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EMPLOYMENT STANDARDS ADMINISTRATION

AGREEMENT WITH WAL-MART INDICATES NEED FOR STRONGER GUIDANCE AND PROCEDURES REGARDING SETTLEMENT AGREEMENTS

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U.S. Department of Labor
Office of Inspector General
Office of Audit

BRIEFLY...

Highlights of Report Number: 04-06-001-04-420, to the Assistant Secretary for Employment Standards.

WHY READ THE REPORT

Wal-Mart Stores, Inc., is the world's largest retailer. The Employment Standards Administration (ESA), Wage and Hour Division (WHD), investigated 27 Wal-Mart stores in 3 states and cited child labor hazardous occupation violations of the Fair Labor Standards Act (FLSA) of 1938, as amended. As a result, WHD pursued a strategy to enter into a national, corporate-wide child labor compliance agreement with Wal-Mart Stores, Inc. Recent congressional interest has focused on whether certain provisions of the agreement signed by Wal-Mart and WHD unduly favored Wal-Mart. This report discusses the results of our audit of WHD's processes regarding settlement agreements, including the Wal-Mart agreement.

WHY OIG DID THE AUDIT

The OIG conducted a performance audit to determine whether WHD had adequate management controls in place over its process for negotiating, developing, and approving settlement agreements, including the January 11, 2005, settlement agreement with Wal-Mart.

READ THE FULL REPORT

To view the report, including the scope, methodology, and full agency response, go to:
http://www.oig.dol.gov/public/reports/oa/2006/04-06-001-04-420.pdf

October 2005

Agreement with Wal-Mart Indicates Need for Stronger Guidance and Procedures Regarding Settlement Agreements

WHAT OIG FOUND

While the Office of Inspector General (OIG) found that the Wal-Mart agreement did not violate Federal laws or regulations, we did find serious breakdowns in WHD's process for negotiating, developing, and approving such agreements. These breakdowns resulted in the WHD entering into an agreement that gave significant concessions to Wal-Mart. Specifically, the agreement provided for advance notification by WHD of Wal-Mart investigations, and gave Wal-Mart the ability to avoid civil money penalties (CMP) under certain conditions. In exchange, the agreement primarily committed Wal-Mart to continue measures that were already in place or required by law. Also, WHD did not consult with the Office of the Solicitor (SOL) in developing and approving the agreement.

WHAT OIG RECOMMENDED

We recommended that (1) WHD develop and implement written procedures for negotiating, developing, and approving agreements with employers, and (2) future agreements be developed in coordination with SOL. ESA agreed with the OIG's recommendations, but argued that the report mischaracterized the effectiveness of the Wal-Mart's agreement. Based on new policy instituted by WHD in June 2005, we consider both recommendations to be resolved.

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Executive Summary

We conducted a performance audit of the Employment Standards Administration (ESA), Wage and Hour Division's (WHD) process that led to a January 11, 2005, settlement agreement with Wal-Mart Stores, Inc. (Wal-Mart). The settlement agreement stemmed from allegations that Wal-Mart violated child labor provisions of the Fair Labor Standards Act (FLSA) of 1938, as amended.

Our audit was designed to answer the following questions:

1. Did WHD's process for negotiating, developing, and approving the Wal-Mart agreement and its content comply with applicable Federal laws and regulations?

2. Did WHD have adequate procedures for negotiating, developing, and approving settlement agreements?

3. How was the Wal-Mart agreement developed, and did it comply with established policies and procedures?

4. How does the content of the Wal-Mart agreement compare with other agreements entered into between WHD and other employers?

Results

Although we found that the Wal-Mart agreement did not violate Federal laws or regulations, we did find serious breakdowns in WHD's process for negotiating, developing, and approving such agreements. These breakdowns resulted in WHD entering into an agreement that gave significant concessions to Wal-Mart (advance notification of future investigations and ability to avoid civil money penalties (CMP)) in exchange for little commitment from the employer beyond what it was already doing or required to do by law. However, nothing came to our attention indicating evidence of influence or pressure from internal or external sources being applied in the negotiation, development, or approval of the agreement.

Specifically, WHD did not have adequate management controls over its process for negotiating, developing, and approving WHD settlement agreements. These agreements generally occur when an investigation related to child labor violations or other issues discloses pervasive problems, and a mutually binding agreement between DOL and the company could possibly achieve increased and focused compliance with Federal laws. The intent of such agreements is commendable, because it promulgates DOL's message of compliance. However, it is important to consider that WHD

settlement agreements typically result from documented violations of the law. Even though WHD intended to obtain the company's future compliance with the law, the Office of Inspector General (OIG) has specific concerns with the Wal-Mart agreement because it contained significant provisions that were principally authored by Wal-Mart attorneys and never challenged by WHD, and because it did not receive adequate WHD review and approval. Additionally, the Office of the Solicitor (SOL) was not consulted on, nor requested to review or participate in, the settlement negotiations despite extensive involvement of Wal-Mart's attorneys, and SOL was not involved in the development or review of the agreement.

Specifically, we found:

Objective 1

1. WHD's process for negotiating, developing, and approving the Wal-Mart agreement and its content did not violate applicable Federal laws or regulations.

Objectives 2 and 3

2. WHD did not have sufficient, established policies and procedures to provide adequate guidelines for its employees to negotiate, develop, and approve agreements with employers.

3. Lack of a formal process for developing agreements with employers resulted in Wal-Mart attorneys authoring key provisions of the Wal-Mart agreement.

4. The provision in the Wal-Mart agreement requiring WHD to notify Wal-Mart 15 days prior to any WHD audit or investigation is inconsistent with WHD's Field Operations Handbook (FOH) guidelines.

5. A provision of the agreement may provide for the avoidance of formal citation and penalty assessment if Wal-Mart brings its facility into compliance within 10 days of a WHD formal notice of a violation.

6. The Wal-Mart agreement required jointly developed press releases, in violation of stated WHD, ESA, and Department of Labor (DOL) Press Policy.

7. Lack of a formal process for management review and approval resulted in inadequate review of key provisions of the Wal-Mart agreement.

8. Lack of adequate guidelines resulted in the Wal-Mart agreement not receiving review by SOL.

Objective 4

9. The agreement between Wal-Mart and the WHD was significantly different from other agreements entered into by WHD. Specifically, the Wal-Mart agreement had the most far-reaching restrictions on WHD's authority to conduct investigations and assess CMPs.

In our view, the Wal-Mart agreement may adversely impact WHD's authority to conduct future investigations and issue citations or penalty assessments, and potentially restricts information to the public.

Unless WHD implements better management controls over its agreement process to ensure strong agreements are entered into with employers in the future, the WHD inadvertently may enter into agreements that fail to maximize accomplishment of the goal of increased compliance with Federal labor laws.

Recommendations

We recommend that the Assistant Secretary for Employment Standards:

1. Develop and implement written procedures for negotiating, developing, and approving agreements with employers. Specifically, the new procedures should provide, at a minimum:

- sufficient detail to ensure that all agreements include specific required elements and exclude elements that are unacceptable;
- appropriate levels of approval at the District Office (DO), Regional Office (RO), and National Office (NO);
- guidelines that identify: the bounds within which agreements may be negotiated; the provisions that should be considered for inclusion; and those provisions that are not negotiable; and
- employer audit/monitoring provisions that describe requirements in sufficient detail to ensure the adequacy and completeness of employer-performed audits/monitoring.

2. Require all future agreements be developed in coordination with the SOL, to include consultation, review and/or drafting of key elements, and clearance before execution, as deemed appropriate.

Agency's Response

ESA responded it agrees with OIG's conclusion that the process previously employed by WHD in negotiating settlement agreements required greater control and oversight. As a result, WHD has developed a new policy surrounding its settlement negotiation process, which ESA believes will effectively implement all OIG recommendations.

However, ESA strongly disagrees with the report's overall characterization of the effectiveness of the Wal-Mart child labor settlement agreement. Further, ESA believes that the OIG report gives the impression that: Wal-Mart was consulted before the Department issued its press release announcing the agreement; advance notice has been provided to Wal-Mart for WHD investigations involving matters other than child labor situations; and Wal-Mart has been permitted to avoid all penalties for violations of Federal law simply by bringing its stores into compliance. ESA contends that the requirement for advance notification applies only to child labor violations, and would not prevent them from intervening in the event of hazardous situations. In challenging our reading of the agreement, ESA argues various points of contract law it claims control how the document should be interpreted. ESA's response is included in its entirety as Appendix D.

OIG Conclusion

We considered ESA's response in its entirety and found no additional information that would materially affect our conclusion that breakdowns in the settlement agreement process resulted in the WHD entering into an agreement that gave significant concessions to Wal-Mart (advance notification of future investigations and ability to avoid CMPs) in exchange for little commitment from the employer beyond what it was already doing or required to do by law.

We disagree with ESA's response that the OIG report mischaracterizes the Wal-Mart agreement's value or the effect of the agreement on WHD obligations and ability to properly exercise its enforcement authority. We found in our analysis of the provisions of the Wal-Mart agreement a significant number of provisions that either required Wal-Mart to comply with existing law or to "continue" actions already being conducted. In contrast to other agreements we reviewed, the WHD agreement with Wal-Mart was the most far-reaching in precluding CMPs and limiting WHD's ability to initiate investigations.

We do not believe our report implies that Wal-Mart was consulted prior to the press release. We did not find any evidence that that was the case. Also, we did not state that Wal-Mart has avoided any penalties simply by bringing a store into compliance.

We did note that based on the language in the agreement, the 10-day provision was designed to allow Wal-Mart to avoid penalties if compliance is achieved.

ESA contends that the advance notification provision applies only to child labor matters, and would not prevent them from intervening in the case of hazardous situations. ESA raises various contract law issues in support of its argument. We continue to maintain that the plain language of the advance notification clause applies to any potential violation, not just child labor violations. Further, the Regional Administrator told us in an interview that, should she become aware of a potential child labor safety or health violation that she considered egregious, she intended to contact the Office of the Solicitor to see what they could do. We also note that, subsequent to the agreement, this provision has not been applied to other types of wage and hour cases involving Wal-Mart. However, the fact that ESA and Wal-Mart, subsequent to the written agreement, mutually may have chosen to do otherwise does not change what is required by the agreement. More importantly, however, inherent in our conclusion and recommendations is that ESA should not have to rely on legal arguments to interpret and enforce its agreements.

The report findings and recommendations remain unchanged. However, based on policy issued by WHD in June 2005, we consider these recommendations to be resolved but open pending OIG's review and analysis of the guidelines to ensure all aspects of the recommendations have been met.

U.S. Department of Labor

Office of Inspector General
Washington, DC 20210

Assistant Inspector General's Report

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We audited the Employment Standards Administration, Wage and Hour Division's procedures and controls governing compliance, litigation settlement, and administrative settlement agreements (referred to hereafter collectively as "agreements") as those procedures and controls were applied to a settlement agreement entered into with Wal-Mart Stores, Inc. The January 11, 2005, settlement agreement with Wal-Mart (see Exhibit A) stemmed from allegations that Wal-Mart violated child labor provisions of the Fair Labor Standards Act of 1938 (FLSA), as amended. See Appendix A for additional background information.

