

IS DOL EFFECTIVELY ENFORCING OUR WAGE AND HOUR LAWS?

HEARING

BEFORE THE
COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED TENTH CONGRESS
SECOND SESSION

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IS DOL EFFECTIVELY ENFORCING OUR WAGE AND HOUR LAWS?

**Tuesday, July 15, 2008
U.S. House of Representatives
Committee on Education and Labor
Washington, DC**

The committee met, pursuant to call, at 10:46 a.m., in room 2175, Rayburn House Office Building, Hon. George Miller [chairman of the committee] presiding.

Present: Representatives Miller, Kildee, Payne, Woolsey, McCarthy, Kucinich, Holt, Loeb sack, Yarmuth, Hare, Clarke, Courtney, Shea-Porter, McKeon, Petri, Platts, Wilson, Kline, Foxx, and Walberg.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Jordan Barab, Senior Labor Policy Advisor; Chris Brown, Labor Policy Advisor; Jody Cal emine, Labor Policy Deputy Director; Lynn Dondis, Policy Advisor, Subcommittee on Workforce Protections; Sarah Dyson, Investigative Associate, Oversight; Carlos Fenwick, Policy Advisor, Subcommittee on Health, Employment, Labor and Pensions; Patrick Findlay, Investigative Counsel; Gabriella Gomez, Senior Education Policy Advisor (Higher Education); David Hartzler, Systems Administrator; Ryan Holden, Senior Investigator, Oversight; Brian Kennedy, General Counsel; Stephanie Moore, General Counsel; Alex Nock, Deputy Staff Director; Joe Novotny, Chief Clerk; Rachel Racusen, Communications Director; Meredith Regine, Junior Legislative Associate, Labor; Michele Varnhagen, Labor Policy Director; Michael Zola, Chief Investigative Counsel, Oversight; Mark Zuckerman, Staff Director; Cameron Coursen, Minority Assistant Communications Director; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Senior Legislative Assistant; Alexa Marrero, Minority Communications Director; Jim Paretti, Minority Workforce Policy Counsel; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Hannah Snoke, Minority Legislative Assistant; and Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel.

Chairman MILLER [presiding]. Good morning. The quorum being present, the committee will come to order.

And before I recognize myself for an opening statement, I want to note that any member under Rule 12, any member may submit an opening statement in writing, which will be made part of the permanent record of this hearing, which is is the Department of

Labor effectively enforcing our wage and hour laws? And I welcome members to do that, and I want to welcome our panel.

I recognize myself for the purposes of an opening statement.

This year in our country, millions of workers will be robbed of their hard-earned wages. There are many ways for unscrupulous employers that can cheat a worker out of the wages that he or she earns. Employers might pay less than the minimum wage, refuse to pay overtime when employees work more than 40 hours a week or require employees to work off of the clock, and some employers never pay their employees at all. Simply put, this is theft, and it is illegal.

No industry or locality is immune from this crime. Wage theft affects everyone from poultry workers to construction workers, nursing home employees to retail employees, farm workers to landscapers. Last month marked the 70th anniversary of the enactment of the Fair Labor Standards Act, and the FLSA requires employers to pay their workers at least a minimum wage and at least time and a half for working overtime. The law also bans the use of child labor.

Thanks to the Fair Labor Standards Act, the Department of Labor is armed with many tools to fight wage theft and protect workers. It can receive and investigate complaints. The department can target entire industries that habitually violate the laws for audits and investigations. It can recover back pay and liquidated damages for employees and obtain civil money penalties against employers that break the law. And the Department of Labor can even stop the shipment of goods produced by law-breaking employers.

The purpose of today's hearing is to examine whether the federal government is doing enough to stop wage theft. We will hear directly from the Department of Labor's acting Wage and Hour administrator about what the agency is doing or not doing to safeguard hard-earned wages.

This committee has heard frequent reports from workers and their advocates that the Department of Labor is failing to effectively advocate on behalf of workers whose wages have been stolen. These accounts range from the department having weak enforcement policies to the department having outright aversion to soliciting workers' complaints.

Unfortunately, the workers most vulnerable to wage theft are also bearing the brunt of these uncertain economic times. These families still have to pay rent, mouths to feed, children to clothe and medicine to buy. For these reasons, I asked the Government Accountability Office to conduct an investigation into the effectiveness of the Department of Labor's enforcement of our wage and hour laws.

Today we will hear the results of two investigations. Both investigations show the Department of Labor is failing to adequately prevent or punish wage theft. Although the Department of Labor currently has the necessary tools to fight wage theft, the GAO investigation suggests that the problem of wage theft is only getting worse because of weaker enforcement.

