[ORAL ARGUMENT NOT SCHEDULED]

No. 15-5014

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RHEA LANA, INC., et al.,
Plaintiffs-Appellants,

v.

DEPARTMENT OF LABOR,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiffs-appellants are Rhea Lana, Inc., and Rhea Lana's Franchise Systems, Inc. The defendant-appellee is the U.S. Department of Labor.

B. Rulings Under Review

The rulings under review (issued by Judge Christopher R. Cooper) are the memorandum opinion and order filed on November 21, 2014. *See* Joint Appendix (JA) 136-46 (opinion); JA 135 (order). The opinion has not yet been published, but it is available on Westlaw at 2014 WL 6534902; there is no official citation for the order.

C. Related Cases

This case has not previously been before this Court or any court other than the district court. Counsel for the government are unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/ Sydney Foster
Sydney Foster

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GLOSSARY

APA	Administrative Procedure Act
EPA	Environmental Protection Agency
FLSA	Fair Labor Standards Act of 1938
JA	Joint Appendix

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STATEMENT OF JURISDICTION

Plaintiffs' complaint invoked the district court's jurisdiction under 28 U.S.C. § 1331, 5 U.S.C. §§ 701-706, and 29 U.S.C. § 201 *et seq.* Joint Appendix (JA) 9. The district court entered final judgment for the government on November 21, 2014. JA 135. Plaintiffs filed a timely notice of appeal on January 20, 2015. JA 147-48; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

The Department of Labor conducted an investigation of the employment practices of plaintiff Rhea Lana, Inc. (Rhea Lana). At the conclusion of the

investigation, the agency sent Rhea Lana a letter expressing its view that Rhea Lana had violated the minimum wage and/or overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, with respect to two groups of workers—managers and so-called "consignors/volunteers." Although Rhea Lana agreed to comply with its statutory obligations concerning managers, it declined to compensate its consignors/volunteers. The agency nonetheless determined, in an exercise of its discretion, that it would not commence any judicial or administrative enforcement proceedings. The question presented is whether the letter the agency sent to Rhea Lana at the end of its investigation explaining the agency's view that the Fair Labor Standards Act applies to consignors/volunteers and declining to take further enforcement action is final agency action reviewable under the Administrative Procedure Act, 5 U.S.C. § 704.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Congress enacted the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, to protect employees by establishing certain federal minimum wage and overtime pay protections. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 & n.18 (1945); *see also* 29 U.S.C. § 206 (minimum wage); *id.* § 207 (overtime pay); *id.* § 213 (exemptions from § 206 and § 207); *id.* § 215(a)(2) (making it unlawful to violate § 206

or § 207). Except in circumstances not relevant here, an employee is defined as "any individual employed by an employer." *Id.* § 203(e)(1). The term "employ," in turn, "includes to suffer or permit to work." *Id.* § 203(g).

Congress has authorized the Administrator of the U.S. Department of Labor's Wage and Hour Division (Administrator)—or his designated representatives—to conduct investigations of employers to determine whether they have violated the FLSA or that "may aid in the enforcement" of the FLSA. 29 U.S.C. § 211(a); *see also id.* § 204(a). Among other enforcement mechanisms, the FLSA authorizes an employee or the Secretary of Labor (Secretary) to bring a civil action against an employer to recover unpaid wages owed to the employee, together with an equal amount as liquidated damages. *Id.* § 216(b), (c); *see also id.* § 203(q). The Secretary may also bring a civil action against an employer to obtain injunctive relief restraining certain statutory violations. *See id.* § 217.

In addition, the FLSA allows the Secretary to enforce the statute by imposing civil penalties on "repeated[]" or "willful[]" violators of the statute's minimum wage or overtime pay provisions. 29 U.S.C. § 216(e)(2).[1] Specifically, the Administrator may issue a notice of a civil penalty, 29 C.F.R. § 580.3, which an employer may challenge in a hearing before an Administrative Law Judge, 29 U.S.C. § 216(e)(4); 29 C.F.R.

[1] The FLSA also provides for criminal penalties for anyone who "willfully" violates 29 U.S.C. § 215, which makes it unlawful to violate, *inter alia*, the minimum wage or overtime pay provisions of the statute, *see id.* § 215(a)(2). *Id.* § 216(a).

§§ 580.6, 580.10. Decisions by an Administrative Law Judge may be appealed to the Department of Labor's Administrative Review Board, 29 C.F.R. § 580.13(a), and decisions of the Administrative Review Board are subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq. See, e.g.*, *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 670, 673 (1st Cir. 1998). The agency may pursue payment of civil penalties determined in the administrative process through, *inter alia*, civil actions filed in district court. *See* 29 U.S.C. § 216(e)(3); 29 C.F.R. § 580.18(b).

B. Factual Background

1. According to plaintiffs' complaint, plaintiff Rhea Lana, Inc. (Rhea Lana) is a business that organizes and hosts consignment sales for children's clothes, toys, and related items. JA 8, 10. Consignors provide items for sale and determine the price. JA 10. If an item sells, the consignor is generally allowed to keep at least seventy percent of the purchase price. JA 11.

Rhea Lana's consignment sales require staff to "undertake general tasks such as greeting shoppers, picking up fallen price tags, reorganizing items that shoppers have handled, and assisting shoppers as they carry items to their vehicles." JA 11. Rhea Lana addresses this staffing need, at least in part, by relying on "volunteer" consignors. JA 10-11; *see also* JA 11 (noting that such "volunteers" may engage in "greeting, sorting, disassembling, etc."). Rhea Lana refers to consignors who "volunteer" for this work as "consignors/volunteers." JA 11. Rhea Lana "does not compensate consignors/volunteers." JA 11. It does, however, offer them the

opportunity to "favorably display" the items they provide for Rhea Lana's consignment sales and to "shop before the event opens to the general public." JA 11.

