

DEPARTMENT OF LABOR

DIVISION OF INDUSTRIAL AFFAIRS

OFFICE OF LABOR LAW ENFORCEMENT

Statutory Authority: 19 Delaware Code, Section 3512 (19 **Del.C.** §3512)

FINAL

1326 Workplace Fraud Act Regulations

ORDER

A public hearing was held on March 8, 2010 to receive public comments to proposed changes to the Workplace Fraud Act. The proposal regulations set forth the regulations necessary for implementation and enforcement of the Workplace Fraud Act. The Director of Industrial Affairs, the Administrator of the Office of Labor Law Enforcement and the Supervisor of the Prevailing Wage Section of the Office of Labor Law Enforcement (collectively the "Panel") present recommended that the Secretary of Labor adopt the proposed regulations as they were published in the *Register of Regulations*, Vol. 13, Issue 8 (February 1, 2010).

Summary of the Evidence and Information Submitted

Exhibits Admitted:

Exhibit 1 - News Journal Affidavit of publication of notice of public hearing.

Exhibit 2 - Delaware State News Affidavit of publication of notice of public hearing.

No one addressed the Panel and no written comments were received by the Panel.

Recommended Findings of Fact with Respect to the Evidence and Information

The Panel is persuaded that these changes are necessary for the implementation and enforcement of the Workplace Fraud Act.

Recommendation

The proposed changes are respectfully submitted to the Secretary of Labor for consideration with a recommendation for adoption this 8th day of March, 2010.

Panel

James G. Cagle, Jr.
Director, Industrial Affairs

Anthony J. DeLuca
Administrator, Office of Labor
Law Enforcement

Francis S. Chudzik
Supervisor, Office of Labor
Law Enforcement, Prevailing
Wage Division

Decision and Effective Date

Having reviewed and considered the record and recommendations of members of the Panel, the proposed regulations are hereby adopted and made effective 10 days following publication of the final regulation in the *Register of Regulations*.

Text and Citation

The text appears in the *Register of Regulations*, Vol. 13, Issue 8 (February 1, 2010).

John J. McMahon, Jr., Secretary of Labor

1326 Workplace Fraud Act Regulations

1.0 General Provisions

- 1.1 Purpose and scope.
 - 1.1.1 The regulations set forth in this part contain the procedures established by the Department of Labor for carrying out its responsibilities in the administration and enforcement of 19 **Delaware Code, Ch. 35.**
- 1.2 Address; office hours.
 - 1.2.1 Questions may be addressed to "Office of Labor Law Enforcement - Administrator" at 225 Corporate Boulevard, Suite 104, Newark, DE 19702. The office is open daily from 8:00 a.m. to 4:30 p.m. except Saturdays, Sundays, and Legal Holidays.
- 1.3 Definitions.
 - 1.3.1 The terms "**Construction services,**" "**Debarment,**" "**Department,**" "**Employee,**" "**Employer,**" "**Exempt person,**" "**Independent contractor,**" "**Knowingly,**" "**Public body,**" "**Secretary,**" "**Secretary of Labor,**" "**Stop work order,**" "**Violate,**" and "**attempts to violate,**" when used in this regulation, shall have the meanings set forth in 19 **Del.C. §3512.**
 - 1.3.2 The following words and terms, when used in this regulation, shall have the following meanings:
"**Administrator**" means the Office of Labor Law Enforcement Administrator or his designee.
"**Corporate officer**" or "**officer of a corporation**" means any person who fills an office provided for in the corporate charter or articles of incorporation. As to persons engaged in the construction industry, the term "officer of a corporation," includes a member owning at least 10 percent of a limited liability company.
"**Day**" means calendar day unless otherwise specified.
"**Party**" means any employee, employer or the Department of Labor.
- 1.4 Attorneys; form of appearance on behalf of parties.
 - 1.4.1 An attorney may appear on behalf of a party by providing written notice of appearance. To constitute an appearance, a form, letter, or document shall contain the names of the parties, the department's docket number if known, the name of the party that the attorney represents, and the attorney's address, telephone number, facsimile number, and e-mail address.
 - 1.4.2 If a party appears through an attorney, all papers shall be served on the attorney with the same force and effect as though served on the client.
 - 1.4.3 An attorney may withdraw his appearance by providing written notice of withdrawal to the department, certifying that a copy of the notice of withdrawal was mailed to all parties.
- 1.5 Parties' obligation to keep department informed of change of address or status.
 - 1.5.1 The parties shall promptly notify the department of any change in address, telephone number, contact information, or other material change in business status while the charge is pending.
- 1.6 Liberal construction of regulations.
 - 1.6.1 These regulations shall be liberally construed by the administrator to permit the department to discharge its statutory duties under 19 **Del.C. Ch. 35.**
- 1.7 Practice where regulations do not govern.
 - 1.7.1 In any circumstance that arises not governed by these regulations, the administrator shall exercise his discretion in order to permit the department to discharge its statutory duties under 19 **Del.C. Ch. 35.**
- 1.8 Validity of regulations if any portion declared invalid.