The GAO will highlight the fact that actions initiated by the department on wage and hour violations have plummeted from ap-

proximately 47,000 in 1997 to fewer than 30,000 in 2007. And in too many cases, investigators from the Wage and Hour Division simply dropped the ball in pursuing employers that cheat their employees out of their hard-earned wages.

We expect to hear recommendations for how the department can do a better job in enforcing the law. We owe that to all hard-working Americans to ensure that the federal government lives up to its responsibility to guarantee that families are not being cheated out of their wages by bad employers.

I want to again thank the witnesses for being here today, and I look forward to your testimony.

I would like now to recognize Congressman McKeon, who is the senior Republican on the Education and Labor Committee.

**Prepared Statement of Hon. George Miller, Chairman, Committee on
Education and Labor**

Good morning.

This year, in our country, millions of workers will be robbed of their hard earned wages.

There are many ways an unscrupulous employer can cheat a worker out of the wages he or she earns. Employers might pay less than the minimum wage, refuse to pay overtime when employees work more than 40 hours a week, or require employees to work off the clock. And, some employers never pay their employees at all.

Simply put, this is theft. And it is illegal.

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Wage theft affects everyone from poultry workers to construction workers, nursing home employees to retail employees, farm workers to landscapers.

Last month marked the 70th anniversary of the enactment of the Fair Labor Standards Act. The FLSA requires employers to pay their workers at least the minimum wage and at least time-and-a-half for working overtime. The law also bans the use of child labor.

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We expect to hear recommendations for how the Department can do a better job of enforcing the law.

We owe it to all hard working Americans to ensure that the federal government lives up to its responsibility to guarantee that families are not being cheated out of their wages by bad employers.

I thank all of our witnesses for being here today and I look forward to their testimony.

Thank you.

Mr. MCKEON. Thank you, Chairman Miller, and good morning.

We are here today to examine the efforts of the U.S. Department of Labor to enforce our wage and hour laws. According to its Web site, the Wage and Hour Division's mission is to promote and achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce.

Consistent with that goal, the Wage and Hour Division is responsible for enforcing a wide range of federal labor laws, from the federal minimum wage, overtime pay, record-keeping and child-labor requirements of the Fair Labor Standards Act, to a number of unemployment—employment standards and worker protections in several immigration-related statutes.

I am pleased that the acting administrator of the Wage and Hour Division will be testifying today to report directly on the department's efforts to enforce these important worker protections and to answer questions about how to continue to strengthen enforcement in the future. But I would like to take just a moment to highlight a few statistics that demonstrate how important this division is.

Since 2001, the Wage and Hour Division has recouped more than \$1.25 billion on behalf of nearly 2 million workers. In fiscal year 2007 alone, more than 341,000 workers received recovered back wages thanks to the Department of Labor's efforts. I look forward to learning more today about how they are recovering wages and what can be done to ensure strong, consistent wage protections for workers now and into the future.

Like all areas of the federal government, the Wage and Hour Division faces challenges when it comes to recruiting and retaining qualified professionals to carry out its important day-to-day activities. We have an aging workforce, with many baby-boomers nearing retirement. We also have a competitive private sector that can lure talent and institutional knowledge away from the federal workforce.

However, despite these challenges, the Wage and Hour Division still manages to enforce critical labor laws on behalf of millions of workers in this country. I know there are dedicated professionals—both political appointees and career civil servants—who take their responsibilities on behalf of America's workers very seriously. Some of these professionals have worked in the Wage and Hour Division for decades, serving under administrations from both political parties, dutifully enforcing our labor laws without regard as to who was in the White House. These individuals work hard, and it would be a real shame if we were to politicize the work of the Wage and Hour Division and ignore the contributions of these hard-working investigators and enforcement officials.

One important measure of the department's success over the years is its ability to call attention to workers' rights under federal law. By enforcing the law and using the power of the bully pulpit to encourage compliance, countless additional workers have been protected. Employers recognize that violations will not be tolerated, and still other workers are made aware of their rights and choose to seek relief through the court system.

It is worth noting that the department has focused much of its attention on low-wage workers. This is important because low-wage workers are often struggling to make ends meet, a challenge that is even more difficult in the current economic environment. I am concerned about the plight of all American workers, who today are paying \$4.11 a gallon of regular unleaded gasoline.