The other plaintiff in this case—Rhea Lana's Franchise Systems, Inc.—is a corporation that "offers franchise opportunities to enterprises that operate in substantial conformity with Rhea Lana's business model." JA 8, 11. For example, each franchisee relies upon consignors to "volunteer" to work during consignment sales. JA 11.

2. In January 2013, the Department of Labor's Wage and Hour Division began an investigation of Rhea Lana's employment practices. JA 12. In May 2013, the agency met with Rhea Lana and explained that, in its view, Rhea Lana's consignors/volunteers are employees under the FLSA. JA 12. The agency told Rhea Lana that the consignors/volunteers were thus entitled to back wages, and it requested Rhea Lana to make payment accordingly. JA 12.

In August 2013, Robert Darling, a District Director in the Wage and Hour Division, sent a letter to Rhea Lana regarding the agency's investigation. JA 12-13, 23. The letter explained that the investigation had "disclosed violations" of the FLSA's minimum wage and/or overtime pay provisions with respect to two groups of workers—managers and consignors/volunteers. JA 23. The letter noted that Rhea Lana had agreed to pay over $6000 to 39 managers, and it observed that Rhea Lana had "refuse[d] to comply" with respect to its consignors/volunteers. JA 23. The letter informed Rhea Lana that the FLSA "provides for the assessment of a civil money

penalty for any repeated or willful violations of [FLSA] section 6 or 7"—*i.e.*, the statute's minimum wage or overtime pay provisions, 29 U.S.C. §§ 206-207. JA 23; *see also* 29 U.S.C. § 216(e) (civil penalty provision of the FLSA). The letter explained that "[n]o penalty is being assessed as a result of this investigation," and it noted that, "[i]f at any time in the future your firm is found to have violated the monetary provisions of the FLSA, it will be subject to such penalties." JA 23.

Darling also sent a separate letter to Rhea Lana's consignors/volunteers in August 2013. JA 12, 21. That letter explained that the agency's investigation of Rhea Lana "indicate[d] that you might not have been paid as required by the law for the period 01/28/2011 to 01/27/2013[]" and that Rhea Lana had not "agree[d] to make payments to you." JA 21. The letter emphasized that the agency "cannot itself order such payment." JA 21. The letter went on to explain that, although the agency was empowered to "file lawsuits against employers and request that a court order the payment of back wages," the agency had determined that it would take "no further action" in this case. JA 21. The letter informed the recipients that the FLSA nonetheless provides them the right to bring a private action against Rhea Lana to recover any back wages and liquidated damages due, noting that the agency "does not encourage or discourage such suits." JA 21.

The agency's reasoning in concluding that Rhea Lana's consignors/volunteers are "employees" under the FLSA was summarized in a subsequent letter from the Principal Deputy Administrator for the Wage and Hour Division to a member of

Congress who had inquired about the Rhea Lana investigation. JA 25-27. That letter explained that certain volunteers for public agencies and non-profit organizations are not "employees" covered by the FLSA. JA 25-26. The consignors/volunteers who "operat[ed] . . . cash register[s], provid[ed] security," and performed other work at Rhea Lana's sales events, by contrast, were "engaged in activities that are an integral part" of Rhea Lana's "for-profit business" and thus were employees within the meaning of the FLSA. JA 27.

C. District Court Proceedings

Rhea Lana and Rhea Lana's Franchise Systems, Inc. filed an action in district court challenging the agency's "decision . . . to classify 'consignors/volunteers' as employees" under the FLSA. JA 8 (complaint). Although plaintiffs brought their action under the Administrative Procedure Act, JA 9, they did not seek to "set aside" any particular "agency action, findings, [or] conclusions," 5 U.S.C. § 706(2). Instead, plaintiffs sought a declaration that consignors/volunteers are not FLSA employees, and they also sought temporary, preliminary, and permanent injunctions prohibiting the agency from "*initiating* any investigations, audits, enforcements, or other agency proceedings against Plaintiffs" based on, *inter alia*, plaintiffs' reliance on the work of consignors/volunteers. JA 16 (emphasis added).

The district court dismissed plaintiffs' complaint, concluding that the agency's letters to Rhea Lana and its consignors/volunteers do not constitute "final agency action" that is subject to judicial review under the APA, 5 U.S.C. § 704. JA 135-46.

Noting that agency action is not "final" and reviewable if it does not determine rights or obligations or cause legal consequences to flow, JA 139, the court rejected plaintiffs' contention that the agency's letters "altered [their] rights and obligations because they force the compan[ies] to either suffer the costs of voluntarily complying" with the agency's views or "risk . . . future enforcement action." JA 141. The court explained that, under "longstanding D.C. Circuit precedent," agency determinations are not reviewable when they "'only affect[] [a party's] rights adversely on the contingency of future administrative action.'" JA 141-42 (second alteration in original) (quoting *DRG Funding Corp. v. Secretary of Hous. & Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996)). Indeed, the court explained, this Court has held unreviewable "a variety of agency notifications similar to [the agency's] letter to Rhea Lana." JA 142 (citing cases).

The district court also rejected plaintiffs' reliance on *Sackett v. EPA*, in which the Supreme Court held that an Environmental Protection Agency (EPA) compliance order issued to certain landowners was final agency action under the APA, 132 S. Ct. 1367, 1371-72 (2012). *See* JA 142-45. The district court explained that, "unlike the EPA's compliance order in *Sackett*, which ordered the landowners to restore their property, the [Department of Labor's] letters here do not affirmatively compel Rhea Lana to do anything." JA 143.

