The Honorable Judge Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHAO CHEN, individually and on behalf of all those similarly situated,

Plaintiff and counter-defendant,

v.

THE GEO GROUP, INC., a Florida corporation,

Defendant and counter-plaintiff.

Case No: 3-17-cv-05769-RJB

**GEO'S OPPOSITION TO CHEN'S MOTION TO DISMISS GEO'S COUNTERCLAIMS AND TO STRIKE GEO'S AFFIRMATIVE DEFENSES**

NOTE ON MOTION CALENDAR:
February 2, 2018

ORAL ARGUMENT REQUESTED



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## INTRODUCTION

Plaintiff Chao Chen ("Plaintiff" or "Mr. Chen") asks this Court to retroactively fabricate a lengthy employment relationship between people who are not working in a competitive job market because they are detained by Immigration and Customs Enforcement ("ICE") and The GEO Group, Inc. ("GEO"), ICE's contracting partner that housed Mr. Chen and other detainees at the Northwest Detention Center ("NWDC"). Mr. Chen seeks damages for allegedly unpaid minimum wages based on a theory disconnected with the realities of detention. Mr. Chen asks the Court to treat him and other voluntary work program ("VWP") participants as GEO's employees, even though they never faced the expectations that they would have as true employees, and even though GEO was never a real employer who could set performance standards for Mr. Chen or other detainees that would justify a minimum wage. In short, Mr. Chen and his putative class members had a ***custodial detention*** relationship with GEO, not an employment relationship.

Mr. Chen asks the Court to exceed its authority by creating a relationship that never existed, without the accompanying burdens of an employment relationship, like performance expectations and taxation. Indeed, the law would have prohibited such an employment relationship at its inception. These grave problems are reflected in the numerous affirmative defenses that GEO has properly plead and the counterclaims that GEO must bring to finally resolve any future risk of wage based claims under federal or state law. Because the Court has denied dismissal on the pleadings—opening the door to the novel idea that federal immigration detainees can receive minimum wages as "employees"—the Court must also recognize the suite of counterclaims and defenses that co-exist when contemplating an employment relationship.



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## ARGUMENT

## I. THE COURT SHOULD DENY CHEN'S MOTION TO STRIKE GEO'S AFFIRMATIVE DEFENSES.

### A. Standard Of Review

Pleadings must be construed to do justice.[1] Motions under Rule 12(f) "are disfavored, because they may be used as delaying tactics and because of the strong policy favoring resolution on the merits."[2] Mr. Chen's motion detracts from discovery and underscores its misperception of the Court's order on GEO's motions to dismiss as a merits victory, when it is not. Quibbling over whether GEO has properly captioned its affirmative defenses or denials is not meritorious. Although the court has yet to dismiss this case outright, it has recognized that Mr. Chen's claims may be federally pre-empted and that any application of the Minimum Wage Act ("MWA") will require a mixed application of the facts with the law, which GEO has properly put at issue with its Answer and Counterclaims.

In determining whether a defense is "insufficient," the Court should not apply the *Twombly* and *Iqbal* heightened standards of "plausibility."[3] That standard contravenes the plain language of the federal rules and fails to appreciate both the defendant's limited time to respond and the plaintiff's other notice derived from the complaint and other pleadings.[4] Rule 8(a)(2) requires a plaintiff to plead a complaint that contains "a short and plain statement of the claim

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[1] Fed. R. Civ. P. 8(e).
[2] *Perez v. Roofing*, No. 3:15-cv-05623, 2016 WL 898545, at *2 (W.D. Wn. Mar. 9, 2016) (citations and quotations omitted).
[3] *Nelson v. U.S. Fed. Marshal's Serv.*, No. 3:16-cv-05680, 2017 WL 1037581, at *1-2 (W.D. Wn. Mar. 17, 2017); *see also Kohler v. Flava Enters., Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2015) (holding that "fair notice" required by the pleading standards only requires describing the defense in "general terms").
[4] *See Kohler*, 779 F.3d at 1019; *Cottle v. Falcon Holdings Mgmt., LLC.*, No. 2:11-CV-95-PRC, 2012 WL 266968, at *2 (N.D. Ind. Jan. 30, 2012).



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***showing*** that the pleader is entitled to relief." [5] Rule 8(b) governs pleading defenses, and the "showing" language is absent. The rule instructs the answering party to use "short and plain ***terms***", rather than a "short and plain statement."[6] Rule 8(c) sets forth the "short and plain terms" to use in an answer to state any avoidance or affirmative defense, but does not require a showing that the pleader is entitled to relief.[7] If the rule drafters expected defendants to plead affirmative defenses with the detail required of complaints, they would have used the same language when describing the duties of the defendants.[8] The differing standards for complaints and affirmative defenses are grounded in concerns about fairness.[9] Mr. Chen has the context of his complaint and GEO's motion to dismiss from which to interpret affirmative defenses, providing sufficient notice to enable plaintiffs to understand the affirmative defenses pled.

Mr. Chen's motion to strike GEO's affirmative defenses should be denied. GEO has pled "short and plain terms," as permitted by Rule 8(b), and no more is required. Mr. Chen is already on notice regarding many of GEO's theories because the parties have briefed GEO's motion to