The primary purposes of our audit were to answer the following questions:

1. Did WHD's process for negotiating, developing, and approving the Wal-Mart agreement and its content comply with applicable Federal laws and regulations?

2. Does WHD have adequate procedures for negotiating, developing, and approving settlement agreements?

3. How was the Wal-Mart agreement developed, and did it comply with established policies and procedures?

4. How does the content of the Wal-Mart agreement compare with other agreements entered into between WHD and other employers?

We conducted our audit in accordance with Government Auditing Standards for performance audits. Our audit scope, methodology, and criteria are detailed in Appendix B.

Objective 1 – Did WHD's process for negotiating, developing and approving the Wal-Mart agreement and its content comply with applicable Federal laws and regulations?

Results

WHD's process for negotiating, developing and approving the Wal-Mart agreement and its content did not violate applicable Federal laws or regulations.

One purpose of the Wal-Mart agreement is for Wal-Mart to provide, and WHD to seek, assurances of Wal-Mart's future compliance with the child labor provisions of the FLSA. We reviewed the FLSA to determine if any clauses or provisions of the FLSA regulate the process of entering into settlement agreements. We also reviewed the Code of Federal Regulations (CFR) associated with the FLSA, specifically 29 CFR Parts 570, 579 and 580. However, there are no Federal laws or regulations that prescribe the negotiation, development, and approval process for the WHD when entering into settlement agreements to ensure future compliance by employers with the child labor provisions of the FLSA. Therefore, we determined that WHD's process for negotiating, developing, and approving the agreement with Wal-Mart did not violate applicable Federal laws or regulations. Additionally, nothing came to our attention indicating evidence of influence or pressure from internal or external sources being applied in the negotiation, development, or approval of the agreement.

With respect to the content of the agreement, in general, sections of the FLSA define actions that can or cannot be taken by employers, such as payment of minimum wages, methods for performing overtime calculations, mandatory record keeping, and child labor restrictions. The FLSA also addresses the process for determining and paying back wages due to employees. Section 11(a) of the FLSA details the rights of the DOL in conducting investigations, inspecting employer facilities and records, and questioning employees. Section 12(b) gives DOL the right to conduct investigations specifically to address allegations of child labor violations. Section 216(e) of 29 U.S.C. (section 16(e) of the FLSA) addresses CMPs in child labor cases:

> Any person who violates the provisions of section 212 of this title or section 213(c)(5) of this title, relating to child labor, or any regulation issued under section 212 or section 213(c)(5) of this title, shall be subject to a civil penalty of not to exceed $11,000 for each employee who was the subject of such a violation. Any person who repeatedly or willfully violates section 206 or 207 of this title shall be subject to a civil penalty of not to exceed $1,100 for each such violation. In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered.

With few exceptions, the commitments Wal-Mart made in the agreement (see Exhibit A) represented either measures already being taken by the company, or assurances that Wal-Mart would adhere to existing laws. Therefore, in determining if the Wal-Mart agreement complied with applicable Federal laws and regulations, we focused on those terms that dictated the Department's actions under the agreement.

We identified three provisions that, in our view, had the greatest potential to limit DOL's authority to enforce labor laws with respect to Wal-Mart. Paragraph 6.B of the Wal-Mart agreement contains two provisions, the first of which requires WHD to provide Wal-Mart with 15 days notice prior to initiating any WHD audit or investigation of Wal-Mart facilities covered by the agreement. Neither Section 11(a) nor 12(b) of the FLSA prohibits WHD from notifying an employer of a forthcoming investigation or requires that unannounced visits be conducted. Therefore, the 15-day advance notification clause of the Wal-Mart agreement did not violate the FLSA. Further, we analyzed Section 16(e) of the FLSA with respect to the second provision of Paragraph 6.B, which eliminates WHD's ability to issue a formal citation or collect CMPs if Wal-Mart brings the facility into compliance within 10 days of a written notification that a violation was found by an audit or investigation. In our opinion, Section 16(e) gives WHD a great deal of discretion with respect to the issuance of any CMP assessment. We, therefore, conclude that the Wal-Mart 10-day provision did not directly violate the FLSA.

Paragraph 8 of the agreement addressed the third provision of concern, which required that any press releases about the Wal-Mart agreement be developed jointly by WHD and Wal-Mart. We did not identify any sections of the FLSA that address dissemination of information regarding investigations of employers or issuances of assessments. Therefore, we conclude that the provisions of the Wal-Mart agreement do not violate applicable Federal laws or regulations.

Objective 2 – Does WHD have adequate procedures for negotiating, developing, and approving settlement agreements?

Objective 3 – How was the Wal-Mart agreement developed, and did it comply with established policies and procedures?

Results

We analyzed the WHD process for negotiating, developing, and approving the Wal-Mart settlement agreement. The results of our analysis indicate weaknesses exist in the management controls surrounding the negotiation, development, and approval processes. If strengthened, management controls could result in clearer provisions in such agreements and ensure consistency with WHD policy. We noted breakdowns in

the process for negotiation, development, and approval of the Wal-Mart settlement agreement, as follows:

Negotiation

WHD does not have sufficient, established policies and procedures to provide adequate guidelines for its employees to negotiate and develop agreements with employers.

In response to WHD's investigations of 27 Wal-Mart stores in 3 states, WHD pursued a strategy to enter into a national, corporate-wide child labor compliance agreement with Wal-Mart. However, WHD's FOH provides little if any guidance regarding the negotiation, development, and approval of agreements as they pertain to future compliance with child labor laws.

How WHD Negotiated the Wal-Mart Agreement

The Main Office/District Office (MODO), District Director (DD), for Wal-Mart stated that in August 2000 he became aware of the first Wal-Mart child labor hazardous occupation (HO) violations relating to operation of dangerous equipment at a store in West Memphis, Arkansas. Another child labor HO violation was found in the Little Rock District in October 2000. Subsequently, in July 2001, a similar child labor HO violation was found in one store in Connecticut while a back wage complaint was being investigated. The District Office (DO) in Connecticut then conducted child labor investigations of all 23 Wal-Mart stores operating in the state at the time. This resulted in findings of child labor HO violations in 21 of 23 Connecticut stores. In September 2001, another Wal-Mart store in the Little Rock District was found to have committed child labor HO violations. In November 2001, the MODO DD notified all other DOs of the status of the Wal-Mart investigations and requested information about pending or past litigation with Wal-Mart, especially cases involving child labor CMPs. The last Wal-Mart investigation arose from an Occupational Safety and Health Administration (OSHA) referral in March 2002, involving a youth who was injured while operating a chain saw at a New Hampshire Wal-Mart store.

The MODO DD stated that in March 2001, he attempted to determine whether similar violations existed throughout Wal-Mart by conducting a 5-year search for Wal-Mart child labor cases in the WHD database. He determined that 21 cases against Wal-Mart had been entered into the database, but that none were for child labor HO violations. The MODO DD stated he was aware that Wal-Mart had in the past been cited primarily for Family and Medical Leave Act (FMLA) violations and not child labor violations. However, he stated that typically child labor violations are not reported as readily as FMLA or other types of FLSA violations.

WHD justified entering the nationwide settlement agreement with Wal-Mart based on the investigations done at 27 stores in three states. Interviews with the Dallas Regional Administrator (RA) and the MODO DD indicate WHD pursued a strategy to have Wal-Mart sign a national, corporate-wide child labor compliance agreement. In February 2003, the MODO DD discussed with Wal-Mart's legal counsel the need for an agreement to settle the alleged violations. The matter of a national agreement was revisited in April 2003, and again in September 2003, due to Wal-Mart changing its legal counsel. 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. The MODO DD explained that without a national agreement, WHD would consider expanding the scope of the investigations by statistically sampling Wal-Mart stores to determine the extent of child labor violations. In response to requests from Wal-Mart's attorneys in April and September 2003, the MODO DD provided the Wal-Mart attorneys with a template of a child labor settlement agreement that could be used as a starting point to develop the agreement. The MODO DD informed the attorneys that it was an example of the type of corporate-wide compliance agreement that WHD was seeking to negotiate with Wal-Mart. Wal-Mart representatives agreed to sign a national corporate-wide settlement agreement and, using the template as a starting point, developed the agreement they proposed to sign. No additional investigations were conducted by WHD and the process of negotiating a national agreement with Wal-Mart continued.

The Dallas RA stated that resource allocation issues played a significant part in the decision to sign a nationwide settlement agreement without conducting additional investigations. In addition, the RA stated the Wal-Mart agreement includes proactive measures to ensure future compliance with child labor laws. The MODO DD indicated that he was concerned during the negotiation of the agreement 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.

Limited Procedural Guidance

The WHD FOH provides WHD with guidelines for initiating and investigating cases to determine compliance with all laws enforced by WHD. The FOH also details the method for determining and assessing CMPs when appropriate. However, the FOH provides little if any guidance for WHD employees when negotiating, developing, and approving agreements with employers that specifically pertain to future compliance with child labor laws. The FOH does address jurisdictional issues if an employer has branch operations located in multiple WHD DO domains. Typically, investigations are conducted locally. However, the DD in the DO that has jurisdiction over the employer's main office, referred to as the Main Office/District Office (MODO), "has overall

responsibility for devising and directing strategies in WHD for dealing with the multi-office employer . . . in order to maximize compliance issues and strategies."[1]

Development

Lack of a formal process for developing agreements with employers resulted in Wal-Mart attorneys authoring key provisions of the Wal-Mart agreement.

The MODO DD met with Wal-Mart attorneys in April 2003 and September 2003, at which times he provided them with a template for developing a child labor settlement agreement. According to the MODO DD, the terms of the Wal-Mart agreement evolved primarily from proposals submitted by Wal-Mart and edited by WHD, instead of a more formal negotiation process involving discussion by both parties of specific provisions.

The template included eight paragraphs and seven optional paragraphs. The eight paragraphs provided were in a fill-in-the-blank format. The eight paragraphs generally addressed items such as:

- reduction of penalty amounts in light of settlement;
- employer agreeing not to employ workers under 18 to work in hazardous occupations;
- employer agreeing not to employ workers under the age of 14;
- requirement that the employer institute specific measures concerning compliance with child labor provisions;
- assertion that USDOL does not waive its right to conduct future investigations, including but not limited to assessment of CMPs; and
- assertion that the employer does not waive any objections, privileges, or defenses with respect to future investigations, assessment of CMPs, or proceeding between the parties.

The optional paragraphs for child labor HO violations provided for some specific measures the employer might implement, such as:

- designating a child labor compliance director;
- training of store managers;
- performing regular internal audits/monitoring of child labor compliance;
- posting of notices on paper balers; and
- posting of USDOL-supplied warning/age restriction stickers on all company-owned hazardous equipment.

[1] Source can be found at FOH 61a01(a).

Wal-Mart's lawyers amended the template and submitted their version of the agreement to the MODO DD in February 2004. They eliminated four of the duties specified for the "Child Labor Compliance Director," requiring only that the compliance director be responsible for supervising compliance with the agreement. In addition, Wal-Mart attorneys drafted key provisions of the agreement that were more favorable to Wal-Mart than the template and required concessions on the part of WHD. Most importantly, two of the provisions violated WHD guidelines and/or policies. Additionally, a third provision potentially restricts WHD from issuing citations and/or levying CMPs. The following discussion addresses these three provisions:

A. The provision in the Wal-Mart agreement requiring WHD to notify Wal-Mart 15 days prior to any WHD audit or investigation is inconsistent with WHD policy.