In addition, the district court observed, noncompliance with the order in *Sackett* would have subjected the plaintiffs to double the civil penalty for the underlying

statutory violations in any future EPA enforcement action, JA 143-44, whereas the Department of Labor's letter to Rhea Lana "has no independent legal effect," JA 144. In reaching that conclusion, the district court explained that, although employers are subject to civil penalties under the FLSA for "willful[]" violations of the statute's minimum wage or overtime pay provisions, 29 U.S.C. § 216(e)(2), a violation is "willful" only if the employer "'knew or showed reckless disregard for the matter of whether its conduct was prohibited'" by the FLSA. JA 144 n.4 (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)). The district court observed that courts of appeals have held that "disagreeing with the Wage and Hour Division's interpretation of the FLSA in good faith does not automatically subject an employer to willfulness penalties," explaining that although the agency's post-investigation letters "might be used as evidence of willfulness, they do not establish it by operation of law." JA 144 n.4. Accordingly, the district court concluded that *Sackett* did not "overturn[] . . . the long line of D.C. Circuit cases" that "foreclose[] APA review of the [Department of Labor's] letters at issue here." JA 144.

SUMMARY OF ARGUMENT

Plaintiffs ask this Court to review a letter from the Department of Labor informing Rhea Lana of the agency's view that the company had failed to comply with the minimum wage and/or overtime provisions of the Fair Labor Standards Act with respect to two groups of workers—a group of managers and a group known as "consignors/volunteers." Rhea Lana had agreed to compensate its managers, and

although Rhea Lana had not agreed to compensate its consignors/volunteers, the agency's letter did not order Rhea Lana to compensate the consignors/volunteers, nor did it require Rhea Lana to pay any civil penalties. Indeed, the agency could have obtained an order requiring payment to the consignors/volunteers only by filing a civil action, and it could impose civil penalties only after providing an opportunity for an administrative hearing.

The district court correctly held that the agency's letter to Rhea Lana is not final agency action reviewable under the Administrative Procedure Act because it determined no rights or obligations and resulted in no legal consequences. That conclusion is amply supported by this Court's precedent holding nonfinal a variety of agency notifications that merely express the agency's view of the law. Here, as in those cases, the agency's view of the law will have force only to the extent that the agency can convince an adjudicator to adopt it in subsequent judicial or administrative enforcement proceedings—proceedings that, at least for now, the agency has made clear it has no plans to commence.

Plaintiffs are mistaken in arguing that the agency's letter constitutes reviewable final agency action under *Sackett v. EPA*, 132 S. Ct. 1367 (2012), which held that an EPA "compliance order" was final agency action. As the district court explained, *Sackett* differs from this case in two important respects. First, "[b]y reason of the order," at issue in *Sackett*, the plaintiffs there were "legal[ly] obligat[ed]" to take

various actions, *id.* at 1371, whereas the Department of Labor's letter here did not compel plaintiffs to do anything.

Second, in *Sackett*, the Supreme Court assumed *arguendo* that the relevant statute authorized civil penalties for violating the compliance order separate from the penalties that could be imposed for violating the statute alone. 132 S. Ct. at 1370, 1372 & n.2. No analogous statutory provision here provides for the imposition of civil penalties for "violations" of the agency's letter to Rhea Lana. Moreover, although the FLSA authorizes the imposition of civil penalties for "repeated" or "willful" violations of the FLSA's minimum wage or overtime pay provisions, the agency's letter does not render any future violations "repeated" or "willful" as a matter of law. To establish a "repeated" violation of the statute, the agency must establish both a violation and a prior violation, and to prove a "willful" violation of the statute, the agency must establish a violation and adduce proof of the employer's knowledge or reckless disregard of its legal obligations. In any hypothetical future enforcement proceeding, the agency's letter might be introduced as evidence supporting these elements, but it would not necessarily be dispositive on any element.

STANDARD OF REVIEW

This Court reviews the district court's grant of the government's motion to dismiss de novo. *See, e.g.*, *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003).

ARGUMENT

The Department Of Labor's Letter To Rhea Lana Is Not Final Agency Action Reviewable Under The APA.

A. The agency's letter merely reflects the agency's view of governing law and has no legal effect.

The Administrative Procedure Act provides a cause of action for judicial review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704; *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006). Agency action is final when two conditions are satisfied: "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Center for Auto Safety*, 452 F.3d at 806 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). The district court correctly held that the Department of Labor's August 2013 letter to Rhea Lana fails to satisfy the second condition and thus is not final and reviewable under the APA. JA 141-45.

To qualify as agency action that determines rights or obligations or results in legal consequences, an agency decision "must have inflict[ed] an actual, concrete injury upon the party seeking judicial review." *AT&T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001) (alteration in original) (internal quotation marks omitted). As this Court has explained, "[s]uch an injury typically is not caused when an agency merely expresses its view of what the law requires of a party, even if that view is adverse to

the party." *Id.*; *Center for Auto Safety*, 452 F.3d at 808; *Independent Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004). Where an agency expresses a view of the law that is adverse to a party, but the agency's determination "affect[s] [the party's] rights adversely on the contingency of future administrative action," the agency determination is nonfinal. *DRG Funding Corp. v. Secretary of Hous. & Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (internal quotation marks omitted); *see also AT&T*, 270 F.3d at 975. Similarly, where an agency's view of the law "has force only to the extent the agency can persuade a court to the same conclusion," the relevant agency action is nonfinal. *AT&T*, 270 F.3d at 976.

