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MEMORANDUM FOR: REGIONAL ADMINISTRATORS
DISTRICT DIRECTORS

FROM:

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Deputy Administrator

SUBJECT: Assessment of Child Labor Civil Money Penalties

This memorandum discusses the guidelines the Wage and Hour Division (WHD) will follow to determine when an assessment of child labor civil money penalties is appropriate, as well as the amounts of the penalties WHD will assess. These guidelines draw heavily on the child labor civil money penalty (CL CMP) process WHD has developed over the past 25 years. Some of the guidelines are new, resulting from the May 21, 2008 amendments to section 16(e) of the FLSA, 29 U.S.C. 216(e), made by the *Genetic Information Nondiscrimination Act of 2008* (GINA). GINA increased the maximum CL CMP from \$11,000 to \$50,000 for any child labor violation that causes the death or serious injury of any employee under the age of 18, and provides that such penalties may be doubled for repeated or willful violations. Certain guidelines are being adopted so that the assessment process incorporates interpretations provided to WHD by the Secretary of Labor's Administrative Review Board. All these guidelines comport with Regulations, 29 CFR Parts 579 and 580.

WHD has created the *Child Labor Enhanced Penalty Program* (CLEPP) to incorporate the applicable provisions of GINA into its existing CL CMP assessment process. This memorandum explains how WHD will assess CL CMPs under CLEPP, and how CL CMPs will be assessed for violations that do not result in deaths or injuries that qualify as "serious" under CLEPP or do not meet the GINA causation standard.

Definitions

CLEPP

A *CLEPP serious injury* is an injury that occurred after May 20, 2008 that was caused by a child labor violation(s) and involves:

1. a permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation); or

2. a permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand, or other body part; or
3. a permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand, or other body part. 29 U.S.C. 216(e)(1)(B).

WHD's assessment of whether the injury resulted in *permanent* or *substantial impairment* will take into account the totality of the injury, including such things as the nature and degree of the impairment, the potential for recovery, the recovery time, the impact of the injury on the minor's daily life, the prognosis issued by medical practitioners and therapists, and evaluations of the degree of impairment pursuant to sources such as the American Medical Association's *Guide to the Evaluation of Permanent Impairment* or state workers' compensation offices. As the degree of impairment increases, the duration that is necessary for the impairment to qualify as substantial decreases. The National Office (NO) will work with District Offices (DOs), Regional Offices (ROs), and the Office of the Solicitor of Labor to determine the seriousness of an injury and/or degree of impairment prior to the assessment of CL CMPs.

A cut or abrasion that impairs a youth's ability to bend his or her knee for one week, for example, will not rise to the level of a *substantial impairment* because the injury is neither significant nor long-lasting, while a puncture or laceration that results in numbness and curtailed use of a youth's hand for several months may be deemed to have substantially impaired the youth's sense of touch. Likewise, scarring that significantly curtails a youth's ability to use the affected body part for a significant period of time will be considered a *substantial impairment* of that bodily member. Even if an injury is expected eventually to heal with no lasting effects, it may qualify as a *substantial impairment* under CLEPP if the impairment lasts for a significant period of time, or it has a significant, albeit temporary, impact. An injury that results in significantly diminished use of a youth's leg for three months, for example, particularly if the youth is not able to work or attend school for that period of time, will be deemed to be a *substantial impairment* under section 16(e) of the Act.

However, a total body impairment rating of less than 5 percent, in and of itself, generally will not place the injury within the parameters of a *CLEPP serious injury*, even if the impairment is permanent. One example of a permanent injury that does not qualify as a *CLEPP serious injury* is:

A 16-year-old minor loses the very tip of one finger of his non-dominant hand while cleaning a power-driven meat slicer in violation of Hazardous Occupations Order (HO) 10. The recovery period was less than three weeks long and the injury constituted less than 5 percent of total body impairment. This injury would be classified by WHD as a *serious injury (Non-CLEPP)* because the severity of the injury, even though it involves the permanent loss of a body part, does not rise to the "seriousness" contemplated by GINA.

Caused by a child labor violation requires a relationship between the violation that occurred and the serious injury or death of the minor employee.

