

gravity of the violation as provided in paragraphs (b) through (d) of this section; Provided, however, that for any violation occurring on or after January 7, 2002 the civil money penalty amount will increase to not to exceed \$11,000 for each employee who was the subject of a violation.

(b) In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the size of the business of the person charged with the violation or violations, taking into account the number of employees employed by that person (and if the employment is in agriculture, the man-days of hired farm labor used in pertinent calendar quarters), dollar volume of sales or business done, amount of capital investment and financial resources, and such other information as may be available relative to the size of the business of such person.

(c) In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the gravity of the violation or violations, taking into account, among other things, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of the minors so employed and records of the required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours.

(d) Based on all the evidence available, including the investigation history of the person so charged and the degree of willfulness involved in the violation, it shall further be determined, where appropriate,

(1) Whether the evidence shows that the violation is "de minimis" and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the Act; or

(2) Whether the evidence shows that the person so charged had no previous

history of child labor violations, that the violations themselves involved no intentional or heedless exposure of any minor to any obvious hazard or detriment to health or well-being and were inadvertent, and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the Act.

(e) An administrative determination of the amount of the civil money penalty for a particular violation or particular violations of section 12 relating to child labor or any regulation issued under that section shall become final 15 days after receipt of the notice of penalty by certified mail by the person so charged unless such person has, pursuant to §580.6 filed with the Secretary an exception to the determination that the violation or violations for which the penalty is imposed occurred.

(f) A determination of the penalty made in an administrative proceeding after opportunity for hearing as provided in section 16(e) of the Act and pursuant to Part 580 of this chapter shall be final.

[40 FR 25792, June 18, 1975, as amended at 56 FR 8679, Feb. 28, 1991; 66 FR 63503, Dec. 7, 2001]

§§ 579.6—579.8 [Reserved]

PART 580—CIVIL MONEY PENALTIES—PROCEDURES FOR ASSESSING AND CONTESTING PENALTIES

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AUTHORITY: 29 U.S.C. 9a, 203, 211, 212, 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App.; secs. 25, 29, 88 Stat. 72, 76; Secretary of Labor's Order No. 4-2001, 66 FR 29656; 5 U.S.C. 500, 503, 551, 559; sec. 9, Pub. L. 101-157, 103 Stat. 938; sec. 3103, Pub. L. 101-508.

SOURCE: 56 FR 24991, May 31, 1991, unless otherwise noted.

§ 580.1 Definitions.

As used in this part:

Act means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060 as amended; 29 U.S.C. 201 *et seq.*).

Administrative law judge means a person appointed as provided in 5 U.S.C. 3105 and subpart B of part 930 of title 5 of the CFR, and qualified to preside at hearings under 5 U.S.C. 554-557.

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized by the Administrator to perform any of the functions of the Administrator under this part and parts 578 and 579 of this chapter.

Chief Administrative Law Judge means the Chief Administrative Law Judge, Office of the Administrative Law Judges, U.S. Department of Labor, Washington, DC 20210.

Department means the U.S. Department of Labor.

Person includes any individual, partnership, corporation, association, business trust, legal representative, or organized group of persons.

Secretary means the Secretary of Labor, U.S. Department of Labor, or a designated representative of the Secretary.

Solicitor of Labor means the Solicitor, U.S. Department of Labor, and includes

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attorneys of the Office of the Solicitor authorized by the Solicitor to perform functions of the Solicitor under this part.

§ 580.2 Applicability of procedures and rules.

The procedures and rules contained in this part prescribe the administrative process for assessment of civil money penalties for any violation of the child labor provisions at section 12 of the Act and any regulation thereunder as set forth in part 579, and for assessment of civil money penalties for any repeated or willful violation of the minimum wage provisions of section 6 or the overtime provisions of section 7 of the Act or the regulations thereunder set forth in 29 CFR subtitle B, chapter V. The substantive requirements for assessment of civil money penalties are set forth at 29 CFR part 579 (child labor) and part 578 (minimum wage and overtime).

§ 580.3 Written notice of determination required.

Whenever the Administrator determines that there has been a violation by any person of section 12 of the Act relating to child labor or any regulation issued under that section, or determines that there has been a repeated or willful violation by any person of section 6 or section 7 of the Act, and determines that imposition of a civil money penalty for such violation is appropriate, the Administrator shall issue and serve a notice of such penalty on such person in person or by certified mail. Where service by certified mail is not accepted by the party, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the Administrator may exercise discretion to serve the notice by regular mail.

§ 580.4 Contents of notice.

The notice required by § 580.3 of this part shall:

(a) Set forth the determination of the Administrator as to the amount of the penalty and the reason or reasons therefor;

(b) Set forth the right to take exception to the assessment of penalties and

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set forth the right to request a hearing on such determination;

(c) Inform any affected person or persons that in the absence of a timely exception to a determination of penalty and a request for a hearing received within 15 days of the date of receipt of the notice, the determination of the Administrator shall become final and unappealable; and

(d) Set forth the time and method for taking exception to the determination and requesting a hearing, and the procedures relating thereto, as set forth in § 580.6 of this part.