These precepts apply even when an agency requests that a party voluntarily comply with its understanding of the law or face the possibility of enforcement proceedings in the future. As this Court has explained, such requests may have "practical consequences," but they "clearly ha[ve] no legally binding effect" and thus do not render an agency decision final. *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003); *see also, e.g.*, *Center for Auto Safety*, 452 F.3d at 810-11 ("[*D*]*e facto* compliance is not enough to establish that the guidelines have had *legal* consequences."); *National Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005); *Independent Equip. Dealers Ass'n*, 372 F.3d at 428.

Under the FLSA, the Department of Labor's Wage and Hour Division is empowered to conduct investigations of employers like the investigation that occurred here, 29 U.S.C. § 211(a), but the agency is not authorized to order an

employer to pay its employees back wages or otherwise comply with the FLSA. Instead, to obtain that relief, the agency must file a civil action against the employer. *See id.* §§ 216(c), 217; JA 21. Similarly, the agency is not empowered to impose monetary civil penalties on an employer without first providing an opportunity for an administrative hearing. *See* 29 U.S.C. § 216(e)(4); *see also* 29 C.F.R. §§ 580.6, 580.10, 580.13(a) (providing an opportunity for a hearing before an Administrative Law Judge and an appeal to the agency's Administrative Review Board).

The agency's August 2013 letter to Rhea Lana informed Rhea Lana of the agency's view that its consignors/volunteers are employees within the meaning of the FLSA, JA 23. Under the FLSA, however, that expression of the agency's view has no independent legal effect. To the contrary, to require Rhea Lana to comply with its view of the law, the agency would first need to persuade a court or administrative adjudicator to adopt its view pursuant to the statutory and regulatory provisions just discussed. JA 21, 23. Accordingly, the agency's letter is not reviewable under the APA.

As the district court explained, this Court has applied these principles to hold unreviewable "a variety of agency notifications similar to [the agency's] letter to Rhea Lana." JA 142. For example, in *AT&T*, this Court considered a "Letter of Determination" issued by the Equal Employment Opportunity Commission to two employees "stating that in its view [the employer] had unlawfully discriminated against" them. 270 F.3d at 974. The Equal Employment Opportunity Commission had subsequently urged the employer to conciliate with the employees or face referral

of the matter to the agency's legal department, and the agency had subsequently notified the employer that it had concluded that conciliation had failed. *Id.* at 974-75. This Court held those actions were nonfinal, explaining that the agency's view of the law would have legal force only to the extent that the agency exercised its discretion to sue the employer and persuaded a court to adopt its view. *Id.* at 975-76.

Similarly, in *Reliable Automatic Sprinkler Co.*, this Court held that a letter to a manufacturer stating that the Consumer Product Safety Commission intended to make a preliminary determination that a product was hazardous and requesting voluntary corrective action was nonfinal because an agency adjudication was required before the agency's determination could be legally binding. 324 F.3d at 730-35; *see also, e.g.*, *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 941, 943-46 (D.C. Cir. 2012) (warning letters sent by the Food and Drug Administration to specific manufacturers "advising that the agency considered their candles to be adulterated and misbranded medical devices" not final agency action); *Center for Auto Safety*, 452 F.3d at 806-11 (letters to auto manufacturers outlining agency's policy guidelines for "regional recalls" not final agency action); *National Ass'n of Home Builders*, 415 F.3d at 9, 14-17 (agency protocols "provid[ing] a methodology for the detection of an endangered subspecies of butterfly in certain areas" not final agency action); *Independent Equip. Dealers Ass'n*, 372 F.3d at 426-29 (EPA opinion letter disagreeing with the petitioner's interpretation of certain regulations not final agency action); *cf. Taylor-Callahan-Coleman Cntys. Dist. Adult Probation Dep't v. Dole*, 948 F.2d 953, 955-59

(5th Cir. 1991) (holding that certain actions by the Department of Labor following an investigation—including notification to employees of their right to bring a private right of action against the employer—were nonfinal, and further holding that several of the agency's opinion letters were nonfinal).[2]

B. Plaintiffs' contentions based on *Sackett* and the FLSA's civil penalty provisions are meritless.

1. Plaintiffs do not appear to take issue with this Court's precedent holding that agency action has no legal consequences for purposes of APA finality analysis where an agency merely expresses its view of what the law requires of a party, even if a party is faced with the practical consequence of choosing between compliance and defending against a possible enforcement proceeding in the future. *See* Pls. Br. 23; *see also id.* at 24-25. They urge, however, that the agency's letter to Rhea Lana has legal consequences because the FLSA authorizes the imposition of monetary civil penalties for "repeated[]" or "willful[]" violations of the minimum wage or overtime pay provisions of the statute, 29 U.S.C. § 216(e)(2). Plaintiffs argue that in the event of a hypothetical violation of the statute pursued by the agency in the future, the agency's

[2] *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430 (D.C. Cir. 1986), is not to the contrary. Among other things, the agency letter at issue there, unlike the letter at issue here, "emphatically required [the plaintiff's] immediate compliance." *Id.* at 437 (internal quotation marks omitted). Moreover, "in *Ciba-Geigy*, the agency denied the plaintiff any opportunity to be heard; whereas here, a hearing will take place in due course should the [Department of Labor] decide to pursue enforcement against [Rhea Lana]." *Reliable Automatic Sprinkler*, 324 F.3d at 733-34 (distinguishing *Ciba-Geigy* on these and other grounds also applicable here).

