

WHISARD Compliance Action Report

FLSNM

Violation / Compliance Status	Violations	EEs ATP	BWs Computed	BWs Agreed	LDs Computed	LDs Agreed	CMPs*
FLSNM Totals:	0	1	\$0.00	\$0.00	\$0.00	\$0.00	
Total Violations Under FLSNM:	2						\$0.00

** CMPs computed do not necessarily indicate CMPs assessed.*

Unduplicated Employees Found:	0	Unduplicated Employees Agreed:	0
Total Amount BWs Computed:	\$0.00	Total Amount BWs Agreed:	\$0.00
Total Amount LDs Computed:	\$0.00	Total Amount LDs Agreed:	\$0.00

Conclusions & Recommendations:

54.25 hours; FLNM investigation; 3(s)(1)(A) enterpr cov; FLSNM violation for failing to provide reasonable break time and place to express milk; no other violations found. ER agreed to comply in future; Pubs: HRG, FSs 28D, 44, & 77A, 073; WHs 1088, 1261, 1262, 1281, 1312, 1318 & 1330. ^(b) notified on 3/24/16. **(b) (7)(E)**

WHI Signature: _____ Date: 03/24/2016

Reviewed By: _____ Date: _____

COVERAGE

Federal Employer Identification Number (FEIN)

The FEIN for this employer (ER) was 45-5203095. (See Exhibit C-1).

Main Office District Office (MODO)

The Phoenix District Office was the MODO. Wage and Hour Investigator (WHI) contacted the MODO and associated the case with the MODO control record. WHI did not receive any instructions from the MODO and handled the subject location locally. (D-1).

Reason for Investigation

This full investigation was initiated as a result of (b) (7)(E), (b) (6), (b) (7)(C) contacted the Department of Labor- Wage and Hour Division (DOL-WHD) to (b) (7)(E) (b) (6). (b) (6) was not given the reasonable break time needed to express breast milk for (b) (6) newborn child. WHI found that (b) (6), (b) (7)(C) was not given reasonable break time and (b) (6) was not provided an adequate space to express (b) (6) breastmilk while employed at the International House of Pancakes (herein IHOP) restaurant. (B-10).

Prior History

The enterprise was previously investigated by the Department of Labor Wage and Hour Division (DOL-WHD). The following is a list of case history for the enterprise including the concurrently investigated location:

CASE ID	ACT	ER Trade Name	Case Status	ER City	ER Legal Name
1056937	CL	IHOP	Concluded	Tempe	Romulus, Inc.
1245703	FLSA	IHOP	Concluded	Phoenix	Romulus, Inc.
1321021	FLSA	IHOP	Concluded	Phoenix	Romulus, Inc.
1370753	CL	IHOP	Concluded	Nogales	Romulus, Inc.
1675725	FLSA	IHOP	Concluded	Dallas	Romulus Group, Inc.
1715986	FLSA	IHOP	Concluded	Pittsburgh	Romulus, Inc.

1716785	FLSA	IHOP	Concluded	Boise	RMLS IHOP IDAHO, LLC.
1736660	CL	IHOP	Concluded	Pittsburgh	Romulus, Inc.
1738842	FLSA	IHOP	Concluded	Oklahoma City	RMLS HOP OKC, LLC
1749220	FLSA	IHOP	Concluded	Pittsburgh	Romulus, Inc.
1764410	FLSA	IHOP	Management Review	Yuma	Romulus Inc,
1767069	FLSNM	IHOP	Under Investigation	Norman	Romulus Restaurant Group
1772839	FLSA	IHOP	Concluded	Mustang	RMLS HOP OKC, LLC

(C-31).

Period of Investigation

The period of investigation was March 1, 2014 to February 29, 2016. (C-1).

Annual Dollar Volume (ADV)

Per the ER's written records, the ADV for the subject location was as follows: 2013- (b) (4), 2014- (b) (4) and for 2015- (b) (4). The ER's attorney, Heidi Nunn-Gilman, refused to provide any further information regarding the enterprise ADV. (C-2 to C-4).

Nature of Business

The subject location was an International House of Pancakes (herein IHOP) restaurant. The enterprise, Romulus Restaurant Group, Inc. specialized in the management of 78 IHOP restaurants throughout nine states. (C-1 to C-31).

Business Structure

The enterprise, Romulus Restaurant Group, Inc. specialized in the management of 78 IHOP restaurants throughout nine states. The enterprise incorporated each location separately and claimed each location was a "manager-managed limited liability company." The subject location, which Romulus Restaurant Group, Inc. incorporated as RMLS HOP OKC, LLC, also does business as IHOP 1485 and will herein be referred to as IHOP. The Attorney for the enterprise, Ms. Nunn-Gilman, claimed (b) (6), (b) (7)(C) (C-1 to C-31).

