned hazardous and restricted equipment, if any, including cardboard balers, cardboard compactors, forklifts, freight elevators, meat slicers, and dough mixers. [Company] will require the managers at each of its locations to comply with these postings. DOL agrees to inspect any equipment upon request to determine if the use of the specific piece of equipment by minors is prohibited or regulated.

2. Establishing a special system for identification of minors

   - [Company] agrees to institute a practice whereby minor employees are identifiable visually by means of color-coded name tags, shirts, hats, smocks, or badges, etc., and/or highlighting minors' names on weekly work schedules, to ensure managers' recognition of these employees' status as minors when scheduling or delegating work.

3. Training of managers and/or employees

   - [Company] agrees to comply with the Child Labor Provisions of Section 12 of the FLSA, and to send a memo to each of its store managers outlining the [Company's] 100% commitment to compliance with the child labor regulations. Included in this distribution will be a copy of the Wage and Hour Child Labor Fact Sheet (supplied by US DOL) for every location's manager, and printed Youthrules! information for every minor employee. [Company] further agrees to insure that every store manager is trained in the US DOL imposed restrictions on the use of hazardous equipment, as defined by the Department's regulations.

   - [Company] will periodically conduct management training programs for managers. Such training shall include a legal compliance section that specifically pertains to the child labor provisions of the Act and its regulations, and such training shall also be made required training or reading for all employees who direct the work of minors. These materials shall set forth, among other things, the requirements imposed by Child Labor Regulation 3, the Hazardous Occupation Orders, Company policies on child labor, and other appropriate materials.

   - New employees hired after [date] by [Company] will be trained, as part of their orientation, concerning the child labor restrictions of the FLSA. Minors will

receive additional training that will include, but not be limited to, reading of US DOL's child labor fact sheets.

4. Consideration of managers' record of compliance in performance evaluations

- [Company] agrees to continue to inform each manager in writing of the firm's commitment to comply with child labor provisions and to make compliance with the child labor provisions and this Compliance Agreement part of the required job duties of all managers and supervisors involved in the hiring, scheduling and employment of minors. Compliance with child labor laws and regulations will be an important factor in evaluating the performance of managers. There will be consequences for managers who are responsible for violations of child labor laws.

5. Disciplining managers for failure to comply

- Managers who violate the child labor regulations will be subject to appropriate discipline.

6. Dissemination of child labor compliance information (to parents, employees, minor applicants, etc.)

- [Company] will send to the parents or the guardians of all employees under 18 years of age a copy of the DOL child labor fact sheet with a request that the parents or guardians review it with their minor child.

- [Company] agrees to require every minor employee to read a DOL child labor fact sheet upon hiring and annually after that. The firm will also request each minor to sign a declaration that he/she has read this fact sheet and retain a copy as proof that the minors were advised of these restrictions.

- Each and every store shall post a Child Labor Notice setting forth a summary of the hazardous occupation orders limiting the occupations of workers under the age of 18 years (29 CFR sections 570.51 through 570.68) and identifying commonly found equipment covered by the HOs; a summary of prohibited occupations limiting the tasks of workers under the age of 16 years (29 CFR sections 570.33 through 570.34); a summary of hours workers under the age of 16 years are permitted to work (29 CFR section 570.35); and restating [Company] policy of mandatory compliance with child labor laws and corporate goal of eliminating child labor violations.

7. Establishing a complaint "hotline"

- [Company] agrees to post the name and phone number of a home office contact along with instructions for minor employees to phone if they should ever be asked to perform job duties that are prohibited under DOL regulations.

- [Company] will establish a toll-free telephone number which will be disseminated to all employees. [Company] will advise all employees to call such toll-free number if they believe they are or their fellow employees' rights or protections under the FLSA have been or are being violated in any manner. [Company] will advise all employees that they are protected from any retaliation as a result of the use of this toll-free telephone number.

8. Appointing a compliance director to supervise child labor compliance

- [Company] shall assign a senior member of its management team the duties of "Youth Employment Compliance Director". The duties or responsibilities of the Director shall be to direct and coordinate all programs and issues relating to child labor compliance, including but not limited to: (1) assuring that store management training materials are updated and revised as necessary; (2) in the event of any future violations by the store of the child labor provisions of the Act, investigating the circumstances of such violations and implementing such additional remedial measures as may be appropriate; (3) providing store managers with a resource person to address any questions or issues which may arise concerning child labor compliance; (4) responding to any complaint or other inquiries from minor employees; and (5) generally supervising compliance with this agreement.

9. HO-specific compliance actions

- [Company] will not employ any worker under 18 years of age in any occupation declared by the Secretary of Labor to be hazardous for the employment of minors between the ages of 16 and 18 years or detrimental to their health or well-being. These hazardous occupation orders are set forth in 29 CFR sections 570.51 through 570.68. In order to ensure compliance with these provisions, [Company] will survey each of its stores to determine whether any of its stores use equipment prohibited for use by persons under 18 years of age. At any location where such equipment is in use, [Company] will implement a program of management training to ensure that any worker under the age of 18 is not assigned or permitted to use such equipment.