I appreciate the opportunity today to discuss enforcement of our wage and labor laws, but I would also welcome a discussion about some of the other pocketbook issues that are, unfortunately, being ignored. In particular, the burden of the high cost of gasoline is putting a particular strain on workers wages. Chairman Miller mentioned many of the things that these low-quality—low-quality, low-price, low-pay workers are struggling with, but he did leave out the cost of gasoline, and that is one of the highest. It is—they have to pay that just to get to work.

I think it is time that the Congress gets serious about protecting families and their workers, and I yield back the balance of my time.

Prepared Statement of Hon. Howard P. "Buck" McKeon, Senior Republican Member, Committee on Education and Labor

Thank you Chairman Miller, and good morning. We're here today to examine the efforts of the U.S. Department of Labor to enforce our wage and hour laws.

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Thank you, and I yield back.

Chairman MILLER. Thank the gentleman for his statement.

I would like now to introduce our panel.

Our first witness is Anne-Marie Lasowski, who is currently the acting director of the GAO's Education, Workforce and Income Security Issues team, where she leads work on worker protection issues. In recent years she has led a body of work on defense trade issues, covering topics such as the U.S. export control system, foreign military sales, and military critical technologies.

Alexander Passantino is the acting administrator of the Department of Labor's Wage and Hour Division. Mr. Passantino—Passantino, right?

Mr. Passantino first joined the department in November 2005 as a senior policy advisor to the assistant secretary for employment standards administration.

Kim Bobo is the founder and executive director of Interfaith Worker Justice, a national organization that mobilizes religious support for low-wage workers. Since its founding in 1996, the organization has built a network of more than 60 religious labor groups around the country and worked on a variety of economic justice issues.

Gregory Kutz is currently the managing director of GAO's Forensic Audits and Special Investigations unit. Mr. Kutz has testified and written investigative reports about the federal government's handling of Hurricane Katrina and Rita, military pay problems at the Department of Defense and smuggling of nuclear materials across our nation's borders, among other important issues.

Welcome to all of you to the committee, and, again, I want to thank you in advance for your time and for your expertise.

As you know—some of you have been here before—that, when you begin talking, there will be a green light in front of you, and we allow you 5 minutes to make your opening statements so that we have time for questions. And then with 1 minute to go, there will be an orange light. You should think about how you are going to wrap your statement up. And then the red light comes on, and we would like you to finish your statement at that time, but we certainly want you to be able to finish it in a coherent fashion.

So we will begin with you, Ms. Lasowski.

**STATEMENT OF ANNE-MARIE LASOWSKI, ACTING DIRECTOR,
GOVERNMENT ACCOUNTABILITY OFFICE, EDUCATION,
WORKFORCE AND INCOME SECURITY ISSUES**

Ms. LASOWSKI. Mr. Chairman and members of the committee, I am pleased to be here to discuss our recently completed work on Wage and Hour's efforts to enforce the Fair Labor Standards Act. As you know, the act protects more than 130 million workers from substandard wages and working conditions.

We were asked to look at Wage and Hour's efforts to ensure compliance with the act from fiscal years 1997 to 2007. Today I will talk about our three key findings: First, the trends in Wage and Hour's compliance activities, which include enforcement, partnerships and outreach; second, how effective it was in planning and conducting its compliance activities; and, third, whether its efforts improved compliance with the act.

When we looked at trends over 10 years, we found Wage and Hour used all three types of its compliance activities, but 81 percent of its efforts were on enforcement actions, and the remainder was spent on partnerships and outreach. Wage and Hour defines a range of actions as enforcement, from investigation to quick conciliations, whereby an investigator will phone the employer. Mr. Kutz will address these actions in his statement.

Yet despite the high percentage of staff time devoted to enforcement actions, the number declined by more than a third over the 10-year period, from 47,000 to 30,000 actions. Agency officials said there were three reasons for this decline: They did more comprehensive investigations, which took more time; they changed the way they screened complaints; and they had fewer investigators.

The number of investigators fell by more than over 200 over the 10-year period, or more than 20 percent. The majority of Wage and Hour's enforcement actions were initiated by complaints from workers, and most of these were handled through conciliations.

In the second area we reviewed, Wage and Hour does not use basic information called for in the Government Performance and Result Act—or GPRA—guidance to plan or carry out its compliance activities. Wage and Hour does not have a clear picture of complaints it receives or complaint backlogs in its regional and district offices. Not all complaints are recorded, and offices differ in how they track backlogs.

GPRA says understanding one's external environment is key to planning. Heavier workloads fall in offices where a state has weak wage laws or enforcement. Yet headquarters does not consider this and has allocated about five new investigators to every region for the most recent years.