Causation can be found if the death or serious injury occurs when the youth is employed in a workplace that has been specifically found by the Secretary to be hazardous, such as a manufacturing plant (Child Labor Regulation No. 3), a saw mill (HO 4), or a coal mine (HO 3). The Secretary's regulatory determinations of what constitutes hazardous workplaces are based on such factors as the potential for injury or death arising from such things as environmental factors, the presence of power-driven equipment, the size of the workforce, the presence of toxic materials, and industry specific occupational death and injury statistics. Such workplaces tend to involve multiple hazards and potential sources of injuries for all workers, routinely requiring a heightened level of safety-consciousness that, because of their youth and inexperience, young workers are generally unable to maintain. Accordingly, if a 16-year-old youth falls to his or her death while employed in a coal mine, for example, the violation of HO 3 (working in a coal mine) will be deemed to have caused the death because the Secretary has deemed work in a coal mine to be inherently dangerous. Other examples of an injury or death being caused by a violation would include:

- A minor is killed when the fork lift he or she is operating overturns and crushes him or her. This violation of HO 7 (power-driven hoisting apparatus) caused the death.
- If a minor is killed while operating the fork lift in a plant manufacturing explosives, WHD would assert that two violations "caused" his or her death—violations involving HO 7 (operating a fork lift) and HO 1 (employment in a plant manufacturing explosives). The violation of HO 1 would occur because the Secretary of Labor has specifically found that the employment of a youth under 18 years of age in an establishment that manufactures explosives is particularly hazardous to his or her health or well-being and therefore prohibited.
- A minor is seriously injured while loading a power-driven compactor that continuously operated during the loading process. The minor was employed in violation of HO 12 (power-driven paper processing machines), which caused his or her serious injury.
- Causation may be found when a 14- or 15-year-old minor is injured or killed after he or she has worked in excess of the hours and times of day standards established by 29 CFR 570.35, if it can be demonstrated, for example, that the time of day or the number of hours worked by the minor employed in violation could have jeopardized his or her health, safety, alertness, or mental acumen.

Violations that might not *cause* an injury under CLEPP could include situations such as:

- A 15-year-old minor employed by a quick service restaurant and operating an open-flame grill (in violation of the occupations standards in Child Labor Regulation No. 3) is injured when he or she slips on a wet floor in the main part of the restaurant, outside the kitchen. The injury may have been prevented had

the youth not been employed in a prohibited occupation, but the violation did not *cause* the injury.

- A 16-year-old minor, while operating a power-nail gun on a worksite, suffers a serious head injury when an adult worker drops a tool kit from the second floor. Although the minor is employed in violation of HO 5 (operating power-driven woodworking equipment), that violation did not *cause* the injury.
- A 13-year-old hired farm worker for whom the farmer does not have written parental permission to employ is struck by lightning and killed while harvesting tomatoes in a field. The worker's employment was in violation of the child labor provisions, but the violation did not cause the death.

Although the injuries in the above three examples were not caused by the child labor violations, child labor violations did exist that were associated with injuries to minors. Accordingly, such violations would not fall under CLEPP, but would be assessed as Non-CLEPP violations using the assessment process in effect prior to May 20, 2008 or, if applicable, the new guidelines provided for a *Serious Injury (Non-CLEPP)*.

Non-CLEPP

A *Serious Injury (Non-CLEPP)* means any injury which does not meet the definition of "CLEPP serious injury" because it:

1. occurred before May 20, 2008;
2. did not fall within one of the three categories of "serious injuries" defined by CLEPP; or
3. failed to meet the level of *causation* required by CLEPP, but which requires treatment more extensive than "first aid" or curtails normal activities.

Specifically, a *serious injury (Non-CLEPP)* is an injury that requires the care of a medical practitioner beyond the initial treatment or curtails the youth's normal activities (school, work, sports) for at least five days. Serious injuries include situations where a minor is required to return to a medical practitioner after an accident to have stitches removed or for an evaluation of the healing process.

Examples of *serious injuries (Non-CLEPP)* might include:

- A 14-year-old fry-cook who is operating a deep-fat fryer that is not equipped with mechanisms that automatically raise and lower the baskets out of the hot oil in violation of Child Labor Regulation No. 3 (CL Reg. 3) suffers a first degree burn that covers a significant portion of his or her forearm. The burn requires a physician's care for at least one week and/or the minor loses a week of work. This injury qualifies as a *serious injury (Non-CLEPP)*.
- A 15-year-old minor's right hand is crushed in an accident before May, 2008, while he or she is unloading boxes from a conveyor at a retail store in violation of CL Reg. 3. The minor suffers permanent nerve damage, permanent loss of sensation, and his or her once dominant hand is now a "helper-hand." This

injury is not a *CLEPP serious injury* because it occurred prior to the effective date of GINA, but is a *serious injury (Non-CLEPP)*.