August 2013 letter to Rhea Lana would establish that Rhea Lana is a "repeated" or "willful" violator "*as a matter of law*." Pls. Br. 13 (emphasis added); *see also id.* at 12-14, 16-22.

In making this argument, plaintiffs rely heavily (Pls. Br. 16-22) on *Sackett v. EPA*, 132 S. Ct. 1367 (2012), which held that an EPA "compliance order" issued to certain landowners was final agency action under the APA, *id.* at 1371-72. The compliance order in *Sackett* included explicit commands "direct[ing] [the plaintiffs], among other things, 'immediately [to] undertake activities to restore [their property] in accordance with [an EPA-created] Restoration Work Plan' and to 'provide and/or obtain access to the Site . . . [and] access to all records and documentation related to the conditions at the Site . . . to EPA employees and/or their designated representatives." *Id.* at 1371 (some alterations in original) (quoting compliance order); *see also* JA 127-29 (compliance order in *Sackett*) (providing that the plaintiffs "shall" undertake various actions specified in approximately ten paragraphs).[3] Furthermore, in *Sackett*, the EPA had taken the position (and the Court assumed *arguendo*) that the relevant statutory provision, 33 U.S.C. § 1319(d), authorized the imposition of civil penalties for violating the compliance order itself that went above and beyond the

[3] The EPA compliance order reproduced in the Joint Appendix at JA 123-34 was subsequently superseded by an amended order. *See* Dkt. No. 15-4, *Sackett v. U.S. EPA*, No. 2:08-cv-185 (D. Idaho) (May 16, 2008). The Supreme Court's discussion in *Sackett* cited to the original order, JA 123-34.

penalties that could be imposed for violating the statute alone. 132 S. Ct. at 1370, 1372 & n.2.

Sackett held that, on these facts, the compliance order constituted final agency action, explaining that the compliance order determined rights and obligations because, "[b]y reason of the order, the [plaintiffs] have the legal obligation to 'restore' their property according to an agency-approved Restoration Work Plan, and must give the EPA access to their property and to 'records and documentation related to the conditions at the Site." 132 S. Ct. at 1371. *Sackett* further concluded that "legal consequences . . . flow[ed]" from the EPA compliance order for finality purposes because, on the EPA's understanding of the statutory civil penalty provision, "the order expose[d] the [plaintiffs] to double penalties in a future enforcement proceeding." *Id.* at 1371-72 (first alteration in original) (internal quotation marks omitted).[4]

2. The district court correctly held that *Sackett* differs from this case in two "important respects." JA 143; *see also* JA 142-45.

[4] Plaintiffs mistakenly urge that "[t]he specter of future penalties arising out of the agency's . . . action weighed heavily on the Court's analysis" of finality, relying on *Sackett*'s observation that although judicial review "'ordinarily comes by way of a civil action brought by the EPA,'" the plaintiffs there could accrue substantial civil penalties each day that the government waited to "'drop the hammer.'" Pls. Br. 17 n.6 (quoting *Sackett*, 132 S. Ct. at 1372). *Sackett* made that observation in the context of addressing the distinct question whether the plaintiffs had "'no other adequate remedy in a court.'" *Sackett*, 132 S. Ct. at 1372 (quoting 5 U.S.C. § 704).

First, as the district court explained, "unlike the EPA's compliance order in *Sackett*, which ordered the landowners to restore their property, the [Department of Labor's] letters here do not affirmatively compel Rhea Lana to do anything." JA 143. Taking issue with district court's observation, plaintiffs declare that the agency's letter to Rhea Lana "*effectively* required Rhea Lana to pay its consignors-volunteers as if they were employees covered by . . . the FLSA," Pls. Br. 17 (emphasis added). The crucial point, however, is that the letter did *not* require Rhea Lana to comply with the agency's view of the law. *Sackett* relied on the EPA compliance order's *express* directives, 132 S. Ct. at 1371, and this Court has repeatedly held that an agency's expression of its understanding of the law does not amount to an implicit directive to comply that is sufficient to render agency action final. *See supra* pp. 12-15. Moreover, *Sackett* emphasized that the compliance order there determined rights or obligations because, "[*b*]*y reason of the order*, [the plaintiffs] have the legal obligation to 'restore' their property according to an agency-approved Restoration Work Plan" designed specifically for the plaintiffs and "must give the EPA access to their property" and certain documents. 132 S. Ct. at 1371 (emphasis added); *see also* JA 127-29 (*Sackett* compliance order) (specifying timelines within which the plaintiffs were required to act); JA 131-34 (EPA Restoration Work Plan applicable to the *Sackett* plaintiffs). By contrast, no obligations are imposed "by reason of" the agency's letter to Rhea Lana here, which merely referenced the agency's understanding of obligations the *FLSA* imposes on Rhea Lana. JA 23.

Second, the district court correctly concluded that "the order in *Sackett* carried its own legal consequence by subjecting the landowners to double penalties in any enforcement action," whereas no such legal consequence flows from the agency's letter to Rhea Lana here. JA 143-44. As explained above, *Sackett* assumed *arguendo* that the statute at issue provided for civil penalties for a violation of the EPA compliance order itself that went above and beyond the civil penalties that could be imposed based on a violation of the statute alone. *See* 132 S. Ct. at 1370, 1372 & n.2. In this case, no analogous statutory provision authorizes civil penalties for "violations" of agency issuances like the letter to Rhea Lana. *Sackett* thus does not control for this reason alone.