§ 580.5 Finality of notice.

If the person charged with violation does not, within 15 days after receipt of the notice, take exception to the determination that the violation or violations for which the penalty is imposed occurred, the administrative determination by the Administrator of the amount of such penalty shall be deemed final, and collection and recovery of the penalty shall be instituted pursuant to § 580.18 of this part.

[56 FR 24991, May 31, 1991, as amended at 66 FR 63503, Dec. 7, 2001]

§ 580.6 Exception to determination of penalty and request for hearing.

(a) Any person desiring to take exception to the determination of penalty shall request an administrative hearing pursuant to this part. The exception shall be in writing to the official who issued the determination at the Wage and Hour Division address appearing on the determination notice, and must be received no later than 15 days after the date of receipt of the notice referred to in § 580.3 of this part. No additional time shall be added where service of the determination of penalties or of the exception thereto is made by mail.

(b) No particular form is prescribed for any exception to determination of penalty and request for hearing permitted by this part. However, any such request shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;
- (3) Specify the issue(s) stated in the notice of determination giving rise to such request;

(4) State the specific reason(s) why the person requesting the hearing believes such determination is in error;

(5) Be signed by the person making the request or by an authorized representative of such person; and

(6) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

[56 FR 24991, May 31, 1991, as amended at 60 FR 17222, Apr. 5, 1995]

RULES OF PRACTICE

§ 580.7 General.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) Subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall apply except as follows: Notwithstanding the provisions of subpart B, including the hearsay rule (§ 18.802), testimony of current or former Department of Labor employees concerning information obtained in the course of investigations and conclusions thereon, as well as any documents contained in Department of Labor files (other than the investigation file concerning the violation(s) as to which the penalty in litigation has been assessed), shall be admissible in proceedings under this subpart. Nothing in this paragraph is intended to limit the admissibility of any evidence which is otherwise admissible under 29 CFR part 18, subpart B.

§ 580.8 Service and computation of time.

(a) Service of documents under this subpart shall be made by delivery to the individual, an officer of a corporation, or attorney of record or by mailing the determination to the last known address of the individual, officer, or attorney. If done by mail, service is complete upon mailing. If done in

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person, service is complete upon handing it to the attorney, officer or party; by leaving it at the office with a clerk or person in charge, or leaving it at a conspicuous place in the office if no one is in charge; or by leaving it at the attorney's or party's residence.

(b) Two (2) copies of all pleadings and other documents required for any administrative proceeding provided by this subpart shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, and one copy on the attorney representing the Department in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

§ 580.9 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 580.6 of this subpart.

REFERRAL FOR HEARING

§ 580.10 Referral to Administrative Law Judge.

(a) Upon receipt of a timely exception to a determination of penalties and request for a hearing filed pursuant to and in accordance with § 580.6 of this subpart, the Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by Order of Reference, refer the matter to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. A copy of the notice of administrative determination and of the request for hearing shall be attached to the Order of Reference and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amend-

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ment that may be permitted under this subpart and 29 CFR part 18.

(b) A copy of the Order of Reference and attachments thereto, together with a copy of this part, shall be served by counsel for the Administrator upon the person requesting the hearing, in the manner provided in § 580.8 of this subpart.

§ 580.11 Appointment of Administrative Law Judge and notification of prehearing conference and hearing date.

Upon receipt from the Administrator of an Order of Reference, the Chief Administrative Law Judge shall appoint an Administrative Law Judge to hear the case. The Administrative Law Judge shall notify all interested parties of the time and place of a prehearing conference and of the hearing.

§ 580.12 Decision and Order of Administrative Law Judge.

(a) The Administrative Law Judge shall render a decision on the issues referred by the Administrator.

(b) The decision of the Administrative Law Judge shall be limited to a determination of whether the respondent has committed a violation of section 12, or a repeated or willful violation of section 6 or section 7 of the Act, and the appropriateness of the penalty assessed by the Administrator. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.

(d) The Administrative Law Judge shall serve copies of the decision on each of the parties.

(e) The decision of the Administrative Law Judge shall constitute the final order of the Secretary unless, pursuant to § 580.13 of this part, there is an appeal to the Secretary.

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§ 580.13 Procedures for appeals to the Secretary.

Any party desiring review of a decision of the Administrative Law Judge shall file an appeal with the Secretary. To be effective, such appeal must be received by the Secretary within 30 days of the date of the decision of the Administrative Law Judge. Copies of the appeal shall be served on all parties and on the Chief Administrative Law Judge. If no timely appeal has been filed, the decision of the Administrative Law Judge shall be deemed the final agency action.

§ 580.14 Filing and Service.

(a) Filing. All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210.

(b) Number of copies. An original and two copies of all documents shall be filed.

(c) Computation of time for delivery by mail. Documents are not deemed filed with the Secretary until actually received by the Secretary either on or before the due date. No additional time shall be added where service of a document requiring action within a prescribed time was made by mail.

(d) Manner and proof of service. A copy of each document filed with the Secretary shall be served upon all other parties involved in the proceeding. Service under this section shall be by personal delivery or by mail. Service by mail is deemed effected at the time of mailing to the last known address.