Nonserious injury means any injury that requires treatment no more extensive than first aid and results in the youth missing school or work, or having their normal activities curtailed, for less than 5 days. The term *first aid* shall mean any one-time treatment. Such one-time treatment is considered first aid even though provided by a physician, registered professional personnel, or an employer.

The 2008 amendments to section 16(e) of the FLSA left intact the requirement for WHD, when determining the amount of CL CMPs, to consider both the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation. Therefore, these considerations will be taken into account irrespective of whether an injury qualifies as a *CLEPP serious injury*. Wage and Hour's existing regulation at 29 CFR 579.5 interpreting this statutory directive provides guidance regarding both aspects of the statutory mandate.

General Rules

When determining the amount of a CL CMP, the WHD will adhere to the following rules, many of which are unchanged from procedures WHD followed before the 2008 amendments to section 16(e):

Unchanged Rules

- As in the past, WHD will continue to use a table that assigns a predetermined “initial assessment amount” to each type of violation for which a CL CMP may be assessed (*see* 29 CFR 579.3 for a list of the violations) when the violation does not cause or contribute to the death or serious injury of a minor employee (*i.e.*, any injury that does not qualify as “serious” under CLEPP or non-CLEPP, or a violation that does not result in any injury). The initial assessment amounts range from \$350 to \$2,325, increasing for more serious violations (a recordkeeping violation, for example, will receive a much lower assessment than a HO violation). As explained below, WHD will not use these predetermined assessment amounts for violations that cause or contribute to the death or serious injury of a minor employee.
- As in the past, WHD will continue to consider the regulatory factors in 29 CFR 579.5 to decide if the initial CL CMP amount should be reduced because of the small size of the employer’s business. Although WHD will typically conclude that a penalty reduction is not appropriate for small businesses if a violation resulted in a death or serious injury at the highest level of the serious injury continuum (*e.g.*, an injury that results in a total body impairment of 35% or more), because of the gravity of such violations, WHD will consider the facts of each individual case before making such a determination. Even if consideration of the gravity of the violation permits reduction for small business size, however, the initial CL CMP amount will be reduced for small businesses only if none of the violations were found to be willful or repeated; the

employer did not falsify or conceal child labor violations; and the employer gave credible assurances of future compliance.

- A multiplier of “2” may be applied when the violations were found to be willful or repeated. In addition, for employers whose violations did not involve the death or serious injury of a minor employee, a similar multiplier would be applied if the employer falsified or concealed the child labor violation or failed to give credible assurances of future compliance.
- As in the past, if a minor performs the same violative act as one that caused or contributed to the death or serious injury of another minor employee, but he or she was not injured or killed, WHD will apply a multiplier of “5” to the initial assessment amount generated for the uninjured minor (referred to as “bundling”).
- WHD generally will not assess a CL CMP for violations it determines to be de minimis. A de minimis child labor violation includes only those isolated and rare CL Reg. 3 hours standards violations that involve the employment of no more than one minor and recordkeeping violations that involve the employment of no more than one minor. Violations of the CL Reg. 3 hours standards (beginning and ending of work day, total number of hours worked in a day, and total number of hours worked in a week) could be de minimis if the individual violations (1) are the only child labor violations documented by the investigation, (2) do not violate the standard by more than 15 minutes—*i.e.*, the minor worked no later than 7:15 p.m. on a winter evening, did not work before 6:45 a.m., or worked no more than 3¼ hours on a school day; (3) such violations involve the employment of only a single minor; and (4) there are no more than three such violations during that minor’s employment with the employer. A recordkeeping violation may be considered a de minimis child labor violation when the employer fails to maintain a record of the date of birth of no more than one minor employee and no other child labor violations are documented by the investigation.
- If a minor does not suffer a serious injury or death while employed in violation of a child labor provision, the maximum civil money penalty that may be assessed for all child labor violations impacting his or her employment is \$11,000. The implementation of CLEPP did not change this rule.
- Consistent with its past practice, WHD will not consider factors such as whether the minor’s own actions contributed to the violation and/or his or her injury or death; whether the parent or guardian attempted to or agreed to waive the child labor provisions on behalf of the minor; and whether the minor or his or her parent or guardian deliberately or accidentally provided an incorrect birth date, to warrant the reduction of a CL CMP. Employers are required to record in their files a birthdate for every employee under the age of 19 years. Employers may protect themselves from unintentional violation of the youth employment provisions by keeping on file a state-issued employment or age certificate for each minor employed to show that the minor is the minimum age for the job. WHD no longer issues such age certificates.