1.8.1 If any portion of these regulations is adjudged by a court of competent jurisdiction to be invalid, or if by legislative action any portion loses its force and effect, the ruling or action will not affect, impair or void the remainder of these regulations.

1.9 Amendment of regulations.

1.9.1 The administrator may rescind, amend or expand these regulations from time to time as necessary to comply with the purpose of the Workplace Fraud Act, 19 Del.C. Ch. 35, and such new regulations shall be submitted to the Registrar's office in accordance with the provisions of 29 Del.C. §10161(b).

2.0 Commencement of Actions

2.1 Manner of commencing actions.

2.1.1 An action may be commenced by the filing of a complaint with the department's Office of Labor Law Enforcement.

2.2 Who may file a complaint.

2.2.1 An employee or the department on its own may file a complaint alleging a violation of the Workplace Fraud Act.

2.3 Preparation and contents of a complaint.

2.3.1 A complaint shall be filed on a printed form approved by the administrator.

2.3.2 The department shall assist the employee in the completion of the complaint where necessary.

2.3.3 The complaint shall indicate that it is filed with the department, and shall set forth the following:

2.3.3.1 The employee's full name, address, and telephone number;

2.3.3.2 The employer's full name, address, and telephone number if known;

2.3.3.3 A brief statement of jurisdiction identifying the nature, date of, and location of the employment relationship;

2.3.3.4 The specific prohibited basis or bases that gave rise to the filing of the complaint;

2.3.3.5 A brief statement of the facts deemed to constitute the alleged violation;

2.4 Filing a complaint.

2.4.1 The filing of a complaint is perfected when received by an official of the Office of Labor Law Enforcement.

3.0 Investigation

3.1 Timing of investigations.

3.1.1 The department shall promptly initiate an investigation into alleged violations when:

3.1.1.1 The department received a complaint; or

3.1.1.2 The department, on its own motion, determines to initiate an investigation.

3.1.2 The department shall complete its investigation as promptly as possible.

3.2 Investigatory procedures.

3.2.1 All investigatory powers granted by 19 Del.C. §3504 shall be available to the department. In its discretion, the department may conduct investigations using, among other things, written requests for information, investigatory conferences, subpoenas, on-site visits, interviews, and depositions as provided by these regulations.

3.2.2 In connection with an investigation, the department may require the submission of information relating to:

3.2.2.1 The employer's books and records;

3.2.2.2 The employment records of employees;

3.2.2.3 The employer's accounts and payroll records;

3.2.2.4 The employer's procedures for hiring and selecting employees; and

3.2.2.5 Such other information as the department determines to be reasonably necessary to carry out the provisions of the Workplace Fraud Act.

3.3 Requests for Information.

3.3.1 The department may serve requests for information to assist the department in its investigation. Unless otherwise specified in a request for information, the response shall be due to the department within 15 days from the date of the request.

3.4 On-Site Visits.

3.4.1 The department may conduct on-site visits to assist in the investigatory process for the purpose of gathering evidence, interviewing witnesses, observing an employer's place of business or work site, and reviewing documents.

3.4.2 The department is not required to provide the employer with any notice prior to its on-site visit.

3.4.3 The employer shall grant access to its premises, documents, and employees during the department's on-site visit.

3.5 Subpoenas

3.5.1 The administrator may issue a subpoena as he deems necessary to assist the investigatory process. The administrator shall issue a subpoena in the name of the department, and the subpoena shall direct the person designated to personally appear and bring any books, records, documents and any other evidence that relates to any violation under investigation, or, in lieu of personal appearance, to produce any books, records, documents and any other evidence which relates to any violation under investigation.

3.5.2 A subpoena shall state the time and place where the person designated is directed to appear.

3.5.3 A subpoena shall be served either by personal service by any person 18 or more years of age by delivery of a copy thereof to the person named therein, by overnight delivery by commercial courier, or by registered or certified mail, return receipt requested.

3.6 Depositions.

3.6.1 The department may take depositions of witnesses under oath as part of any investigation when, in the discretion of the administrator, such depositions will aid the investigatory process.

3.7 Enforcement of subpoenas.

3.7.1 If any person fails to comply with a subpoena issued by the department, he shall be subject to the appropriate enforcement provisions of 19 Del.C. §3505.

3.8 Investigatory conferences.

3.8.1 Investigatory conferences, as part of the department's investigation, are subject to the following:

3.8.1.1 As part of its investigation and at the discretion of the administrator, the department may convene an investigatory conference for the purpose of obtaining evidence, identifying the issues in dispute, and ascertaining the positions of the parties. The investigatory conference is not an adjudication of the merits of the charge.

3.8.1.2 The department shall provide the parties with written notice of the investigatory conference at least 30 days prior to the conference. The notice shall specify the date, time and location of the conference and shall identify the individuals requested to attend, and any documents that a party is requested to provide at the conference.