GPRA guidance also stresses the importance of obtaining input from external stakeholders. District office officials solicit input from external stakeholders, but these meetings are held after priorities are set at headquarters.

The agency also does not fully use studies it commissioned and paid for. Researchers identified 33 industries—9 in particular—where violations are likely to occur. Wage and Hour officials told us it shifted its focus accordingly. However, since the completion of

those studies in 2004, investigations of the top 9 have increased only 2 percent.

Wage and Hour has also not sufficiently leveraged available tools, such as hotlines and partnerships, to encourage compliance.

Finally, we do not know whether Wage and Hour activities have improved compliance with the act because Wage and Hour frequently changes how it measures and reports its performance. The agency's long-term goals have remained the same over the 10-year period. But of the 131 performance measures it established, it reported on only 6 of them for longer than a year.

We are making several recommendations. To improve how Wage and Hour plans and conducts its compliance activities, we recommend the agency evaluate its complaint data, use input, as appropriate, from stakeholders, incorporate findings from its commission studies and leverage existing tools.

We also recommend Wage and Hour be more accountable by establishing, maintaining and reporting on its performance measures.

In conclusion, Wage and Hour is responsible for ensuring the basic rights of workers, but it does not know how effectively it is doing so. Given staff reductions, it is critical for Wage and Hour to use all available information and tools, and it must consistently measure its results to determine what works. Basic steps outlined on our recommendations address these challenges.

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions you or other members of the committee may have.

Thank you.

[The statement of Ms. Lasowski may be accessed at the following Internet address:]

<http://www.gao.gov/new.items/d08962t.pdf>

Chairman MILLER. Thank you.
Mr. Passantino.

STATEMENT OF ALEXANDER PASSANTINO, ACTING ADMINISTRATOR, U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION

Mr. PASSANTINO. Thank you, and will my written statement be made part of the record?

Thank you.

Chairman Miller, Ranking Member McKeon and distinguished members of the committee, thank you for the opportunity to answer the question posed by today's hearing: Is the Department of Labor effectively enforcing our wage and hour laws?

On behalf of the men and women who make up the Wage and Hour Division, including the deputy administrator for enforcement and our five regional administrators, who join me here today—and they are right here in this front row—I respond with an unqualified yes.

Whether you measure by quality of cases, back wages recovered, employees receiving back pay or any other meaningful measure, the Wage and Hour Division's performance has been improving

over the past 10 years. Since 2001, Wage and Hour has recovered more than \$1.25 billion for nearly 2 million workers.

In fiscal year 2007, over 341,000 workers received back wages, the second-largest number of workers ever behind 2003. Last year's recovery of wages for workers, \$220 million, is the highest total the agency has ever recorded. This represents a 67 percent increase over back wages recovered in 2001 and is more than twice the amount collected in fiscal 1997.

In the brief time that we have had the GAO testimony on FLSA enforcement, numerous senior agency personnel, including those sitting behind me today, have reviewed the testimony. Each reviewer has been struck by the fact that, despite having spent over a year conducting its audit, GAO lacks a fundamental understanding of so many things about the Wage and Hour Division.

GAO is wrong about the purpose of the list of the nine industries, wrong on where independent reports direct us to focus our resources, wrong on where we should be focusing our resources, wrong on the value of stakeholder meetings at the district office level, and wrong on whether district offices consider complaints in the planning process.

Fundamentally, GAO lacks an understanding of our planning process and, as a result, underestimates the effectiveness of Wage and Hour's enforcement activities. GAO describes a process uninformed by the realities in the field in which Wage and Hour's national office somehow directs the specific activities of the district office. This description reflects GAO's failure to appreciate how Wage and Hour sets its national priorities and what exactly the term "national priorities" represents.

Each year the executive leadership team, which includes the regional administrators and the deputy regional administrators, sets broad-based national priorities. Our priorities are based on detailed research, review of prior year's performance and the continuous flow of information within the agency, whether it is an item contained in the various weekly reports or a conversation between an investigator and a regional administrator.

Our priorities include broad categorical directives, such as complaint management, focus on low-wage industries likely to employ independent contractors and conduct investigations in agriculture. The specifics related to the directives are typically completed at the district office level. District offices hold annual meetings for this exact purpose, and this local planning is critical to the success of the agency.

As a result of the planning that goes on at the national, regional and local levels, Wage and Hour has, over the last several years, devoted between 20 and 30 percent of its enforcement time, which is approximately 35 percent of all investigations, to directed investigations in low-wage industries that employ large numbers of vulnerable low-skill workers.

