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CTR

TO: Agency Review Team for U.S. Department of Labor

FROM: United Food and Commercial Workers International Union

DATE: December 4, 2008

RE: **DOL/FLSA: Compensation For Donning And Doffing Protective Gear**

In many industries, such as meat packing, food processing, and chemical production, employees spend a substantial amount of time donning and doffing required safety equipment. Unfortunately, Bush DOL actions have undermined their right to compensation for this time and federal health and safety laws which mandate the use of such equipment. The new administration should correct these actions by issuing new opinion letters, reinstating and revising withdrawn opinion letters, and withdrawing opinion letter FLSA2002-2 dated June 6, 2002 and a portion of opinion letter FLSA2007-10 dated May 14, 2007.

The Portal-to-Portal Act amended the FLSA only to except payment for time spent in work activities defined as preliminary and postliminary and not compensable by contract, custom, or practice. 29 CFR §790.3(a)(2); §790.7(a). The Portal Act is inapplicable to an activity determined to be a principal activity. 29 CFR §790.7(a). Therefore, DOL should issue an opinion letter clarifying that an activity outside the regular workday must first be examined to determine whether it is a principal activity.

In addition, DOL should issue an opinion letter clarifying that the term "principal activity" defined at 29 CFR §790.8(b) covers all activities which are an "integral" part of a principal activity, including activities which are "indispensable" to an integral activity. The regulations do not establish a wholly separate condition for establishing a principal activity, as certain cases have incorrectly held.[1] 29 CFR §790.8(c). An example given in the regulations is that changing clothes on an employer's premises when required by law, the employer's rules, or by the nature of the work can qualify as an integral part of a principal activity. 29 CFR §790.8(c). Accordingly, an opinion letter should repudiate case misinterpretation of existing regulations.

Furthermore, DOL should issue an opinion letter distinguishing clothes changing (which may or may not be a principal activity depending on the circumstances) from donning and doffing protective gear or equipment which are clearly outside the common definition of clothing. Several cases interpreting 29 U.S.C. §203(o) erroneously treat any article which covers any part of the body as clothing. The opinion

[1] See, e.g., Gorman v. Consolidated Edison Corp., 488 F.3d 586, 592-93 (2d Cir. 2007).

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letter should establish a common sense definition of what articles are not within the definition of clothing. Specifically, the opinion letter should clarify that protective gear such as specialized gloves, smocks, belly guards, shin and arm guards, and any other items designed to meet the particular safety and sanitary or other special needs of a job do not constitute clothing because their use is warranted by special characteristics of the job and not simply to cover the worker. The opinion letter should also stress that the analysis whether an article donned before or doffed following regular working hours constitutes protective gear must begin with an examination of whether its use is required by law, the rules of the employer, or by the nature of the work. 29 CFR §790.8(c). These objectives should be accomplished by reinstating opinion letters: Cleaning Protective Gear/Hours Worked (issued January 15, 2001 and withdrawn by the June 6, 2002 opinion letter) and Hours Worked/Cleaning, Putting on Safety Gear (issued December 3, 1997 and withdrawn by the June 6, 2002 opinion letter) and making sure they are consistent with the objectives set forth here.

Finally, DOL should issue an opinion letter clarifying the definition of the term "practice" under section 203(o) of the FLSA and Portal Act regulation 29 CFR §790.10 so that the FLSA's definition is consistent with the term "practice" as commonly understood under the National Labor Relations Act.[2] Under the NLRA and arbitration decisions, a practice develops when a course of conduct exhibits clarity and consistency, longevity and repetition, acceptability, and mutuality.[3] Past practices may be repudiated by either party through timely notice before or during negotiations. Upon notice that a party repudiates a practice, the other party must negotiate a written contractual term to prevent the discontinuance of the practice. The few cases interpreting "practice" under the FLSA ignore these established bargaining principles and their misinterpretations should be repudiated. An opinion letter should issue to clarify that the term "practice" under the FLSA is consistent with the definition of term under the NLRA so that unions will not suffer inconsistent obligations under the FLSA and NLRA.

In coordination with issuing the opinion letters suggested above, the Secretary should immediately withdraw opinion letter Hours Worked/Changing Clothes or Washing, FLSA 2002-2 issued June 6, 2002.[4] Additionally, the Secretary should withdraw the portion of opinion letter FLSA2007-10 dated May 14, 2007 which states that clothing includes heavy protective equipment and is therefore subject to §203(o).

Eventually, the changes brought about by the new, reinstated, and withdrawn opinion letters suggested here can be made permanent by issuing clarifying regulations.

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[2] In opinion letter FLSA2007-10 dated May 14, 2007, the Secretary states that DOL takes no position on what constitutes a custom or practice.

[3] Richard Mittenthal, Arbitration and Public Policy: Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators: Past Practice and the Administration of Collective Bargaining Agreements 30, 32-33 (Spencer D. Pollard ed., 1961).

[4] The June 6, 2002 opinion letter, FLSA 2002-2, refers to an opinion letter dated February 18, 1998 which the 2002 opinion letter withdrew. Although, a search for the 1998 opinion letter was unsuccessful, it should be reviewed for reinstatement.

OBAMA-BIDEN TRANSITION PROJECT

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Employment Standards Meeting—Wage and Hour
Thursday December 4, 2008

Increase resources for Wage and Hour Division (WHD) and restore WHD mission as worker protection agency. Two July 2008 GAO reports and a 2005 Brennan Center report document the deterioration of FLSA enforcement. Dwindling WHD resources also hinder enforcement of the Davis-Bacon Act and Service Contract Act (SCA), and WHD currently has a five-month backlog of SCA complaints.

Strengthen FLSA enforcement. On Day One, issue guidance to SOL offices on aggressive new enforcement policy. Within 100 days, issue memo to WHD communicating new enforcement priorities; review all wage and hour opinion letters; establish procedures for partnering with state agencies; improve WHD complaint procedures; improve FLSA poster; start publishing WHD enforcement activities; and revise non-action letters. Within first year, build centralized enforcement database with enforcement history of employers and information on complaints; establish community and union outreach task force; and update Field Operations Handbook.