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[5] Fed. R. Civ. P. 8(a)(2) (emphasis added).
[6] Fed. R. Civ. P. 8(b) (emphasis added).
[7] *Cottle*, 2012 WL 266968, at *2 (N.D. Ind. Jan. 30, 2012) ("The requirement of a 'showing that the pleader is entitled to relief' in Rule 8(a) is not contained within the requirements of 8(b) for 'defenses' or 8(c) for 'affirmative defenses,' and an affirmative defense is not a claim for relief."); *Dilmore v. Alion Sci. & Tech. Corp.*, No. 11-72, 2011 WL 2690367, at *5 (W.D. Pa. July 11, 2011) ("Rule 8(b) and 8(c) do not require a showing, which leads this Court to the conclusion that, at least under current Third Circuit law, *Twombly* and *Iqbal* are not applicable to defensive pleadings.").
[8] *EEOC v. Joe Ryan Enters., Inc.*, 281 F.R.D. 660, 663 (M.D. Ala. 2012); *see* also *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning."). *Cf. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002) (Courts should not give different language in two subsections the same meaning by assuming a "mistake in draftsmanship").
[9] *Lane v. Page*, 272 F.R.D. 581, 595 (D.N.M. 2011) ("Courts that decline to extend ... *Twombly* and ... *Iqbal's* pleading standard to affirmative defenses reason that, given the limited time defendants have to file their answers, it is appropriate to impose asymmetric pleading requirements on plaintiffs and defendants."); *Holdbrook v. SAIA Motor Freight Line, LLC*, No. 09-cv-02870-LTB-BNB, 2010 WL 865380, at *2 (D. Colo. Mar. 8, 2010) ("[I]t is reasonable to impose stricter pleading requirements on a plaintiff who has significantly more time to develop factual support for his claims than a defendant who is only given 20 days to respond to a complaint and assert its affirmative defenses.").



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dismiss all claims in the Complaint. GEO should now have the fair opportunity to expand upon these defenses through discovery and to move for relief on them at appropriate times.[10]

Although not required to do so by the applicable pleading standards, in opposition to Mr. Chen's motion GEO has provided a brief discussion of the defenses that he seeks to strike. GEO objects to Mr. Chen's assertion of any heightened pleading standard, to treating this briefing as a Rule 12(b)(6) determination, and to limiting GEO's ability to present and argue the defenses in future papers.[11] In the event the Court decides to strike any defenses, the Court should freely give leave for GEO to amend its answer.[12]

**B. Mr. Chen Fails to State a Claim on Which Relief May Be Granted (Answer ¶ 8.1).**

GEO recognizes that the Court has denied its motion to dismiss Mr. Chen's complaint. But that denial does not cure the fundamental defects in Mr. Chen's claim, nor does it prevent GEO from seeking further appropriate relief in this proceeding based on those defects. Indeed, the Court identified dismissal arguments as premature because they required further factual development,[13] such that GEO must be permitted to seek discovery on precisely the issues that the Court considered to be factual.[14]

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[10] Fed. R. Civ. P. 26(b)(1) limits the scope of discovery to material relevant to the defenses pled. For example, GEO believes the Department of Labor and Industries has never considered GEO's voluntary work program subject to the MWA just like state correctional service industry private contractors are not subject to the MWA. Documents yet to be discovered would further support GEO's failure to state a claim and laches defenses.

[11] *See Nelson*, 2017 WL 1037581, at *2 (distinguishing Rule 12(b)(6) standards and Rule 12(f) standards).

[12] Fed. R. Civ. P. 15(a).

[13] *See*, *e.g.*, Order Den. Mot. Dismiss, Doc. 29 at 11 (concluding that factual issues regarding preemption prevented dismissal).

[14] In *Hensley v. United States*, the Court declined to apply the law of case doctrine, notwithstanding its denial of the government's Rule 12(b)(6) motion, because "the facts of the case had not been developed and the non-moving party's allegations were assumed to be true. It would be a 'manifest injustice' to bind the government to that holding before it has had a chance to develop its theory of the case through the discovery process." No. C04-302P, 2005 WL 2898040, at *1 (W.D. Wn. 2005).



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Although federal law prohibits GEO from hiring an unauthorized alien,[15] Mr. Chen has alleged that all detainee workers are "employees."[16] Accepting that those claims can be plausibly pled immediately creates a conflict: state law says GEO employs federal detainees when federal law prohibits it.[17] Mr. Chen admitted in his briefing that at least ***some*** detainees at NWDC are not work-eligible, making the conflict unavoidable.[18] Thus, if even ***one*** detainee who participated in the VWP lacked work authorization, then the claims necessarily raise a conflict that has preemptive effect.

More fundamentally, Mr. Chen has failed to state a claim because his claim is preempted by federal law under any approach. When the Court denied GEO's motion to dismiss the minimum wage claim, it addressed field preemption as it relates to "detainee wages."[19] That mis-framed the issue: any consideration of wages is secondary to whether Congress has occupied the field of detainee ***employment***.

Congress has unequivocally determined that no employer-employee relationship is created by detainee volunteer work. Congress specifically authorized "payment of ***allowances*** [to detainees] . . . for work performed," and limited the payment to "such rate as may be

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[15] 8 U.S.C. § 1324a.

[16] Complaint ¶ 4.6, ECF 1 (alleging that "detainee workers are 'employees,' and GEO is an 'employer' under Washington's minimum wage laws. GEO employed and continues to employ the detainee workers by engaging, suffering, or permitting them to work on its behalf.").

[17] 8 U.S.C. § 1324a; 8 C.F.R. § 274a.2-3.

[18] Mr. Chen's complaint does not allege that he or anyone else in the putative class was legally authorized to work in the United States while at the NWDC. *See* Complaint. In his opposition, Mr. Chen was not willing to state that every detainee is work eligible. Pl.'s Opp. GEO's Mot. to Dismiss, at 2, ECF 15 ("Mr. Chen and members of the putative class are ***not all*** 'unauthorized aliens' ineligible for work.") (emphasis added). If Plaintiff can actually identify a detainee who was eligible to be employed under federal law, he could—perhaps—refile a complaint raising that allegation and stating a MWA claim on behalf of such a detainee.

[19] *See* Order at 9 ("Here, the pertinent area of regulation for examination is detainee wages."); *id*. at 11 ("In summary, Congress has not chosen to occupy the field of detainee wages.").