Ten years ago Wage and Hour concentrated its low-wage enforcement priorities in three industries: garment manufacturing, long-term health care and agriculture. For several years these were the only industries on which Wage and Hour could report performance. Moreover, by focusing on these three industries, Wage and Hour

limited the ability of every district office to fully participate in the agency's focus.

Accordingly, Wage and Hour retained outside contractors to conduct a low-wage study—a study on low-wage industries. After several years of research and analysis, in 2004 the contractors developed a list of 33 national industries in which the data suggested there was a higher likelihood of minimum wage and overtime violations.

During the planning cycle for fiscal year 2005, Wage and Hour shared the list with its managers across the country and officially expanded its low-wage targeting to encompass the 33 industries, including eating and drinking, hotel and motel, construction and daycare. The list of 33 industries allowed and continues to allow regional flexibility in selecting industries for initiative. Individual offices may even deviate from the list of the 33 if the office can provide data that supports their efforts.

As a result, Wage and Hour low-wage initiatives have resulted in the backwage collections on behalf of gas station employees in the Northeast, car wash workers in Los Angeles and New York, security guards in Puerto Rico, restaurant workers in Chicago and Indianapolis, construction workers in Las Vegas, day-care workers in Mississippi and Alabama and a host of other workers nationwide.

Moreover, independent review and analysis of our enforcement data demonstrates that our managers and investigators do a remarkable job of targeting local industries and local employers to find compliance problems.

In addition to enforcement, Wage and Hour has been aggressive in outreach to worker populations who may be unfamiliar with labor standards laws and remedies available to them.

Local Wage and Hour offices have collaborated with government agencies and advocacy organizations, including Mexican, other staff and Central American consulates. These partnerships typically exist in areas with large Hispanic and Asian populations, and they include justice and equality in the workplace. Empleo, which started in Los Angeles, and it was expanded to cover all of Southern California and Las Vegas, the Reach initiative in New York City, Coach initiative in Northern New Jersey, Tiger in Houston, and Peace in Kansas City. There are countless other relationships, both formal and informal, throughout the country.

During the course of this hearing, we have heard and will continue to hear about enforcement compliance assistance, partnerships, penalties, litigation and a host of other issues related to the operation of the Wage and Hour Division. Although we have been successful in many ways, I would like to discuss one success story in particular.

In 1997 and 2000, Wage and Hour compliance surveys of the poultry-processing industry found violations of overtime requirements affecting thousands of low-wage workers. In 2002 the Solicitor of Labor filed suit against Perdue, George's Processing and Tyson's for failing to pay their workers for all hours worked. That year, Perdue settled with the department and agreed to pay over \$10 million to over 25,000 employees and also agreed to comply with the Fair Labor Standards Act in the future.

Following the Supreme Court's decision in *IBP vs. Alvarez*, the Wage and Hour Division again advised poultry processors of their obligations under the Fair Labor Standards Act. In May 2006 George's Processing settled with the department by agreeing to pay more than \$1.2 million to more than 5,000 employees. George's also agreed to future compliance.

The department's lawsuit against Tyson, which was filed in 2002, is ongoing.

The success of the poultry-processing litigation demonstrates the careful balance we must deal with each day. We must weigh the benefits of prompt payment to employees against the benefits of enhanced penalties against employers.

Chairman MILLER. Mr. Passantino, I am going to ask you to—if you can wrap up.

Mr. PASSANTINO. Last paragraph.

Chairman MILLER. Yes.

Mr. PASSANTINO. It is not an easy answer, and there is no one-size-fits-all solution.

For 70 years, Wage and Hour has had a strong record of enforcement on behalf of workers in this country. For the past 2½ years, it has been my honor and privilege to serve alongside the dedicated and committed staff of professionals, who strive to carry out the agency's mission, to promote and achieve compliance with labor standards, to protect and enhance the—the welfare of the nation's workforce. We believe that we have achieved significant results for workers, and we will continue towards this end.

Mr. Chairman, this concludes my prepared remarks. I will be happy to answer any questions that you or the members of the committee have.

[The statement of Mr. Passantino follows:]

**Prepared Statement of Alexander J. Passantino, Acting Administrator,
Wage and Hour Division, U.S. Department of Labor**

Chairman Miller, Ranking Member McKeon, and distinguished members of the Committee: Thank you for the opportunity to discuss the record of the Department of Labor's Wage and Hour Division (WHD) in enforcing the nation's wage and hour laws. For seventy years, WHD has had a strong record of enforcement on behalf of workers in this country. In the two and one-half years of my tenure with this agency, it has been my honor to serve with the dedicated and committed staff of professionals who all strive to carry out the agency's mission "to promote and achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce."

