IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF EASTERN VIRGINIA
NORFOLK DIVISION

MARTIN J. WALSH, Secretary of Labor, U.S. Department of Labor, Plaintiff, v. HEAVENLY HANDS HOME HEALTHCARE, LLC d/b/a HEAVENLY HANDS HOME HEALTHCARE, and LAUREN WILSON, an individual Defendants.	Civil Action No. 2:22-cv-237

MEMORANDUM IN SUPPORT OF SECRETARY'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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I. INTRODUCTION

Plaintiff Martin J. Walsh, Secretary of Labor, United States Department of Labor (the "Secretary"), files this action to immediately restrain Heavenly Hands Home Healthcare, LLC d/b/a Heavenly Hands Home Healthcare, and Lauren Wilson (collectively, "Defendants"), from unlawful obstruction and retaliation against employees who engage in protected activity under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. (the "Act" or "FLSA").

After agreeing to pay $413,382.28 in back wage compensation owed to their employees, Defendants are now reneging on their Agreement with the Secretary by instructing their employees to make false statements to the United States Department of Labor (the "Department") regarding receipt of these back wages. Further, Defendants have obstructed the Secretary's investigation by providing fabricated payroll statements to the Department, soliciting employees to sign a government form with false statements about their pay, and forging employees' signatures on receipt of payment forms. In fact, on multiple occasions, Defendants have misinformed the Department, verbally and in writing, that they have successfully complied with their duty under the FLSA. These actions only scratch the surface of Defendants ongoing wage theft and obstructionist behavior.

The anti-retaliation provisions prohibit employers from engaging in conduct intended to chill participation in FLSA investigations. Employers may not use their authority to dissuade employees from complaining to the Department or from otherwise cooperating in the Department's investigation. But Defendants' unlawful and coercive tactics have caused irreparable harm to the Secretary's ability to investigate their compliance with Act. Moreover, employees have expressed fear regarding retaliation. Defendants' actions clearly violate sections 11(a) and 15(a)(3) of the Act, 29 U.S.C. §§ 211(a), 215(a)(3).

Accordingly, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Secretary moves the court for: (1) a temporary restraining order, to be in effect until a hearing is held concerning a preliminary injunction, restraining Defendants and their agents from violating sections 11(a) and 15(a)(3) of the FLSA by intimidating, retaliating, or otherwise hindering employees' participation in the Secretary's action or open communication with the Department, and (2) a preliminary injunction.

II. BACKGROUND

Heavenly Hands Home Healthcare, LLC d/b/a Heavenly Hands Home Healthcare ("Heavenly Hands" or "Company") is a Virginia home healthcare company that has been in operation since 2014. The Company is located at 4425 Portsmouth Blvd., Suite 210E, Chesapeake, VA 23321 and is privately owned by Lauren Wilson. Defendant Wilson controls, operates, and manages the Company's daily operations, such as hiring and firing workers, establishing compensation policies, and determining employees' pay rates. Since at least July 2021, Heavenly Hands has employed at least 30 personal care aides and certified nursing assistants (together, "employees"). The employees primarily work out of a patient's home and perform a variety of functions, including cooking, aiding patients with bathing and feeding, washing dishes, and making the bed.

A. The Secretary's Investigation of Defendants

The Department's Wage and Hour Division ("WHD") began investigating Defendants' payment practices on or about June 11, 2021. Defendants' payroll records and employee interviews revealed that Defendants did not pay non-exempt employees one and one-half times their regular rate of pay when they worked in excess of forty (40) hours per week but rather paid straight time for all hours worked. As a result, WHD determined that Defendants violated § 207

of the FLSA by failing to pay the overtime premium to at least 37 non-exempt current and former employees for all hours worked in excess of forty (40) hours per week between July 10, 2019 and July 7, 2021. *See* 29 U.S.C. § 207

Defendants also violated the provisions of §11(c) of the Act by failing to maintain adequate and accurate records of their employees' wages and hours. 29 U.S.C. § 211(c). Even though the employees worked overtime in both weeks of a pay period, Defendants only kept bi-weekly record of hours worked for its employees. Additionally, Defendants failed to keep hours worked for all employees prior to March 1, 2020. This failure to keep detailed time and pay records violated 29 CFR Part 516.