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specified from time to time in the appropriation Act involved."[20] Although this provision is simple, it speaks volumes about Congress's intention regarding detainee work: it pays "allowances," and only at rates specified by its own appropriations. Congress's decision in 1979 to no longer specifically appropriate the $1-per-day allowance does ***not*** mean it relinquished the question of detainee employment ***to states***. To the contrary, long after Congress ceased to specifically appropriate the amount, courts and opinions of the Immigration and Naturalization Service ("INS") continue to treat detainee payment as a matter of "legislative discretion" and Congress's earlier appropriations as governing the form and amount of allowance.[21]

In an opinion attached as **Appendix "A"** to this response, the General Counsel of INS—ICE's predecessor—expressly considered whether work performed by alien detainees at detention facilities "operated by ***or contracted through***" INS is subject to Immigration Reform and Control Act ("IRCA") sanctions.[22] INS said "no," because "***an alien detained in an INS facility does not meet the definition of 'employee,' nor does INS meet the definition of 'employer,'" because "[a] detainee performs work for institution maintenance, not compensation***."[23] Notably, the INS General Counsel (thirteen years after Congress ceased direct

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[20] 8 U.S.C. § 1555(d).

[21] *Guevara v. INS*, 954 F.2d 733, 1992 WL 1029, *2 (Fed. Cir. Jan. 6, 1992) ("The Congress provided that under certain circumstances aliens who are lawfully detained pending disposition may be paid for their volunteer labor. The wage level is a matter of legislative discretion."); INS, *Your CO 243-C Memorandum of November 15, 1991; DOD Request for Alien Labor*, Genco. Op. No. 92-63, 1992 WL 1369402, *1 (Nov. 13, 1992) (citing The Department of Justice Appropriations Authorization Act, 1979, Pub. L. No. 96-132, 2 (10), 93 Stat. 1040, 1042 (1979) (appropriating funds to INS for "payment of allowances to aliens, while held in custody under the immigration laws, for work performed")). The INS General Counsel noted that discontinuance of annual appropriation of $1 daily allowance "does not abrogate [INS/ICE] authority to pay aliens for labor performed while in [INS/ICE] custody" and "the [INS/ICE] retains authority to expend appropriated funds to pay aliens for labor performed while in custody." *Id.*

[22] INS, *The Applicability of Employer Sanctions to Alien Detainees Performing Work in INS Detention*, General Counsel Op. No. 92-8 (INS), 1992 WL 1369347, at *1 (Feb. 26, 1992) (emphasis added).

[23] *Id.* (emphasis added).



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appropriations) still described the pay as an "allowance" paid to a detainee that is "specifically provided for by 8 U.S.C. § 1555(d) and currently limited by Congress to $1 per day."[24]

In IRCA, Congress indicated its intent to forbid the employment of the population that is housed at federal detention facilities such as NWDC.[25] IRCA and corresponding regulations require employers to verify that potential employees are eligible to work before hiring them, prohibit employers from hiring people it knows are ineligible, and prohibit employers from continuing to employ people after they are found to be ineligible.[26] Immigration detainees in ICE custody are almost always ineligible.

Precedents under the Federal Labor Standards Act ("FLSA") uniformly hold that detainees are not "employees" entitled to a minimum wage for work performed at detention facilities.[27] Indeed, detainees must be ***categorically*** outside of the scope of employer-employee

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[24] *Id.*; *see also* 8 U.S.C. § 1555(d); *Guevara*, 1992 WL 1029, at *1.

[25] 8 U.S.C. § 1324a (making it unlawful "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment"). Subsection (h)(3) defines the term "unauthorized alien" to mean, "with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General."). *See also* 8 U.S.C. § 1226(a)(3) (providing that the Attorney General "may not provide the [detained] alien with work authorization . . . unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization").

[26] 8 U.S.C. § 1324a; 8 C.F.R. § 274a.2-3.

[27] *See*, *e.g.*, *Tourscher v. McCullough*, 184 F.3d 236, 243-44 (3d Cir. 1999) ("Tourscher's employment bears no indicia of traditional free-market employment. Therefore, we hold that the minimum wage requirements of the FLSA do not apply to Tourscher or other similarly situated pretrial detainees."); *Villarreal v. Woodham*, 113 F.3d 202, 207 (11th Cir. 1997) (because a detainee's situation "does not bear any indicia of traditional free-market employment contemplated under the FLSA . . . we hold that [plaintiff] and other pretrial detainees in similar circumstances are not entitled to the protection of the FLSA minimum wage requirement"); . *See also Bennett v. Frank*, 395 F.3d 409, 409-10 (7th Cir. 2005) ("People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep."). In *Hale v State of Ariz.*, the Ninth Circuit "conclude[d] that Congress did not intend automatically to exclude inmate employees from the protections of the Act." 967 F.2d 1356, 1362-63 (9th Cir. 1992), *on reh'g*, 993 F.2d 1387 (9th Cir. 1993). However, that decision does not hold that inmates ***are*** employees; and in any event, inmate/prisoner labor presents different circumstances than the VWP work at issue here. In *Hale*, the prisoners were "making products ***for sale in the outside world***." *Id*. at 1359 (emphasis added). Here, Plaintiffs have not alleged that detainees make anything for sale outside of the detention facility. They only voluntarily work for purposes of "institutional maintenance." *See Guevara*, 1992 WL 1029, at *2.



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relationship because coverage under the FLSA would render 8 U.S.C. § 1555(d) meaningless: if detainees were to be treated as employees under the FLSA, Congress would have no need to appropriate an "allowance" for their "work performed." Federal courts interpreting the application of state minimum law statutes to federal immigration detainees have done so by reference to FLSA precedents.[28]

Thus, Mr. Chen has failed to state a claim on which relief may be granted because his claims are preempted by federal law. Mr. Chen asks this court to find that he is an employee under state law ***even though he was not employed or employable under either the FLSA or IRCA***.[29] But Congress controls the field of detainee ***employment***, and that issue precedes the secondary issue of whether Congress has pre-empted state wages. Congress, the courts, and ICE's general counsel have spoken with a uniform voice: detainees who work while in detention are not "employees" of the detention facilities; unauthorized aliens cannot be "employees;" and detainees are paid an "allowance"—not wages—that Congress controls and appropriates. Mr. Chen's claim must fail.