The Wal-Mart agreement provides that WHD will give Wal-Mart 15 days prior notice before initiating audits or investigations of stores covered by the agreement. However, WHD management published, on WHD's website, *Fact Sheet # 44,* dated August 15, 2003, which states that the WHD does not require an investigator to announce the scheduling of an investigation. The decision to announce investigations remains with the investigator. *Fact Sheet # 44* also states that:

> The investigator has sufficient latitude to initiate unannounced investigations in many cases in order to directly observe normal business operations and develop factual information quickly.

This is addressed in FOH 52a01(d) as follows:

> The CO shall exercise a practical judgment on a case-by-case basis as to whether the appointment procedure is appropriate.

Wal-Mart attorneys drafted provision 6.B of the settlement agreement, which states, in relevant part:

> During the twelve-month period . . . of this Agreement, the WHD shall provide Wal-Mart with fifteen (15) days prior notice of any WHD audit or investigation at the stores covered by this Agreement. All such notices shall be addressed and sent via Certified Mail (return receipt requested) to the following: Corporate Employment Compliance.

In September 2004, Wal-Mart attorneys submitted to the WHD MODO DD the final version of the agreement that was eventually signed in January 2005. The Wal-Mart attorneys had removed an edit proposed by the Acting Administrator to limit the scope of Paragraph 6.B to only child labor investigations. They changed the wording of the scope to "any WHD audit or investigation." The 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 violations.

WHD contends this provision is confined to child labor violations only, because the entire agreement itself is a child labor agreement. In addition, they stated that the agreement is a child labor agreement as stated in the preamble of the agreement. Furthermore, the Assistant Secretary for Employment Standards met with Wal-Mart in February 2005, days before the New York Times article was released regarding concerns surrounding the Wal-Mart agreement, to discuss the potential for the parties to enter into agreements similar to the Wal-Mart "child labor agreement." Although we agree this is a "child labor" agreement stemming from child labor violations, it does not mean that every clause is relevant only to child labor, no matter how it is worded. There is no other interpretation of the explicit replacement of the words "child labor" with "any" WHD audit or investigation. Moreover, the MODO DD stated clearly that at the time of execution of the agreement, he understood the clause to apply to all WHD audits or investigations, not just those relating to child labor violations.

WHD management contends that they and Wal-Mart intended for the provision to only relate to child labor investigations. On this point, WHD stated that, of five WHD non-child labor investigations conducted at Wal-Mart stores since the effective date of the agreement, none received the 15-day prior notification. We accept management's assertion that, since the release of the New York Times article both WHD and Wal-Mart have chosen to not adhere to the prior notification requirements of the agreement with respect to non-child labor investigations. However, it is apparent to us that the language in the provision referring to "any" violations must be interpreted as subjecting all violations to the 15-day prior notification period before conducting an investigation.

Senior WHD managers further contend that advance notification of investigations not only complies with FOH guidelines, but is good practice. WHD senior management claimed that WHD gave up little, if anything, in agreeing to the 15-day prior notification, because in practice such notification is routinely given, even in child labor HO cases. Senior management also stated that investigators do not have legal authority to enter an employer's property without first securing the employer's consent or getting a court-order. Therefore, senior management maintains that unannounced investigations may waste departmental time and resources because the employer can refuse to provide documents and/or entry into non-public spaces absent a subpoena or court order. To support this position, they cite the following passage from FOH 52a01(d):

> 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.

We agree that, in appropriate circumstances, announced investigations can be beneficial in terms of planning and effective time utilization. However, in our view, even in light of the requirement to formally obtain access to non-public areas of an employer's facility prior to an investigation, the authority to proceed with an unannounced investigation must remain in the control of WHD. The Dallas Regional Director of Enforcement stated that WHD abdicated enforcement authority by agreeing to the 15-day prior notification provision.

Regarding senior management's assertion that WHD investigators do not have legal authority to enter an employer's property without first securing the employer's consent or getting court approval, the information provided by WHD relates to compelled entry into non-public areas or compelled access to the employer's documents. WHD provided us with nothing suggesting that unannounced observation from public areas, like parking lots or shopping aisles, would be illegal without a subpoena or court order. In fact, several WHD officials advised us that WHD investigators, particularly in the agricultural industry, do conduct surveillance and make unannounced visits. In addition, the fact that an employer may, absent court approval, refuse to consent to inspection of non-public areas or of employer documentation does not mean that the employer will always refuse such consent.

The MODO DD contended that another benefit to the prior notice provision is that it ensures one Wal-Mart corporate manager is given responsibility for promptly remedying a potentially dangerous child labor violation, which provides continuity when more than one alleged violation arises. The MODO DD claimed that, absent this provision, notices to Wal-Mart supervisors about alleged child labor hazardous occupation violations could take much longer to be addressed because it may take time to find the appropriate Wal-Mart official to take action. However, the central point for information and responsibility could have been assigned to Wal-Mart's Corporate Employment Compliance manager, as indicated in the agreement, without requiring WHD to give 15 days notice before investigating alleged violations. That is, the notice to the Wal-Mart official could be simultaneous with the initiation of the investigation.

A related concern is whether the 15-day prior notice provision could result in WHD disclosing certain complaint information in violation of WHD policy. The 15-day prior notice provision provides that the method of notification is by certified mail, but remains silent regarding the type and amount of information that must be provided to Wal-Mart. When asked, the MODO DD stated that the notification would have to be sufficient to allow Wal-Mart to intervene in a child labor safety issue. He indicated this would include the type of violation, the specific store, and other details as necessary. However, WHD policy prohibits the investigator from disclosing such details as whether the investigation

is in response to a complaint, the identity of the complainant, and the reason for the investigation. Specifically, FOH 52d00 provides that:

> The investigator shall take no action, which would reveal the existence of a complaint or disclose the identity of a complainant. As a matter of policy, WHD does not disclose reasons for making an investigation.

This is reiterated in WHD website *Fact Sheet # 44* which states:

> The WHD conducts investigations for a number of reasons, all having to do with enforcement of the laws and assuring an employer's compliance. WHD does not typically disclose the reason for an investigation. Many are initiated by complaints. All complaints are confidential; the name of the worker and the nature of the complaint are not disclosable; whether a complaint exists may not be disclosed.

Because the agreement is silent on the matter and WHD did not notify Wal-Mart in advance of the five investigations initiated after the agreement went into effect, we were unable to verify if the information that might be provided as a result of the 15-day prior notification to Wal-Mart would violate these FOH guidelines and established WHD procedures. WHD management did state that under no circumstances would it reveal to Wal-Mart the identity of a complainant.

In summary, WHD management states that time may be wasted as a result of investigators not having legal authority to enter an employer's property without first securing the employer's consent or getting a court order. We agree that, in appropriate circumstances, announced investigations can be beneficial in terms of planning and effective time utilization. However, in our view the authority to proceed with an unannounced investigation, even if exercised sparingly, must remain in the control of WHD. This view was echoed during an interview with the ESA Assistant Secretary, who stated, "unannounced visits should not be discouraged." The prior notification requirement in the Wal-Mart agreement as written prevents WHD from making unannounced investigations of alleged violations, which presumably could include egregious violations resulting in injury or death of a minor. WHD claims that addressing such an alleged egregious violation would not be an "investigation" and thus, they would take immediate action. However, the agreement is silent as to any restrictions to the advance notification clause. The requirement that WHD provide Wal-Mart with prior notice before initiating any WHD investigation violates the portion of FOH 52a01(d) requiring a "case-by-case" determination as to whether notification is appropriate and could potentially result in WHD disclosing inappropriate information to the employer.

B. A provision may provide for the avoidance of formal citation and penalty assessment if Wal-Mart brings its facility into compliance within 10-days of a formal notice of alleged violation.

The Wal-Mart agreement contains a provision that allows Wal-Mart 10 days to come into compliance and, in doing so, effectively avoid the issuance of related citations and penalties. Specifically, provision 6.B of the Wal-Mart agreement states:

> Where an alleged violation is identified as the result of said audit or investigation, **prior to and in avoidance of the issuance of a formal violation citation and/or penalty assessment**, Wal-Mart shall be provided with (a) formal written notice of such alleged violation via Certified Mail (return receipt requested) addressed to the Corporate Employment Compliance Group . . . and (b) **a period of ten (10) business days from the date of receiving such formal notice to bring the facility into compliance.** [Emphasis added.]

When interviewed, the MODO DD and senior management could not clearly define what the phrase "prior to and in avoidance of" in this 10-day clause means. In particular, they were uncertain about how the provision would impact the issuance of a citation and collection of a CMP. Yet, senior management stated that in the event of an egregious child labor violation resulting in injury or death, they did not consider the agreement to preclude WHD from taking immediate action or to limit their ability to levy penalties. Although this agreement stemmed from child labor violations, predominately from minors operating hazardous equipment, Paragraph 6.B does not make any special allowances for WHD to take action if an egregious event occurs at a Wal-Mart facility, such as death or injury to a minor. Other WHD agreements do provide for different procedures in egregious cases, including those involving injury or death.

Consistent with its plain language, we read this clause to mean that if Wal-Mart brings the facility where the alleged violation occurred into compliance within 10 business days from the date of receiving a formal notice, Wal-Mart would avoid issuance of a formal citation and CMP assessment regardless of the extent of the violation. This is significant, as the ability to assess and collect CMPs is an important and effective enforcement tool available to WHD.

Several DDs interviewed indicated that they would never agree to restricting their authority to issue a citation or reduce or eliminate a CMP in exchange for an employer taking action to come into compliance after a violation is found by WHD. The DDs stated they were not even aware that was acceptable under the WHD FOH or policy. On the other hand, WHD management contends that settlement agreements often allow

employers to entirely avoid penalties for violations simply by taking actions to come into compliance when the employer discovers the violations through self-audits. In the Wal-Mart agreement, however, the avoidance of citations is not linked to employer self-audits or other means of discovery of violations by the employer, but rather violations discovered during audits and/or investigations conducted by WHD after a 15-day notification period. We consider this to be a significant distinction between the Wal-Mart agreement and others that enable employers to avoid CMPs. The Dallas Regional Administrator (RA) contends that, contrary to the language in the agreement that restricts WHD's ability to collect CMPs, this provision would not give Wal-Mart the ability to avoid CMPs in child labor cases. However, she admitted that a better understanding of the provision is needed.

C. The Wal-Mart agreement required jointly developed press releases, in violation of stated WHD Press Policy.

Wal-Mart attorneys submitted to WHD in September 2004, the following Paragraph 8, which was included in the final agreement:

> Prior to the execution of this Agreement, the WHD and Wal-Mart will develop the terms of any joint or separate statement(s) issued by either party announcing this Agreement to the media and/or the public.

WHD's Media Policy states "every effort should be made to avoid having publicity or press releases the subject of negotiations with employers." WHD senior management stated that WHD's acceptance of this provision in the agreement was a result of a failure in the WHD review and approval process at the very top of the WHD management, and that this provision should not have been included in the agreement. In an interview with the OIG, the Assistant Secretary for Employment Standards indicated that this provision should not have been included in the agreement because restricting DOL's dissemination of information to the media is contrary to ESA, WHD, and DOL policy.