FLSA regulations. On Day One, withdraw FLSA regulation proposed in July 2008. Within first year, issue regulation to increase $455/week threshold for Part 541 overtime exemptions and index threshold to inflation; clarify that the salary paid to non-exempt salaried workers covers only first 40 hours of work; require employers to provide their employees with wage and hour information they are already required to keep; amend tip credit regulations to reflect 1974 FLSA amendment providing that tips remain property of employees; amend meal credit regulations to specify applicable restrictions, as some courts have done; correct the *Coke* decision and narrow the exemption for "companionship services"; and provide that recruitment expenses for temporary agricultural workers cannot be included in the calculation of wages. In the longer term, revisit 2004 revisions to Part 541 overtime regulations with a view towards providing clear, bright-line rules that enhance worker protection; require a genuine bilateral agreement before public employers can provide comp time, instead of cash overtime, in a non-union workplace; and restrict the interpretation of "volunteer services" to services that are not compensable.

FLSA legislation. Within first year, increase minimum wage $9.50 and index to inflation; lower tip credit; and toll the FLSA statute of limitations for all similarly-situated employees as of the day a WHD investigation is opened. In the longer term, require public employers to grant requests for comp time within a reasonable amount of time of the request, and to grant requests for comp time if another employee is available to work; and provide that the *de minimis* exception to payment of wages applies only in extraordinary circumstances, and not if the employer has a computerized payroll.

Independent contractor misclassification. Within 100 days, include misclassified workers among WHD's new enforcement priorities. Within first year, issue regulation to clarify the FLSA recordkeeping requirements applicable to independent contractors; enact legislation to clarify FLSA recordkeeping requirements applicable to independent contractors, authorize enhanced FLSA damages for misclassification, require notification to workers of their classification, and focus

OBAMA-BIDEN TRANSITION PROJECT

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25% of DOL audits on misclassification issues (HR 6111, S 3648); and enact legislation to close tax loophole for misclassification (HR 5804, S 2044).

Davis-Bacon Act. Always include Davis-Bacon coverage in any legislation that provides for federally-assisted construction, including assistance through innovative financing methods such as revolving funds, loan guarantees, and tax credits. On Day One, issue executive order to clarify how *Crown Point* criteria control application of Davis-Bacon to construction leases. Within 100 days, freeze regulation on certified payroll reports proposed in July 2008 (if final, then rescind, or withdraw if not final), which would eliminate decades-old requirement that contractors and subcontractors provide enforcement agencies with addresses and Social Security numbers of workers whose wages and fringe benefits are reported each week. Within first year, give WHD resources to accelerate and modernize prevailing wage determination process (and oppose transfer of this function to Bureau of Labor Statistics); re-evaluate rules applicable to sham fringe benefit funds on non-union construction projects and strengthen enforcement against abuses in this area; issue Davis-Bacon regulation to clarify that the "site of work" on which prevailing wages must be paid includes any location where work is performed by employees of a covered contractor or subcontractor; and issue Davis-Bacon regulation to make calculation of "prevailing wage" more reflective of wages actually paid to most workers—for example, by returning to the "30 percent rule" or presuming that the locally negotiated rate is the prevailing rate.

Service Contract Act (SCA). On Day One, reinstate a revised Executive Order 12933 to require follow-on service contractors and subcontractors to offer employees of the previous contractor the right of first refusal of employment, eliminate E.O. 12933's many exclusions, and expand its protections to all workers covered by the SCA. Within first year, issue procurement regulation requiring wage payment bonds for most SCA contracts; and issue procurement regulation requiring incumbent contractors with collective bargaining agreements to provide information on their benefit cost burden.

Davis-Bacon and SCA—common issues. On Day One, issue executive order to provide that WHD coverage determinations are binding on all federal agencies, and to give WHD responsibility for implementing its coverage determinations, which it would do by issuing determination letters directing other agencies to remedy Davis-Bacon and SCA violations. Within first year, issue procurement regulation to the same effect; issue executive order establishing a multi-agency labor and employment law task force, modeled after New York and California initiatives, to leverage resources across federal and state agencies, put as many investigators in the field as possible, and target employers in the underground economy that violate multiple laws; and take steps to ensure that the federal government contracts with "high road" contractors who are exemplary employers with respect to not only Davis-Bacon and SCA, but also FLSA, Title VII, FMLA, OSHA, and the NLRA.

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CTW

Employment Standards Meeting
December 4. 2008
FLSA Enforcement: CTW Recommendations

"It is important that [DOL] put procedures into place that will lead to improvements in the enforcement of worker rights . . . This is the core mission of the department and failing to adequately enforce the Fair Labor Standards Act is unacceptable." President-Elect Obama.

DOL should take the following actions, using existing authority, to make enforcement of child labor, minimum wage and overtime laws a "core mission" of the DOL. None of these actions require statutory or regulatory changes:

1. **Focus Resources on Targeted Enforcement.** Concentrate Wage and Hour Division (WHD) and Solicitor of Labor resources on low wage industries (many of which employ large numbers of vulnerable immigrants), repeat violators and employers that systematically work employees "off the clock" or misclassify workers as independent contractors or exempt employees, practices which violate current law. Pursue budget increases for FLSA enforcement, and reallocate budget resources away from unproductive OLMS compliance towards FLSA enforcement.

2. **Make Use of the Full Range of Available Penalties.** Restore FLSA's deterrent effect by pursuing the full range of penalties available under existing law, including full repayment of lost wages with interest, liquidated damages, injunctions and civil money and criminal penalties.

3. **Use Cooperative Enforcement Arrangements to Leverage Scarce Resources.** Adopt cooperative enforcement arrangements with other agencies (such as IRS, DOJ, DHS and state agencies) and with community groups and labor/management cooperatives and establish a community and labor enforcement task force. Facilitate private enforcement through improved notice to complainants of their private action rights and by developing lists of private counsel willing to accept referrals. Stop bringing lawsuits that cut off the rights of claimants to join private actions.

4. **Establish Enforcement Priorities and Goals; Implement GAO Recommendations.** Establish clear agency enforcement priorities and goals, appoint knowledgeable and experienced low-wage advocates as Regional Directors, and revise the outmoded Field Operations Handbook, as identified by the GAO in its 2008 report, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*), and implement all of the GAO's recommendations for improved enforcement and accountability. DOL should also support and articulate the legislative and regulatory changes needed to protect low-wage workers, as set forth in detailed papers developed by CTW and AFL-CIO. See attached *FLSA Workgroup: Statutory Initiatives; Revisions and Updates Needed for Regulations under FLSA.*

5. **Update and Issue New Opinion Letters Reflecting WHD Enforcement Policies,** Review all opinion letters and other enforcement policy documents and rescind all those which undermine sound FLSA enforcement policy, including Wage and Hour Div. Advisory Op. Ltr No. FLSA2002-2 (June 6, 2002), which misinterprets the Portal-to-Portal Act, 29 U.S.C. Sec. 203(o), to exclude payment to certain workers for time spent donning and doffing required

OBAMA-BIDEN TRANSITION PROJECT

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protective gear. In addition, new opinion letters should be issued to clarify required payment for such time, and the broad interpretation of "work hours" enshrined in the FLSA, which includes all work employers "suffer or permit." Seek litigation opportunities to advance appropriate positions taken by the agency in opinion letters and other enforcement documents.