**C. The Court Should Not Strike the Defense of Statute of Limitations (Answer ¶ 8.2).**

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[28] *Menocal v. The GEO Group, Inc.*, 113 F. Supp. 3d 1125, 1129 (D. Colo. 2015) (granting motion to dismiss ICE detainee claim for minimum wage at GEO facility); *Whyte v. Suffolk Cty. Sheriff's Dep't*, 91 Mass. App. Ct. 1124, 2017 WL 2274618, at *1-2 (May 24, 2017) (affirming dismissal of ICE detainee's claim for minimum wage and unjust enrichment). The Court declined to follow these decisions, and their reliance on *Alvarado*, stating that "to interpret this State's statutory exception to include federal detainees moves beyond interpretation to legislation." Order, at 13-14. But the importance of these cases extends beyond using them to interpret Washington's statutory exception. They support the view that state minimum wage laws are not intended to create an employment relationship between federal immigration detainees and federal detention facility contractors.

[29] Indeed, such a result would allow states to nullify IRCA, because they could simply define "employment" in terms that they claim are broader than those used in IRCA and enforce their laws without regard to IRCA. That is exactly what Chen's lawsuit would accomplish here.



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Mr. Chen argues that GEO's limitations defense should be stricken because it is factually unsupported and will fail as a matter of law.[30] But under the proper standard, GEO needed only to plead this defense enough to put him on notice.[31] As Mr. Chen's response itself shows, GEO's pleading sufficed to put him on notice: his arguments about the length of the limitations period and his putative class definition show that he has understood the defense.

Further, Mr. Chen's rebuttal is nothing but a premature argument on the merits of the defense, which is inappropriate at this stage of litigation. Indeed, that rebuttal rests on at least one suspect assumption: Mr. Chen claims that his putative class definition means his claim cannot be subject to a limitations defense.[32] But on its own terms, his putative class does no such thing: it is limited to detainees who worked at the NWDC in the three years prior to filing suit, but it is not also limited to the work those detainees performed during that time period.[33] An added factor affecting the viability of wage claim based on the passage of time in the context of NWDC detainees involves the requisite permission from the federal government that is a precursor to lawful work for a specified period for three years.[34] Mr. Chen or the putative class members may not now, retroactively, obtain the necessary authorization to approve their VWP participation as employment for a period beyond the period authorized (180 days) and therefore may not claim entitlement to wages for a three year statutory period. Thus, Mr. Chen's claim is subject to a limitations defense. Because the defense is not foreclosed as a matter of law under Mr. Chen's own description of his claim, the defense is properly pled.

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[30] Pl.'s Mot. to Dismiss Or Strike GEO's Counterclaims & Affirmative Defenses, at 12, ECF 37 ("Chen Mot.").
[31] *Simmons v. Navajo Cty.*, 609 F.3d 1011, 1023 (9th Cir. 2010).
[32] Chen Mot. 12.
[33] *See* Chen Mot. 12.
[34] 8 C.F.R. § 274a.12(c)(8)(Employment Authorization Document Form I-765)



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**D. The Court Should Not Strike the Laches Defense (Answer ¶ 8.4).**

Laches is an affirmative defense that limits a party's right to bring suit based upon delay.[35] In highly prejudicial circumstances to the defense, a two year delay has been held sufficient to uphold the defense.[36] Laches applies primarily when a statutory limitations period does not.[37] Laches may bar a statutorily timely filed claim.[38] A laches defense applies when a plaintiff who was aware of the actions giving rise to its claim delays filing suit to the defendant's prejudice.[39] Laches concerns the date at which a party acts on his claim, not the date at which a party gives defendant notice of his claims.

Here, Mr. Chen has not pled any legal entitlement to employment while detained, in particular that he applied for and received authorization to work since his resident status was impaired from his criminal conviction. Mr. Chen was represented by counsel while detained. Certainly he knew or should have known that in order to work lawfully he would require permission from ICE, and further that if he were to work competitively, the MWA would apply to him. His brother, a coffee shop owner, gave testimony for his brother's pardon, promising to hire Mr. Chen, presumably at minimum wages or higher upon his release. Mr. Chen had to know or had reason to know of minimum wage laws and the applicability to him long before he filed suit. What Mr. Chen knew and when are inquiries yet to be further developed in support of GEO's defense that he waited too long to obtain the necessary paperwork from ICE to be deemed an employee of GEO while detained to the extreme prejudice of GEO. Mr. Chen seeks

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[35] *Kling v. Hallmark Cards, Inc*., 225 F.3d 1030 (9th Cir. 2000).
[36] *New Era Publ'ns Int'l v. Henry Holt & Co.,* 873 F.2d 576, 585 (2nd Cir. 1989).
[37] *See Petrella v. Metro-Goldwyn-Mayer, Inc*., 134 S. Ct. 1962, (2014).
[38] *Danjaq LLC v. Sony Corp*, 263 F.3d 942 (9th Cir. 2001), citing to *Kling v. Hallmark Cards, Inc*, 225 F.3d 1030, 1036 (9th Cir. 2000) and *Jackson v. Axton*, 25 F.3d 884, 886 (9th Cir. 1994).
[39] *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme NW, Inc*., 277 P.3d 18, 30-31 (Wash. Ct. App. 2012).


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to represent a class of detainees to claim damages from GEO dating back several years. GEO never offered Mr. Chen or any putative class member a job. GEO did nothing to create any expectation of minimum wage work. GEO did not pay below minimum wages knowing minimum wages applied to the activities performed. GEO never engaged Mr. Chen or any putative class member in employment contract negotiations that necessarily would include GEO employing individuals whom GEO could expect would perform competitively, and who would meet performance standards like the actual GEO employees had to meet to earn minimum wages or greater. A putative class claim to minimum wages for all VWP participants severely prejudices GEO. Every other case where the economic realities test has been applied to decide the existence of an employment relationship has been under factual circumstances where the worker had to perform or would get fired or the independent contract terminated.[40] Never before has a court applied the MWA to detention. Detention work is not employment. To artificially impose employment wage obligations three years later without the requisite work authorizations required for detainees should be barred by laches.