Approval

Lack of a formal process for management review and approval resulted in inadequate review of key provisions of the Wal-Mart agreement.

Because WHD lacked a formal process for review and approval of settlement agreements, the Wal-Mart agreement received only cursory review at the highest level of the WHD. The WHD Regional Office (RO) management and the MODO DD relied on the fact that the National Office (NO) management was provided with copies of the draft and final Wal-Mart agreements and approved them. Simultaneously, the NO management relied on the RO management and MODO DD expertise and experience,

since the RO management and MODO DD had handled many agreements in the past. NO management also assumed, without confirming, that the terms of the Wal-Mart agreement were similar to other such agreements.

The review and approval process began with the MODO DD receiving the Wal-Mart attorneys' first proposed draft in February 2004. Shortly thereafter, the draft version was forwarded to the RO and NO. The WHD Administrator then instructed the then-WHD Deputy Administrator for Policy to review the agreement. The WHD Deputy Administrator (who subsequently became the Acting Administrator) was under the erroneous impression that this first draft he reviewed was a document that had already been subject to significant back and forth negotiations between the parties, and that it was too late to make any significant changes. Accordingly, he offered what he believed to be only minor edits after a relatively limited review. In fact, the draft he reviewed was Wal-Mart's first proposal to modify the template that had been provided by the MODO. The WHD Deputy Administrator stated that he would have given the document more careful scrutiny had he known that it was Wal-Mart's first proposal.

As discussed earlier, Wal-Mart attorneys in September 2004 submitted to the WHD MODO DD the final version of the agreement that was eventually signed in January 2005. The Wal-Mart attorneys had removed an edit proposed by the Acting Administrator to limit the scope of Paragraph 6.B to only child labor investigations. They changed the wording of the scope to "any WHD audit or investigation." The 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 violations.

Within days of receipt of the agreement, the MODO DD forwarded it by e-mail to the Dallas RA, who then forwarded it to the WHD Deputy Administrator for Policy, who was serving at that time as the WHD (Acting) Administrator. The Dallas RA also forwarded the agreement by e-mail to the Director of External Affairs in the NO. The e-mail was tagged as "High" importance. The MODO DD stated in the e-mail:

> The two largest changes I detect are as follows:
> - Item #6B: concerning WHD providing 15 days notice prior to any child labor violation has been changed to 'prior to any investigation'.
> - Item #8 calls for the joint development of any press releases.

In her reply e-mail to the Dallas RA, which also was sent to the Acting Administrator, the Director of External Affairs stated, "at first blush, these are not acceptable changes, are they?" No further edits were made to the agreement.

Thus, the press release provision as written by the Wal-Mart attorneys remained unchanged. Additionally, the final agreement states that <u>any WHD</u> audit or investigation

was subject to advance notification, not just child labor issues. The earlier version stated "the WHD shall provide Wal-Mart with fifteen (15) days prior notice of an intended WHD child labor audit or investigation at stores covered by this Agreement." The Acting Administrator gave his approval to enter into the agreement, although he never opened the September 2004 e-mail from the Director of External Affairs questioning the acceptability of the most recent changes, of which he was unaware. The Acting Administrator stated that although he had not reviewed the final changes or the September 2004 e-mail, he relied upon the review and advice of others in approving the agreement. In support of this reliance, WHD management cites an e-mail received in November 2004 from the Director of External Affairs to him that stated:

> . . . 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.

We conclude that a significant breakdown occurred in the review and approval of the Wal-Mart agreement. The Deputy Administrator for Policy/Acting Administrator failed to provide an adequate substantive review of the first draft submitted by Wal-Mart, and then again, did not review subsequent drafts that were presented to him. This occurred due to his mistaken belief that they remained largely unchanged from the first draft, although he took no steps to confirm this.

This breakdown in the process resulted in the acceptance of a Wal-Mart settlement agreement that contained the 15-day and 10-day provisions, as well as the provision governing press releases. WHD never expressed to Wal-Mart any objection to these provisions. Therefore, the extent to which these provisions were negotiable from Wal-Mart's perspective remains unknown. In addition, WHD management involved in the development and approval of the Wal-Mart agreement stated in interviews that they were uncertain as to the meaning of the 15/10-day provision or how they would be implemented. Further, although not favored by at least some WHD management staff, WHD management accepted two key changes made by Wal-Mart: a) the removal of the limitation on the 15/10-day notice provisions to only **child labor** investigations, as opposed to **any** WHD investigations; and b) the requirement of a jointly developed press release.

Lack of adequate guidelines resulted in the Wal-Mart agreement not receiving review from the Office of the Solicitor (SOL).

Throughout the negotiation and development processes, Wal-Mart was represented by outside legal counsel as well as in-house legal counsel. However, WHD never

consulted the DOL Office of the Solicitor for advice at the Regional (RSOL) or the National (SOL) level. In 12 of 13 similar agreements reviewed[2], the process of developing and approving the agreements did include the review of the RSOL. In most cases the RSOL was principally involved in drafting the agreements, with contributions from WHD management. In the Wal-Mart agreement, the RSOL was not asked to review the agreement or otherwise participate in the agreement process. This is despite the fact that Wal-Mart is the nation's largest retailer and, as noted earlier, Wal-Mart's lawyers were heavily involved in the agreement's drafting. It should be noted that some of the agreements we identified in other RO/DOs that did go to SOL were required to do so because they involved a consent decree/judgment. Therefore, these are not necessarily representative of what these other RO/DOs might have done had they been handling the Wal-Mart agreement. The lack of SOL involvement may have been attributable to the lack of adequate guidelines concerning when and how to obtain SOL review and/or lack of clarity about whether it was the NO, the RO, or the DO that was responsible for seeking SOL review.

The Dallas Regional Solicitor and the attorney on his staff designated to handle ESA matters stated that they first became aware of the settlement agreement with Wal-Mart when the Solicitor of Labor contacted his office after the signed agreement had become national news. The Dallas RA stated that she did not consult with the RSOL regarding the Wal-Mart agreement because she did not consider the agreement to be unusual. The Dallas RSOL, on the other hand, considered the lack of notification by WHD to be atypical.

According to the Dallas RA, she met regularly with the Dallas/Denver RSOL, usually once per quarter. The RSOL's designated-ESA attorney stated that she maintains continuous contact with the various DOs within her region. Additionally, she visits each office yearly to meet with all personnel and inform the DO of the services the RSOL provides. Frequent "Combined Joint Review Conference" (CJRC) calls are conducted between the Dallas RSOL and the Regional or District WHD offices to discuss ongoing cases that may result in litigation. Under these circumstances, given the long period over which the Wal-Mart agreement was pending, we conclude there was ample opportunity for RSOL review. In addition, the WHD NO management could have sought SOL review at DOL headquarters in Washington, D.C. It is possible that, like other breakdowns in communication relating to the Wal-Mart agreement, the NO and RO each considered it the other's responsibility to seek guidance or review from SOL.

[2] The 13 agreements were similar to Wal-Mart because they met the following three criteria: 1) the employer had civil monetary assessments over $25,000 for child labor violations; 2) the employer operated in numerous physical locations and would be considered a chain of stores; and 3) the employer and DOL signed either a compliance, litigation settlement or administrative settlement agreement as a result of child labor investigations.

FOH 61b03 addresses the importance of CJRC calls when an investigation of a Main Office Employer (MOER) branch establishment appears to meet potential litigation criteria. According to FOH 61b03:

a. If it is decided the facts warrant consideration for litigation by DOL, a Combined Joint Review Conference (CJRC) call will be organized cooperatively by the MODO and the BRDO [Branch District Office] Mgrs.

   (1) The members of the CJRC will include: 1) the BRDO Manager and BRDO Investigator, 2) the MODO Manager, 3) the R/SOL representative . . . 4) the WHD RA . . . and 5) an NO/OEP [National Office / Office of Enforcement Policy] representative(s), if the MODO Manager deems appropriate because of significant national issues, or a national enterprise (multi-region) is involved.

b. The purpose of the CJRC is to consider whether litigation is appropriate and, if so, which of the possible litigation strategies would best suit the case. It is essential . . . that all parties including the BRDO, the MODO, and appropriate RSOL offices be involved in the decision on strategy to be employed.

In internal WHD e-mails sent between February 2002 and February 2004, the RO and MODO DD discussed the possibility of litigation against Wal-Mart. Text of a February 2003 e-mail indicated that the Dallas RA had consulted with the WHD Administrator regarding the best strategy to employ with Wal-Mart. However, the managers failed to include a representative from SOL in these communications despite guidance from FOH 61b03 and the open lines of communication between the Dallas RSOL and RO. Even though WHD decided not to litigate against Wal-Mart, had management consulted with a representative from SOL in that decision, the RSOL at a minimum would have been informed of the strategy to enter into a corporate-wide settlement agreement with Wal-Mart. Under those circumstances, SOL would have had an opportunity to become involved in the negotiation and/or review of the Wal-Mart agreement.

Routinely, the Dallas RO limits the use of the RSOL in resolving open WHD cases to those involving litigation. Typically, the Dallas RO does not involve the RSOL when negotiating settlement agreements unless the DO or the RO think they have legal issues to be addressed. The MODO DD confirmed this Dallas RO practice by stating that the RSOL becomes involved when agreements with employers require judicial action to force employers into compliance. When no potential litigation exists, the determination of RSOL's participation is made on a case-by-case basis.

The Dallas RA contends that the template agreement that the MODO DD presented to the Wal-Mart attorneys in April and September of 2003 had been reviewed and approved by the RSOL. This template became the starting point for the settlement agreement with Wal-Mart. As discussed earlier, however, Wal-Mart attorneys drafted several key provisions of the final agreement, which went beyond the standard template that was used as a starting point. Edits from Wal-Mart attorneys, as well as from WHD representatives, were incorporated into the final agreement signed in January 2005. Although the SOL reviewed the template used as a starting point for developing settlement agreements, they did not review the subsequent modifications that were incorporated into the final signed agreement between WHD and Wal-Mart.

The policy and procedures of ESA WHD as demonstrated in connection with the Wal-Mart agreement are not sufficient to provide adequate guidance for its employees when entering into agreements with employers. Consequently, opportunities exist to develop stronger agreements with employers and to include more proactive compliance measures. This can be accomplished through the development and implementation of written procedures with management controls governing the process of entering into child labor compliance agreements with employers.

Objective 4 – How does the Wal-Mart agreement compare with other agreements entered into between WHD and other employers?

Results

The agreement signed between Wal-Mart and WHD was significantly different from other agreements entered into by WHD.

Our review and analysis of the Wal-Mart agreement was initially compared to 13 other similar[3] agreements. Through this analysis, we identified three anomalies within the Wal-Mart agreement that limited WHD's authority over Wal-Mart. These limitations pertained to the authority to: 1) conduct investigations; 2) issue citations and collect CMPs; and 3) disseminate information regarding the agreement to the public or media. We also determined that provisions addressing employer-performed audits/monitoring and proactive measures taken by the employer were prevalent in the agreements, including Wal-Mart. We therefore expanded our comparison of WHD agreements to more fully understand the extent of these anomalies and provisions in a broader population of WHD agreements. We reviewed all 424 agreements, including Wal-Mart,

[3] The 13 other agreements were similar because they met the following three criteria: 1) the employer had civil monetary assessments over $25,000 for child labor violations; 2) the employer operated in numerous physical locations and would be considered a chain of stores; and 3) as a result of child labor investigations the employer and DOL signed either a compliance, litigation settlement or administrative settlement agreement. We limited our review to only one employer per industry.