During a meeting with WHD, Defendants conceded that their employees did not fall under any exemptions to the FLSA. On February 15, 2022, Defendants executed a settlement agreement ("Settlement Agreement") which required them to pay $413,382.28 in unpaid wages and liquidated damages to the employees listed in Schedule A to the Settlement Agreement. *See* Settlement Agreement, Ex. 1; Redacted Schedule A, Ex. 2. Pursuant to the Settlement Agreement, Defendants were required to remit payments directly to their employees and submit proof of payment in full to the Department within thirty (30) days on WH-58 Forms.[1] *See* Back Wage Payment Instructions, Ex. 3. Defendants also stipulated that they would not "directly or indirectly, solicit or accept the return or refusal of any sums paid or due" and would not "discriminate against or discharge any employees for . . . asserting any rights guaranteed to such employee under the FLSA . . .." *See* Settlement Agreement, Ex. 1.

[1] The WH-58 Form requires an employee to confirm receipt of payment "in full." The Form also requires an employer to certify to the distribution of payment and attest that the employer did not retaliate or ask the employee to return any portion of the payment. The Form notes that false statements may be punishable by imprisonment. *See e.g.*, Two Redacted WH-58 Forms, Ex. 5.

B. Defendants' Retaliation Against Employees

Defendants have coerced and threatened employees to not cooperate with the Department in its investigation by (1) urging employees to make false statements about their pay on the WH-58 Forms, (2) forging employees' signatures on the WH-58 Forms, and (3) instructing employees to give false testimony to the Department.

On or about March 17, 2022, Defendants submitted 37 WH-58 Forms confirming full payment of back wages. *See* Rodriguez Decl. ¶ 15, Ex. 4. Each form was purportedly signed by an affected employee. *See, e.g.*, Two Redacted WH-58 Forms, Ex. 5. However, multiple employees later informed the Department that they did not sign such form or receive back wage. Indeed, Defendant Wilson never met with nor requested a meeting or conversation with any employee prior to March 17, 2022 (the day the Department received signed WH-58 Forms for *all* employees). *See* Rodriguez Decl. ¶¶ 21, 24, Ex. 4. Rather, some employees informed WHD that Defendant Wilson mentioned and/or presented the WH-58 Form, but that they had not received any money and had never signed the form. *See* Rodriguez Decl. ¶¶ 20, 21, 27, Ex. 4. For example, one employee stated that, on or about March 31, 2022, the employee spoke to Defendant Wilson on the phone while the office manager, Letisha Holland Mitzell, presented them the WH-58 Form in the Heavenly Hands office. *See* Rodriguez Decl. ¶ 25, Ex. 4. In an attempt to convince this employee to make false statements, Defendant Wilson stated that the WH-58 Form was simply a "formality" to "get in compliance" with the Department. *Id*. After reviewing the form, the employee decided not to sign the form and left the building. *Id*. ¶ 26. When Defendant Wilson and the employee spoke again, Defendant Wilson pleaded that she needed employees to sign the form so that the Department will "get out of her hair." *Id.* ¶ 27. The employee never turned in a signed form. *Id*. Nevertheless, Defendants provided WHD a

signed copy of the WH-58 Form with a signature reflecting payment of wages to this employee.

Consistent with the Settlement Agreement's terms, WHD requested proof of payment via cancelled checks for each employee to confirm payment. In response, Defendant Wilson stated that none of the employees cashed their checks. *See* Email from Lauren Wilson to Dianett Gunn (March 30, 2022), Ex. 6. Instead, Defendant Wilson provided payroll records reflecting payment to each affected employee. *See* Redacted Pay Stubs for Employees, Ex. 7 (reflecting a "bonus" payment to each employee). Consequently, WHD contacted the employees and sent a separate WH-59 Form to: (1) inform the employees of the Secretary's investigation; (2) educate employees on anti-kickback and anti-retaliation laws under FLSA; and (3) inquire about the payment of back wages and the liquidation damages. To date, WHD has received 11 signed WH-59 Forms from employees confirming that that they did not receive any wages from Defendants. *See, e.g.*, Redacted WH-59 Forms for Three Employees, Ex. 8. On April 15, 2022, Defendant Wilson sent the Department one cancelled check, but the Department has not been able to contact this employee to confirm receipt of payment. *See* Rodriguez Decl. ¶ 31, Ex. 4.