As you know, WHD is responsible for enforcing some of our nation's most comprehensive federal labor laws including the minimum wage, overtime pay, record-keeping, youth employment and special employment, family and medical leave, migrant worker protections, lie detector tests, worker protections in certain temporary worker programs, and the prevailing wages for government service and construction contracts. WHD is first and foremost an enforcement agency, and its record recoveries on behalf of the workers in this country are a testament to the importance that the agency places on its law enforcement responsibilities.

Like all regulatory enforcement agencies, WHD employs a variety of tools and activities to enforce the law and achieve compliance. For example, WHD responds to complaints, initiates directed (i.e., targeted) cases, engages in educational and other outreach activities, and assesses penalties against violators. Each fiscal year, we review our results, and, based on, among other things, the extensive knowledge and expertise of our field personnel, undertake extensive operational planning for the coming year. Our annual planning process considers our available resources (current and anticipated), legislative and regulatory changes (recent and anticipated), demographic shifts, recent events (e.g., Hurricanes Katrina and Rita), information from

other government agencies and our non-government partners, studies and reports by outside consultants, and input from stakeholder groups.

Priorities are set on a national, regional, and district office level, with input from individuals at all levels of the organization. Indeed, district offices hold annual meetings for the specific purpose of preparing the following year's plan. This local planning is critical to the success of the agency—targeting strategies that may be successful in Des Moines, Iowa, for instance, are not necessarily effective in Brooklyn, New York. Once each plan is finalized and approved, it is carried out by the local management teams, support staff, and, of course, investigators.

Wage and Hour investigators are extensively trained, receiving both classroom and field training before being permitted to officially conduct an investigation on behalf of the agency. Many speak two or more languages. They are sworn law enforcement officers who carry badges and take seriously their responsibility to faithfully enforce the laws for which WHD has responsibility.

In addition to careful and rigorous annual planning, WHD has sought to become more efficient in enforcement. Field offices have emphasized complaint intake strategies that screen incoming calls and correspondence to ensure that the issue is properly within WHD's enforcement jurisdiction. In FY1997, some 36 percent of all cases handled by WHD resulted in a finding of no violation. By FY2007, WHD had reduced the percentage of no violation cases by nearly half—to 19 percent.

Over the last several years, WHD has generally devoted between 20 to 30 percent of its enforcement time—or approximately 35 percent of all investigations—to directed (or targeted) investigations in low-wage industries that employ large numbers of vulnerable low-skilled workers. Let me emphasize that these are investigations initiated by WHD and are not in response to complaints. Ten years ago, WHD concentrated its low-wage enforcement priorities in three industries—garment manufacturing, long-term health care, and agriculture. As we all know, the workplace has changed in the last ten years, and WHD has seen compliance problems grow in other low-wage industries even while the agency's resources were focused on the three national priorities. To combat this trend, WHD expanded its low-wage targeting to encompass a broader range of 33 industries, including eating and drinking, hotel and motel, construction, and day care. The 33 industries are those in which an external evaluation of data suggested there was a higher likelihood of minimum wage and overtime violations.

WHD's compliance efforts and successes in low-wage industries, such as garment manufacturing, health care, and poultry processing are well-documented and demonstrate the positive effect of the agency's strategies on employer behavior. In FY2005, WHD completed an investigation-based compliance survey of garment manufacturers in the two major garment areas of Los Angeles and New York City. The Los Angeles results demonstrated a 14 percentage point increase in compliance over the FY1994 baseline. In New York City, minimum wage and overtime compliance among garment contractors increased 17 percentage points between 2001 and 2004 and 32 percentage points over the baseline measure in 1997.

In the long-term health care industry, 2004 compliance surveys also documented marked improvements in compliance. The compliance rate for the nursing home industry increased by 16 percentage points between 2000 and 2004. Nearly 90 percent of employees were found to be paid in compliance. In the residential care industry, compliance increased by 13 percentage points between 2001 and 2004. Ninety-five percent of the employees were found to be paid in compliance with the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA).

Compliance surveys of the poultry processing industry in 1997 and 2000 found violations of overtime requirements affecting thousands of low wage workers. In an effort to promote compliance in this industry, in 2002, the Solicitor of Labor filed suit against Perdue, George's Processing, and Tyson for failing to pay their workers for all hours worked, including time spent donning and doffing protective gear and related walking time. In 2002, Perdue settled with the Department and agreed to pay over \$10 million to over 25,000 employees who worked at their plants between 2000 and 2002. Perdue also agreed to comply with the FLSA in the future by recording and paying workers for all hours worked.