- In determining the amount of the CL CMP, the WHD assessing official will, following the guidance of this document, use his or her independent judgment to consider whether the child labor violation is “de minimis”; whether the violation was inadvertent and involved no intentional or heedless exposure of any minor to any obvious hazard or was detrimental to the youth's health or well-being; whether the person charged gave credible assurance of future compliance; and whether the proposed civil money penalty assessment is necessary to achieve the objectives of the Act.

Rules After CLEPP (Post May 20, 2008 Violations)

- For each child labor violation occurring after May 20, 2008 that causes the death of a minor employee, the WHD will generally assess a CL CMP of \$50,000. Although WHD will typically conclude that a penalty reduction based on the size of the business or any other factor listed in 29 CFR 579.5 is not appropriate where a violation resulted in a youth's death, WHD will consider the facts of each individual case before making such a determination. Because the CLEPP statutory provisions provide for a CL CMP assessment of up to \$50,000 for each violation “that causes the death . . . of *any* employee under 18,” the maximum CL CMP can be assessed for a death even if the minor employed in violation was not the minor employee that suffered the death, provided that the violation actually caused the death. 29 U.S.C. 216(e)(1)(A)(ii) (emphasis added). The initial assessment amount may be doubled, up to \$100,000 per violation, if the violations are determined to be willful or repeated. For example:
 - A 16-year-old minor driving a truck in violation of HO 2 is involved in an accident that kills his 17-year-old coworker who is a passenger in the vehicle. Although it is the driver, not the passenger, whose employment is in violation of the child labor provisions, an assessment under CLEPP is proper since the violation caused the death of an employee under the age of 18. The 16-year-old was prohibited from driving the vehicle by HO 2. Had the firm been in compliance with the child labor provisions, the accident would not have happened and the 17-year-old would not have died. The assessment is proper even when, as in this case, the employment of the youth who died was not in violation of the child labor provisions. The assessment would also be appropriate even if the employment of the minor who was killed was not covered under the provisions of the FLSA, for example, if the 17-year old is not individually covered and there is no enterprise coverage for the employer
 - A 14-year-old hired farm worker, operating a tractor in violation of Agriculture Hazardous Occupations Order Number 1 (AG H.O. No. 1), runs over a 17-year-old coworker. The older hired farm worker suffers injuries that result in the amputation of his or her leg above the knee. Even though the 17-year-old was not employed in violation of any child labor provision, an assessment of a CL CMP is under CLEPP is permissible because the violation caused the serious injury of a minor employee under the age of 18.
- CLEPP requires direct causation. Therefore, for each child labor violation that contributes to, but does not directly cause, the death of a minor employee, the WHD

will generally assess the pre-CLEPP CL CMP of \$11,000. WHD will typically conclude that a violation resulting in a youth's death does not warrant any reductions based on the size of the business or any other factor listed in 29 CFR 579.5. The statutory language addressing non-CLEPP deaths and injuries permits assessments up to \$11,000 "for each employee who was the subject of such a violation." 29 U.S.C. 216(e)(1)(A)(i). Therefore, in a non-CLEPP context, the minor employed in violation must be the minor employee that suffers the death for the \$11,000 to be assessed for each violation that contributed to the death of the minor.

- For each child labor violation occurring after May 20, 2008 that causes a *CLEPP serious injury* of a minor, as defined in FLSA section 16(e)(1)(B), WHD will generally assess a penalty of \$15,000, \$25,000, or \$40,000, depending on the severity and permanency of the injury. As explained above, when evaluating the seriousness of an injury, WHD will consider the totality of the injury, including such things as the potential for recovery, the recovery time, the impact of the injury on the minor's daily life, the prognosis issued by medical practitioners and therapists, and evaluations of the degree of impairment pursuant to sources such as the American Medical Association's *Guide to the Evaluation of Permanent Impairment* or state workers' compensation offices. Generally, a total body impairment rating of 35 percent or more will warrant the assessment of a \$40,000 CL CMP for each violation that caused the *CLEPP serious injury*. An impairment rating of 20 through 34 percent generally will warrant the assessment of a CL CMP of \$25,000. A rating of 5 percent to 19 percent generally will warrant the assessment of a CL CMP of \$15,000. A total body impairment rating of less than 5 percent, in and of itself, generally will not place the injury within the parameters of a *CLEPP serious injury*. These initial assessments can be doubled, up to \$100,000, if the violations are determined to be willful or repeated. The WHD will usually consider reduction of the amount of the CL CMP based on the size of the employer's business to be appropriate only in those cases where the initial CLEPP assessment is less than \$40,000, and only if the injury was caused by a single child labor violation; none of the employer's violations were found to be willful or repeated; none of the employer's violations caused or contributed to the death of a minor employee or to a more serious injury of a minor employee; the employer did not falsify or conceal child labor violations; and the employer gave credible assurances of future compliance. However, WHD will consider the appropriateness of a CL CMP reduction based on the facts of each individual case.
- For child labor violations resulting in *serious injuries (Non-CLEPP)*, WHD will generally assess a CL CMP of \$6,000, \$8,000, or \$10,000, depending on the seriousness of the injury. *Serious injuries (Non-CLEPP)* may include injuries that are serious enough to qualify under CLEPP, but do not meet all the CLEPP requirements (*i.e.*, the injury was not directly caused by the child labor violation or occurred before the effective date of the amendment). When evaluating the seriousness of an injury, WHD will look at the totality of the injury, the potential for recovery, the recovery time, the impact of the injury on the minor's daily life, the prognosis issued by medical practitioners and therapists, and, if relevant, evaluations of the degree of permanent impairment pursuant to, *e.g.*, the American Medical Association's *Guide to the*