Branch Establishments

The enterprise, Romulus Restaurant Group, Inc. specialized in the management of 78 IHOP restaurants throughout nine states. The Attorney for the enterprise, Ms. Nunn-Gilman, only provided the Oklahoma locations and the corporate address in Phoenix, Arizona; Ms. Nunn-Gilman refused to provide the addresses and locations of the other 71 IHOP restaurants. The corporate office was located at, 4131 N. 36th Street, Phoenix, Arizona 85018. (C-1 to C-31).

Workforce

The Attorney for the enterprise, Ms. Nunn-Gilman refused to provide the total employees (EEs) managed under

Romulus Restaurant Group, Inc. The subject location had an estimated 50 EEs. At the initial conference however, the Director of Operations, Nick Perry stated that he believed Romulus Restaurant Group, Inc. employed around (b) (4) total EEs. (C-1 to C-31).

Litigation

The Attorney for the enterprise, Ms. Nunn-Gilman stated that the enterprise did not have any pending litigation with regards to the Fair Labor Standards Act (FLSA) §16(b) actions. (C-1 to C-31).

Government Contracts

The Attorney for the enterprise, Ms. Nunn-Gilman stated that the enterprise did not have any Davis-Bacon Act, Davis-Bacon Related Acts or Service Contract Act contracts. (C-1 to C-31).

Joint Employment

Joint employment with any other enterprise did not exist. (C-1 to C-31).

Employment Relationship and Independent Contractors

WHI did not find any EEs misclassified as Independent Contractors. WHI looked at the seven factors given by the Supreme Court in the determination of the EE and ER relationship between the ER and Tye Restaurant Service, LLC (herein Tye Restaurant Service) and Billy R. Beer DBA BClean (herein BClean). Both Independent Contractors owned their own business with their own Federal Tax Identification Number (FEIN). (C-5).

Integral Part of the ER's Business

First, the work performed by Tye Restaurant Service and BClean were not integral parts of IHOP's business. IHOP was a restaurant that provided food and beverages to customers 24 hours a day. Tye Restaurant Service and BClean were both businesses that provided specialized cleaning of kitchen equipment and other large appliances used by commercial kitchens. The services provided by Tye Restaurant Service and BClean were not integral to the restaurant business. (C-5).

Permanency

Second, Tye Restaurant Service and BClean only worked for IHOP for 2015. IHOP did not utilize either business' services in the previous years as IHOP inly needed the services of Tye Restaurant Service and BClean once every few years. (C-5).

Investment

Third, both owners of Tye Restaurant Service and BClean provided their own tools and equipment. IHOP provided access to the kitchen equipment that need to be cleaned. But Tye Restaurant Service and BClean

brought their own cleaning materials and tools when work was performed at IHOP. (C-5).

Control

Fourth, the work of Tye Restaurant Service and BClean was controlled by IHOP only when Tye Restaurant Service and BClean were performing work at IHOP. Both Tye Restaurant Service and BClean had independent businesses to run and had other customers which utilized their services. (C-5).

Profit and Loss

Fifth, Tye Restaurant Service and BClean were employed by multiple companies and not only by IHOP. Tye Restaurant Service and BClean were paid a set amount for their services (versus an hourly amount). Essentially, both Tye Restaurant Service and BClean had complete control over the amount of profit and loss earned. (C-5).

Competition

Sixth, WHI found that BClean advertised on the internet. Although WHI could not find advertising for Tye Restaurant Service, WHI did find where the owner of Tye Restaurant Service had established a legal name that was registered with the State of Oklahoma. Both Tye Restaurant Service and BClean worked for multiple different companies other than IHOP. Additionally, both Tye Restaurant Service and BClean held themselves out as Independent Contractors and business owners. (C-5).

Degree of Independent Business Organization

Finally, Tye Restaurant Service and BClean both held themselves out as Independent Contractors and consider themselves business owners. Tye Restaurant Service and BClean paid taxes to the Internal Revenue Service (IRS) out of the 1099 form paid to them by IHOP and by their many other customers. (C-5).

Looking at all of the factors, WHI found that Tye Restaurant Service and BClean were not misclassified as Independent Contractors. (C-5).

Interstate Commerce

The enterprise is covered under FLSA §3(s)(1)(A). The ADV for the enterprise was over \$500,000 per year, there were more than two EEs, and all EEs handled goods produced and moved in commerce. The EEs used and handled goods shipped from other states including, Post-It Notes© from Kentucky. (C-1).