Moreover, as the district court explained, the agency's letter to Rhea Lana concluding that consignors/volunteers are "employees" under the FLSA would "ha[ve] no independent legal effect" in a future proceeding concerning the imposition of civil penalties under 29 U.S.C. § 216(e)(2) for "repeated[]" or "willful[]" violations of the minimum wage or overtime pay provisions of the FLSA, 29 U.S.C. §§ 206-207. JA 144 & n.4. Plaintiffs' argument to the contrary—that "a 'repeated' or 'willful' violator of the FLSA is simply a violator that has previously received notice that [the agency] considers it to have committed a violation," Pls. Br. 13—fundamentally misunderstands the governing statutory and regulatory provisions.

Plaintiffs cite (Pls. Br. 13-14) an agency regulation stating that a violation of § 206 or § 207 "shall be deemed to be 'repeated' . . . [w]here the employer has

previously violated [§ 206 or § 207], provided the employer has previously received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act." 29 C.F.R. § 578.3(b)(1). But under this regulation, "[t]he burden [is] on the [agency] . . . to establish both the violation at issue *and the previous violation*." 57 Fed. Reg. 49,128, 49,128 (Oct. 29, 1992) (emphasis added) (preamble to final rule promulgating regulation). Indeed, in adopting the regulation, the agency specifically declined to adopt language under which an agency notification of a prior statutory violation would conclusively establish the prior violation or shift the burden of proof on that issue to the employer. *Compare id.*, *with* 56 Fed. Reg. 25,168, 25,169-70 (June 3, 1991) (proposed rule).

Plaintiffs are thus quite wrong (Pls. Br. 12-14) that the agency's letter to Rhea Lana means that as a matter of law they would be "repeated" violators of the statute in the event of a future violation. To the contrary, in any hypothetical future enforcement proceeding, the agency would have the burden to establish not only the future violation at issue but also a prior violation. At the very most, an agency notice of a prior statutory violation would "constitute just one piece of the evidence" that may be introduced to establish those two key elements—*i.e.*, the future violation and the prior violation. *National Ass'n of Home Builders*, 415 F.3d at 15. "At the time of any

enforcement proceeding," an employer "can challenge the soundness" of the agency's conclusion in the notice. *Id.*[5]

Plaintiffs' argument (Pls. Br. 12-14, 19-22) that the agency's letter to Rhea Lana has legal consequences because it assertedly renders any future violations of the statute "willful" as a matter of law fares no better. In any future enforcement proceeding seeking to impose civil penalties on Rhea Lana for "willful" violations of the statute, the agency would bear the burden of establishing both a violation of the statute and the willful nature of the violation. *See* 29 U.S.C. § 216(e)(2). The Supreme Court has held that a violation of the FLSA is "willful" only if the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 135

[5] The proviso in 29 C.F.R. § 578.3(b)(1) requires the agency to establish as a separate element that the employer received appropriate notice from the agency of some prior violation of the minimum wage or overtime pay provisions of the statute. Receipt of such notice does not of itself, however, establish that an entity is a "repeated" violator of the statute because the two elements discussed above must also be established. Moreover, the agency action challenged here (*i.e.*, the agency's determinations about Rhea Lana's consignors/volunteers) would have no effect on whether the agency could establish the regulation's notice element in a future civil penalty proceeding because that element would be independently established by a distinct notice—the agency's notification to Rhea Lana in the same letter that it violated the minimum wage and/or overtime pay provisions with respect to a *different* group of 39 employees classified as managers, JA 23. Rhea Lana agreed to comply with the statute with respect to those employees and pay them back wages, JA 23, and plaintiffs have not challenged the agency's conclusion regarding those employees in this litigation.

(1988).[6] The agency's regulations repeat that standard, further explaining that "[*a*]*ll of the facts and circumstances* surrounding the violation shall be taken into account in determining whether a violation was willful." 29 C.F.R. § 578.3(c)(1) (emphasis added). Under these principles, as the district court explained, an agency's notification to an employer that it has violated the FLSA "might be used as evidence of willfulness," but it would "not establish [willfulness] by operation of law." JA 144 n.4; *see also National Ass'n of Home Builders*, 415 F.3d at 15.

Plaintiffs emphasize (Pls. Br. 13) that the agency's regulation addressing willfulness states that "an employer's conduct shall be deemed knowing" and thus willful "if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful." 29 C.F.R. § 578.3(c)(2). But receipt of such advice (including a letter such as the one issued to Rhea Lana here) would not necessarily be dispositive of willfulness in a future civil penalty proceeding. Instead, an employer would have the opportunity during such a proceeding to contest the assertion that the violation was willful notwithstanding its receipt of such advice by, *e.g.*, contending that it had a good-faith and nonreckless disagreement with the agency's view based on evidence such as advice from counsel. Indeed, a contrary understanding—that receipt of advice letters is necessarily

[6] Although *McLaughlin* interpreted the term "willful" in the FLSA's statute-of-limitations provision, 29 U.S.C. § 255(a), the same standard applies in the civil penalty context. *See, e.g.*, *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 679 n.14 (1st Cir. 1998).

dispositive as to willfulness—is inconsistent with *McLaughlin* and related Supreme Court authority. *See, e.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616 (1993) (willfulness not established "[i]f an employer incorrectly but in good faith and nonrecklessly" believes its actions are permissible).[7]

The agency's understanding of the willfulness inquiry is well supported by case law holding that an employer's receipt of a notice from the Department of Labor of a FLSA violation does not automatically establish willfulness when an employer persuades the factfinder based on other evidence that the employer did not know that its conduct was unlawful and did not act in reckless disregard of its legal obligations. *See, e.g.*, *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 680-81 (1st Cir. 1998) (holding that there may be "room for legitimate disagreement between a party and the Wage and Hour Division" and that the *McLaughlin* standard of "knowledge" and "reckless disregard" governs);*Taylor-Callahan-Coleman*, 948 F.2d at 959; *see also* JA 144 n.4.[8]

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[7] *See also, e.g.*, *McLaughlin*, 486 U.S. at 135 & n.13 (employer's conduct is not willful if the employer acts reasonably or acts "unreasonably, but not recklessly"); *cf. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 n.20 (2007) (willfulness not established under the Fair Credit Reporting Act, 15 U.S.C. § 1681n(a), where company adopts reasonable interpretation of statute, even if it acts in bad faith); *id.* (leaving open the possibility that "good-faith reliance on legal advice" renders conduct nonwillful).