6. **Improve Worker Access to WHD; Build a Centralized Enforcement Database.** Improve worker access to the agency's enforcement resources by revising its complaint intake procedures, website and workplace postings, and implement a system for tracking of all complaints and inquiries received by the DOL. Accelerate WHD's efforts to build a centralized enforcement database that will allow its personnel to determine quickly and efficiently the enforcement history of any particular employer on a nationwide basis.

7. **Publicize Enforcement Actions.** Enhance the agency's deterrent effect by publishing and publicizing all significant enforcement actions, including lawsuits, judgments and settlements.

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FLSA Workgroup: Statutory Initiatives

The following are statutory initiatives that need to be addressed.

1. Amend the FLSA to address misclassification of workers (current Woolsey-Andrews-Miller bill), which includes record keeping requirements, notice to workers of their classification and the consequences of the classification, workplace notices, DOL enhanced website, and coordination with state agencies. This would include:

    a. Amend Section 211(c), the record-keeping provision, to require employers to accurately record the status of "employees" and non-employees (i.e., independent contractors) and keep records of independent contractors' remuneration and hours.
    b. Amend Section 211 to add a new provision requiring every employer to provide notification to each person employed by the employer that such person is considered an employee for purposes of this Act; and to each individual who is not employed by the employer, but for whom the employer is required to file a return under Section 6041 of the Internal Revenue Code of 1986, that such individual is not considered an employee by the employer for purposes of this Act; and further, to provide that the individuals be notified of the consequences of their classification as an independent contractor.
    c. Amend Section 215(a) to provide that an employer's failure to accurately classify an employee as an employee, as required by section 11(c) is a violation of the FLSA.
    d. Amend Section 216(b) to provide double liquidated damages for a record keeping violation where there is also backpay owed resulting from an overtime or minimum wage violation.
    e. Amend Section 16(e) to provide for penalties for a willful failure to maintain the records required by the FLSA.
    f. Amend the FLSA to require that DOL establish a website describing in plain terms the rights of workers under the FLSA.

2. Overturn the Supreme Court's holding in Long Island Care at Home v. Coke that home "companion" workers paid by third-party agencies are exempt from coverage under the Act (bill introduced as HR 3582).

3. Amend the statute to increase the tipped employee minimum wage and the minimum wage of general applicability and peg them to inflation.

4. Amend Section 3(o) to make clear that the term "clothing" does not include protective attire or gear that workers are required to wear in the performance of their duties and to overturn the decision in *Anderson v. Cagle's Inc.*, 488 F.3d 945 (11th Cir. 2007) and related cases, concerning the phrase "custom or practice."

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5. Amend the statute to provide for a mandatory unpaid 30 minute duty free meal period after working for five hours and a paid 10 minute rest period per four hours of work and if an employer fails to provide an employee the meal period or rest period, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided. If the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. A second meal period of not less than thirty minutes is required if an employee works more than ten hours per day, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and employee only if the first meal period was not waived.

6. Amend the FLSA to permit employees to bring traditional class actions, by:

   a. Amending 16(b), in part, as follows (new text underlined, deleted text has strike-through):

      An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or by a representative of employees. ~~No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become~~ such ~~a party and such consent is filed in the court in which such action is brought.~~

   b. Or, retaining the existing language in Section 16(b) and adding the underlined text:

      An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated or by a representative of employees. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought, provided however, that such actions may be joined with a class action alleging a cause of action under federal or state laws.

   c. Or, amending Section 16(b) to provide that the plaintiff can seek to represent a class of similarly situated employees or a collective action.

7. Amend the FLSA to reimburse the government for the costs assumed by the government as a result of the underground economy by adding a new section which mirrors CA Labor

OBAMA-BIDEN TRANSITION PROJECT

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Code section 2699 (relevant section inserted below), which permits individual workers to recover civil penalties in the Labor Code (which then go to the government). Any penalties recovered by individual workers could be earmarked for wage and hour enforcement work in a statutory amendment to the FLSA's 216(b).

> 2699. (a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

8. Amend FLSA to clarify that pre-dispute arbitration agreements are not enforceable, nor are arbitration agreements which fail to meet the fairness and due process requirements set forth in the final Dunlop Report.

9. Amend Section 16(b) to clarify that "similarly situated" includes employees of the same employer, regardless of location, who are subject to the same or similar practices.

10. Amend the FLSA to provide for a private right of action to pursue civil penalties.

11. Amend the FLSA to provide that the statute of limitations is tolled for all similarly situated employees as of the date an investigation is opened, whether as a result of a targeted investigation or the result of employee complaint.

12. Amend the FLSA to require that an employer provide each of its employees, prior to the time such employee commences employment, and on or before January 1 of each subsequent year, with a written statement, in English and in the principal language of the employee, setting forth the terms and conditions of his/her employment, including but not limited to:

    a. The full name, mailing address, and phone number of the employer or employers as defined herein, including each individual employer as defined herein; and the federal and state tax identification number of each employer who is not a natural person.
    b. The place or places of employment.
    c. The hours of work per day and number of days per week to be worked. The wages to be paid (per hour, day, week, or other measure) and the frequency and nature of payment of such wages.

OBAMA-BIDEN TRANSITION PROJECT

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d. The circumstances under which the employee will be paid a premium for working in excess of an established number of hours per day, week, or month, or for working on designated nights, weekends, or holidays.
e. The precise mathematical formula for calculating overtime compensation must be maintained by the employer and is open to the employee's inspection, or the inspection of the employee's designated representative.

13. Change the statute of limitations from 3 years to 5 years for willful violations.

14. Amend Section 16(b) to provide that the liquidated damages penalty will be an amount equal to two times the amount due for unpaid wages or overtime.

15. Amend Section 11(a) and 12(b) to provide that private litigants can seek injunctive relief for violations of Section 216.

16. Amend the FLSA to provide that the *de minimis* exception is not applicable to time worked that is measureable and not sporadic.

17. Amend Section 7 of the FLSA to make clear that the regular rate of any employee who is paid a fixed amount of compensation, and whose hours worked per workweek are subject to fluctuation, shall be deemed to be the compensation paid for the workweek divided by 40, or by the actual hours worked in the week, whichever is less.