3.8.2 The conference shall be conducted as follows:

3.8.2.1 A department employee shall conduct and control the proceedings.

3.8.2.2 With prior notice to the department, the parties may request to bring witnesses to the conference in addition to those whose attendance may be specifically requested by the department. The department employee has discretion over which witnesses shall be heard and the order in which they are heard. The department employee may exclude any witness or other person from the conference, except that one representative of each party and counsel shall be permitted to remain throughout.

3.8.2.3 The department may request that the parties provide affidavits from witnesses who intend to appear at the conference.

3.8.2.4 A party may be accompanied at the conference by his attorney, and by a translator, if necessary.

- 3.8.2.5 An attorney for a party who has not previously entered his appearance shall do so at the onset of the conference.
- 3.8.2.6 Because the investigatory conference is part of the department's investigation and not a hearing on the merits of a case, the parties shall not be entitled to cross-examine witnesses. All questioning shall be conducted by the department employee, unless in his discretion the department employee permits questions to be asked by other persons present at the conference.
- 3.8.3 Postponement of a conference.
 - 3.8.3.1 Except in extraordinary circumstances, requests for postponements must be made by notice to all parties at least 15 days prior to the conference.
 - 3.8.3.2 Any opposition to a request for postponement must specifically state the basis for the opposition and must be received by the department at least seven days prior to the conference.
 - 3.8.3.3 If a party or witness fails to appear at a scheduled conference, the department may proceed with the conference without the party or witness.
- 3.8.4 If a party refuses or fails to attend a scheduled conference, the department may in its discretion schedule an alternate conference date. The department may subpoena any party or witness who failed or refuses to attend a scheduled conference. The department may also subpoena any documents that either party was requested to bring to the conference, but failed to bring to the conference.

4.0 Administrative Dismissal

- 4.1 The administrator may in his discretion administratively dismiss a complaint for reasons including but not limited to the following:
 - 4.1.1 Lack of jurisdiction;
 - 4.1.2 The employee is unavailable or unwilling to participate in the investigation, or to attend a scheduled conference;
 - 4.1.3 Relief is precluded by the respondent's bankruptcy or other special circumstances as determined by the administrator;
 - 4.1.4 The complaint on its face fails to state a claim under the Workplace Fraud Act.
- 4.2 Prior to administratively dismissing a complaint, the administrator shall notify the employee of the reason for the proposed dismissal and shall offer the employee the opportunity to respond.
 - 4.2.1 The administrator shall make his final determination, considering all responses received within 15 days of the date of notice to the employee.

5.0 Final Determinations

- 5.1 Issuance of findings.
 - 5.1.1 Following the completion of an investigation, the administrator shall determine whether or not the employer violated or committed an unlawful employment practice in violation of, 19 **Del.C.** Ch. 35.
 - 5.1.2 If the administrator determines after completion of an investigation that the employer has violated one (1) or more of the provisions of 19 **Del.C.** Ch. 35, the administrator will issue a violation determination.
 - 5.1.3 If the administrator determines after completion of an investigation that no violation(s) of the provisions of 19 **Del.C.** Ch. 35, have occurred the administrator will issue a no violation determination.
 - 5.1.4 If the administrator determines after completion of an investigation that the employer has violated some but not all of the alleged violations, the administrator will issue a violation determination as to those violations which the department has determined has occurred, and a no violation determination as to those violations which the department determines no violation has occurred.
 - 5.1.5 The department's initial determination is final when issued.

5.1.6 The initial determination will be sent to the parties by certified mail, return receipt, and shall include notice to the employer of the opportunity to appeal in accordance with the Administrative Procedures Act, 29 Del.C. Ch. 101.

6.0 Enforceability of settlement agreements.

- 6.1 A settlement agreement reached during an investigation shall be set forth in writing and signed by the parties.
- 6.2 Allegations of breach of a settlement agreement shall be brought to the attention of the administrator. The administrator shall review and investigate the allegations of breach of a settlement agreement to determine whether a breach has occurred.
- 6.3 The administrator shall issue written findings to the parties with regard to the allegation of breach of a settlement agreement.
- 6.4 The administrator in his discretion will determine whether to forward allegations of breach of the settlement agreement to the Attorney General for review.

7.0 Access to Department's Investigatory Files

- 7.1 Confidentiality of department's investigatory files.
- 7.1.1 The department's investigatory records are confidential and exempt from public access under 29 Del.C. Ch. 100.
- 7.2 Discovery of department's investigatory files by non-parties.
- 7.2.1 Non-parties to an investigation shall not have access to the material in the department's investigatory file(s).
- 7.3 Copying Costs.
- 7.3.1 The department's fee for copying documents requested under this section shall be the same fee as is applicable to requests granted pursuant to 29 Del.C. Ch. 100. The administrator may waive or modify this fee in the case of an indigent party or in other extraordinary situations for good cause.

8.0 Retention of Investigatory Files

- 8.1 The department shall retain investigatory files for three years after the end of the administrative process.

13 DE Reg. 1342 (04/01/10)