- If the subject of the violation is the use of specific hazardous equipment, then language regarding the specific piece of equipment should be included. (E.g., "All compactors when not in use will be locked. The key will be maintained by a member of the store management team or an adult associate designated by the store management team.")

Suggested Wages & Overtime Compliance Measures

1. Monitoring of contractors, including pre-contract evaluations, to assure that contractors are paying their employees properly

- Before entering into a contract for services, including janitorial services, [company] agrees to assure that the contractor is able and willing to comply with the requirements of the FLSA, and that the contract price is sufficient to allow for such compliance.

2. Consideration of individuals performing services as "employees" (employers sometimes mistake employees for independent contractors resulting in a failure to pay OT)

   - [Company] agrees to evaluate its putative independent contractors on an ongoing basis to determine whether they are employees as defined under the FLSA. In performing this evaluation, [company] will review all pertinent factors including but not limited to:

     - The nature and degree of [company's] control as to the manner in which the work is performed
     - The contractor's opportunity for profit or loss based on management skill
     - The contractor's investment in equipment or materials
     - The contractor's special skill
     - The degree of permanency of the contract

     Where these or other factors weigh in favor of employee status, the contractor will be paid in accordance with the minimum wage and overtime provisions of the FLSA.

3. Use of time clock and individual time cards

   - Each employee will have his or her own separate time card for each workweek. All entries on each time card to indicate the time of day will be made by using a reliable time clock furnished and maintained by the employer. Each employee is to perform all punching of that employee's hours worked on the time clock, without any exceptions of any kind.

4. Statement of job duties for all 541 exempt employees

   - [Company] will develop and maintain written descriptions of the major job duties for each position which it asserts is exempt from minimum wage and overtime requirements under the regulations at Part 541 (Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees).

5. Use of payroll checks and uniform payroll system (e.g,. a uniform workweek, paid no later than seven days after the end of the workweek, check stub showing hours worked, gross and net pay, deductions)

   - The workweek will end the same time on the same day of each week for all employees. Each employee will be paid weekly for all hours worked by the employee in the workweek. The pay day will not be more than seven calendar days following the end of the workweek and will be the same day of the week for all of the employees for each workweek. All wages will be paid using a payroll check and will be paid free and clear. No wages will be paid in cash or by any means other than a payroll check. Each payroll check will be accompanied by a detailed breakdown on a payroll check stub, showing each item of information for the particular employee for the particular workweek covered by the payment.

6. Training of managers and/or employees

   - [Company] agrees to comply with the minimum wage and overtime provisions of the FLSA and to send a memo to each of its managers outlining the [Company's] commitment to compliance. [Company] further agrees to ensure that every store manager is trained in the US DOL's minimum wage and overtime regulations.

   - [Company] periodically will conduct management training for managers. Such training shall include a legal compliance section that specifically pertains to the minimum wage and overtime provisions of the FLSA and its regulations.

7. Consideration of managers' record of compliance in performance evaluations

   - Compliance with minimum wage and overtime laws will be an important factor in evaluating the performance of managers. There will be consequences for managers who are responsible for violations of minimum wage and overtime requirements.

8. Disciplining managers for failure to comply

   - Managers who violate the minimum wage and overtime requirements of the FLSA will be subject to appropriate discipline.

9. Dissemination of compliance information

   - [Company] agrees to provide a copy of US DOL's Handy Reference Guide to the FLSA to all new employees upon hiring. US DOL agrees to provide copies of the Guide upon request.

   - [Company] agrees to provide a copy of US DOL Fact Sheet # [---] to all employees. US DOL agrees to provide copies of the Fact Sheet upon request.

10. Establishing a complaint "hotline"

- [Company] will establish a toll-free telephone number which will be disseminated to all employees. [Company] will advise all employees to call such toll-free number if they believe they are or their fellow employees' rights or protections under the FLSA have been or are being violated in any manner. [Company] will advise all employees that they are protected from any retaliation as a result of the use of this toll-free telephone number.

11. Appointing a compliance director to supervise wage and overtime compliance

- [Company] shall assign to a senior member of its management team the duties of Compliance Director. The duties or responsibilities of the Director shall be to direct and coordinate minimum wage and overtime compliance, including but not limited to: (1) assuring that store management training materials are updated and revised as necessary; (2) in the event of any future violations of the minimum wage and overtime provisions of the act, investigating the circumstances of such violations and implementing such additional remedial measures as may be appropriate; (3) providing store managers with a resource person to address any questions or issues which may arise concerning compliance; (4) responding to any complaint or other inquiries from employees; and (5) generally supervising compliance with this agreement.

V. **Prohibited provisions**

1. Press: No agreement should ever include a provision that would in any way limit the Department's ability to make public statements about the agreement.