§ 580.15 Responsibility of the Office of Administrative Law Judges for the administrative record.

Upon receipt of a petition seeking review of the Decision and Order of an Administrative Law Judge, the Chief Administrative Law Judge shall promptly forward a copy of the complete hearing record to the Secretary.

§ 580.16 Final decision of the Secretary.

The Secretary's final decision shall be served upon all parties and the Chief Administrative Law Judge, in person or by mail to the last known address.

§ 580.17 Retention of official record.

The official record of every completed administrative hearing provided by this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

§ 580.18 Collection and recovery of penalty.

(a) When the determination of the amount of any civil money penalty provided for in this part becomes final under § 580.5 in accordance with the administrative assessment thereof, or pursuant to the decision and order of an Administrative Law Judge in an administrative proceeding as provided in § 580.12, or the decision of the Secretary pursuant to § 580.16, the amount of the penalty as thus determined is immediately due and payable to the U.S. Department of Labor. The person against whom such penalty has been assessed or imposed shall promptly remit the amount thereof, as finally determined, to the Secretary by certified check or by money order, made payable to the order of Wage and Hour Division. Such remittance shall be delivered or mailed to the Regional Office, Wage and Hour Division, for the area in which the violations for which the penalty was assessed occurred.

(b) Pursuant to section 16(e) of the Act, the amount of the penalty, finally determined as provided in § 580.5, § 580.12 or § 580.16, may be:

(1) Deducted from any sums owing by the United States to the person charged. To effect this, any agency having sums owing from the United States to such person shall, on the request of the Secretary, withhold the specific amount of the penalty from the sums owed to the person so charged and remit the amount to the Secretary to satisfy the amount of the penalty assessed;

(2) Recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor. When the person against whom a final determination assessing a civil money penalty has been made does not voluntarily remit the amount of such penalty to the Secretary within a reasonable time after notification to do so,

the Solicitor of Labor may institute such an action to recover the amount of the penalty; or

(3) Ordered by the court, in an action brought for a violation of section 15(a)(4) or a repeated or willful violation of section 15(a)(2), to be paid to the Secretary. Any such unlawful act or practice may be enjoined by the United States district courts under section 17 upon court action, filed by the Secretary; and failure of the person so enjoined to comply with the court order may subject such person to contempt proceedings. A willful violation of section 6, 7, or 12 of the Act may subject the offender to the penalties provided in section 16(a) of the Act, enforced by the Department of Justice in criminal proceedings in the United States courts. In any of the foregoing civil or criminal proceedings, the court may order the payment to the Secretary of the civil penalty finally assessed by the Secretary.

PART 697—INDUSTRIES IN AMERICAN SAMOA

Sec.

697.1 Wage rates and industry definitions.

697.2 Industry wage rates and effective dates.

697.3 Notices.

697.4 Effective dates.

AUTHORITY: 29 U.S.C. 205, 206, 208.

§ 697.1 Industry definitions.

(a) *Government employees.* This industry includes all activities of employees of the Government of American Samoa. This industry does not include any employees of the United States or its agencies.

(b) *Fish canning and processing.* This industry shall include the canning, freezing, preserving, and other processing of any kind of fish, shellfish, and other aquatic forms of animal life, the manufacture of any by-product thereof, and the manufacture of cans and related activities.

(c) *Petroleum marketing.* This industry shall include the wholesale marketing and distribution of gasoline, kerosene, lubricating oils, diesel and marine fuels, and other petroleum products, bunkering operations in connection

therewith, and repair and maintenance of petroleum storage facilities.

(d) *Shipping and transportation.* This industry shall include the transportation of passengers and cargo by water or by air, and all activities in connection therewith, including storage and lighterage operations: *Provided, however,* that this industry shall not include the operation of tourist bureaus and of travel and ticket agencies. *Provided, further,* that this industry shall not include bunkering of petroleum products or activities engaged in by seamen on American vessels which are documented or numbered under the laws of the United States, which operate exclusively between points in the Samoan Islands, and which are not in excess of 350 tons net capacity. Within this industry there shall be three classifications:

(1) *Classification A: Stevedoring, lighterage and maritime shipping agency activities.* This classification shall include all employees of employers who engage in each of the following three services: stevedoring, lighterage and maritime shipping agency activities.

(2) *Classification B: Unloading of fish.* This classification shall include the unloading of raw and/or frozen fish from vessels.

(3) *Classification C: All other activities.* This classification shall include all other activities in the shipping and transportation industry.

(e) *Construction.* This industry shall include all construction, reconstruction, structural renovation and demolition, on public or private account, of buildings, housing, highways and streets, catchments, dams, and any other structure.

(f) *Retailing, wholesaling and warehousing.* This industry includes all activities in connection with the selling of goods or services at retail, including the operation of retail stores and other retail establishments, the wholesaling and warehousing and other distribution of commodities including but without limitation the wholesaling, warehousing and other distribution activities of jobbers, importers and exporters, manufacturers' sales branches and sales offices engaged in