**E. The Court Should Not Strike the Waiver Defense (Answer ¶ 8.5).**

Mr. Chen argues that GEO cannot assert any waiver argument because the MWA makes any contract to receive sub-minimum wages unenforceable.[41] The problem with Mr. Chen's argument is that in the context of immigrant detention, GEO may not hire Mr. Chen under its contract and Mr. Chen may not work for GEO without express ICE approval. When Mr. Chen chose not to obtain the requisite paperwork from ICE to work for GEO, Chen and all of his

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[40] *Anfinson v. Fed Ex Ground Package System, Inc.,* 159 Wn.App. 35, 244 P.3d 32 (2010); *Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 309 P.3d 711 (2013); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473 (1947).

[41] Chen Mot. 13 (citing Wash. Rev. Code § 49.46.090(1)).



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putative class members waived any claim that their participation in the voluntary work program was a real job subject to minimum wages. The statute he cites facially refers to an employment contract that establishes impermissibly low ***wages***; it says nothing about whether a party can waive an ***employment relationship*** by knowingly acting as a volunteer. In fact, under the MWA individuals may chose to participate voluntarily in a government program and receive an allowance or stipend for such volunteer activities and such participants are not "employees" under the MWA.[42] GEO expects to prove that Chen never left his housing unit to perform any VWP tasks, but rather he handed out food trays within the unit, or emptied the trash cans and swept the floor to pass as much time as he wanted to devote to it to make the hours pass. Thus, the waiver defense is legally cognizable under the facts of this case.

**F. The Court Should Not Strike the Defenses that Chen Has Not Exhausted Administrative Remedies (Answer ¶ 8.11) and that Chen's Claim Is Not Ripe (Answer ¶ 8.8) or Justiciable (Answer ¶ 8.9).**

The exhaustion doctrine applies when a legal claim should have been addressed in the first instance through an administrative process. "Generally, if an administrative proceeding can alleviate the harmful consequences of a governmental activity at issue, a litigant must pursue that remedy before the courts will intervene."[43] Washington law recognizes this principle in its MWA.[44] A claim is not ripe when it is not yet fit for judicial review.[45] Relatedly, a claim is not justiciable when a party has no standing to assert a claim.[46]

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[42] Wash. Rev. § Code 49.46.010 (3)(d).
[43] *Smoke v. City of Seattle*, 132 Wn. 2d 214, 223-24, 937 P.2d 186, 190 (1997).
[44] *See* Wash. Rev. Code § 49.46.040(2) ("With the consent and cooperation of federal agencies charged with the administration of federal labor laws, the director may . . . utilize the services of federal agencies and their employees . . . .").
[45] *See*, *e.g.*, *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003).
[46] *See*, *e.g.*, *Spokeo, Inc. v. Robins*, 126 S. Ct. 1540, 1546-47 (2016).



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Here, Mr. Chen could reasonably have presented his claim through administrative channels at ICE that would have been more efficient than filing a claim in this Court. Washington law allows L&I—a state agency with specific knowledge of and specialized expertise in the subject matter in this case—to enforce the MWA in coordination with the federal government. Mr. Chen is seeking a potentially substantial damages award from a federal contractor without any attempt to involve the federal government itself or obtain the necessary employment authorization from ICE. Because Mr. Chen's employability concerns the application of federal law to include ICRA and the administrative requirements associated with obtaining an approved I-765, he should be required to have exhausted available remedies through the established grievance processes that exist at the NWDC before asserting a minimum wage claim.[47] Had Mr. Chen followed appropriate administrative channels, this claim would have been addressed by the appropriate agencies in the first instance, thus preventing GEO and this Court from confronting a claim that inarguably invades multiple federal agencies' areas of expertise without any guidance from those agencies themselves. GEO's exhaustion and ripeness defenses should not be stricken.

More fundamentally, Mr. Chen himself likely does not have standing to bring this claim. As GEO noted in its prior filings in this case, Mr. Chen was not a lawful permanent resident at

[47] 42 U.S.C. § 1997e(a); *Hansen v. DOC*, No.: 12-2-01264-1, 2012 WL 6756100 (Thurston Cty Sup. Crt. Nov. 8, 2012). The NWDC complies with prison standards by contract, and as a matter of law. Detainees at the NWDC are detained at a "prison" as defined by the Prison Rape Elimination Act ("PREA") at 18 U.S.C.A § 2246 (1) & (5)("official detention" means detention under the direction of a Federal officer following civil commitment pending deportation) and its detainees who are "accused of" "violations of criminal law" are "prisoners" under the PLRA definition at 42 U.S.C.A. § 1997e(h). Thus exhaustion of administrative remedies is compulsory as to Chen.



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the time he was detained at the NWDC because he was subject to a final removal order.[48] Further, Mr. Chen was under that order because he had been convicted of a violent crime. While Mr. Chen's complaint survived dismissal partly on the theory that some members of his class may have been authorized to work, such that federal law would not facially have prohibited GEO from hiring them,[49] GEO contends that Mr. Chen himself had no such authorization. If GEO's contention is proven true, Mr. Chen will lack standing to bring his claim: because he was unemployable under federal law, he could not have been employed under State law.

**G. The Court Should Not Strike the Unclean Hands Defense (Answer ¶ 8.10).**

GEO's unclean hands defense is adequately pled and facially plausible under the circumstances of this case. Mr. Chen filed his class claim in this Court, while the State of Washington simultaneously filed a remarkably similar claim in Washington state court. Attorney General Ferguson filed the State's case and has publicly touted his lawsuit in press releases and his political campaigns. Whether this case is based upon Mr. Chen actually performing minimum wage work or whether he is simply the only available class plaintiff advocates could convince to file suit to benefit advocates has yet to be explored. Mr. Chen came to the NWDC from prison where he likely was not paid minimum wages to perform work and where he was compelled to work under Washington Law. Mr. Chen and his family appear to have significant political influence having received a pardon by the governor of Washington in late 2016 for purposes of avoiding deportation. In light of these facts, GEO respectfully submits that this lawsuit—along with the State's own—may not be for the benefit of the putative class

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[48] *See* GEO's Reply in Supp. of Mot. to Dismiss, at 6 n.30, ECF 16 (Chen's status as lawful permanent resident had been revoked at the time he was detained at the NWDC).