Defendants also manipulated employees and scripted their conversations with the Department in an effort to conceal their non-compliance with the Settlement Agreement. After another employee learned of the back wages owed and confronted Defendants, Defendant Wilson asked the employee to lie to the Secretary's representative about being paid. *See* Rodriguez Decl. ¶ 23, Ex. 4. Defendant Wilson also attempted to dissuade the employee in speaking with the Department by threatening to go out of business if she was forced to pay wages owed. *Id*. Defendant Wilson then stated that the employee would have to find another job. *Id*. Defendant Wilson also stated that employees would have to drag her to court to see any

portion of their money. *Id*. Defendants' witness intimidation tactics, forging of documents, and coercion of employees are retaliation and must be stopped immediately.

III. ARGUMENT

A. Defendants' Egregious Acts of Ongoing Retaliation and Obstruction Require the Remedy of Preliminary Injunctive Relief.

The standard for entry of a temporary restraining order is virtually the same as the standard for a preliminary injunction. *See Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 32 (2008) quoting *Amoco Production Co. v. Gambell,* 480 U.S. 531, 546 at n. 12, (1987); *see also Singer Management Consultants, Inc. v. Milgram,* 650 F.3d 223, 236 n.4 (3d Cir. 2011) (addressing temporary restraining orders and preliminary injunctions together, "as the two share nearly identical factors which courts evaluate in granting such interim relief"). To satisfy the grounds for a temporary restraining order, a moving party must demonstrate: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that the balance of equities tips in its favor; and (4) that the public interest favors such relief. *Winter*, 555 U.S. at 20; *see also Munaf v. Geren,* 553 U.S. 674, 689 – 690, (2008); *Amoco Production Co.,* 480 U.S. at 542; *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 311–312, (1982).

Importantly, when a federal statute expressly provides for injunctive relief, no showing of irreparable harm is required. *See Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 362 (4th Cir. 1991); *See e.g. United States v. Odessa Union Warehouse Co-op.,* 833 F.2d 172, 174–75 (9th Cir.1987) (finding no showing of irreparable injury necessary where the injunction was authorized by 21 U.S.C. § 332(a) and statutory conditions had been satisfied); *In re National Credit Management Group, LLC, et al.,* 21 F.Supp.2d 424, 439 (3d Cir. 1998) (*citing United States v. Focht,* 882 F.2d 55, 57 (3d Cir. 1989) (granting preliminary injunction for violations of federal statutes and New Jersey Consumer Fraud Act)); *Marxe v. Jackson,* 833 F.2d 1121, 1128

n. 3 (3d Cir. 1987) (irreparable injury need not be shown when federal statute expressly provides for injunctive relief); *United States Postal Service v. Beamish*, 466 F.2d 804, 806 (3d Cir. 1972) (no irreparable harm showing where statute allowed for it); *ReMed Recovery Care v. Township of Willistown*, 36 F. Supp. 2d 676 , 688 (E.D. Pa. 1991). Indeed, where "Congress has seen fit to act in a given area by enacting a statute, irreparable injury must be presumed in a statutory enforcement action." *See Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) ("where a defendant has violated a civil rights statute," irreparable injury [may be presumed] from the fact of the defendant's violation"); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 833 (10th Cir. 1993); *Rogers v. Windmill Pointe Village Club Ass'n*, 967 F.2d 525, 528 (11th Cir. 1992) (quoting *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984)) (the showing of irreparable injury to support an injunction "may be presumed from the fact of discrimination"); *United States v. Hayes Int'l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969)(same); *Pathways Psychosocial Support Ctr., Inc. v. Town of Leonardtown*, 223 F. Supp. 2d 699, 717 (D. Md. 2002) (presuming irreparable harm from violation of civil rights statute); *Doe v. Wood Cnty. Bd. of Educ.*, 888 F. Supp. 2d 771, 773 (S.D. W.Va. 2012) (granting preliminary injunction and holding that "a violation of Title IX may constitute irreparable harm") (*citing McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 301-02 n. 25 (2d Cir. 2004)).

Here, Section 17 of the FLSA, 29 U.S.C. § 217, explicitly provides for injunctive relief to restrain violations of FLSA Section 15, including, among other things, retaliating against employees who cooperate in an investigation. *See* 29 U.S.C. §§ 215(a)(3) (anti-retaliation provision); 217 (discussing injunctions). Therefore, the Secretary need not show that there is a possibility of irreparable harm before this Court may issue an injunction. Instead, the Secretary

need only show that Defendants are engaged in, or are about to be engaged in, acts or practices prohibited by the FLSA. *See Atchison, T. and S. F. Ry. Co. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1981) ("When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown."). As discussed below, to highlight the gravity of Defendants' conduct, the Secretary has taken the additional step of showing that the requested injunction is necessary to prevent irreparable harm. Here, the Secretary plainly meets all of the requirements for issuance of a temporary restraining order and preliminary injunction.