2. Limits on investigations: No agreement should ever include a provision limiting the Department's ability to conduct further investigations, or promising not to conduct future investigations under ordinary circumstances.

3. Post-investigation penalties: No agreement should waive penalties assessed as a result of a future WHD investigation.

4. Settling claims of employees who were not investigated: Where WHD has conducted an investigation limited to one or more units of employees, the settlement agreement should not contain language that could be construed to resolve the claims of employees outside of the unit(s) investigated.

5. Settling violations reported through self-audits without corroboration: No agreement should settle violations reported to WHD through an employer self-audit unless WHD has independently corroborated the extent of the violations.

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Attachment 2

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WAL★MART®
COMPLIANCE

WAL★MART
WAL★MART LOGISTICS
Corporate Employment Compliance
508 S.W. 8th Street, Bentonville, AR 72712.
Mail Stop 505

Employment of Minors Compliance Reporting 1st and 2nd Quarter

Signing:

- Wal-Mart sent new Employment of Minors Hazardous Equipment Sticker kits (3,890) to the field on February 1, 2005.
  - Each kit contained 30 stickers for hazardous equipment (total of 116,700 stickers).
  - Wal-Mart sent follow-up communication to the field on February 23, 2005 and June 16, 2005 to verify all new hazardous equipment stickers were posted.

Communication:

- Wal-Mart sent a communication to the Field, Regional Personnel Managers, and Company Officers on the signing of the DOL agreement and management's responsibility to call the Wage and Hour Hotline regarding any occurrence of a minor Associate using Hazardous Equipment.
- The company sent a verification form to the field requiring management to acknowledge receipt and posting of the stickers for hazardous equipment.
- Wal-Mart sent communications to field verifying work permits and work-hour restrictions for all minor Associates.
- Recap of the previous communication to the field was covered on the Operations Broadcast.

Training:

- Personnel Manager training on Employment of Minors held by Regional Personnel Managers.
- New Store Manager Orientation: Class updated in March 2005 to include training on Youth Employment restrictions.
- New Associate Orientation Checklist and New Associate Risk Control Checklist (General and Department) updated to include minor specific information.
- New Hire Orientation materials updated to include information on Employment of Minors:
  - Yellow dot program
  - Hazardous equipment discussion with minors
  - Information targeted to new hire minor Associates
- Employment of Minors training and audit sent to facilities employing minors.
- Wal-Mart blocked the following CBLs to prevent minor Associates from taking them:
  - Walker Stacker (effective February 17, 2005)
  - Forklift (effective March 3, 2005)
  - Electric Pallet Jack (effective March 10, 2005)
  - Scissor Lift (effective March 10, 2005)
  - Power Equipment (effective March 16, 2005)
- Total number of managers and supervisors trained in provisions of Youth Employment laws:

	1st Qtr	2nd Qtr	YTD Total
Managers and Hourly Supervisors who have completed Hazardous Equipment CBL training	73,033	91,611	164,644
Managers trained on Youth Employment Laws in New Store Orientation	44	77	121
Total Managers Trained	**73,077**	**91,688**	**164,765**

KNOWING AND DOING THE RIGHT THING

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COMPLIANCE

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Corporate Employment Compliance
508 S.W. 8th Street, Bentonville, AR 72712,
Mail Stop 505

Disciplinary Actions:

- There were zero violations of youth employment laws that resulted in injury to minor Associates during the first and second quarter of Fiscal Year End 2006.
- Wal-Mart developed the following coaching codes March 14, 2005 to separate hazardous equipment usage coachings from work-hour restriction coachings:
  - Employment of Minors (use of hazardous equipment) - Hourly Associate Coaching
  - Employment of Minors (use of hazardous equipment) – Management/Supervisory Associate
- Coaching results by quarter:

	1st Qtr	2nd Qtr	Total YTD
Use of Hazardous Equipment (Hourly Associate)	0	1	1
Use of Hazardous Equipment (Management/Supervisory Associate)	0	0	0
Total # of Coachings	**0**	**1**	**1**

Internal Audits:

- Wal-Mart has conducted 3,026 Compliance On-line Review Tools (CORT) facility audits year-to-date.
- Wal-Mart has conducted 6,359 Store Total Activity Reports (STAR) facility audits year-to-date.
- These audits contain questions that go beyond the employment of minor requirements covered under federal law and are designed to audit compliance with Wal-Mart's obligations under the Department of Labor Child Labor Settlement Agreement. If non-compliance is discovered, our protocol is to correct issues immediately and/or prepare an action plan outlining compliance efforts.

Summary of Best Practices:

- Provide *Store Staffing Availability Report* to closing manager. (Minors have an * beside their name.) This will inform Management of any minor Associate working for follow up to ensure they leave on time.
- Place a yellow dot on minor Associate personnel files. This is an informational tool to help identify the minor Associates in the work place.