[49] *See* Order, at 12 (treating detainees' immigration status, and thus employability, as a fact issue).



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members, but rather for political reasons or the result of undue influences or coercion. GEO's unclean hands defense should not be stricken.

## II. THE COURT SHOULD DENY MR. CHEN'S MOTIONS TO STRIKE OR DISMISS GEO'S CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF.

Mr. Chen has moved to strike two of GEO's counterclaims under Rule 12(f) and to dismiss two others under Rule 12(b)(1).[50] The Court should do neither. As the above discussion of defenses shows, there are significant problems with Mr. Chen's case, ranging from the ripeness and justiciability to the timeliness and validity of the claims. There are many ways this case may readily end without a judgment on the merits. But that does not abate GEO's own independent interest in resolving the questions related to whether it has an employer-employee relationship with VWP participants and whether the MWA applies to NWDC detainees. GEO has been sued twice in Washington, and faces similar claims elsewhere.

Federal law authorizes a party to seek declaratory relief for any case or controversy. "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the . . . legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."[51] The "actual controversy" that the statute requires is closely related to justiciability under Article III of the United States Constitution.[52] "Basically, the question in each case is whether the facts

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[50] Mr. Chen's motion does not actually track the counterclaims GEO has pled, as it refers to the "first two" and the "second two" declaratory judgment claims, while GEO has sought only three declarations. *See* Chen Mot. 8. GEO interprets Mr. Chen's motion to be asserting a Rule 12(f) motion against GEO's two claims for declarations about the MWA and a separate Rule 12(b)(1) motion against GEO's claims about the FLSA. Mr. Chen also has provided no argument addressing GEO's claim for injunctive relief, so GEO does not address that claim here.

[51] 28 U.S.C. § 2201.

[52] *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-27 (2007).



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alleged . . . show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[53] Further, where threatened action by the government is concerned, courts need not "require a plaintiff to expose [it]self to liability before bringing suit to challenge the basis for the threat . . . ."[54] A private party need not violate the law to create a justiciable controversy, since avoiding that situation "was the very purpose of the Declaratory Judgment Act…."[55]

All of GEO's counterclaims for declaratory relief are sufficient under this standard. As explained below, GEO's claims relating to the MWA are appropriate counterclaims that do not merely duplicate Mr. Chen's own claim, and GEO's claim relating to the FLSA does not seek an impermissible advisory opinion.

**A. The Court Should Not Strike the Claims for Declaratory Relief Regarding the MWA.**

A counterclaim for declaratory judgment should only be struck under Rule 12(f) if it would burden a court and accomplish nothing. Courts may "strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter."[56] As this Court has explained, Rule 12(f) "is designed to help avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial."[57] Motions under Rule 12(f) "are disfavored, because they may be used as delaying tactics and because of the strong policy

[53] *Id.* at 127 (quoting *Maryland Casualty Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).
[54] *Id.* at 128-29.
[55] *Id.* at 129 (quotation omitted).
[56] Fed. R. Civ. P. 12(f).
[57] *Perez*, 2016 WL 898545, at *2 (citations and quotations omitted).



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favoring resolution on the merits."[58] Courts have "discretion to dismiss 'mirror image' counterclaims that are redundant of affirmative defenses or claims found in the complaint."[59]

Under these principles, GEO's claims for declaratory relief relating to the MWA are properly pled. GEO has brought counterclaims seeking two declarations from this Court that relate to the MWA: (1) that the MWA does not apply to detainees at the NWDC, and (2) that GEO has no employment relationship with detainees who participate in the VWP.[60] There can be no question that these claims satisfy the "actual controversy" requirement for declaratory relief, since these issues have been raised by Mr. Chen's own claim.[61]

Further, GEO's claims for declaratory relief are not mirror images of Mr. Chen's claim. With respect to GEO's claim for a declaration relating to the MWA, Mr. Chen argues only that these claims "mirror" his claim, such that "resolving the complaint's MWA claim will necessarily resolve the legal issues presented by GEO's requests for declaratory relief."[62] But as a matter of basic logic, the Court could deny Mr. Chen's claim for a variety of reasons without granting the declaration GEO seeks. For example, Mr. Chen currently represents only himself, though he seeks to represent a class comprising other similarly situated parties.[63] The Court could decline to certify Mr. Chen's putative class, thereby limiting its holding only to the parties who are already before the Court. Any resulting judgment in GEO's favor would leave GEO open to copycat suits filed by other detainees at NWDC with claims no more viable than Chen's

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[58] *Id*. (citations and quotations omitted).
[59] *Id*. (citations and quotations omitted).
[60] Answer ¶ 12.8, Prayer.
[61] *See* Compl., ¶¶ 5.1-5.6 (alleging that GEO violates the MWA by failing to pay detainees minimum wage); Answer ¶ 12.8.
[62] Chen Mot. 9.
[63] *See* Compl., Relief Requested.



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own. To avoid this result, GEO seeks affirmative declarations that, if granted, would forestall subsequent suits that are intended to avoid a narrow holding that could result in this case. GEO's claims for declarations that the MWA does not apply to detainees and that GEO has no employment relationship with detainees who participate in the VWP are not, therefore, mirror images of Mr. Chen's own claim.

Mr. Chen has also provided no reason to strike these distinct claims on efficiency grounds. Rule 12(f) is intended to avoid unnecessary time and expenditures during litigation.[64] While GEO's counterclaims seek relief that is distinct from Mr. Chen's claim, both claims will likely turn on the same evidence. There is no danger of unnecessary expenditures that these claims will incur. GEO seeks distinct relief that will impose no real litigation burdens. Consequently, the Court has clear reasons to allow these claims, but no reason to dismiss them.

**B. The Court Should Not Dismiss the Claims for Declaratory Relief Regarding the FLSA.**

An advisory opinion is impermissible because it exceeds the powers of the federal judiciary. Claims that fall into this category can arise in various circumstances, such as when another branch of the federal government seeks the courts to "pass upon the validity of [their] actions . . . ."[65] Relevant here, a claim may present an impermissible request for an advisory opinion when there is no concrete conflict between the parties.[66]

GEO's claim for declaratory relief relating to the FLSA is properly pled because it addresses a concrete conflict between the parties. GEO seeks a declaration that the FLSA also

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[64] *Perez*, 2016 WL 898545, at *2.
[65] *Flast v. Cohen*, 392 U.S. 83, 96 (1968).
[66] *Id*. at 96-97.