B. The Secretary is Likely to Succeed on the Merits of His Claims.

1. The Secretary is likely to succeed on his claim that defendants have violated Sections 7 and 15(a)(2) of the FLSA by failing to pay overtime.

Defendants willfully violated the overtime requirements of the Act since at least July 10, 2019. The FLSA requires that covered employers pay employees a minimum wage as well as one and one-half the regular rate for any hours worked in excess of forty (40) in a workweek. 29 U.S.C. §207(a)

Since at least July 10, 2019 through at least July 7, 2021, Defendants failed to compensate non-exempt employees who worked over forty (40) hours in a workweek one and one-half times their regular rate. Defendants paid those employees straight time for all hours worked over forty (40) in a workweek. Defendants' practice of paying employees straight time for all hours worked over forty (40) in a workweek violates Sections 7 and 15(a)(2) of the Act. Further, Defendants were aware of their obligation to pay overtime. In fact, recently obtained evidence shows that Defendants required their employees to sign a form waiving their entitlement to the overtime premium of one-half time their regular rate for hours worked in

excess of forty (40) hours in a workweek. *See* Rodriguez Decl. ¶ 28, Ex. 4; Redacted Overtime Waiver, Ex. 9.

Defendants conceded to liability in the Settlement Agreement. Therefore, there is no dispute that Defendants owe their employees at least $206,691.14 in back wages between July 10, 2019 through at least July 7, 2021. As such, Plaintiff is likely to succeed on the merits of claim that Defendants violated Section 7.

2. *The Secretary is likely to succeed on his claim that defendants have violated Sections 11(c) and 15(a)(5) of the FLSA by failing to maintain and preserve adequate and accurate employee's wage and hours records.*

During the investigation period, from July 10, 2019 to July 7, 2021, the evidence clearly establishes that: (1) Defendants did not have weekly payroll or time records for all employees; (2) Defendants failed to preserve payroll records for employees prior to March 1, 2020; and (3) that this failure to keep proper records violated the Act. *See* Rodriguez Decl. ¶¶ 7, 8, Ex. 4.

The FLSA requires that covered employers maintain adequate and accurate records of their employees' wages and hours. 29 U.S.C. § 211(c). At the beginning of their FLSA investigation, WHD found that Defendants only kept bi-weekly record of hours worked for its employees. *See* Rodriguez Decl. ¶ 7, Ex. 4. However, employee interviews confirmed that employees worked overtime in both weeks of a pay period. Furthermore, citing a change in payroll company services, Defendants stated that they did not have records for all employees prior to March 1, 2020. *See* Rodriguez Decl. ¶ 8, Ex. 4. These deficiencies required WHD to compute back wages for affected employees based on historical records and employee interviews.

Defendants have made no effort to make, keep, and preserve proper records. Instead, Wilson submitted fabricated payroll records to the Department to show compliance with the

Settlement Agreement and the FLSA. Accordingly, Defendants continue to engage in a deliberate, and intentional violation of Sections 11(c) and 15(a)(5) provision of the Act, and TRO or preliminary injunction must be granted to end these violations.

*3. The Secretary is likely to succeed on his claim that defendants have violated Section 11(a) of the FLSA by obstructing the Se*cretary's investigation.

The Secretary is likely to prevail in proving that Defendants violated Section 11(a) of the FLSA by obstructing the Secretary's investigation. The FLSA grants the Secretary broad authority to investigate employers subject to its terms and to gather information from employees and others. Specifically, the FLSA provides:

> The Secretary of Labor 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 Act, 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 Act or which may aid in the enforcement of the provisions of this Act.

