

Defending Against Aggressive DOL Child Labor Enforcement

By **Bradford Kelley, Michael Paglialonga and Lee Schreter** (July 23, 2024)

On July 2, the U.S. District Court for the Northern District of Alabama issued its decision in *Julie Su v. Mar-Jac Poultry of Alabama LLC*, denying the U.S. Department of Labor a preliminary injunction over child labor allegations at a poultry facility in Alabama.[1]

The court concluded that the DOL failed to show that the company knew it was employing underage workers in violation of the Fair Labor Standards Act.

The DOL's Wage and Hour Division investigators executed a civil search warrant during a late-night shift and discovered four minors alleged to be under the age of 18 working at the poultry plant, along with one individual alleged to have turned 18 years old seven days prior to the search.

Later, while conducting interviews at a local high school, WHD investigators claimed to have discovered an additional minor who worked at the plant. The DOL then sought an injunction under the FLSA for hot goods to prohibit the company from shipping chicken produced in the 30 days prior to the alleged child labor violation.

The FLSA contains a hot goods provision specifically for child labor, which provides:

No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed.[2]

The DOL also sought an injunction requiring the company to disgorge all profits related to the shipment of or delivery for shipment of the hot goods and provide records of such profits.

The court rejected the DOL's motion and refused to hold that the FLSA imposes strict liability for child labor violations, finding that the "argument is contrary to binding precedent." The district court explained that the DOL had presented no evidence that the company knowingly employed any person under 18 years old.

The district court emphasized that the company had a corporate policy prohibiting employment of anyone under the age of 18 and noted that the company contended that it steadfastly adheres to that policy.

The district court also noted that the company had presented evidence that all the minors provided it with false documentation that stated that the minors were over the age of 18, and that the company had run the documents through E-Verify, which confirmed the validity of the documentation.



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The court explained that rejecting this documentation after verification could possibly have exposed the company to liability for discrimination under the Immigration Reform and Control Act.

The court also emphasized the potential economic impact of an injunction on the company and the local community, finding that a hot goods injunction would cause \$63 million in economic damages and introduce a chicken shortage "in an already inflation-ridden economy." In effect, the court recognized that a hot goods injunction would mean that millions of pounds of chicken would have been placed in landfills.

The court also noted that because the 30-day period has passed, the disgorgement remedy the DOL sought, along with its request to prevent any stored meat from the 30-day period from entering interstate commerce, would inflict unjustifiable harm, noting that the net profit from the plant averages around \$2 million per month.

Consequently, the court denied the DOL's motion, emphasizing that the severe remedy sought was not justified by the presented evidence.

Takeaways

1. The DOL maintains a continued focus on child labor violations.

The decision was the result of the DOL's continued focus on enforcing the FLSA's child labor provisions, with special attention to supply chain violations, including through subcontractors and staffing agencies. The National Strategic Enforcement Initiative on Child Labor was launched last year by the DOL to address child labor violations.

In 2023, the DOL concluded 955 investigations that found child labor violations and assessed more than \$8 million in penalties for these violations, representing an 83% increase from the previous year.

The WHD primarily relies on two mechanisms to address child labor violations: preventing employers from shipping or profiting from hot goods, and assessing aggregate civil money penalties.

2. Policies are important.

Employer liability for potential child labor policies can be limited through the adoption and use of strong policies preventing child labor.

In reaching its conclusion that the DOL failed to present any evidence that the company knowingly employed any person under 18 years old, the court emphasized that the company had a corporate policy intended to prevent hiring anyone under the age of 18, and noted that the company contended that it consistently adhered to the policy.

3. E-Verify can serve as a defense.

Employer risk from child labor violations can be managed through vigilant use of E-Verify. The court found that the company had been provided with false documentation stating that the minors were over the age of 18 and that the company had run the documents through E-Verify, which confirmed the validity of the documentation.

The court noted that rejecting this documentation after verification could possibly have

exposed the company to liability for discrimination under the Immigration Reform and Control Act.

In a footnote, the court also rejected the DOL's argument that employment records could suggest a different person filled out a minor's personal information section from the person who signed the document, concluding: "[T]he Court still does not believe this shows a lack of reasonable diligence, particularly since all the minors supplied Defendant with documentation that passed E-verify."

4. Available remedies have not been addressed.

The DOL has taken steps to punish child labor violations more severely, including disgorgement of profits.

In the Mar-Jac case, the Northern District of Alabama assumed, without deciding, that disgorgement is an available remedy. The court recognized that the company fervently contested the availability of disgorgement under the FLSA, but the court found "that is an issue for another day."

As such, the court directed the company to maintain financial records from the relevant 30-day period so that the court will have the ability to order disgorgement at the conclusion of the case if the court finds it is due.

5. The DOL's child labor enforcement and WHD child labor field assistance bulletins will face increased scrutiny.

Despite the DOL's aggressive posture, there are valid defenses that employers can raise. The court's decision was issued just days after the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which overruled the framework for judicial deference to administrative agency interpretations of statutes.[3]

In *Loper Bright*, the Supreme Court held that federal courts must exercise independent judgment in interpreting statutes and when deciding whether agencies have acted within their statutory authority. In practical terms, this means the DOL can no longer expect to go into court with a leg up, and the parties will now be on equal footing.