Section 3(d) Employer (ER)

(b) (6), (b) (7)(C) (the General Manager) and (b) (6), (b) (7)(C) (the local Area Manager) met the definition of a 3(d) ER. (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) were involved in the daily operations of the enterprise; (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) had the ability to hire and fire EEs, gave instructions to EEs and acted in the interest of the enterprise. (C-1).

EXEMPTIONS

Applicable

FLSA §13(a)(1)
29 CFR §541.100

The ER claimed exemptions for the General Manager, (b) (6), (b) (7)(C) and the Assistant General Manager, (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) were paid a salary of at least \$455 per week and managed all of the EEs at the restaurant. (b) (6), (b) (7)(C) had the ability to hire, fire and discipline EEs; (b) (6), (b) (7)(C) scheduled and trained all of the EEs at the restaurant. Thus, WHI found the exemptions applicable during the period of investigation. (B-1, C-1 and 29 CFR §541.100).

The only exemptions claimed at the investigated location were (b) (6), (b) (7)(C); WHI did not investigate the exemptions claimed at the corporate level. No other exemptions were found applicable. (C-1).

STATUS OF COMPLIANCE

Period of Investigation

The period of investigation was March 1, 2014 to February 29, 2016. (C-1).

Reason for Investigation

This full investigation was initiated as a result of (b) (7)(E), (b) (6), (b) (7)(C), (b) (7)(E) (b) (6), (b) (7)(C) was not given the reasonable break time needed to express breast milk for (b) (6), (b) (7)(C) newborn child. WHI found that (b) (6), (b) (7)(C) was not given reasonable break time and (b) (6), (b) (7)(C) was not provided an adequate space to express (b) (6), (b) (7)(C) breastmilk while employed at the International House of Pancakes (herein IHOP) restaurant. (B-10).

(b) (6), (b) (7)(C) Information

(b) (6), (b) (7)(C) was employed at the IHOP location from 5/4/2015 through (b) (6), (b) (7)(C) termination date in (b) (6), (b) (7)(C) was hired as a Server and paid (b) (6), (b) (7)(C) per hour plus tips. (B-10).

(b) (6), (b) (7)(C) stated that (b) (6), (b) (7)(C) was not allowed to take (b) (6), (b) (7)(C) repeated requests to have reasonable break time to express (b) (6), (b) (7)(C) breastmilk. Additionally, (b) (6), (b) (7)(C) stated that on the few occasions when (b) (6), (b) (7)(C) was given time to express (b) (6), (b) (7)(C) milk, (b) (6), (b) (7)(C) was forced to pump in (b) (6), (b) (7)(C) own personal vehicle as the ER did not provide a reasonable and private location (other than the restroom). (B-1).

§7(r)- Break Time for Nursing Mothers

The Patient Protection and Affordable Care Act amended section seven of the FLSA to require ERs to provide nursing mothers with a reasonable break time to express breast milk and a place, other than a bathroom, that may be used to express milk. The ERs must be covered by FLSA enterprise coverage or the EE must be individually covered. Additionally, the break time is only afforded to non-exempt EEs. Finally, the ER may claim an undue hardship exemption if the ER employs less than 50 EEs. The number of EEs is determined by counting EEs at all worksites, regardless of location or part-time status. (FLSA §7(r)).

The requirements under §7(r) of the FLSA:

- (1) An ER shall provide—
 - (A) A reasonable break time for an EE to express breast milk for her nursing child for one year after the child's birth each time such EE has need to express the milk; and
 - (B) A place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an EE to express breast milk.
- (2) An ER shall not be required to compensate an EE receiving reasonable break time under paragraph (1) for any work time spent for such purpose.
- (3) An ER that employs less than 50 EEs shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the ER significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the ER's business.
- (4) Nothing in this subsection shall preempt a State law that provides greater protections to EEs than the protections provided for under this subsection.

Under the FLSA §7(r)(1)(A), the ER failed to provide (b) (6), (b) (7)(C) (an hourly, nonexempt EE) with reasonable break times to express breast milk for (b) (6), (b) (7)(C) nursing child. (b) (6), (b) (7)(C) stated that when (b) (6), (b) (7)(C) requested time to pump (b) (6), (b) (7)(C) breastmilk, the GM, (b) (6), (b) (7)(C) would tell (b) (6), (b) (7)(C) “not right now,” or “later.” (b) (6), (b) (7)(C) developed mastitis. According to WebMD, mastitis may develop when a nursing mother goes, *for long stretches between nursing or failing to empty the breast completely.* (b) (6), (b) (7)(C) eventually terminated her own employment at IHOP. (b) (6), (b) (7)(C)

(b) (6), (b) (7)(C) stated (b) (6), (b) (7)(C) quit not because of the nursing mother issues, but because (b) (6), (b) (7)(C) did not get along with the GM, (b) (6), (b) (7)(C). (B-10).