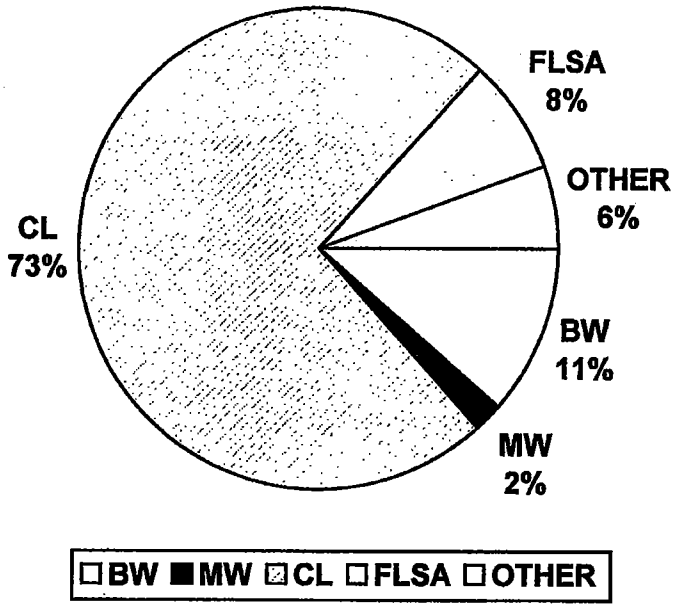
provided by WHD as having been in place at any time during a 10-year period. WHD categorized the agreements as follows:

- **Compliance agreements** or partnerships entered into between WHD and a company to promote corporate-wide compliance with labor laws. Some agreements were entered into as a result of violations found against the employers in multiple employer establishments;

- **Litigation settlement agreements** entered into to resolve FLSA minimum wage, overtime, and child labor violations after the investigation file had been referred to the SOL for litigation; and

- **Administrative settlement agreements** entered into to resolve FLSA minimum wage, overtime, and child labor violations prior to the initiation or referral of the investigation for litigation. It is possible that some of these cases were referred to the Regional Solicitor, but settled by Wage and Hour.

TYPES OF LAW ENFORCED
Total = 424 Agreements



Of the 424 agreements, 73 percent pertained strictly to child labor violations and future compliance with the child labor provisions of the FLSA. Agreements that required the amount and method for the employer to pay back wages (BW) amounted to 11 percent of the total. Only 2 percent of the agreements limited their provisions to enforcement of minimum wages (MW) without mentioning payment of back wages. A total of 8 percent specified compliance with at least two of the major provisions of the FLSA; minimum wage and overtime, back wages, record keeping, and child labor. The remaining 6 percent of the agreements (OTHER) concerned more than one law enforced by WHD, typically FLSA and FMLA; goods produced with labor in violation of FLSA involving manufacturing, usually garment, firms distributing "hot goods" to retailers; and agreements that did not fit into the above categories.

We also tallied all agreements that had reference to the following matters and made notations of the specifics of these clauses:

- Press Releases
- Restrictions on DOL's Ability to Initiate Investigations or on the Timing of Such Investigations
- Restrictions on DOL's Authority to Issue CMP Assessments
- Employer Conducted Audits/Monitoring
- Proactive Measures for Future Compliance

The following table indicates the frequency of these provisions in the 424 agreements reviewed.[4]

Table 1

AGREEMENTS WITH SPECIFIC PROVISIONS
424 Agreements Reviewed

Type of Provision	Agreements with Provision	% of Total
Press Releases	7	1.65 %
Restrictions on DOL to Initiate Investigations or on the Timing of Investigations	19	4.48 %
Restrictions on DOL to Assess CMPs	22	5.19 %
Employer Conducted Audits/Monitoring	109	25.71 %
Proactive Measures for Future Compliance	275	64.86 %

[4] Each agreement may contain more than one attribute tested; therefore, the total number of attribute entries is greater than the total number of agreements reviewed.

Analysis of Press Release Clauses

Seven of the agreements contained provisions related to the development and release of information to the media. Of these, one child labor agreement (Wal-Mart) and two other FLSA agreements provided that DOL would jointly develop press releases with the employer. The remaining four agreements, all of which related to back wages, restricted DOL from releasing information to the media, with the exception of information required to be released pursuant to the Freedom of Information Act (FOIA). The Wal-Mart agreement (CL) provision states clearly, without restriction, that:

> Prior to the execution of this Agreement, the WHD and Wal-Mart will develop the terms of any joint or separate statement(s) issued by either party announcing this Agreement to the media and/or the public.

The other two agreements found to involve jointly developed press releases were not comparable to the Wal-Mart agreement. One agreement was a voluntary compliance agreement not arising from violations. The provision for a press release in the other FLSA agreement did not require joint agreement as to the terms of a press release, but only provided that WHD would "consider incorporating any reasonable [employer] suggestions or revisions. The Wage & Hour national office may make additional revisions to the initial draft." This clause, therefore, unlike the Wal-Mart agreement, preserved WHD's control of the final press release.

Of the four agreements that totally prevented DOL from releasing any information, unless required by the FOIA, all are for BW agreements and connected to press releases for employer compliance. Specifically, in each of these cases the agreement stipulates that DOL will not release any information to the press or public concerning the employer's voluntary compliance efforts, the self-audit, or results of the self-audit.

Analysis of Restrictions on DOL's Initiation of Investigations

Of the 424 agreements reviewed, 19 (4.5 percent) included clauses limiting WHD's ability to initiate investigations or restricting the timing of such investigations. One type of limitation on WHD's ability to initiate investigations required WHD, prior to conducting its own investigations, to refer complaints to the employer for the employer's further action, which usually involved the employer conducting its own investigation or self-audit. These employer self-audits either acted as a substitute for or delayed a WHD investigation of the complaint.

Factors that remove limitations on WHD's ability to initiate investigations were included in 15 of the 19 agreements. These factors include:

- investigations arising from complaints of egregious or child labor violations;
- industry-directed investigations, predominately in health care cases;
- employer not in substantial compliance with the agreement;
- WHD and the employer cannot agree on the establishments at which self-audits are to be conducted; or
- based on issue(s) involved, WHD decides to investigate.

The remaining four agreements did not include any conditions that would remove the restrictions on the initiation or timing of WHD investigations. Of these four agreements, three, including Wal-Mart, incorporated a restriction requiring WHD to notify the employer a specified number of days prior to initiating a WHD investigation. The Wal-Mart agreement provided that WHD provide Wal-Mart with 15-days advance written notice before any audit or investigation could be initiated. However, unlike the Wal-Mart agreement, the time restrictions on WHD included in the other two agreements only applied if the employer's establishment was scheduled for but had not yet started or completed a self-audit. Otherwise, WHD was not restricted in the commencement of an investigation. The other two agreements further prescribe that the employer has 10 calendar days to complete the self-audit and upon request the employer shall disclose at the outset of the WHD investigation the findings of such self-audit to the WHD. The fourth agreement required the employer to perform self-audits with a defined methodology and scope that included specific agreed-upon procedures for identifying and calculating back wages due to non-exempt security personnel. Although the agreement required the employer, instead of WHD, to resolve complaints, it only applied to complaints covered by the self-audit period and included WHD's involvement in the resolution of the complaint.

In summary, 19 agreements contain restrictions on WHD's ability to initiate investigations, but in 15 agreements there are factors where restrictions can be removed, allowing WHD to initiate an investigation. The restrictions on three agreements were predicated on the employer conducting self-audits. Wal-Mart's agreement was the only agreement that neither had factors that removed the restriction nor tied the time restriction to the employer's self-audits.

Analysis of Restrictions on DOL to Assess CMPs

Twenty-two of 424 agreements (5.2 percent) included some form of restriction on WHD's assessment of CMPs. Any such restrictions are significant, because the ability to assess and collect CMPs is an important enforcement tool available to WHD.

Of the 22 agreements placing restrictions on CMP assessments, 21 (all except Wal-Mart) precluded WHD from assessing CMPs against the employer if the labor law violations were found as a result of the employer conducting a self-audit. Further, most of the 21 agreements included one or more of the following conditions that would permit WHD to proceed with assessing CMPs:

- self-audit not conducted to WHD's satisfaction;
- self-audit found child labor violations;
- alleged violations contributed to the death or injury of a minor;
- employer violates the terms of the agreement;
- employer failed to pay back wages found from self-audit; or
- employer did not immediately correct the violation.

Although 22 agreements provided some circumstance under which WHD would be precluded from assessing CMPs, the Wal-Mart agreement was the only agreement that did not predicate the CMP restriction on the employer discovering the violation through a self-audit. The WHD agreement with Wal-Mart was also the most far-reaching in precluding CMPs, in that Wal-Mart was given 10 days, from WHD's formal notification that its investigation had disclosed violation(s), to correct the violation(s) and otherwise bring the facility into compliance and avoid a CMP. As the agreement makes no distinction, this is apparently the case regardless of the nature or severity of the violation(s).

Analysis of Proactive Measures

Proactive measures were included in 275 of the 424 agreements (65 percent). The specific measures required the employers to incorporate activities into their operating procedures that would help prevent the labor law violations that prompted the agreement. Of the 275 agreements with proactive measures, 239 (87 percent) pertained to ensuring future compliance with child labor provisions of the FLSA. Depending upon the type of child labor violation that precipitated the agreement, these measures generally addressed preventing either hazardous occupation violations or violations that resulted in minors working during non-allowable hours. Due to the volume and diversity of proactive measures incorporated into these agreements, we limited our analysis to comparing the Wal-Mart agreement to a subset of 13 agreements from the 424 agreements. These 13 agreements were most similar to the facts and circumstances of the Wal-Mart case in that the employer:

1) had CMP assessments over $25,000 for child labor violations;
2) operated in numerous physical locations and would be considered a chain of stores; and
3) signed either a compliance, litigation settlement, or administrative settlement agreement as a result of child labor investigations.

Similar measures were noted in most of the 14 agreements, including Wal-Mart, that we reviewed. These measures are broadly categorized as follows:

- **An ombudsman or similar type designation, such as a compliance director or official, was commonly found in child labor agreements to oversee compliance with the agreement.** Additional responsibilities of the ombudsman included updating and revising managers' training materials, investigating future violations, and implementing remedial measures. Of 14 agreements, 5 did not include an ombudsman reference. In nine other agreements, reference to the ombudsman was included with varying degrees of responsibilities. The Wal-Mart agreement did designate a compliance official; however, the only responsibility of the position was the general supervision of the agreement.

- **A 1-800 hotline number or similar resource was made available for reporting alleged violations or receiving answers to labor law questions.** If violations were reported, the company agreed to investigate the allegations and take appropriate corrective action. Of 14 agreements, 6 agreements did not include such a measure. The Wal-Mart agreement did not contain such a provision. However, according to WHD management, toll-free telephone numbers were already in existence at Wal-Mart prior to the development of the agreement. Therefore, it was not included as a provision in the agreement.