With child labor enforcement, the DOL has principally relied on field assistance bulletins, which are meant to provide enforcement guidance to WHD field personnel. The DOL's child labor field assistance bulletins may become more vulnerable in *Loper Bright*'s wake.

This vulnerability is underscored by congressional interest in how the DOL is handling child labor enforcement. Most notably, immediately after *Loper Bright* was decided, U.S. Sen. Bill Cassidy, R-La., ranking member of the Health, Education, Labor, and Pensions Committee, sent a letter to the DOL requesting information on how the department will comply with the Supreme Court's decision.[4]

There has also been pushback against the DOL's child labor enforcement at the state level. For instance, Iowa Gov. Kim Reynolds sent acting DOL Secretary Julie Su a letter in early July criticizing how the department has handled child labor enforcement, contending that federal enforcement has gone too far.[5]

Reynolds cited small business owners that have reported facing fines of up to \$180,000 for employing teenagers until 9 p.m. on school days and 11 p.m. on nonschool days, which is

permitted under state law.

Reynolds stated: "We fully support the enforcement of labor laws against businesses which employ youth in dangerous and harmful work environments. But a teenager working past 7 p.m. on a school night is not oppressive child labor."

6. Employers must be aware of increased governmental agency collaboration.

Organizations should fully expect increased government collaboration to address child labor violations.

For instance, the DOL's Interagency Task Force to Combat Child Labor Exploitation was launched in 2023 and aims to bring together federal agencies to improve information sharing, provide outreach and education to the public, and coordinate efforts. Participants include the U.S. Department of Justice, U.S. Department of Health and Human Services, U.S. Department of Homeland Security, and several other agencies.

Recommended Practices

There are certain steps that employers should consider moving forward.

First, organizations should implement policies regarding hiring minors. As noted above, the court was strongly persuaded by the fact that the company had a policy and adhered to it.

Second, organizations should consider implementing additional guardrails to ensure compliance with the law, such as an age verification mechanism. In *Su v. Mar-Jac Poultry*, the court found that the company's use of the E-Verify system was helpful in defending a case having nothing at all to do with issues related to the Immigration Reform and Control Act.

E-Verify is currently voluntary for most employers but required for federal contractors and in certain states. Because of the value of the E-Verify defense, employers should consider using the system even if it is not mandatory, especially companies operating in industries that regularly employ young workers, such as the hospitality industry.

There are other innovative guardrails that may be beneficial. The DOL has explained that an employer best practice can involve providing workers under the age of 16 with a different color name tag than those worn by older workers.

For instance, some grocery stores have adopted a system of different colored name badges for workers who are 14 or 15, 16 or 17, or older. This allows a supervisor to immediately see if a worker who may be allowed to perform certain tasks (e.g., shelf stocking, cashier) is performing work they should not be doing (e.g., operating a meat slicer in a deli).

Third, organizations should adopt written policies that ensure that hazardous equipment is properly labeled and locked as appropriate (e.g., trash compactors). Notably, the DOL provides downloadable stickers for employers to place on hazardous equipment to alert all workers that no one under 18 years of age may operate the equipment.[6].

Fourth, organizations should maintain appropriate training programs for managers and workers to implement policies and standards, and to comply with applicable legal requirements.

Fifth, organizations should develop a media strategy. Because media reports concerning child labor violations can seriously damage a business's reputation, it is important that organizations have a strategy in place that engages the media constructively.

Conclusion

Ultimately, the steps required to reduce the risks from aggressive DOL enforcement are to engage in an active approach to compliance through robust policies and practices.

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[1] *JulieSu v. Mar-Jac Poultry of Alabama LLC*, No. 6:24-cv-00569 (N.D. Ala. July 2, 2024).

[2] 29 U.S.C. § 212(a).

[3] *Loper Bright Enterprises v. Raimondo*, Case. No. 22-451, 603 U.S. __ (2024).

[4] https://www.help.senate.gov/imo/media/doc/loper_bright_letter_dolpdf.pdf.

Senator Cassidy's letter to the DOL states:

DOL has also consistently failed to provide timely or satisfactory responses to oversight requests, hindering Congress' ability to make informed policy decisions and hold agencies accountable for implementing the laws Congress writes. Among the most troubling examples of this failure has been DOL's response—or lack thereof—to my oversight efforts on DOL's handling of child labor violations. For months, I have sent letters to, and requested information from, DOL regarding its efforts to proactively prevent exploitative child labor throughout the country. Each time, however, DOL has simply provided re-packaged press releases, touted its public record of enforcing the law after children are hurt in the workplace, and detailed its perceived need for more funding to actually make a difference in children's lives. Unfortunately, this kind of non-response is all too common from DOL.

[5] <https://governor.iowa.gov/press-release/2024-07-01/gov-reynolds-issues-letter-dept-labor-excessive-fines-target-iowa-businesses>.

[6] The appropriate labels are available on DOL's website.