18. Amend the statute to provide that overtime is due after one and one-half times the employee's regular rate or pay for all hours worked in excess of eight hours up to and including 12 hours in any workday, and for the first eight hours worked on the seventh consecutive day of work in a workweek; and double the employee's regular rate or pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight on the seventh consecutive day of work in a workweek.

19. Amend the statute to provide a cap on the number of mandatory overtime hours an employee can be required to work.

20. Amend the FLSA to provide additional waiting time damages, in addition to current liquidated damages tied to the backpay owed, which is equal to thirty days of pay. The employer could avoid payment of these damages if the employer paid the underpaid wages at or before the end of the worker's employment or, proportionally, to the extent

OBAMA-BIDEN TRANSITION PROJECT

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the employer paid the worker the wages due within thirty days of the worker's last day of work.

21. Amend Section 16(b) to reflect that the liquidated damages due are in addition to and not in lieu of prejudgment interest.

22. Amend FLSA section 3(e)(4), 29 U.S.C. 203(e)(4), to provide that a person employed within a governmental jurisdiction to provide certain services (e.g., firefighting) could not be considered a legitimate volunteer (not entitled to pay) if the person did the same services for another agency in the same governmental jurisdiction.

23. Amend the statute (29 U.S.C. §203(s)(1)(A)) to eliminate the requirement that an enterprise have an annual gross volume of sales made or business done that is $500,000 or more. Alternatively, reduce the dollar amount, or replace this provision with a minimal employee threshold, e.g., 2 or more employees, akin to the civil rights statutes and provide that the individual coverages are unaffected.

24. Amend the FLSA to provide overtime coverage for agricultural workers.

25. Amend Section 7(i) to define/clarify the term "commission" requires involvement in sales, and not piece rate work that mechanics and others engage in.

26. Eliminate the "window of correction" in 29 C.F.R. § 541.118(a)(6), by legislating that if the improper withholding from salary was done through inadvertence, it must be reimbursed within 30 days of it first occurring in order to avoid liability for liquidated damages and attorney's fees

OBAMA-BIDEN TRANSITION PROJECT

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REVISIONS AND UPDATES NEEDED FOR REGULATIONS UNDER THE FAIR LABOR STANDARDS ACT

Many existing regulations under the Fair Labor Standards Act (FLSA or Act) are out of date, in some instances not reflecting developments in the case law and in other instances not having been amended to take account of amendments to the FLSA.[1] In those instances in which the regulations are out of date, the U.S. Department of Labor (DOL) has often relied on opinion letters issued by the Wage and Hour Administrator to clarify ambiguities or to establish new interpretations.[2] Some of these opinion letters have rescinded positions taken in earlier opinion letters or otherwise changed long-standing policies.

In light of this situation, Wage and Hour Administrator opinion letters need to be reviewed as thoroughly as regulations to determine which ones need revisions. This paper, however, in order to be of reasonable length, discusses regulations, with only one or two references to opinion letters.

Below is a listing of regulations that need to be changed, along with a summary explanation of what changes are needed. The regulations that in our opinion are most in need of change are listed first. All of them are in Title 29 of the Code of Federal Regulations.

The suggested regulatory changes below are by no means exhaustive, but are illustrative of what needs to be done to strengthen and otherwise improve existing regulations.

Part 516 (recordkeeping)

Making employers responsible for providing pay records to employees. Part 516 requires employers to make and preserve detailed records of wages paid, hours worked, and other information relating to employees, and to make these records available to DOL's Wage and Hour Division investigators for inspection and transcription. The regulations, however, do not require that any of this information be made available to employees. If employees were required to be provided with such information (for example, at the time of hire and on each payday), this would help improve compliance

[1] It is important to recognize that the FLSA, unlike many other statutes, does not give DOL the authority to issue any appropriate regulations under all provisions of the Act. Instead, DOL is given this power only with the regard to specified provisions of the FLSA. In light of this situation, DOL has issued in some instances what it terms "interpretative bulletins," which do not have the force of law as regulations do, but have nonetheless been accorded considerable deference by the courts. In this paper, for convenience, the term "regulation" is used to refer both to regulations and to interpretative bulletins.

[2] Under section 10 of the Portal-to-Portal Act, 29 U.S.C. 259, an employer is excused from any liability for violations of the FLSA if the employer can prove that "the act or omission complained of was in good faith in conformity with and reliance on any written administrative regulation, order, ruling, approval, or interpretation of . . . the Administrator of the Wage and Hour Division of the Department of Labor."

OBAMA-BIDEN TRANSITION PROJECT

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with the FLSA, because employees would be better able to determine whether they were being paid properly.

Is there a basis in the FLSA statutory language to change the Part 516 recordkeeping regulations in this way? FLSA section 11(a), 29 U.S.C. 211(a), authorizes DOL to "enter and inspect" places of business and employment records and to "investigate such facts, conditions, practices, or matters" relating to wages, hours, and other conditions affecting employment as DOL deems "necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act." FLSA section 11(c), 29 U.S.C. 211(c), authorizes DOL to issue regulations, "as necessary or appropriate for the enforcement of the provisions of this Act," requiring covered employers to "make, keep, and preserve" records "of the wages, hours, and other conditions and practices of employment," and to "preserve such records for such periods of time" as DOL shall require.

Part 516 specifies in considerable detail what records the employer must maintain and preserve, and in addition it requires that employer records "shall be available for inspection and transcription by the [Wage and Hour] Administrator or a duly authorized and designated representative." 29 C.F.R. 516.7(b). If the records are kept at a central location other than the place of employment, the employer must make the records available within 72 hours' notice (29 C.F.R. 516.7(a)) -- thus implying that if the records are kept at the place of employment, they must be made available immediately, without the need for any advance notice. FLSA section 11(a) on its face justifies the regulatory requirement that the employer's records must be made available to DOL.

The above statutory language, in our judgment, provides a basis for requiring that at least some, if not all, of the records that the employer has to maintain and preserve must also be provided to each employee. So long as DOL can show, in the language of FLSA section 11(c), that such a requirement would be "necessary or appropriate for the enforcement of" the FLSA, there would be a strong basis for imposing such a requirement. There is already a similar requirement written into the statutory language of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S. C. 1801 *et seq.* (AWPA or MSPA), based on Congressional findings that migrant farmworkers were often cheated of proper wages. If DOL -- based on its investigatory experience and the widespread FLSA violations disclosed in litigation and in the media -- were to make a similar finding with regard to employees protected by the FLSA, that finding could well justify such a change in the regulations.