- **Several agreements address the implementation of a system, such as color-coded nametags, which designate employees as minors.** To ensure that minors did not work in excess of the maximum allowable hours or during restricted hours, work schedules often identified minors. Because Wal-Mart reportedly does not hire minors under the age of 16, these actions to prevent minors from working unallowable hours was not considered necessary. Also, according to WHD, Wal-Mart requires 16- and 17-year-olds to wear color-coded badges.

- **All companies agreed to place warning notices on hazardous equipment identifying the age restrictions to ensure prevention of future HO child labor violations.** The Wal-Mart agreement states that Wal-Mart agrees to continue posting WHD-supplied warning/age restriction stickers on all company-owned hazardous equipment in the store areas where minors work, including but not limited to cardboard balers, cardboard compactors, and freight elevators. Some agreements included reference to having hazardous equipment key-locked to ensure compliance; Wal-Mart and other agreements did not.

- **Some agreements required oversight by senior management of local managers' staffing decisions to ensure sufficient number of employees over the age of 16 are scheduled to work during prohibited hours, and that enough employees over 18 years old are scheduled to operate HO equipment.** Of 14 agreements, 5 included senior management review. One agreement required senior management's policy support and that they actively

participate in the training initiative. One agreement required that senior management review compliance results. Wal-Mart and six other agreements made no reference to this provision.

- **The development and implementation of child labor compliance training programs is commonly included in these agreements.** We noted all 14 agreements had training programs included. The Wal-Mart agreement requires new managers to be trained on child labor compliance during orientation and through online reference. Current Wal-Mart store managers receive their training through computer-based learning on HO equipment. Although minors are required to receive training in other agreements reviewed, Wal-Mart's agreement does not address the issue of training minors.

- **Of 14 agreements, 13 require reference materials, such as "Facts Sheets", "At-A-Glance Info", booklets, posters, letters and or memoranda to be distributed to new hires, managers, and or parents informing of child labor compliance issues.** We did not find a similar reference in the Wal-Mart agreement.

- **Of 14 agreements, 6 addressed the issue of discipline for manager non-compliance, and 8 did not.** In the Wal-Mart agreement and five other agreements, disciplinary actions were included. Also, Wal-Mart and four of these agreements indicated that disciplinary actions would be taken "up to and including termination."

- **Of 14 agreements, 10 referenced a requirement to report results of actions taken to identify violations and document results of actions taken to remedy these violations.** The requirement to report out varies in the level of detail and frequency. While most agreements require quarterly reporting, others require reporting on a semiannual or annual basis. The Wal-Mart agreement requires that reporting occur at the end of the one-year term of the agreement.

We found a degree of consistency in the terms and provisions within this subset of the total child labor agreements. We conclude that the Wal-Mart agreement did not stand out from others, in that we found little uncommon or unique in its provisions in comparison to other proactive provisions found in similar agreements.

In addition, a total of 109 agreements of the 424 reviewed (26 percent) included provisions describing audit/monitoring activities to be performed by the employer. Of these 109 agreements, 59 agreements (54 percent) were designed to address child labor law compliance. We found the provisions regarding employer-conducted audit/monitoring varied in scope, frequency, degree of detail, and the level of DOL supervision and approval of results. Senior management confirms that there is no set

definition for employer-conducted audits, commonly understood as "self-audit," and there is no common understanding among employers regarding specific steps that must be taken when a self-audit is being conducted.

Of the 109 agreements, many incorporated the standard template language found in the "optional" paragraphs of the agreement template that stated the employer:

> . . . shall include in its regular inspections of all its establishments internal audits / monitoring of child labor compliance.

In the Wal-Mart agreement, references to conducting audits/monitoring were as follows:

> Wal-Mart agrees to continue monitoring its compliance with child labor laws as part of its quarterly STARS reviews and annual store file reviews. During 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.

In summary, Wal-Mart 's agreement, as well as many other agreements, did not provide sufficiently detailed procedures to be conducted by the employer in conducting audits/monitoring activities. This lack of clear definition of the scope, methodology and reporting of the procedures and results for audit/monitoring activities weakens the Department's ability to enforce these agreements and undermines the level of reliance on the information obtained from these employer compliance activities.

Summary of Audit Results

With 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. While we found that WHD's process for negotiating, developing, and approving the Wal-Mart agreement did not violate applicable laws or regulations, we determined WHD does not have sufficient policies and procedures governing settlement agreements. We also identified three provisions of the Wal-Mart agreement -- the 15-day prior notice clause, the 10-day compliance period, and the development of joint press releases – that limit WHD's authority over Wal-Mart. Finally, our comparisons of the Wal-Mart agreement with other agreements revealed the following:

1. Release of information to the media -- Limitations on press releases were rarely addressed in WHD agreements (present in only 7 of 424 agreements), and run counter to WHD policy. The Wal-Mart agreement was more specific than others in requiring mutual agreement in the development of the press release.

2. Limitations on WHD's authority to conduct investigations, or on the timing of investigations -- Such limitations were also rarely addressed (19 out 424 agreements), and Wal-Mart's agreement was the most far-reaching.
3. Restrictions on assessing CMPs -- Such restrictions were only included in about 5 percent of the agreements, and, with the exception of Wal-Mart, were uniformly predicated on the employer discovering the violation through a self-audit. The Wal-Mart agreement was also the most far-reaching in precluding CMPs in that the 10-day provision gave Wal-Mart 10 days to correct any violation, regardless of its nature or severity, in order to avoid a CMP.
4. Employer-conducted audit/monitoring -- The level of detail describing the scope, methodology and reporting of results of employers' self-audits is not adequately defined and/or consistent among agreements.
5. Proactive measures -- A degree of consistency exists in the terms and provisions within a subset of the total child labor agreements. We conclude that Wal-Mart's agreement did not stand out from others, in that we found little uncommon or unique in its provisions in comparison to other proactive provisions found in other similar agreements.

Overall Conclusion

Although we did not find that the Wal-Mart agreement violated Federal law or regulation, we did find serious breakdowns in the Department's process for developing, negotiating, and approving such agreements. These breakdowns resulted in the Department entering into an agreement that gave significant concessions to an employer (advance notification of future investigations and ability to avoid civil money penalties) in exchange for little commitment from the employer beyond what they were already doing or required to do by law.

Recommendations

We recommend that the Assistant Secretary for Employment Standards:

1. Develop and implement written procedures for negotiating, developing, and approving agreements with employers. Specifically, the new procedures should provide, at a minimum:

- sufficient detail to ensure that all agreements include specific required elements and exclude elements that are unacceptable;
- appropriate levels of approval at the District Office, Regional Office, and National Office;
- guidelines that identify: the bounds within which agreements may be negotiated; the provisions that should be considered for inclusion;, and those provisions that are not negotiable; and

- requirements regarding employer audit/monitoring provisions that are sufficiently detailed to ensure the adequacy and completeness of such provisions.

2. Require all future agreements be developed in coordination with the SOL, to include consultation, drafting of key elements, and clearance before execution.

ESA's Response to the Draft Report

ESA responded it agrees with OIG's conclusion that the process previously employed by WHD in negotiating settlement agreements required greater control and oversight. As a result, WHD has developed a new policy surrounding its settlement negotiation process, which ESA believes will effectively implement all OIG recommendations.

However, ESA strongly disagrees with the report's overall characterization of the effectiveness of the Wal-Mart child labor settlement agreement. Further, ESA believes that the OIG report gives the impression that: Wal-Mart was consulted before the Department issued its press release announcing the agreement; advance notice has been provided to Wal-Mart for WHD investigations involving matters other than child labor situations; and Wal-Mart has been permitted to avoid all penalties for violations of Federal law simply by bringing its stores into compliance. ESA contends that the requirement for advance notification applies only to child labor violations, and would not prevent them from intervening in the event of hazardous situations. In challenging our reading of the agreement, ESA argues various points of contract law it claims control how the document should be interpreted. ESA's response is included in its entirety as Appendix D.

OIG's Conclusion

We considered ESA's response in its entirety and found no additional information that would materially affect our conclusion that breakdowns in the settlement agreement process resulted in the WHD entering into an agreement that gave significant concessions to Wal-Mart (advance notification of future investigations and ability to avoid CMPs) in exchange for little commitment from the employer beyond what it was already doing or required to do by law.

We disagree with ESA's response that the OIG report mischaracterizes the Wal-Mart agreement's value or the effect of the agreement on WHD obligations and ability to properly exercise its enforcement authority. We found in our analysis of the provisions of the Wal-Mart agreement a significant number of provisions that either required Wal-Mart to comply with existing law or to "continue" actions already being conducted. In

contrast to other agreements we reviewed, the WHD agreement with Wal-Mart was the most far-reaching in precluding CMPs and limiting WHD's ability to initiate investigations.

We do not believe our report implies that Wal-Mart was consulted prior to the press release. We did not find any evidence that that was the case. Also, we did not state that Wal-Mart has avoided any penalties simply by bringing a store into compliance. We did note that based on the language in the agreement, the 10-day provision was designed to allow Wal-Mart to avoid penalties if compliance is achieved.

ESA contends that the advance notification provision applies only to child labor violations, and would not prevent it from intervening in the event of hazardous situations. ESA raises various contract law issues in support of its argument. We continue to maintain that the plain language of the advance notification clause applies to any potential violation, not just child labor. Further, the Regional Administrator told us in an interview that, should she become aware of a potential child labor safety or health violation that she considered egregious, she intended to contact the Office of the Solicitor to see what they could do. We also note that, subsequent to the agreement, this provision has not been applied to other types of wage and hour cases. However, the fact that ESA and Wal-Mart, subsequent to the written agreement, mutually may have chosen to do otherwise does not change what is required by the agreement. More importantly, however, inherent in our conclusion and recommendations is that ESA should not have to rely on legal arguments to interpret and enforce its agreements.

The report findings and recommendations remain unchanged. However, based on policy issued by WHD in June 2005, we consider these recommendations to be resolved but open pending OIG's review and analysis of the guidelines to ensure all aspects of the recommendations have been met.

Elliot P. Lewis

Elliot P. Lewis
September 21, 2005

Exhibit

EXHIBIT A

UNITED STATES DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

IN THE MATTER OF:
WAL-MART STORES, INC.

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into this 6th day of January, 2005, (and shall expire approximately 12 months thereafter in accordance with Section 6 below), by and between the United States Department of Labor, Wage and Hour Division ("the WHD") and Wal-Mart Stores, Inc. ("Wal-Mart"), as follows:

WHEREAS, the WHD conducted investigations under the child labor provisions of the Fair Labor Standards Act, as amended, 29 U.S.C. Section 201 *et seq.* (hereinafter "the Act"), covering the period of approximately 10/01/1998, through 04/11/2002, with respect to various Wal-Mart stores located in the States of Arkansas, Connecticut and New Hampshire, resulting in various alleged violations of the child labor provisions of the Act, and the initial assessment by WHD of civil money penalties totaling $150,600.00; and

WHEREAS, Wal-Mart has denied the alleged violations of the child labor provisions of the Act, and has taken exception to the assessment of any civil money penalties; and

WHEREAS, both the WHD and Wal-Mart desire to resolve the dispute concerning the alleged violations and civil money penalties initially assessed without incurring the expense of further litigation, and Wal-Mart wishes to provide assurances of, and the WHD seeks to enhance, future compliance with the child labor provisions of the Act;

The WHD and Wal-Mart, in order to resolve this matter, hereby stipulate and agree to the following:

1. The WHD agrees to modify the initial civil money penalties downward from $150,600.00 to $135,540.00, and Wal-Mart hereby agrees to withdraw its exception to such assessment of civil money penalties.