29 U.S.C. § 211(a). The Act grants these powers to question and interview employees because the FLSA "relies for enforcement of these standards, not upon 'continuing detailed federal supervision or inspection of payrolls,' but upon 'information and complaints received from employees seeking to vindicate rights claimed to have been denied.'" *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (quoting *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)). Thus, employee cooperation is necessary to allow the government to determine compliance with the FLSA and ensure a fair playing field of competition. Notably, section 11(a) also directs the Secretary to seek injunctive relief to stop any employer who impedes the Secretary's investigation. *See* 29 U.S.C. § 211(a) ("The Secretary shall bring all actions under section 17 to restrain violations of this chapter."); *Walsh v. Med.*

Staffing of Am., LLC, No. 2:18-CV-226, 2022 WL 141528, at *14 (E.D. Va. Jan. 14, 2022) (finding that injunctive relief was appropriate where defendants failed to "make, keep, and preserve" employee records); *Perez v. Zampini Constr. Corp.*, No. 16-cv-5023 (E.D.N.Y. Sept. 9, 2016) (restraining defendants from instructing employees to provide false information to the Secretary); *Perez v. BabyVision Inc.*, No. 14-CV-7821 KMK, 2014 WL 5280392, at *2 (S.D.N.Y. Sept. 30, 2014) (enjoining defendants from violation section 11(a) or obstructing the Secretary's investigation "in any way," including "instructing any individual not to speak to representatives of the Secretary"); *Perez v. Abbas*, No. 5:13-CV-04208-EJD, 2015 WL 2250436, at *10 (N.D. Cal. May 13, 2015) (same).

Here, defendants violated the Act and obstructed the Secretary's investigation by, *inter alia*: (1) instructing employees to give false testimony to the Department; (2) producing falsified payroll records and WH-58 Forms to the Department; and (3) urging employees to incorrectly state on the WH-58 Form that they received the back wages and liquidated damages. *See* Rodriguez Decl. ¶¶ 20, 23, 25, Ex. 4; Two Redacted WH-58 Forms, Ex. 5; Redacted Pay Stubs for Employees, Ex. 7. Defendant approached at least one employee to falsely claim on the WH-58 Form that they received back wages. *See* Rodriguez Decl. ¶ 25, Ex. 4. Defendants also attempted to manipulate at least one employee to lie to the Department about receiving back wages. *Id.* ¶ 23. When Defendants tactics proved unsuccessful, Defendants resorted to simply submitting forged WH-58 Forms and fabricating payroll records. *See* Two Redacted WH-58 Forms, Ex. 5; Redacted Pay Stubs for Employees, Ex. 7. Defendants' interference is clearly designed to frustrate the government's effort to investigate and enforce violations of the FLSA. Accordingly, the Secretary is likely to succeed on his claim that Defendants are violating section 11(a).

4. The Secretary is likely to succeed on his claim that defendants have violated Section 15(a)(3) by retaliating against its employees.

The Secretary is likely to prevail in proving that Defendants violated Section 15(a)(3) of the FLSA when they interfered with the employees' ability to communicate freely with the Secretary. The FLSA anti-retaliation provision authored by Congress states that

> [I]t shall be unlawful for any person . . .(3) to discharge or *any other manner discriminate* against any employee because such employee has filed any complaint or instituted or cause to be 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.

29 U.S.C. § 215(a)(3) (emphasis added); *see also Robert De Mario Jewelry, Inc.*, 361 U.S. at 292 ("Plainly, effective enforcement [of the FLSA] could . . . only be expected if employees felt free to approach officials with their grievances."). Indeed, enforcement of the FLSA's protections cannot be accomplished without cooperation and information from employees. *See Saint-Gobain Performance Plastics Corp.*, 563 U.S. at 11-12.

The anti-retaliation provision is to be interpreted broadly. "Unchecked retaliation, no matter what form, subverts the purpose of the FLSA." *Mullins v. City of New York*, 626 F.3d 47, 55 (2d Cir. 2010). To establish a prima facie case of retaliation under the FLSA, the Secretary need only show that an individual or group of individuals (1) engaged in activity protected by the FLSA; (2) suffered adverse employment action by the employer; and (3) a causal connection existed between the activity and the employer's adverse action. *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997) (analyzing an FLSA retaliation claim by adopting the Title VII burden shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); *see also Shakib v. Back Bay Res. Grp., Inc.*, 2011 WL 4594654 (D.N.J. Sept 30, 2011) (complaint to management constitutes protected activity). The *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) standard for determining what conduct is prohibited -- conduct that

could reasonably dissuade employees from coming forward or cooperating -- has been adopted by Courts interpreting the FLSA's retaliation provision. *Mullins,* 626 F.3d at 53; *Darveau v. Detecon, Inc.*, 515 F.3d 334, 342 (4th Cir. 2008) (noting "almost uniform practice of courts in considering the authoritative body of Title VII case law when interpreting the comparable provisions of other federal statutes"); *Noack v. YMCA of Greater Houston Area*, 418 F. App'x 347 (5th Cir. 2011).

a. Speaking Truthfully and Cooperating with the Secretary's Investigation is a Protected Activity.