Part 516 could be amended to mirror the AWPA or MSPA requirements mentioned above, both with regard to information required to be provided to employees at the time of hire and as subsequent changes occur. At a minimum, there is solid justification to require that each employee be given information about hours worked, basic rate of pay, overtime rate of pay, any additions to pay (such as lodging and meals), and any deductions from pay, with each paycheck. Many states require that employees be given pay stubs on each payday, so the additional paperwork that such a requirement would impose on employers should be minimal.

OBAMA-BIDEN TRANSITION PROJECT

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There is already an example in which the recordkeeping regulations impose a requirement that improves enforcement with the FLSA even though the requirement is not explicitly in the statute. Under 29 C.F.R. 516.4, a covered employer must display a poster, "prescribed by the Wage and Hour Division," describing employee rights under the law. The courts have not held that this requirement is beyond DOL's statutory authority, and indeed have often used an employer's failure to display such a poster as a basis for the equitable tolling of the statute of limitations.

Making employers responsible for keeping pay records for independent contractors. Another weakness of the Part 516 regulations is that they require an employer to keep records only for "each employee," thereby excusing employers from keeping records of workers who are considered to be independent contractors, even though these workers do jobs that benefit the employer and directly contribute to its business operations. There has been a recent legislative initiative to remedy this problem -- H.R.6111, introduced on May 21, 2008, as the Employee Misclassification Prevention Act. This bill would require amend the FLSA to require employers to keep records of non-employees who perform labor or services for remuneration, provide a special penalty for employers who misclassify employees as non-employees, and make related changes. If H.R. 6111 does not become law, the possibility amending Part 516 to require employers to keep records on non-employees who perform services for them for remuneration needs to be considered. This may well be a difficult goal to accomplish, because FLSA section 11(c) requires that every employer must keep prescribed records "of the persons employed by him . . . ." H.R. 6111 seems to acknowledge that the workers whom it is designed to protect are not considered employees under the existing language of FLSA section 11(c).

Part 531 (meal, lodging, and tip credit; deductions from wages, etc.)

FLSA section 3(m), 29 U.S.C. 203(m), defines "wage" to include the "reasonable cost" or "fair value," as determined by DOL, of "board, lodging, or other facilities," if such facilities "are customarily furnished by such employer to his employees."[3] Part 531 implements these provisions.

Meal credit. Counting board furnished by the employer as pay – commonly called the "meal credit" -- has been a particularly important issue. The prevailing weight of authority seems to be that, contrary to 29 C.F.R. 531.30, the employee's acceptance of the meal credit does not have to be "voluntary and uncoerced." See, *e.g., Herman v. Collis Foods, Inc.*, 176 F.3d 912 (6th Cir. 1999), and cases there cited. In other words, in certain circumstances, an employer can require an employee to be "paid" the minimum wage partly with "free" meals, even if the employee would prefer to be paid entirely in cash. This is a situation ripe for abuse by employers. DOL needs to review all of the court decisions on this point to see if there is some way, even despite the seeming weight of authority, to permit an individual employee to decline to take a meal credit and instead

[3] Such facilities cannot, however, be included in an employee's wage if they are excluded under the terms of a collective bargaining agreement.

OBAMA-BIDEN TRANSITION PROJECT

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be paid entirely in cash. If this is not possible, then at a minimum DOL should amend Part 531 to specify more clearly, as various courts have done, the restrictions that apply to the meal credit even if its acceptance need not be voluntary and uncoerced.

Tip credit. In addition, section 3(m) permits tips received by an employee to count towards the employer's minimum wage obligation, but with the limitation that the employee must be paid by the employer at least $2.13 per hour, or whatever greater amount, when added to the tips the employee receives, equals at least the minimum wage. If the employee is not informed about this so-called tip credit provision, or if the employee does not retain all tips received, then the employer cannot take advantage of the tip credit, in which event the employer must pay the full minimum wage out of his own pocket (and the employee must still retain all tips received). The only exception to the requirement that an employee must retain all tips received is that tip pooling is permitted among employees who customarily and regularly receive tips.

Part 531, which was last amended in 1967, does not reflect amendments made in 1974 to the FLSA's tip credit requirements, which make clear, as noted above, that employees must retain all tips. The tip credit regulations must be amended to remedy this situation, since otherwise employers and perhaps even some courts will continue to cite the existing regulations to justify what are clearly violations of the FLSA's tip credit provisions. The regulations have to make absolutely clear that an employee *must* retain all tips (except for legitimate tip pooling, a concept which itself needs to be fleshed out as well). The employer cannot claim that he is not using the tip credit provisions, and on that basis take tips from employees. The application of the tip credit, and the appropriate remedy for violations, are particularly well explained in *Winans v. W.A.S., Inc.*, 772 P.2d 1001 (Wash. S. Ct. 1989). Its teachings should be incorporated into Part 531.

Employer recruitment expenses. A third important issue under section 3(m) and its implementing regulations is the question of the cost of furnishing "facilities" that are "primarily for the benefit or convenience of the employer," to use the language of 29 C.F.R. 531.3(d), which states that such facilities "will not be recognized as reasonable and may not therefore be included in computing wages." *Arriaga v. Florida Pacific Farms*,305 F.3d 1228 (11th Cir. 2002), is an important precedent that applies this concept to the expenses paid by H-2A temporary agricultural guest workers. The H-2A workers in that case were required to pay their employer's recruitment expenses, which included the cost of transportation from their home communities in Mexico to their employer's place of business in Florida, as well as visa and border crossing fees. The Eleventh Circuit in *Arriaga*, and every court that has considered this issue, have ruled that these recruitment expenses are primarily for the employer's benefit, and must therefore be treated as a deduction from wages. If this deduction results in the employee receiving less that the minimum wage on the first payday, then the courts have ruled that there is a minimum wage violation. DOL does not enforce this rule anywhere in the country, not even in those judicial districts in which the courts have upheld it. Part 531 needs to be amended to enshrine this important principle relating to recruiting expenses.

Part 541 (white-collar exemption)

OBAMA-BIDEN TRANSITION PROJECT

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FLSA section 13(a)(1), 29 U.S.C. 213(a)(1), deprives from the minimum wage and overtime compensation protections of the Act "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman . . . ." DOL is expressly authorized to issue regulations defining these terms. There is no legislative history giving any clue as to the meaning of these terms.[4]

Part 541 implements this section of the FLSA. For many years there have been, generally speaking, three basic requirements for exempt status: an employee, in order to fall within the exemption, must (1) perform specified duties, (2) be paid on a salary basis, and (3) be paid no less than a minimum specified salary.[5] In April 2004, DOL published in final form major revisions to Part 541 (see 69 Fed.Reg. 22260), which weakened each of these requirements: (1) the duties tests were made easier to meet, with the result that more employees would be able to satisfy them; (2) the exceptions to the salary basis of payment were expanded; and (3) the minimum salary was increased to $455 per week, but the rationale for adopting this level was flawed, so that the minimum salary should have been set at a significantly higher level.[6] In addition, DOL refused to provide for automatic increases in salary, so now more than four years have gone by and there has been no increase in the minimum salary requirement.