2. Wal-Mart agrees to pay such assessed civil money penalties of $135,540.00 within 30 days of the date of its signing of this Agreement.

3. Wal-Mart agrees that, at its Wal-Mart Stores, Supercenters, and Neighborhood Markets ("the stores"), it will not require any worker under 18 years of age to perform any job function that has been declared by the Secretary of Labor to be hazardous for the employment of minors between the ages of 16 and 18 years. These hazardous job functions are set forth in 29 CFR Sections 570.51 through 570.68.

MISC 1001

4. Wal-Mart agrees that, at the stores, it will not employ any worker under 14 years of age.

5. Wal-Mart further assures the WHD that, at the stores, it shall implement and/or continue the following specific measures concerning compliance with the child labor provisions of the Act:

   A. Wal-Mart agrees to designate a member of its corporate office to generally supervise compliance with this Agreement.

   B. Wal-Mart agrees to provide new store manager training on child labor law compliance and its Employment of Minors policy during manager orientation, and through its online reference.

   C. Wal-Mart agrees to continue its practice of providing current store managers with training on child labor law compliance through computer-based learning on hazardous equipment, its Employment of Minors policy and its online reference.

   D. Wal-Mart agrees to continue monitoring compliance with child labor laws as part of its quarterly STARS reviews and annual store file reviews. During 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. Compliance with the 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 the child labor laws, under the company's disciplinary system, up to and including termination.

   E. Nothing in Section 5.D. shall preclude coaching or disciplinary consequences for supervisors and associates who are involved in any such violations, up to and including termination.

   F. Wal-Mart agrees to the following proactive practices at each of the stores:

      (1) To continue its practice of declining to employ 14 and 15 year old minors as inappropriate for its workplaces.

      (2) To continue to obtain consents/age verifications for all newly hired 16 and 17 year-old minors prior to their beginning employment.

      (3) To continue to prohibit 16 and 17 year old minors from loading, operating or unloading cardboard balers. Wal-Mart also agrees to post a notice on each cardboard baler that 16 and 17 year old minors may not use or touch the cardboard baler.

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G. Wal-Mart agrees to continue posting WHD-supplied warning/age-restriction stickers on all company-owned hazardous equipment in the store areas where minors work, including but not limited to cardboard balers, cardboard compactors, and freight elevators.

6. By entering into this Agreement, the WHD does not waive its right to conduct future investigations under the Act and to take appropriate enforcement action with respect to any alleged violations disclosed by such investigations, including but not limited to, assessment of civil money penalties pursuant to Section 16(e) of the Act or injunctive relief pursuant to Section 17 of the Act; provided that, for the duration of this Agreement, the parties further agree:

A. That Wal-Mart shall be entitled to a period of twelve (12) months, from the date of its signing this Agreement, to fully implement the provisions of this Agreement. At the end of such twelve (12) month period, Wal-Mart shall report to the WHD the actions it has taken to implement this Agreement and the results thereof. Said report will include information on the number of managers and supervisors trained in the provisions of the child labor laws, 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.

B. That during the twelve-month period described in Section 6(A) of this Agreement, the WHD shall provide Wal-Mart with fifteen (15) days prior notice of any WHD audit or investigation at the stores covered by this Agreement. All such notices shall be addressed and sent via Certified Mail (return receipt requested) to the following: Corporate Employment Compliance, Wal-Mart Stores, Inc., Mailstop # 0505, 702 Southwest 8th Street, Bentonville, Arkansas 72716-0215. Further, where an alleged violation is identified as the result of said audit or investigation, prior to and in avoidance of the issuance of a formal violation citation and/or penalty assessment, Wal-Mart shall be provided with (a) formal written notice of such alleged violation via Certified Mail (return receipt requested) addressed to the Corporate Employment Compliance Group at the above-referenced address; and (b) a period of ten (10) business days from the date of receiving such formal notice to bring the facility into compliance.

C. At the end of the twelve-month period, the WHD and Wal-Mart will meet and confer in good faith in an effort to extend the applicability of the fifteen-day notice provision described above, or any other aspects of their relationship that may be mutually agreed upon.

D. That in resolving exceptions taken to any assessment of any civil money penalties for alleged future violations found as a result of any investigation, the WHD will

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give due consideration to compliance efforts undertaken by Wal-Mart to avoid the occurrence of such violations.

7. Wal-Mart's entry into this Agreement shall not constitute or be construed as an admission of liability or wrongdoing by Wal-Mart, which Wal-Mart expressly denies. Further, by entering into this Agreement, Wal-Mart does not waive any objections, privileges, or defenses which it may have with respect to any future investigation, assessment of civil money penalties, or proceeding between the parties.

8. Prior to the execution of this Agreement, the WHD and Wal-Mart will develop the terms of any joint or separate statement(s) issued by either party announcing this Agreement to the media and/or the public.

9. The execution of this Agreement closes the record in this matter, and the assessment of civil money penalties, as provided in Section 2 herein, shall be final and binding.

WAL-MART STORES, INC.

By: Robin E Forbes
Senior Vice President
Finance, Compliance & Strategy

Date: January 6, 2005

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

Cynthia C Watson
Regional Administrator

Date: January 11, 2005

Washington:118203.1 015602.4342

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Appendices

APPENDIX A

BACKGROUND

WHD Organization and Operations

The WHD is a division within the Employment Standards Administration of the Department of Labor. A total of 48 District Offices report to 5 Regional Offices. Each Regional Office reports to the National Office. The table below indicates the location, number of states/territories and number of District Offices for each WHD Regional Office.

WAGE AND HOUR DIVISION

Region	Location	Number of Territories	Number of District Offices
Northeast	Philadelphia, PA	17	14
Southeast	Atlanta, GA	8	10
Midwest	Chicago, IL	10	8
Southwest	Dallas, TX	11	8
Western	San Francisco, CA	12	8
	Totals	58	48

WHD administers and enforces various Federal labor laws, including the FLSA, which includes provisions for child labor protections. They have the authority to engage in civil and criminal remedies. Since 1974, FLSA contained a civil money penalties (CMP) provision for child labor violations. The 1989 Amendments to FLSA added a provision for CMP for repeated or willful minimum wage or overtime violations. Other major labor statutes administered and enforced by WHD include: Family and Medical Leave Act, Consumer Credit Protection Act, Davis-Bacon and Related Acts, McNamara-O'Hara Service Contract Act, Immigration and Nationality Act, Migrant and Seasonal Agricultural Protection Act, and Walsh-Healey Public Contracts Act.

According to the "DOL's Strategic Plan for Fiscal Years 2003 – 2008", Goal 2 is to promote the economic security of workers and families. Accordingly:

> The Department is committed to achieving the highest level of protection for our workforce including: Protecting workers' wages and working conditions. . . . While our commitment to worker protection is steadfast, our approach is expanding to providing extensive compliance assistance in helping employers comply with our regulations. Compliance assistance, along with targeted enforcement, will help prevent violations, leverage our resources, and position the Department to deal with 21st century challenges.

The "DOL's Strategic Plan for Fiscal Years 2003 – 2008" describes compliance assistance as "... preventative in nature -- aiming at intervention before harm is done,

rather than solely enforcing the law afterwards. It complements the Department's vigorous enforcement of its laws." The strategy designed by DOL to accomplish this goal includes development and support of crosscutting activities pertaining to coordinated compliance assistance. DOL anticipates that this will assist the regulated community of employers and labor unions to better understand their responsibilities under various worker protection laws. The "DOL's Strategic Plan for Fiscal Years 2003 – 2008" further states that, "Laws mandating inspections will continue to be enforced, but enforcement will be better focused and complemented by more compliance assistance and continued worker involvement in the inspection process."

The DOL strategy to employ compliance assistance in meeting its goals of providing a safe work environment is incorporated into WHD's vision statement. WHD maximizes "its impact on compliance through a comprehensive enforcement program, leveraging its resources and serving as a catalyst for action by others to promote compliance."

WHD Case Investigation Process

The WHD investigative process typically originates either from a directed investigation or from a complaint driven investigation. Under most circumstances the District Office (DO) handles investigations within its jurisdiction. If an employer has branch operations located in different district office jurisdictions, the District Director of the WHD office located closest to the employers' corporate headquarters becomes the MODO (Main Office / District Office).[5] The MODO may decide that the negotiation and resolution of the findings of an investigation should be handled by the MODO instead of the local DO.

The authority to open investigative cases, assess fines and close investigations rests with the District Director (DD) or MODO. Additionally the MODO takes responsibility for coordinating between other DOs information relating to the national employer. The MODO is kept apprised of all activity relating to the employer. If necessary the MODO coordinates investigative activities of the employer. The MODO's responsibility also includes serving as the contact point for negotiating agreements with the employer.

The Regional Office (RO) and DO are responsible for planning and executing a compliance program for their respective areas that will result in the best possible use of resources to achieve the overall goal of a balanced enforcement program. The RO and National Office (NO) serve in an oversight and support capacity. Although based on certain factors such as size of the employer, amount of the fine, and/or severity of the violations, the RO and NO may become more involved in the case review and determination of assessments.

An investigation may consist of an examination of payroll and time records. It might include interviews with certain employees in private. Typically, the investigator conducts a final conference after completing the fact-finding portion of the investigation. However, if current child labor violations are discovered during the investigation, the

[5] Wal-Mart's headquarters is located in Bentonville, AR. Therefore, the WHD MODO for Wal-Mart is the DD of Little Rock, AR, that reports to the Southwest Region located in Dallas, TX.

employer should be advised promptly without waiting for the final conference. By doing so, corrective steps can be taken immediately, such as transferring the minor to permissible work. Included at the conference are the employer and/or a representative of the firm who has authority to reach decisions and commit the employer to corrective actions if violations have occurred. The employer will be told whether violations have occurred and, if so, what they are and how to correct them. If violations were disclosed, the employer or representative may present additional facts for consideration.

If child labor violations are evident, the investigator provides the employer with a copy of WH-103, "Notice to Employer – Employment of Minors Contrary to the Fair Labor Standards Act" at the final conference. The investigator then advises the employer that determination of the appropriateness and amounts of CMPs is handled at the supervisory level. If it is determined that CMPs are appropriate, the DO sends the employer an assessment letter stating the amount of the CMPs and the violations that resulted in the penalty assessment.

Procedures established under the FLSA, which may differ under other statutes administered and enforced by WHD, allow employers 15 days to file an exception letter after receiving a notice of assessment of CMPs. If the employer fails to file a timely exception letter, then the amount of the assessment shall be deemed final. If the employer files a timely exception letter, then the assessment is not collectible until the case is dismissed or an Administrative Law Judge affirms the determination.