Defendants' employees are entitled to protection under the FLSA for engaging in a protected activity. An employee who "has testified or is about to testify" in any proceeding under or related to the FLSA is expressly protected from retaliation because of that protected activity. *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 365 (4th Cir. 2000); 29 U.S.C. § 215(a)(3).[2] FLSA must not be "interpreted or applied in a narrow, grudging manner." *Minor v. Bostwick Lab'ys, Inc.*, 669 F.3d 428, 437 (4th Cir. 2012) (citing *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)).

The broad reading of the FLSA's anti-retaliation provision has been extended to actions that cannot be considered filing a complaint or instituting a proceeding, but instead involve employer's actions that undermine employees' rights under the FLSA. *See Robert De Mario,* 361 U.S. 288 (finding that refusal to forgo or return a back pay award provided as a result of a DOL investigation constituted a protected activity under Section 15(a)(3)); *Brock v. Casey*

[2] Within this context, the term "employee" covers both current and former employees, granting protection during and after their employment. *See Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008); *Boscarello v. Audio Video Sys., Inc.*, 784 F. Supp. 2d 577, 583 (E.D. Va. 2011) ("It would be nonsensical to hold that the FLSA prohibits employers from retaliating against former employees generally, but employers are free to retaliate against former employees with whom they maintain an independent contractor relationship.").

Truck Sales, 839 F.2d 872 (2d Cir. 1988) (holding refusal to return back pay awarded by DOL constituted protected activity); *Wirtz v. Ross Packaging Co.*, 367 F.2d 549 (5th Cir. 1966) (holding that refusal to sign receipt for retroactive wage payment, unless such payment was actually made, was a protected activity).

In this case, Defendants threatened adverse action or otherwise intimidated employees from cooperating with the Department's investigation. For example, Defendant Wilson urged at least one employee to lie to the Department about receiving unpaid wages and liquidated damages. *See* Rodriguez Decl. ¶ 23, Ex. 4; *see e.g. Robert De Mario*, 361 U.S. at 292 (finding that refusal to forgo or return a back pay award provided as a result of a DOL investigation constituted a protected activity under Section 15(a)(3)). Defendant Wilson further attempted to dissuade that employee from speaking with the Department with threats of going out of business or needing to engage in a lengthy legal battle if employees insisted on getting their back wages. *See* Rodriguez Decl. ¶ 23, Ex. 4.

Further, Defendants' knowing failure to pay their employees for overtime is a blatant attempt to prevent employees from later testifying in support of the Department's investigation or from filing their own claim for unpaid wages. Defendants' success in following through with getting employees to sign off on deceptive statements does not make the act of employees' participation in the Secretary's investigation any less protected or the Defendants' actions any less obstructive. *See, e.g.*, *Perez v. La Bella Vida ALF, Inc.*, No. 8:14-CV-2487-T-33TGW, 2015 WL 12765538, at *1 (M.D. Fla. June 30, 2015) (enjoining defendants from retaliating against employees, including offering employees payment in exchange for their signature of releases and false declarations). Accordingly, employees' participation and cooperating with the Secretary's investigation is clearly protected activity covered by the Act's

anti-retaliation provision.

b. Defendants Took Adverse Actions Against Employees by Soliciting Kickbacks, Encouraging Lies, and Chilling Participation

Defendants' efforts to coerce employees to kickback FLSA compensation is an adverse employment action that dissuades a reasonable worker from making or supporting a charge of discrimination" or other violation of the employee's statutory rights. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (decided in the context of Title VII). The category of conduct that might constitute "adverse action" is not limiting. Indeed, any conduct intended to chill employee participation in an investigation constitutes adverse action. *Casey Truck Sales, Inc.*, 839 F.2d at 879 ("Protection against discrimination for instituting FLSA proceedings would be worthless if an employee could be fired for declining to give up the benefits he is due under the Act."); *Burlington*, 548 U.S. 53 (holding that reassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job description); *Darveau*, 515 F.3d at 343 (reversing the district court judgment and holding that the employee need not show that the retaliatory conduct was "materially adverse . . .."); *Boscarello v. Audio Video Sys., Inc.*, 784 F. Supp. 2d 577, 582 (E.D. Va. 2011) (holding that an adverse action, rather than an adverse employment action, is sufficient to plead a retaliation claim) (decided in Title VII context).