Part 541 needs to be revisited to make various changes.

Salary level for exempt status. The salary level of $455 needs to be increased significantly. Given that it was established over four years ago, it needs to be raised in any event, and issuing proposed regulations to raise it automatically (based on some index of white-collar workers' pay increases) offers an opportunity to reconsider afresh the rationale for selecting the $455 salary in the first place.[7]

Highly compensated employees. Under 29 U.S.C. 601, fewer duties tests apply to employees whose "total annual compensation" is at least $100,000. But only $455 per week of this compensation needs to be "on a salary or fee basis." The rest can include "commissions, non-discretionary bonuses, and other non-discretionary compensation," and can even include a final payment, made within one month after the end of the year, that raises the employee's total compensation for the year to $100,000. These other forms of compensation, apart from salary or fees, which can count towards the $100,000

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[4] See James B. Leonard, book review of Marc Linder, *"Time and a Half's the American Way": A History of the Exclusion of White-Collar Workers from Overtime Regulation, 1868-2004* (Fanpihua Press, Iowa, City, Iowa, 2004), *Monthly Labor Review*, June 2007, available at www.bls.gov/opub/mlr/2007/06/bookrevs.htm.

[5] There are various exceptions to these three basic rules, but they need not be discussed here.

[6] There is also a higher-level salary minimum of $100,000 per year for any employee who customarily and regularly performs only one of the duties required for exemption as an executive, administrative, or professional employee. 29 C.F.R. 541.601(a). As with the $455 minimum salary, there is no automatic increase for this higher-level salary, but the regulation should be amended to correct this deficiency.

[7] Comments filed by the AFL-CIO on DOL's proposed regulations offer a detailed description of why the salary set by DOL is far too low.

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threshold need to be eliminated. If the lower $455 test needs to be paid entirely on a salary or fee basis to qualify for exempt status, the same rule should apply to the higher $100,000 test.

Duties tests. The duties tests also need to be reconsidered. Under the duties tests in the old regulations, there were conflicting court decisions interpreting them, because of ambiguities in the regulatory language. DOL, rather than clarifying the regulations to make them narrower, thereby offering minimum wage and overtime compensation protection to more employees, instead tended to adopt in the new regulations those court decisions that deprived more employees of these protections. Unfortunately, because of the lack of a legislative history, it may be more difficult to amend the duties tests so soon after the new regulations came into effect. However, as more court decisions applying the new duties tests are handed down, there are likely to be clearer indications that the duties tests are not stringent enough.

Primary duty. One of the biggest loopholes in the duties tests is the requirement that in order for an employee to be considered exempt, his or her "primary duty" must be the performance of work duties that are deemed to be exempt. A bona fide executive, for example, must have the primary duty of "management" (29 C.F.R. 541.100(a)(2)). "Primary duty" is not based on time alone, and indeed employees who spend less than 50 percent of their time doing "exempt" tasks can be considered exempt. The key loophole here is that one of the factors to be considered in applying the primary duty test is "the relative importance of the exempt duties as compared with other types of duties" (29 C.F.R. 541.700(a)). This is a very subjective test which permits an employer to testify, quite self-servingly, that certain employee duties, which take far less than 50 percent of any employee's time, are nonetheless of exceptionally high importance, and hence warrant a finding of exempt status.

Concurrent duties. This loophole is made even broader by 29 C.F.R. 541.106, which states that concurrent performance of exempt and non-exempt work does not disqualify an employee from being a bona fide executive. As an example, DOL says that an "assistant manager [in a retail establishment such as a fast-food restaurant] can supervise employees and serve customers at the same time without losing the exemption." 29 C.F.R. 541.106(b). These provisions are entirely too broad and need to be narrowed considerably.

Team leader. Another provision in Part 541 that needs to be changed is the concept of "team leader." According to 29 C.F.R. 541.203(c), a employee "who leads a team of other employees assigned to complete a major protect for the employer" can generally be considered to be an exempt administrative employee "even if the employee does not have direct supervisory responsibility over the other employees on the team." One example that is given of this concept is a group of employees assigned to negotiate a collective bargaining agreement. The regulation would treat the team leader of this group as an exempt administrative employee, but none of the other members of the team would be exempt. But if the actual responsibilities that the entire team has for negotiating the collective bargaining agreement are not sufficient to make *all* members of the team

OBAMA-BIDEN TRANSITION PROJECT

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exempt as administrative employees, then the justification for treating only the team leader as exempt must be his or her leadership role in the team – in the manner of an executive employee. But the team leader can qualify as an exempt executive employee only if he or she has the "primary duty is management of the enterprise" or of "a customarily recognized department or subdivision thereof"; "customarily and regularly directs the work of two or more other employees"; and "has the authority to hire or fire other employees" (or whose "suggestions and recommendations" in this regard "are given particular weight.)" 29 U.S.C. 541.100(a). A team leader can be exempt, however, even without these executive powers. As this analysis indicates, the team leader concept treats as exempt an employee who is not truly an administrative employee and is not truly an executive employee. In other words, the concept greatly expands the scope of the white-collar exemption, thereby depriving many workers of overtime compensation. For all these reasons, the team leader exemption in the regulations should be eliminated.

Part 552 (domestic service)

FLSA section 2(a), 29 U.S.C. 202(a), added in 1974, brought employees engaged in domestic service within the protections of the Act, based on a Congressional finding that such employees' work "affects [interstate] commerce." (Previously, most domestic service employees were not protected by the Act unless they regularly crossed state lines in connection with their work or unless they were employed not directly by householders but instead by large businesses that supplied domestic servants to householders.)

There are two major exemptions from coverage. FLSA section 13(a)(15), 29 U.S.C. 213(a)(15), excludes from minimum wage and overtime compensation protection casual babysitters and employees who provide companionship services for individuals who, because of age or infirmity, are unable to care for themselves. And FLSA section 13(b)(21), 29 U.S.C. 213(b)(21), excludes from overtime compensation protection "any employee who is employed in domestic service in a household and who resides in such household."