Following the November 2005 Supreme Court decision in *IBP v. Alvarez*, WHD again advised poultry processors of their obligation to pay their employees who work in meat and poultry processing plants for the time they spend donning and doffing gear, as well as for the time they spend walking between the place where they put on and take off protective equipment and the place where they process the meat or poultry. In May 2006, George's Processing settled with the Department by agreeing to pay more than \$1.2 million to more than 5,000 employees for donning and doffing violations and agreed to future compliance. The Department's lawsuit against Tyson is ongoing. In August 2007, the Department filed a lawsuit against Pilgrim's Pride,

the largest poultry processor, in district court in Dallas, Texas, seeking back wages for workers at the Dallas facility and a nationwide injunction.

It is clear that over the last seven years WHD has maintained its long-standing goal of increasing compliance in these initially targeted low-wage industries, while expanding its focus on other industries. WHD low-wage initiatives have resulted in back wage collections on behalf of gas station employees in the northeast, car wash workers in Los Angeles and New York, security guards in Puerto Rico, restaurant workers in Chicago and Indianapolis, construction workers in Las Vegas, day care workers in Mississippi and Alabama, and a host of other workers nationwide.

In addition to its enforcement in low-wage industries, WHD has been aggressive in outreach to worker populations who may be unfamiliar with labor standards laws and the remedies available to them. Local WHD offices have developed, or have been a catalyst in developing, compliance initiatives designed specifically to ensure that low-wage workers are employed in compliance with labor statutes. Initiatives involve collaborations with government agencies and advocacy organizations, including Mexican and other South and Central American Consulates to which immigrant workers often turn for assistance.

The first compliance partnership programs began in areas with large Hispanic and Asian populations—Houston, Dallas, Las Vegas, and Los Angeles. The Justice and Equality in the Workplace Program—established in Houston in 2001 to educate Spanish-speaking low-wage workers and their employers about the law—has been a model for other compliance initiatives with similar objectives, such as the EMPLEO (Employment Education Outreach) initiatives in Southern California and Las Vegas. Other programs, like the REACH (Rapid Employer Assistance Chinese Hotline) in New York City, COACH (Compliance Outreach to the Asian Community and Hispanics) in Northern New Jersey, and TIGAAR (The Information Group for Asian American Rights) in Houston, work to increase knowledge of WHD laws and services among workers in the Asian and Hispanic communities and among new and small business owners.

As a result of these and countless other efforts by the agency, WHD has recovered more than \$1.25 billion for nearly two million workers since 2001. In FY 2007, over 341,000 workers received recovered back wages—the second largest number of workers since 1993, and the amount of wages recovered for workers—\$220,613,703—is the highest total the agency has ever recorded. This represents a 67 percent increase over back wages recovered in 2001, and is more than twice the amount collected in fiscal year 1997.

In fact, WHD total back wage collections for the last seven fiscal years represent a 28 percent increase over the back wage collections for the seven fiscal years beginning in 1994 and ending in 2000. During this same time period, WHD also increased by 10 percent the number of workers for whom it collected back wages. WHD achieved these important successes despite limited staff levels.

There is no question that WHD's staff levels have been declining. As with all federal agencies, experienced personnel have retired and others have left federal service to pursue private employment. WHD's authorized full time equivalent (FTE) levels have declined from 1,528 in fiscal year 2001 to 1,208 in fiscal year 2008. On-board investigator levels have declined from 945 in 2001 to 725 today. This decline is similar to the period from 1990 to 1996, when investigator levels decreased from 938 to 781. Today, WHD finds itself in that situation again.

We believe we have achieved significant results for workers, and we will continue toward this end.

Mister Chairman, this concludes my prepared remarks. I will be happy to answer any questions that you or the Members of the Committee may have.

Chairman MILLER. Thank you.
Mr. Kutz.

STATEMENT OF GREG KUTZ, MANAGING DIRECTOR, GOVERNMENT ACCOUNTABILITY OFFICE, FORENSIC AUDITS AND SPECIAL INVESTIGATIONS

Mr. KUTZ. Mr. Chairman and members of the committee, thank you for the opportunity to discuss the Department of Labor's investigations of wage and hour complaints. As you have heard, Labor has established a Wage and Hour Division, whose mission is to protect our nation's workforce.

Today's testimony highlights 15 closed cases that show inadequate investigations of worker complaints. As you requested, we plan to continue our work in this area to determine whether these cases are indicative of systemic problems.