Evaluation of Permanent Impairment or state workers' compensation offices.

Generally, a total body impairment rating of 35 percent or more or a recovery period greater than three months would warrant the assessment of the \$10,000 CL CMP. A permanent impairment rating of 20 percent to 34 percent or a recovery period between one and two months would generally warrant an initial civil money penalty assessment amount of \$8,000. A rating of less than 20 percent or a recovery period of less than one month would generally warrant the assessment of a CL CMP of \$6,000. These initial assessments could be increased to up to \$11,000 per violation if the violations are determined to be willful or repeated, the employer failed to provide credible assurances of future compliance, or the employer concealed or falsified the child labor violations. The WHD will typically find reduction of the amount of the CL civil money penalty based on the size of the employer's business to be appropriate only in those cases where the initial assessment is less than \$10,000, and only if the injury was caused by a single child labor violation; none of the employer's violations were found to be willful or repeated; none of the employer's violations caused or contributed to the death of a minor employee or to the more serious injury of a minor employee; the employer did not falsify or conceal child labor violations; and the employer gave credible assurances of future compliance. However, WHD will consider the appropriateness of a CL CMP reduction based on the facts of each individual case

- For every violation that causes the *nonserious injury* of a minor employee, WHD will generally determine an initial assessment amount based on the table of predetermined amounts discussed earlier in this document. Because the violation resulted in an injury, WHD will then apply a multiplier of "3" to that base amount. Such amounts may be reduced when the employer and the violation comport with the criteria established for reductions for small businesses (*see* last bullet of this document). The total CL CMP assessed for the employment of a minor who suffered a nonserious injury (and not a death or a serious injury) may not exceed \$11,000.
- For violations of the child labor record keeping provisions, WHD will generally assess an initial CL CMP of \$350. For violations of the "hot goods" provisions of FLSA section 12(a), WHD will generally assess an initial CL CMP of \$775 or \$1300, depending upon when the shipment of the hot goods occurred and whether other aggravating factors were present. These initial assessment amounts may be doubled if any of the employer's child labor violations were willful or repeated, the employer falsified or concealed child labor violations, or the employer failed to provide credible assurances of future compliance.
- WHD may reduce certain initial CL CMP assessment amounts in consideration of the size of the employer's business. WHD will generally find such reduction to be appropriate only when all of the criteria listed below have been met:
 1. The employer's gross annual dollar volume of sales made or business done, exclusive of excise taxes, does not exceed \$1,000,000.
 2. None of the employer's child labor violations were determined to be willful or repeated.

3. The employer did not conceal or falsify child labor violations.
4. None of the employer's child labor violations caused or contributed to the death of a minor employee.
5. None of the employer's child labor violations caused or contributed to a serious injury of a minor that resulted in an initial assessment amount of \$40,000 for a CLEPP serious injury or \$10,000 for a Non-CLEPP serious injury.
6. The employer has given credible assurances of future compliance.
7. If a child labor violation caused or contributed to a serious injury, there may be only one such violation and only one such injury.

If all the criteria above have been met, the WHD will generally reduce the initial CL CMP assessment amount based on the following formulae:

1. The initial CL CMP amount will be reduced by 50% if the employer has less than 21 employees.
2. The initial CL CMP amount will be reduced by 30% if the employer has between 21 and 99 employees.

No reduction will be permitted if the employer has a gross annual dollar volume of sales made or business done, exclusive of excise taxes, that is greater than \$1,000,000 or if the employer employs 100 or more employees.