Part 552 fleshes out these two exemptions, but it needs to be narrowed.

Regulatory reversal of the Supreme Court's *Coke* decision. The most important recent court decision relating to Part 552 is *Long Island Care at Home, Ltd.. v. Coke*, 127 S.Ct. 2339 (2007), in which the Supreme Court, relying on 29 C.F.R. 552.109(a), an "interpretative bulletin" that was subjected to notice-and-comment rulemaking, held that the FLSA section 13(a)(15) minimum wage and overtime compensation exemption applies to those employees who provide companionship service, regardless of whether they are employed directly by the householder or instead by some third-party employer or agency. DOL in 1993, 1995, and 2001 took steps to amend the regulation at issue in *Coke* to restrict the exemption to companions hired directly by the householder, but no such change was actually made. Now is the time to make this change, by amending 29 C.F.R. 552.109. The Supreme Court itself recognized that there was Congressional floor debate in the legislative history to justify the restriction urged by the plaintiff in *Coke*, although the matter was not free from doubt. What is most

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troubling about the regulatory provision as interpreted by *Coke* is that it deprives from minimum wage and overtime compensation protection many domestic service employees who enjoyed such coverage prior to the 1974 amendments, based on their crossing state lines in connection with their work or being employed by a covered "enterprise" within the meaning of the FLSA.

Narrowing the companionship services exemption. The other major problem with Part 552 is that its definition of the "companionship services" that deprive an employee of minimum wage and overtime pay protection is so broad as to permit employees who spend most of their time doing routine household work to be exempt as well. The culprit is 29 C.F.R. 552.6. This provision states that a companion can do an unlimited amount of household work that is "*related to* the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services" (emphasis added). In addition, the employee can spend as much as 20 percent of his or her time doing "general household work" (which does not have to be related to the care of the aged or infirm person in any way). Accordingly, if the aged or inform person requires considerable household work, and if in addition there is other household work to be done (for the working spouse of the aged or infirm person, for example), an employee whose main job is to be a cook, maid, and housekeeper can in many instances be deemed an exempt "companion." This regulation needed to be narrowed to prevent exploitation of such people who are not true companions within the meaning of FLSA section 13(a)(15).

Part 515 (using state agencies for investigations)

Greater cooperation between DOL and State agencies. FLSA section 11(b), 29 U.S.C. 211(b), authorizes DOL to "utilize the services of State and local agencies" to carry out its functions and duties under the FLSA. Part 515 deals only with procedures by which DOL can give work to State and local agencies to enforce the FLSA. It says nothing about more wide-ranging cooperation under which DOL could share information with State and local agencies to improve compliance with minimum wage and overtime laws across the board. In other words, DOL could rely on information gathered by State or local agencies to itself conduct investigations for possible FLSA violations. This and similar approaches could be much more creatively and effectively carried out, and spelled out -- if not in regulations, then at least in memorandums of understanding or other similar agreements.

The substance of such amended regulations (or memorandums of understanding) should include, at a minimum, that (1) neither DOL nor the state agency shall disclose to the employer, or to any other person or organization that might take adverse action against the employee, the immigration or tax status of the employee, and (2) if DOL receives information indicating a possible violation of state wage and hour law, or if a state agency receives information about possible violation of the FLSA, then the agency receiving such information shall supply it to the other agency, along with all details that it has collected on the matter. If the agreements between DOL and the various state

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agencies currently in place are not working in optimum fashion, they need to be improved.

Part 553 (state and local government employees)

The FLSA applies to state and local government employees, but many special provisions deprive such employees of protections enjoyed by private-sector employees.

Volunteer services. Under FLSA section 3(e)(4), 29 U.S.C. 203(e)(4), a person who performs volunteer services for a state or local government agency is not considered to be an employee while doing such volunteer work if (a) the person "receives no compensation or is paid expenses, reasonable benefits, *or* a nominal fee to perform the services" (emphasis added) and (b) the services are "not the same type of services which the individual is employed to perform for" the state or local government agency. For example, a school custodian who was a track star during his high school years might volunteer to coach the school's varsity track team. In regulations implementing this statutory language, DOL stretches this language by taking the position that volunteers may be paid "expenses, reasonable benefits, a nominal fee, *or any combination thereof*, for their service without losing their status as volunteers." 29 C.F.R. 553.106(a) (emphasis added). DOL's regulations also state that a "nominal fee is not a substitute for compensation and must not be tied to productivity," and add that the determination of this issue must be made "in the context of the economic realities of the particular situation." 29 C.F.R. 553.106(e) & (f). There is no elaboration of what those "economic realities" might be.

This regulation on volunteer activities needs to be amended – or, at a minimum, opinion letters interpreting it need to be revised. In a November 10, 2005, opinion letter (FLSA2005-51), DOL took the position that a "nominal fee" could be as high as 20 percent of what the school district would otherwise pay to hire a full-time varsity track coach for the same services. DOL added that within this limitation, the stipend could be based on "time commitments" required for coaching duties and "still qualify as nominal." The opinion letter also said that the "economic realities" in the case included "the humanitarian nature of the volunteer effort" and the "fact that school districts often do not track or control their coaches' hours." In reaching this result, DOL withdrew four earlier opinion letters, from 1988, 1992, 1995, and 1999 "to the extent they are inconsistent with the interpretation of nominal fee in this opinion." The November 2005 opinion needs itself to be rescinded, or even better, Part 553 on this point needs to be amended.

Compensatory time off. Another important provision affecting state and local government employees under the FLSA is compensatory time off, or comp time. These employers may be granted comp time in lieu of time-and-one-half overtime pay (FLSA section 7(o), 29 U.S.C. 207(o)). If there is no collective bargaining agreement or other any other agreement between the state or local government agency and representative of the employees, then there must be "an agreement or understanding arrived at between the employer and employee before the performance of the work." FLSA section 7(o)(2)(A)(ii). DOL regulations permit this "agreement or understanding" requirement to

OBAMA-BIDEN TRANSITION PROJECT
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be satisfied in the form of "an express condition of employment." 29 C.F.R.553.23(c)(1). Alternatively, the employer can simply tell the employee that comp time will be given in lieu of overtime pay, and "an agreement or understanding" is deemed to exist if the employee "fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay." *Ibid.*. The "agreement or understanding," according to the regulations, "need not be in writing, but a record of its existence must be kept." *Ibid.* This regulatory language, particularly the second provision, could easily result in an employee not even realizing that he or she has an option to insist on overtime pay instead of comp time, and seems to undermine the concept of an "agreement or understanding" as used in section 7(o). This provision in Part 553 needs to be strengthened.