Here, there can be no question that directing employees to fabricate information to the government to secure kick backs, especially by an owner, carries with it an implied threat that failure to fabricate may lead to negative consequences. *Cf. ABC Indus. Laundry, LLC*, 355 NLRB 88, 97 (2010) (finding that a supervisor's demand to an employee to provide her with a report about employees' protected concerted activities was "inherently coercive"). Moreover, Defendants' actions were designed to, and have in fact, dissuaded reasonable workers from

speaking with the Department and from enforcing their rights under the Act. WHD interviewed at least eleven employees, and none of them were willing to be named in this filing. *See* Rodriguez Decl. ¶ 30, Ex. 4. One employee told WHD that they worry about not being able to provide for themselves if the Company were to shut down, as Defendant Wilson threatened. *See Id*. ¶ 23. Such threats, especially to employees who work long hours alone in patient's homes without easy contact with coworkers, is precisely the type of intimidation that would discourage reasonable workers from asserting their rights. Since employee interviews are critical to the Secretary's information gathering, Defendants' threats work to thwart Secretary's investigation. Consequently, Defendants actions constitutes an adverse action under FLSA section 15(a)(3).

c. The Causal Connection Between Employees' Protected Activities and Defendants' Adverse Actions Is Clear

Defendants' efforts to have employees lie to the government and threaten potential cooperators with negative consequences underscores the causal connection between their protected activity and Defendants' retaliatory animus. A causal connection between the protected activity and the action disadvantaging the employee may be established by showing that (1) the employer either understood or should have understood the employee to be engaged in protected activity, and (2) the employer took adverse action against the employee soon after becoming aware of such activity. *Strothers v. City of Laurel, Maryland*, 895 F.3d 317, 335-36 (4th Cir. 2018); *see also Sempowich v. Tactile Sys. Tech., Inc.*, 19 F.4th 643, 654 (4th Cir. 2021) (Title VII case). Evidence of retaliatory animus, directed against the plaintiff, or "by showing that the protected activity was closely followed in time by the adverse action" is sufficient for establishing causation; *Burgess v. Bowen*, 466 F. App'x 272, 282 (4th Cir. 2012) ("[v]ery little evidence of a causal connection is required to establish a prima facie case of retaliation."); *see*

also Foster v. Univ. of Maryland-E. Shore, 787 F.3d 243 (4th Cir. 2015), 251; *Strothers*, 895 F.3d at 336; *Sempowich*, 19 F.4th at 654.

Here, there is no question that the adverse actions Defendants took were connected to protected activity. The employees who were targeted were singled out solely because they are named in the Secretary's Settlement Agreement. Defendants asked at least one employee to lie to the Department about receiving back wages. *See* Rodriguez Decl. ¶ 23, Ex. 4. The conduct, as well as the timing of the conduct, further underscores the causal connection. The Defendants clearly understood its employees to be engaged in asserting their rights under the FLSA. In addition, Defendant Wilson encouraged at least one employee to falsify the WH-58 Form. *See* Rodriguez Decl. ¶ 25, Ex. 4. Under these circumstances, there can be no dispute that Defendants' actions are causally connected to employees anticipated or perceived protected activity of engaging or participating in the Secretary's investigation. Given that the Secretary will be able to establish each element of an FLSA retaliation claim, the Secretary is likely to succeed on the merits of the claim.

C. Defendants' Employees and the Secretary Will Likely Suffer Irreparable Harm Unless Defendants are Restrained from Further Retaliation

1. Irreparable Harm to the Employees

Defendants' employees will be irreparably harmed if Defendants' retaliation goes unchecked because employees will be discouraged from enforcing their rights under the Act. Retaliatory conduct that tends to deter employees from asserting their rights can constitute irreparable harm for purposes of a preliminary injunction or temporary restraining order relief. *Holt v. Cont'l Grp., Inc.*, 708 F.2d 87, 91 (2d Cir. 1983) (decided in the context of Title VII); *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251, 263 (4th Cir. 2017) (false advertisement targeting an egg producer constituted irreparable harm); see also

Holt v. Continental Group, Inc., 708 F.2d 87, 90-91 (2d Cir. 1983) (discussing chilling effect in Title VII discrimination case) *cert. denied*, 465 U.S. 1038 (1984).