Wal-Mart Investigation and CMP Assessment

The Wal-Mart agreement stemmed from a total of 27 Wal-Mart stores investigated for child labor HO violations; 23 located in the Hartford, CT district, 3 in the Little Rock, AR district, and 1 in the Manchester, NH district. Of the 27 stores investigated, HO violations were found in all except 2 of the Connecticut stores.

A hazardous occupation complaint against a Wal-Mart store in the Little Rock, AR district initiated the first investigation in August 2000. A second store in the same district received a back wage complaint in October 2000 initiating another investigation. In July 2001 the Hartford, CT district initiated an investigation after receiving a complaint from a Wal-Mart employee regarding back wages. After the MODO was informed of the Connecticut investigation, he directed the Hartford DD to handle the investigation locally and to include child labor hazardous violations in the investigation. The Hartford DD decided to investigate all 23 Wal-Mart stores within the state at that time and continued to inform the MODO of the status of their investigations. In October 2001, the MODO instructed Hartford to hold final conferences with the stores they had investigated and to inform the managers that the files would be forwarded to the MODO for consideration of CMPs and discussions of corporate-wide compliance.

In November 2001, the MODO informed all WHD managers nationwide of the Connecticut and Arkansas investigations. He requested information on past and current cases or litigations against Wal-Mart and his desire for corporate-wide compliance. A third investigation in the Little Rock, AR district began in September 2001 after the

district received a complaint from an employee's parent regarding child labor hazardous occupation violations. The final investigation started in March 2002, after OSHA informed the Manchester, NH DO that a minor had been injured in the Salem, NH store while operating a chainsaw.

As a result of these investigations, WHD assessed Wal-Mart a total $150,600 civil money penalties for violations of child labor laws, most notably hazardous occupation provisions of the FLSA. In response to the alleged violations, Wal-Mart filed a timely exception pursuant to FLSA requirements. Wal-Mart and WHD elected to settle these alleged violations, resulting in a mutual agreement to enter into a national agreement to ensure future compliance and pay 90 percent of the total assessment amount.

APPENDIX B

OBJECTIVES, SCOPE, METHODOLOGY, AND CRITERIA

Objectives

Our audit was designed to answer the following questions:

1. Did WHD's process for negotiating, developing, and approving the Wal-Mart agreement and its content comply with applicable Federal laws and regulations?

2. Does WHD have adequate procedures for negotiating, developing, and approving settlement agreements?

3. How was the Wal-Mart agreement developed, and did it comply with established policies and procedures?

4. How does the content of Wal-Mart agreement compare with other agreements entered into between WHD and other employers?

Scope and Methodology

We performed fieldwork from February 21, 2005, through September 21, 2005, at the WHD National Office, WHD Dallas Regional Office, WHD Little Rock Arkansas District Office, and WHD Hartford Connecticut District Office. To answer our objectives, we reviewed the Fair Labor Standards Act (FLSA) of 1938, as amended, and the associated Code of Federal Regulations (CFR), specifically Section 29 CFR Parts 570, 579, and 580. We obtained and reviewed ESA WHD's three-volume set of instructions referred to as the Field Office Handbook (FOH) for written procedural guidelines. We also obtained and reviewed WHD's Media Policy. We accessed ESA, WHD websites to gain an understanding of the WHD's organization, enforcement scope, and mission and vision statements. We examined WHD-supplied correspondence, predominately copies of e-mails dated between August 9, 2000, and February 10, 2005, which pertained to the Wal-Mart agreement. We reviewed listings provided by WHD of current and former DOL employees who were either involved in the Wal-Mart agreement or might have had a limited involvement with the agreement. From these listings and review of documents, selected individuals were interviewed regarding the Wal-Mart agreement.

We reviewed the information described above to gain an understanding of the applicable laws and regulations and the WHD policies and procedures that apply to the negotiation, development and approval of agreements. This information was also used to evaluate the specific provisions of the Wal-Mart agreement.

Our review and analysis of Wal-Mart's agreement was initially compared to 13 other similar agreements judgmentally selected. For the 13 agreements, we conducted

interviews with key WHD National, Regional and District Office personnel that were involved in investigations of the child labor violations; and in the negotiation, development and approval of the agreements. We also analyzed copies of the 13 agreements, comparing the terms between each agreement. We reviewed WHD investigative files and written correspondence regarding the Wal-Mart investigation and settlement agreement. These Wal-Mart materials were obtained from ESA and from Wal-Mart attorneys and covered the period August 9, 2000, through May 4, 2005.

The 13 agreements were judgmentally selected from the WHD database of child labor investigations based on the following three criteria: 1) the employer had civil monetary assessments over $25,000 for child labor violations; 2) the employer operated in numerous physical locations and would be considered a chain of stores; and 3) the employer and DOL signed either a compliance, litigation settlement or administrative settlement agreement as a result of child labor investigations.

We performed the following measures in order to arrive at our 13 judgmentally selected agreements for comparison with the Wal-Mart agreement.

- A search of the WHD database for child labor violation cases with settlement dates from March 1, 1998, through February 28, 2005, and assessed civil monetary penalties equal to or greater than $25,000, identified 217 cases.
- We then sorted those results and identified cases that were documented through the notation feature as ones resulting in settlement agreements. Twelve companies, not necessarily chain store operations, were identified.
- In order to provide for the possibility that all child labor cases with settlement agreements were not properly noted in the database, we analyzed press releases provided by the Department for the period March 1, 1998, through February 28, 2005. Additional companies of interest were identified through this process.
- We compared the companies identified through the press release search with those identified from the WHD database and found child labor cases related to the companies that had not been properly noted in the notation section of the database as having a settlement agreement.
- We, therefore, asked the Department to provide copies of all settlement agreements they had on file. We were provided 424 agreements from 1994 through March 2005, including agreements not related to child labor violations settlements. We analyzed all 424 to determine which agreements were based on child labor cases with assessments equal to or greater than $25,000 and the company operated in numerous physical locations.
- The above process identified 13 agreements to be compared with Wal-Mart.

Our analysis of the Wal-Mart agreement and 13 other similar agreements revealed significant differences in four areas relating to restrictions on WHD's ability to issue press releases, initiate investigations, issue citations and assess civil money penalties, and consult with or obtain the approval of SOL. We also determined that provisions addressing audits/monitoring conducted by the employer and proactive measures taken

by the employer were prevalent in the agreements. Given that these types of provisions and processes are not exclusive to just child labor investigations, we expanded our testing of agreements to more fully understand the extent of these anomalies and provisions in a broader population of WHD agreements.

In response to a request for data, WHD supplied OIG with six lead schedules categorized into three different types of agreements. WHD defined the types of agreements as follows:

- **Compliance agreements** or partnerships entered into between WHD and a company to promote corporate-wide compliance with labor laws. Some agreements were entered into as a result of violations found against the employers in multiple employer establishments;

- **Litigation settlement agreements** entered into to resolve FLSA minimum wage, overtime, and child labor violations after the investigation file had been referred to the Office of the Solicitor for litigation; and

- **Administrative settlement agreements** entered into to resolve FLSA minimum wage, overtime, and child labor violations prior to the initiation or referral of the investigation for litigation. It is possible that some of these cases were referred to the Regional Solicitor, but settled by Wage and Hour.

WHD provided OIG with copies of 424 agreements from 1994 through March 2005. In order to determine the extent of the provisions found in the Wal-Mart agreement, we analyzed all 424 for provisions pertaining to press releases, restrictions on DOL's ability to initiate investigations, restrictions on DOL's authority to assess penalties, employer audits/monitoring and proactive measure requirements.

Management Controls

To meet our objectives, we reviewed management controls over relevant activities. Our management controls work included obtaining and reviewing policies and procedures manuals, interviewing key personnel, and reviewing selected agreements to determine the controls in place. Our testing of management controls focused only on the controls related to our audit objective of reviewing the WHD's process for entering into agreements and was not intended to form an opinion on the adequacy of overall management controls, and we do not render such an opinion.

Compliance with Laws and Regulations

We reviewed and analyzed pertinent sections of the FLSA, WHD's FOH, and WHD's Media Policy to determine if the provisions of the Wal-Mart agreement are in compliance with these policies and procedures. However, our testing of WHD's compliance with the FOH requirements of entering into and processing agreements was limited to interviews conducted with WHD personnel involved in developing and executing 14 child labor agreements tested. This testing was not intended to form an opinion on compliance with laws and regulations as a whole, and we do not render such an opinion.

Auditing Standards

We conducted our audit in accordance with Government Auditing Standards for performance audits issued by the Comptroller General of the United States. Those standards require that in planning and performing a performance audit, we make an objective and systematic examination of evidence for the purpose of providing an independent assessment of the performance of WHD.

An audit made in accordance with these standards provides reasonable assurance that its objectives have been achieved; but it does not guarantee the discovery of illegal acts, abuse or all internal control weaknesses. Providing an opinion on compliance with all laws, regulations, and other compliance requirements or internal controls was not an objective of our audit and accordingly, we do not express such an opinion. We believe our audit provides a reasonable basis for our assessment and conclusions.

The conclusions provided in this report are the result of our performance audit of WHD's procedures during the period of August 9, 2000, through January 11, 2005. Changes in the WHD processing of agreements, including changes in controls or laws, regulations, and other compliance requirements, could result in performance that would be different from the performance during that period. Therefore, this report should not be used to evaluate performance results of future periods.

Criteria

We used the following criteria to perform this audit:

Fair Labor Standards Act of 1938, as amended
29 CFR parts 570, 579, and 580
ESA WHD Field Operations Handbook
Wage and Hour's Media Policy

APPENDIX C

ACRONYMS AND ABBREVIATIONS

ADD	Assistant District Director
BRDO	Branch District
BW	Back Wage
CFR	Code of Federal Regulations
CJRC	Combined Joint Review Conference
CL	Child Labor
CMP	Civil Money Penalty
CO	Compliance Officer/Investigator
DD	District Director
DO	District Office
DOL	Department of Labor
ESA	Employment Standards Administration
FLSA	Fair Labor Standards Act
FMLA	Family Medical Leave Act
FOH	Field Office Handbook
FOIA	Freedom of Information Act
HO	Hazardous Occupation
MODO	Main Office/District Office
NO	National Office
OIG	Office of Inspector General
OSHA	Occupational Safety and Health Administration
RA	Regional Administrator
RO	Regional Office
RSOL	Regional Office of the Solicitor
SOL	Office of the Solicitor
STARS	Store Total Activity Review
WHD	Wage and Hour Division

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]

[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]

[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 <u>only</u> 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.

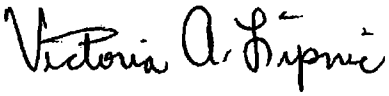
C. TEN DAY COME-INTO-COMPLIANCE PROVISION

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

Attachments

Attachment 1

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

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:

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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.

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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

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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

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- 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.

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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

WAL★MART®
COMPLIANCE

WAL★MART
WAL★MART LOGISTICS
Corporate Employment Compliance
508 S.W. 8th Street, Bentonville, AR 72712.
Mail Stop 506

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
8/2/2005 Page 1

WAL★MART®
COMPLIANCE

WAL★MART
WAL★MART LOGISTICS
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.

K N O W I N G A N D D O I N G T H E R I G H T T H I N G