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does not apply to detainees at the NWDC.[67] This claim represents a controversy of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment,"[68] because Mr. Chen's attempt to apply state minimum wage law raises an obvious threat that he may try to replead his case under federal law if its claim under the MWA fails. Further, the FLSA itself is regularly cited to interpret the MWA, as Mr. Chen has essentially admitted.[69]

More fundamentally, if this Court decides that detainees are GEO's employees under state law, that decision will necessarily implicate federal law. As explained above and in GEO's prior filings, federal law controls employment in the circumstances of this case, as detainees at the NWDC have, by definition, troubled immigration status.[70] Most, if not all, of those detainees cannot be employed under federal law.[71] Consequently, any decision finding that GEO has employed detainees under state law will raise a clear conflict with federal law: detainees will have been employed under the MWA even though they were unemployable under federal law. To the extent this outcome is even possible under the Supremacy Clause, it would clearly leave GEO's obligations under federal labor laws, such as the FLSA, in substantial doubt. Mr. Chen's claim necessarily raises questions about the FLSA, even if Mr. Chen himself would prefer to avoid federal law entirely.

Mr. Chen's other objection—that GEO cannot seek relief regarding the FLSA because Mr. Chen himself has not raised it—fails. In response to GEO's counterclaim relating to the FLSA, Mr. Chen argues that because "the parties do not seek to enforce the FLSA or any other

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[67] Answer ¶ 12.11-12.12, Prayer.
[68] *See MedImmune*, 549 U.S. at 127.
[69] Answer ¶¶ 12.10-12.12; Pl.'s Opp. to GEO's Mot. to Dismiss, at 18, ECF 15 (claiming that the FLSA is "not ***necessarily*** probative of coverage under state law") (emphasis added).
[70] *See* Answer ¶¶ 12.5-12.7.
[71] *See* 8 U.S.C. § 1324a(a).



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federal minimum wage laws," any adjudication of GEO's counterclaim would be an "advisory opinion."[72] As a factual matter, this claim is untrue: GEO—a ***party***—has raised the applicability of the FLSA in its counterclaim. Such relief is proper, and GEO's counterclaim is properly pled.

## III. THE COURT SHOULD DENY CHEN'S MOTION TO DISMISS GEO'S UNJUST ENRICHMENT CLAIM.

When the Court allowed Mr. Chen's novel claims to go forward, this case entered uncharted territory. Mr. Chen seeks to retroactively invent an employer-employee relationship between GEO and immigration detainees like him that is not only prohibited by federal law, but is completely unaccounted for by the Department of Homeland Security, ICE, GEO and other federal contractors, and state agencies.

This artificial, retroactive, legal fabrication bears none of the indicia of a genuine employer-employee relationship. For example, detainees' allowances were not subject to taxation, and none of the paperwork and clearances that GEO's real employees must have completed according to state or federal law were effectuated. GEO would be retroactively deemed to have had employees, but without any of the standard means to regulate that employment as a real employer could do with an employee hired in a competitive environment, *e.g.*, set expectations; conduct performance reviews; make reasonable demands for regularity in scheduling, efficiency and output. Instead, GEO would be forced to pay back minimum wages for detainee "employees" who never really worked a wage job and were under none of the expectations and obligations that come with one. VWP participants always worked voluntarily. They could walk off the job when they no longer felt like volunteering, or not show up at all.

[72] Chen Mot. 10.



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Through the MWA, Mr. Chen is seeking to use the Court's power to transmute this into an employment relationship and to order GEO to pay Mr. Chen and his putative class as wage-earning "employees" when GEO never received what genuine wage-earning employees in the competitive workforce are expected to deliver. These outcomes would unjustly enrich Mr. Chen and his putative class members.

Additionally GEO provided a number of benefits to VWP participants (e.g., health and dental care, lodging, clothes, food) that ordinary "employers" would not be required to provide to "employees." or for which the employer could have negotiated an appropriate offset.[73] As the Washington Supreme Court has explained, "[t]he doctrine of set-off, whether legal or equitable, is essentially a doctrine of equity. It was that natural justice and equity which dictated that the demands of parties, mutually indebted, should be set off against each other . . . ."[74] An offset should "certainly be recognized" in Washington, in which "equitable defenses to actions at law are authorized by statute."[75] Consequently, a court has discretion to decide whether to apply an offset when parties are found to have mutual debts, and should apply equitable principles when doing so.[76]

Courts have allowed contingent unjust enrichment counterclaims in minimum wage actions. In *Mann v. Fredericktown Associates Limited Partnership*,[77] the court allowed a defendant to plead an unjust enrichment claim that was contingent on the plaintiff's claim for

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[73] Wash. Admin. Code § 296-126-025; Wash. Rev. Code § 49.52.060.
[74] *Reichlin v. First Nat'l Bank*, 184 Wn. 304, 313, 51 P.2d 380, 384 (1935) (quotation omitted).
[75] *Id*. at 314.
[76] *Id*. at 314-15; *see also In re Rapid Settlements, Ltd.'s Application for Approval of Transfer of Structured Settlement Payment Rights*, 166 Wn. App. 683, 694, 271 P.3d 925, 931 (Wn. App. 2012) (allowing recoupment even in bankruptcy claim).
[77] Civ. No. WDQ-14-2971, 2015 WL 4878661 (D. Md. Aug. 13, 2015).