Under the FLSA §7(r)(1)(B), the ER failed to provide (b) (6), (b) (7)(C) (an hourly, nonexempt EE) with a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an EE to express breast milk. (b) (6), (b) (7)(C) stated that on the occasions when (b) (6), (b) (7)(C) allowed (b) (6), (b) (7)(C) to express (b) (6), (b) (7)(C) milk, (b) (6), (b) (7)(C) had to go to (b) (6), (b) (7)(C) own vehicle to do so. (B-10).

(b) (6), (b) (7)(C) also stated that (b) (6), (b) (7)(C) did not want (b) (6), (b) (7)(C) job back at IHOP, nor did (b) (6), (b) (7)(C) expect any back payment. (b) (6), (b) (7)(C) stated that (b) (6), (b) (7)(C) wanted (b) (6), (b) (7)(C) to “change (b) (6), (b) (7)(C) ways,” so that other nursing mothers did not experience the same things as (b) (6), (b) (7)(C) did when (b) (6), (b) (7)(C) was employed there. (B-10).

During WHI's initial conference, WHI found that the ER had come into compliance and had made the Manager's office available for nursing mothers. The ER had added a curtain to cover the window to allow for privacy of the nursing mother. (C-1).

§6- Minimum Wage (MW)

No violations found. The ER paid \$7.25 for all hours worked; if the tipped EE made less than MW with their (b) (4) hourly wage plus their tips, the ER brought the EEs up to MW. (D-19 to D-121).

§7- Overtime Pay (OT)

No violations found. The ER paid time and one-half (T ½) all non-exempt EEs' regular rates when they worked over 40 hours in a workweek. (D-19 to D-121).

§11-Recordkeeping (RK)

No violations found. The ER had all posters posted. (C-1).

§12- Child Labor (CL)

No violations found. (C-1).

DISPOSITION

On March 1st, 2016, via a telephonic conference call, WHI met with the ER's attorney, Heidi Nunn-Gilman, Nick Perry (Director of Operations), and Denyse Lujan (Human Relations Director for Romulus), who represented

Romulus Restaurant Group, Inc. WHI (b) (6), (b) (7)(C) represented the DOL-WHD. WHI (b) (6), (b) (7)(C) began with an explanation of coverage under the Fair Labor Standards Act of 1938, as amended; the investigative period; the process regarding the investigation, and the outcome of the investigation.

§7(r)- Break Time for Nursing Mothers

WHI discussed in detail what the nursing mothers violations. Ms. Nunn-Gilman to comply with all nursing mothers requirements in the future.

§6- Minimum Wage

WHI discussed in detail what constituted a MW violation. Ms. Nunn-Gilman agreed to continue to comply with MW in the future.

§7- Overtime Pay

WHI discussed in detail what constituted an OT violation. Ms. Nunn-Gilman agreed to continue to comply with OT in the future.

§11-Recordkeeping

Ms. Nunn-Gilman agreed to continue to comply with all recordkeeping requirements in the future.

§12- Child Labor

Ms. Nunn-Gilman agreed to continue to comply in the future with all applicable CL provisions.

Civil Money Penalties (CMPs)

WHI advised the ER's attorney that failure to comply in the future could result in CMPs. Additionally, WHI informed the ER that CMPs were always a possibility. Ms. Nunn-Gilman stated that she understood.

Complainant Notification

WHI left a voicemail message for (b) (6), (b) (7)(C) on 3/24/2016 and informed (b) (6), (b) (7)(C) of the findings.

(b) (7)(E)

Publications Provided

WHI sent the ER or the ER's attorney the following publications on or before 3/29/2016:

IHOP Case ID: 1767069

FS 044
Wage & Hour Visits to Employers Fact Sheet

FS 073
Nursing Mothers Fact Sheet

WH 1261
FLSA Recordkeeping Regs (29 CFR 516)

WH 1262
Overtime Compensation Regs (29 CFR 778)

WH 1281
FLSA Exec, Admin, Professional or Outside Sales Regs (29 CFR 541)

WH 1282
FLSA Handy Reference Guide (English)

WH 1312
FLSA Hours Worked Regs (29 CFR 785)

WH 1318
FLSA Fair Labor Standards Act

WH 1325
Overtime Compensation Pamphlet

WH 1330
Child Labor Non-Agriculture Requirements

WH 1418
FMLA Family and Medical Leave Act

Future Contact:

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602-322-4080

IHOP Case ID: 1767069

WHI (b) (6), (b) (7)(C) 3/24/2016