Defendants have engaged in intimidation tactics to dissuade employees from asserting their statutorily protected rights. At least one employee stated that they stopped inquiring about the back wages out of fear of retaliation, while another expressed feeling defeated and disinterested in returning to work. Defendant Wilson's instruction to employees to falsely state to the Department that they received overtime pay when they did not, puts employees at a further risk of harm. For example, if the employees succumb to the Defendants' intimidation tactics and claim they received back wages, there will be no violations of the FLSA and thus, no back wages due to employees. This is precisely the goal of defendants' retaliation and intimidation scheme.

2. Irreparable Harm to the Secretary

Without immediate injunctive relief, the Secretary's enforcement efforts will also be irreparably harmed. The Secretary depends on cooperation from employees in his investigations and federal court actions to enforce the FLSA. *See Robert De Mario*, 361 U.S. at 292. Defendants' conduct has caused irreparable harm to the Secretary because employees are reluctant to cooperate openly with the investigation. Current and former employees did not want to be named in this filing, and some were concerned that cooperating with the Secretary might affect the future of the Company and their job security. *See* Rodriguez Decl. ¶ 23, 30, Ex. 4. Accordingly, the irreparable harm here is ongoing and this Court must restrain Defendants from further compromising the ability of the Secretary to enforce the rights of all employees under the FLSA.

D. The Balance of Equities Tips in the Department's Favor.

The balance of equities tips in the Secretary's favor.[3] The FLSA is "remedial and humanitarian in purpose." *Tennessee Coal, Iron & R. Co.*, 321 U.S. at 597. The legislative history of the Act shows "an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706–707 (1945) (citing H. Rep. No. 2738, 75th Cong., 3d Sess., pp. 1, 13, 21 and 28); 29 U.S.C § 201.

Here, Defendants' intimidation of employee witnesses to provide false information to the Department poses a clear and direct threat to the Secretary's ability to enforce national labor policy. Moreover, Defendants have been successful in chilling employee participation. Employees have told the Department that they are fearful of asking Defendants about the back wages because of the risk of losing their jobs. Therefore, the Secretary has a powerful interest in ensuring that workers who complain about violations to their employers, as well as employees who turn to Department or the courts for a remedy, are protected. *See Robert De Mario*, 361 U.S. at 292.

E. Public Interest Would be Best Served by an Injunction.

The public would suffer the substantial, ongoing irreparable harms detailed above if no TRO or preliminary injunction issues. Defendants' conduct undermines the public interest by

[3] Since the Secretary has already shown that he is likely to succeed on the merits of his retaliation claim and that irreparable harm to both the Secretary and Defendants' employees is likely in the absence of immediate injunctive relief, he is not required to also demonstrate that the balance of hardships tips decidedly in his favor; a showing that the case raises grave or serious questions is sufficient. *James A. Merritt & Sons v. Marsh*, 791 F.2d 328, 330 (4th Cir. 1986). Nevertheless, the equities heavily favor the Secretary's and the public's interest in preliminary injunctive relief.

undercutting law-abiding competitors with their unfair and unlawful business practices. *See* 29 U.S.C. § 202(a); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36 (1987) (discussing Congress' intent to "eliminate the competitive advantage enjoyed by goods produced under substandard [labor] conditions"). The Defendants have no legitimate interest in continuing to intimidate or instruct employees who seek to assert their right to lawful compensation under the FLSA to provide false information.

Undoubtedly, Defendants' only interest here is self-serving: to prevent employees from asserting their right to be paid properly and to mislead the government in its investigation. Defendants will suffer no harm if they are immediately restrained from retaliating against employees, but as discussed above, the Secretary and the public have a strong interest in ensuring that workers are free to report possible violations of the FLSA. Therefore, injunctive relief restraining retaliation against employees is crucial for ensuring compliance with the rest of the Act and serving the public's interest in fair wages and fair competition. *Robert De Mario*, 361 U.S. at 292.

IV. CONCLUSION

For the foregoing reasons, the Secretary respectfully asks the Court to enter a temporary restraining order, prohibiting Defendants from any further obstruction of the Secretary's investigation and from any further retaliation against or intimidation of their employees in violation of the FLSA.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that, on June 1, 2022, I caused a copy of the Memorandum in Support of Secretary of Labor's Motion for a Temporary Restraining Order and Preliminary Injunction, with related exhibits, to be served via first class mail and email on Defendants at the following addresses:

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Pro hac vice application to be filed