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wages under the FLSA, based on housing the defendant provided to the plaintiff.[78] The defendant sought leave to counterclaim for unjust enrichment when they had provided housing for the plaintiff. The court described the "gravamen" of the unjust enrichment counterclaim as contingent: "*if* [the defendants] [we]re required to pay the [p]laintiff compensation for her services, then she [would be] required to pay rent under the terms of the lease ***or disgorge the benefit she would receive if permitted to live rent free and receive compensation***."[79] The court then allowed the defendants to file their counterclaim even though the FLSA arguably foreclosed a counterclaim for offset.[80] In doing so, the court reasoned that the existence of a wage claim did not nullify other relationships between the parties that made their counterclaim cognizable.[81]

Similarly, in *Reyes v. LaFarga*,[82] the court allowed defendants to assert offset as an affirmative defense to a plaintiff's claim under the FLSA. In that case, the plaintiff alleged he had lived on the defendant's premises and worked more than eighty hours per week as a security guard for the defendant for over a decade.[83] The defendant claimed that he had merely allowed the plaintiff to live rent-free on his property, and that he had merely asked the plaintiff to alert him if the plaintiff ever noticed anything amiss.[84] Relevant here, the court allowed the defendant to claim that his provision of housing and food to the plaintiff could suffice at least to lower a judgment against the defendant.[85]

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[78] *Id*. at *5.
[79] *Id*. (first emphasis in original).
[80] *Id*.
[81] *Id*.
[82] No. CV-11-1998, 2013 WL 12097452 (D. Ariz. July 24, 2013).
[83] *Id*. at *1.
[84] *Id*.
[85] *Id*. at *3.



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At this stage, GEO is not required to prove its entire theory of offset, recoupment, or unjust enrichment. Through its counterclaims and defenses, GEO has put Mr. Chen on notice that any monetary recovery may be subject to an equitable adjustment to avoid an award that would unjustly enrich Mr. Chen or his putative class members.

## CONCLUSION

For the above stated reasons, the Court should deny Mr. Chen's motion to strike GEO's affirmative defenses and to dismiss GEO's counterclaims.

Dated: January 29, 2018

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**ATTORNEYS FOR DEFENDANT THE GEO GROUP, INC.**

**CERTIFICATE OF SERVICE**

I, Joseph Fonseca, hereby certify as follows:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On January 29, 2018, I electronically filed the above GEO's Opposition to Chen's Motion to Dismiss GEO's Counterclaims and to Strike GEO's Affirmative Defenses, with the Clerk of the Court using the CM/ECF system and served via Email to the following:

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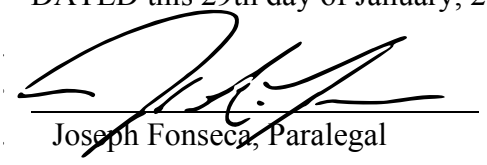
I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

DATED this 29th day of January, 2018 at Fircrest, Washington.



Joseph Fonseca, Paralegal

# Appendix A

Genco Op. No. 92-8 (INS), 1992 WL 1369347

U.S. Department of Justice

Immigration and Naturalization Service

General Counsel's Office

# Legal Opinion: The Applicability of Employer Sanctions to Alien Detainees Performing Work in INS Detention Facilities

**G. H. Kleinknecht, Associate Commissioner, Enforcement**

February 26, 1992

## I. QUESTION PRESENTED

***1** Does work performed by alien detainees in a detention facility operated by or contracted through the Immigration and Naturalization Service (INS or the Service) subject the Service to the employer sanctions provisions of the Immigration and Nationality Act (the Act)? [1]

## II. SUMMARY CONCLUSION

No. Alien detainees who perform work for the INS while in INS custody in a contract or Service detention facility are not considered "employees" for purposes of employer sanctions.

## III. LEGAL ANALYSIS

Background. On April 22, 1988, the Office of General Counsel opined to the Field Advisory Committee that inmates who perform duties in federal and state penal institutions are not subject to the employer sanctions provisions as set forth in § 274A of the Act. [2] At that time the issue of work performed by alien detainees in INS operated or controlled detention facilities was not addressed. This supplemental memorandum is therefore provided.

Analysis. In 1988, we determined that inmates who perform duties pursuant to prison work programs and receive gratuity for so doing are not subject to employer sanctions provisions as set forth in § 274A of the Act because no employer/employee relationship is ever formed. Inmates may be required to participate in an institutional work program, and for that participation receive remuneration. Work performed is for the purpose of rehabilitation and institutional maintenance, not compensation. Therefore, an inmate who participates in a work program in a state or federal facility is not doing so "for wages or other remuneration" and is not therefore an "employee" as defined by 8 C.F.R. § 274a.1(f). Likewise, the facility does not engage an inmate's services "for wages or other remuneration" and cannot be an employer as defined by 8 C.F.R § 274a.1(g).

Similarly, an alien detained in an INS facility does not meet the definition of "employee", nor does the INS meet the definition of "employer." A detainee performs work for institution maintenance, not compensation. The allowance paid to a detainee for work performed is specifically provided for by 8 U.S.C. § 1555(d) and currently limited by Congress to $1 per day. [3] This payment does not constitute an appointment of the detainee to the position of a federal employee. [4] The allowance is not subject to the provisions of the Fair Labor Standards Act (FLSA). [5]

Further, the specific Congressional intent behind the passage of the employer sanctions provision of the Act was to deter illegal immigration by removing the lure of employment. Work performed by alien detainees is incident to their detention. Therefore, this is certainly not the type of employment to which Congress referred as creating a magnet for illegal aliens.

***2** Therefore, we conclude that the work performed by alien detainees in INS custody does not fall within the purview of the employer sanctions provisions.

/s/ GROVER JOSEPH REES III
General Counsel

**Attachment**

Footnotes

1 8 U.S.C. 1324a.

2 Office of General Counsel Legal Opinion, entitled "Form I-9 Requirements: Inmates Employed Within Federal and State Institutions," dated April 27, 1988.

3 FY 1978 Appropriation Act, P. L. 95-86, 91 Stat. 426(August 2, 1977).

4 Alvarado-Guevara et al. v. INS, No. 90-1476, (Fed. Cir. Jan.6, 1992). Although this case is not citable as precedent, the Court held that detainees lacked proper appointment to be considered employees of the Service.

5 29 U.S.C. §§ 201 et seq.

Genco Op. No. 92-8 (INS), 1992 WL 1369347

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