[8] Contrary to plaintiffs' suggestion (Pls. Br. 21 n.8) the Eleventh Circuit's decision in *Davila v. Menendez* had no occasion to address whether receipt of notice from the agency is necessarily dispositive as to willfulness because the evidence in that case did not include any such notice. 717 F.3d 1179, 1184-85 (11th Cir. 2013). Moreover, to the extent that the Seventh Circuit held that receipt of a letter like the

Continued on next page.

Indeed, court decisions—including the decisions upon which plaintiffs rely (Pls. Br. 21 n.8)—have found willfulness only after considering *all* of the relevant evidence, not just agency advice letters. *See, e.g.*, *Herman v. Palo Grp. Foster Home, Inc.*, 183 F.3d 468, 474 (6th Cir. 1999) (holding an employer's conduct was willful where he "had been investigated for violations twice in the past, *paid unpaid overtime wages*, received explanations of what was required to comply with the Act, and *assured the* [*agency*] *that he would comply in the future*" (emphasis added)); *Reich v. Bay, Inc.*, 23 F.3d 110, 117 (5th Cir. 1994) (concluding that an employer acted recklessly and thus willfully when the employer was notified by the agency that its overtime practices violated the FLSA and the employer "[*c*]*ontinue*[*d*] *the payment practices without further investigation*" (emphasis added)); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1062 (2d Cir. 1988).[9] Similarly, one of the decisions upon which plaintiffs rely (Pls. Br. 21 n.8) *declined* to grant summary judgment against an employer on a particular willfulness claim even

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one Rhea Lana received here is necessarily dispositive of whether an employer's violation of the FLSA is willful, *see Western Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 663 (7th Cir. 1998), that holding is contradicted by *McLaughlin* and the Supreme Court authority discussed above.

[9] *See also, e.g.*, *Mata v. Caring For You Home Health, Inc.*, No. 7:13-CV-287, 2015 WL 1408924, at *9 (S.D. Tex. Mar. 27, 2015) (employers acted recklessly and thus willfully when the agency informed them their pay scheme violated the FLSA and the employers implemented certain labeling changes but "*did not seek guidance from the Department of Labor*," "*an attorney*," or "*any third party*" (emphasis added)); *Abadeer v. Tyson Foods, Inc.*, 975 F. Supp. 2d 890, 909-13 (M.D. Tenn. 2013) (holding willfulness was established with respect to a particular claim after considering voluminous evidence, including court orders and "agreements" by the employer "to pay unpaid . . . wages and to assure future compliance," *id.* at 911).

though the record evidence included opinion and advice letters from the agency, explaining that "a reasonable jury could . . . conclude that the employees' proof does not meet the bar to show willfulness." *Abadeer v. Tyson Foods, Inc.*, 975 F. Supp. 2d 890, 913 (M.D. Tenn. 2013).

Plaintiffs are thus quite wrong in stating that it is the Department of Labor's "legal position . . . that as a matter of law Rhea Lana *will* be treated as a willful violator in any future enforcement action," and plaintiffs err in stating that 29 C.F.R. § 578.3(c) and the agency's letter to Rhea Lana embrace that position. Pls. Br. 22. To the contrary, Subsection (c)(1) of the regulation emphasizes that "[a]ll of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful," and Subsection (c)(2) simply reflects the commonsense principle that, in the absence of persuasive and relevant evidence presented by an employer, notice from the agency of a FLSA violation may be used to establish willfulness. 29 C.F.R. § 578.3(c)(1), (2). Similarly, the agency's letter to Rhea Lana merely informed Rhea Lana of the FLSA's civil penalty provisions for repeated and willful violations of § 206 or § 207 and indicated that if Rhea Lana is found in the future "to have violated the monetary provisions of the FLSA, it will be subject to such penalties." JA 23.

The district court thus properly concluded that the receipt of an agency notification like the one Rhea Lana received here is but one piece of evidence that may be used in a hypothetical future enforcement proceeding seeking to impose civil

penalties on an employer for "willful" violations of the statute and is not necessarily dispositive of the willfulness question. JA 144 n.4. Such notifications do not establish willfulness as a matter of law and do not have legal consequences for purposes of APA finality analysis.[10] *See National Ass'n of Home Builders*, 415 F.3d at 15.