Part 570 (child labor substantive provisions)

Particularly hazardous work. FLSA section 3(*l*), 29 U.S.C. 203(*l*), authorizes DOL to issue regulations that bar any child under the age of 18 from working in any job that the Secretary of Labor finds and declares to be "particularly hazardous for the employment of children" under age 18 or "detrimental to their health or well-being . . . ." (Under a special exemption in FLSA section 13(c)(2), 29 U.S.C. 213(c)(2), the minimum age for "particularly hazardous" jobs in agriculture is 16.)[8]

DOL, in Part 570, has declared various agricultural and non-agricultural jobs to be particularly hazardous, which are typically called "Hazardous Orders" or simply "HOs." However, these regulations in many instances have not been revised or updated, in order to take account of new work environments and new machinery and equipment, in more than 30 years. The nation's premier job-safety research agency, the National Institute for Occupational Safety and Health, issued a length study in May 2002, commissioned by DOL, to consider changes that should be made in the Hazardous Orders. The NIOSH report noted that many HOs were out of date and needed to be updated, and it also recommended new Hazardous Orders. Specifically, NIOSH recommended that 13 of the 17 HOs relating to non-agricultural employment be revised, that 8 of the 11 HOs relating to agricultural employment be revised, and that 17 new HOs be created, for a total of 38 revised or new HOs in all. Nearly five years after publication of the NIOSH report, DOL in April 2007 proposed regulations that would to revise only five existing HOs, and even so DOL did not adopt many of the recommendations made by NIOSH about how to improve these five HOs. Worst of all, even though agriculture is probably the most hazardous sector of the economy in which children work, DOL's proposed regulation did not address the agriculture HOs at all.

Part 570 needs to be amended much more broadly than DOL has proposed, by incorporating many more of the NIOSH recommendations. DOL's proposed regulations would also greatly expand the kinds of non-hazardous jobs that 14- and 15-year-old

[8] The age 16 minimum does not apply to a child who has a "particularly hazardous" job on a farm owned or operated by the child's parent, or person standing in the place of the parent. FLSA section 13(c)(2), 29 U.S.C. 213(c)(2).

OBAMA-BIDEN TRANSITION PROJECT

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children could perform in non-agricultural settings.[9] Whether DOL has time before January 20, 2009, to issue final regulations on these maters remains to be seen. If it does, then these new regulations will almost certainly require additional amendments.

Part 579 (child labor civil money penalties)

Increased civil money penalties. FLSA section 16(e), 29 U.S.C. 216(e), subjects "any person" who violates the child labor provisions of the FLSA or any child labor regulation to a civil money penalty of not more than $11,000 "for each person who was the subject of such a violation."[10] This provision has very recently been amended, by means of a rider to the Genetic Information Nondiscrimination Act (GINA), signed by President Bush on May 21, 2008. Under GINA section 302, a $50,000 penalty may be assessed with regard to each violation that causes the death or serious injury of any employee under the age of 18 years. This penalty may be doubled where the violation is a repeated or willful violation. These changes to FLSA section 16(e) take effect immediately.

Part 579 has to be amended to reflect these statutory changes.

Part 782 (motor carrier overtime exemption)

FLSA section 13(b)(1), 29 U.S.C. 213(b)(1), excludes from overtime compensation protection any employee with respect to whom the U.S. Department of Transportation (DOT) has the authority to establish qualifications and maximum hours of service under a provision of the Motor Carrier Act (49 U.S.C. 31502).

Updating and narrowing the motor carrier regulations. Part 782 was last amended in 1971 (with a minor amendment in 1972), and is very much out of date. It is much too wordy and cites many old cases that are often not the clearest or most recent authority. And perhaps most significantly, it fails to reflect a 2005 amendment to the Motor Carrier Act that deprives DOT of the authority to prescribe qualifications or maximum hours of service for drivers of certain motor vehicles, and hence removes these drivers from the FLSA section 13(b)(1) exemption, making them eligible for overtime

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[9] In non-agricultural settings, for jobs that the Secretary of Labor has not found to be "particularly hazardous," the minimum age is 16. However, there is a statutory exemption that permits 14- and 15-year-olds to work in limited circumstances, based on regulations issued by DOL. In agricultural settings, by contrast, the minimum age for jobs not deemed "particularly hazardous" is 14, and there are many statutory exceptions that permit children as young as 10 to work in agriculture.

[10] The FLSA says that $10,000 is the maximum penalty, but this has been changed based on other laws. Specifically, on December 7, 2001, DOL issued a regulation that, effective January 7, 2002, increased the $10,000 maximum penalty to $11,000 (66 Fed. Reg. 63,501). This $1,000 increase was mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, P.L. 101-410, 104 Stat. 890 (as amended by the Debt Collection Improvement Act of 1996, P.L. 104-134, 110 Stat. 1321-373), which requires federal agencies to adjust their civil money penalties periodically to account for inflation, as reflected in the Consumer Price Index. These statutes required that the first upward adjustment be made by October 1996, and then every four years thereafter. In other words, DOL should have made the $11,000 penalty effective in 1996 instead of 2002, and it should have raised the $11,000 penalty still further in 2000, in 2004, and in 2008.

OBAMA-BIDEN TRANSITION PROJECT

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compensation.[11] DOL on May 23, 2007, issued a so-called Field Assistance Bulletin explaining this change, but it has made no change in its regulations in Part 782. Under the statutory change to the Motor Carrier Act, the driver of the following kinds of vehicles would be entitled to FLSA overtime compensation: Any vehicle (1) weighing 10,000 pounds or less; (2) designed or used to transport 8 or fewer passengers (including the driver) for compensation; (3) designed or used to transport 15 or fewer passengers (including the driver), and not used to transport passengers for compensation; (4) not used for transporting hazardous material that requires special placarding under DOT regulations.

Part 776 (FLSA coverage provisions)

Updating the explanation of FLSA coverage. The FLSA does not expressly authorize DOL to issue regulations elaborating on the coverage provisions of the Act. Part 776 is thus an interpretative bulletin on this subject. However, it was first issued in 1950, before the enterprise coverage amendments of 1961, and revisions made to it in 1970 did not explain enterprise coverage but instead made some changes to the explanation of individual coverage. If DOL wants to have a brief explanation of both individual coverage and enterprise coverage in a readily available place, then Part 776 should be revised and brought up to date.

[11] The amendment was made by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The key provision that affects the FLSA exemption is the definition of "commercial motor vehicle" in 49 U.S.C. 31132(1).