3. Plaintiffs' final argument (Pls. Br. 14-16) relies on the Seventh Circuit's decision in *Western Illinois Home Health Care, Inc. v. Herman*, 150 F.3d 659 (7th Cir. 1998), which held that, "[a]lthough it is a close call," a Department of Labor letter characterizing two employers as a joint employer was final agency action, *id.* at 660, 663-64. But the court in that case emphasized that "[t]here [wa]s nothing hypothetical or tentative about th[e] letter" because the agency "threatened a follow-up investigation to confirm that [the employers]" were complying with the agency's understanding of the law, *id.* at 663. No such follow-up investigation was threatened with respect to Rhea Lana. It appears, moreover, that the Seventh Circuit's decision was based on a misunderstanding of how the agency's letter would affect the employers' status as "repeated" or "willful" violators of the FLSA in any future civil penalty proceedings; the court apparently concluded that the employers necessarily

[10] Plaintiffs suggest that the agency's letter to Rhea Lana has legal consequences beyond the context of civil penalty proceedings because a "defendant's status as a 'willful' violator" also "removes the court's discretion to not assess liquidated damages[] and extends the statute of limitations from two to three years." Pls. Br. 14 n.5 (citing 29 U.S.C. §§ 255(a), 260). That argument fails for the same reason that plaintiffs' argument concerning the civil penalty context fails: the agency's letter has no legal consequences with respect to willfulness determinations under the statute for purposes of APA finality analysis.

"*would be treated either as recidivists or as willful violators* if they failed in the future to comply with the legal ruling." *Id.* (emphasis added). As explained above on pages 20-27, that understanding of the statutory and regulatory scheme is incorrect.

In addition, to the extent that the Seventh Circuit concluded that the letters there were final based on the agency's mere statement of its understanding of how the FLSA applied to the employers there, that holding is inconsistent with this Court's precedents discussed *supra* on pages 12-15. The Seventh Circuit's holding is likewise in tension with the Fifth Circuit's decision in *Taylor-Callahan-Coleman*, which held nonfinal a post-investigation letter from the Department of Labor to an employer that (1) acquiesced in the employer's agreement to comply with the FLSA going forward with respect to the employees at issue; and (2) indicated that the agency would notify those employees of their right to file a private right of action. *See* 948 F.2d at 955-56; *see also id.* at 959.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JULY 2015

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 7343 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1). I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 2010 in a proportionally spaced typeface, 14-point Garamond font.

s/ Sydney Foster
Sydney Foster

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. On or before July 6, 2015, I will cause eight paper copies to be delivered to the Court via hand delivery. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Sydney Foster
Sydney Foster

ADDENDUM

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5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

29 U.S.C. § 211. Collection of data

(a) Investigations and inspections

The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

(b) State and local agencies and employees

With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Records

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

(d) Homework regulations

The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect.

29 U.S.C. § 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

> (1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Secretary issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Secretary issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a)(1) of this section proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

29 U.S.C. § 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in

an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. 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. 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. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such

employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C.A. § 251 et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e)(1)(A) Any person who violates the provisions of sections 212 or 213(c) of this title, relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed—

> (i) $11,000 for each employee who was the subject of such a violation; or
>
> (ii) $50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term "serious injury" means—

> (i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) 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

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 206 or 207, relating to wages, shall be subject to a civil penalty not to exceed $1,100 for each such violation.

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be—

(A) deducted from any sums owing by the United States to the person charged;

(B) 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; or

(C) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.

29 U.S.C. § 217. Injunction proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

29 C.F.R. § 578.3. What types of violations may result in a penalty being assessed?

(a) A penalty of up to $1,000 per violation may be assessed against any person who repeatedly or willfully violates section 6 (minimum wage) or section 7 (overtime) of the Act; Provided, however, that for any violation occurring on or after January 7, 2002 the civil money penalty amount will increase to up to $1,100. The amount of the penalty will be determined by applying the criteria in § 578.4.

(b) Repeated violations. An employer's violation of section 6 or section 7 of the Act shall be deemed to be "repeated" for purposes of this section:

> (1) Where the employer has previously violated section 6 or 7 of the Act, provided the employer has previously received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act; or
>
> (2) Where a court or other tribunal has made a finding that an employer has previously violated section 6 or 7 of the Act, unless an appeal therefrom which has been timely filed is pending before a court or other tribunal with jurisdiction to hear the appeal, or unless the finding has been set aside or reversed by such appellate tribunal.

(c) Willful violations.

> (1) An employer's violation of section 6 or section 7 of the Act shall be deemed to be "willful" for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the

requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.

(2) For purposes of this section, an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful.

(3) For purposes of this section, an employer's conduct shall be deemed to be in reckless disregard of the requirements of the Act, among other situations, if the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry.

29 C.F.R. § 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.

29 C.F.R. § 580.6. Exception to determination of penalty and request for hearing.

(a) Any person desiring to take exception to the determination of penalty, or to seek judicial review, 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. No additional time shall be added where service of the determination of penalties or of the exception thereto is made by mail. If such a request for an administrative hearing is timely filed, the Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues a decision affirming the determination.

(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.

29 C.F.R. § 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 amendment 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.

29 C.F.R. § 580.13. Procedures for appeals to the Administrative Review Board.

(a) Any party desiring review of a decision of the Administrative Law Judge, including judicial review, must file a petition for review with the Department's Administrative Review Board (Board). To be effective, such petition must be received by the Board 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 such a petition for review is timely filed, the decision of the Administrative Law Judge shall be inoperative unless and until the Board dismisses the appeal or issues a decision affirming the decision of the Administrative Law Judge.

(b) All documents submitted to the Board shall be filed with the Administrative Review Board, Room S–4309, U.S. Department of Labor, Washington, DC 20210. An original and two copies of all documents must be filed.

(c) Documents are not deemed filed with the Board until actually received by the Board, 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) A copy of each document filed with the Board shall be served upon all other parties involved in the proceeding. Such service shall be by personal delivery or by mail. Service by mail is deemed effected at the time of mailing to the last known address of the party.