The cases we investigated relate to low-wage workers. Their complaints related primarily to not being paid minimum wage or overtime, not receiving their final paycheck or, in some cases, not being paid at all. These workers included cashiers, cooks, painters, plumbers, security guards and truck drivers. These cases are from states across the country, including California, Florida, Maryland, Ohio, Texas and Virginia.

For these 15 cases, we found that Labor's investigations were inadequate. In some cases, very little effort was expended before a case was closed. In other cases, the case was closed because the 2-year statute of limitations was about to expire.

Here are a few examples of what we found: First, a child-labor complaint was closed because an employer could not be found. We easily identified this employer through a public-records search and a telephone call.

In another case, an employer admitted that wages were due but told the investigator to call back later. After subsequent phone calls were not returned, the investigator closed the case.

One case was assigned to an investigator 17 months after it was received. After the investigator held this case for 6 additional months, it was closed.

And, finally, one case was closed after an employer represented to an investigator that their revenue was below the \$500,000 threshold, where federal law applies. In a subsequent civil case, these representations were proven false and the employer settled with these employees for an undisclosed amount.

The most troubling cases to me are the ones where labor records indicate that wages were in fact due. Rather than pursue payment, Labor closed these cases and informed these individuals of the right to file a lawsuit. Examples of individuals informed of this right to file a lawsuit include a homeless person owed thousands of dollars, a gas station cashier owed a final paycheck, a garment worker whose employer was found by Labor to owe her and 23 other works \$60,000 and a painter whose employer refused to pay legally due wages because he and others were not U.S. citizens.

The poster board in the picture on the monitor shows an example of one of these letters that Labor sent to one of our case-study individuals. Note that in this case you see the employer refused to pay back wages that were due. However, the next sentence says that no further action will be taken. Imagine how this individual felt after reading at the bottom of the letter that Labor is—and I quote—"working to improve the lives of America's workers."

This and other letters also inform individuals of the right, as I mentioned, to file a lawsuit. It is hard to believe there are a lot of attorneys looking to work low-dollar, minimum wage and last-paycheck cases. And even if there were, these people certainly couldn't afford to pay them.

In conclusion, I can't tell you whether these cases are isolated or whether they are the tip of the iceberg. However, what is clear is that in several cases employers got away with labor-law violations

with no consequences. If Labor's mission is truly to protect our nation's workforce, these cases indicate they have a ways to go.

Mr. Chairman, that ends my statement. I look forward to your questions.

[The statement of Mr. Kutz may be accessed at the following Internet address:]

<http://www.gao.gov/new.items/d08973t.pdf>

Chairman MILLER. Thank you.
Ms. Bobo.

**STATEMENT OF KIM BOBO, EXECUTIVE DIRECTOR,
INTERFAITH WORKER JUSTICE**

Ms. BOBO. Thank you for allowing me to testify.

My name is Kim Bobo. I am the director of Interfaith Worker Justice. We run a network of 19 worker centers around the country, where workers who haven't gotten paid come for help.

The number-one problem we see is wage theft, workers are not getting paid. Out of this, I have just finished a book that is being published this fall on wage theft, and I have to tell you it is a national crisis at this moment in our nation. Two to three million workers aren't paid minimum wage. Three million workers are misclassified. Estimates are that millions are illegally denied overtime pay. Billions of dollars are at stake every year.

So if the question is is Wage and Hour doing important work, then the answer is yes. Is the question are there dedicated Wage and Hour staff who are hard working, then, absolutely, the answer is yes. But if the question is, is the Department of Labor effectively enforcing our wage and hour laws ?, are they stopping and deterring wage theft ?, then the answer must be a resounding no.

Let me offer five recommendations for strengthening the Wage and Hour Division. First, we need to develop a community policing model. Local police forces have found that they have got to create partnerships. We have been a part of some of the partnerships that Wage and Hour has developed, but they have inadequate staff and resources. Let me give you an example.

A couple years ago we started a worker center in Houston. When we got there, we saw all the billboards around advertising the partnership that Wage and Hour Division had developed, and the billboards had phone numbers you could call if you had a wage and hour violation. The problem was no one would answer the phone. So you had this entire effort with no one staffing the phone. Eventually we got permission to answer the phone, but it was not an adequate situation.

I heard last week from our worker center in Northwest Arkansas that they had sent over to the Wage and Hour Division 60 wage complaints that they thought were legitimate. Two of them were investigated; one resulted in back wages. Now, maybe we didn't get all the information we needed, but we need to work together to figure out how to collect these back wages.

Second recommendation, we need to devote 50 percent of the Wage and Hour Division's staff and resources to targeted investiga-

tions. Most of the work right now, because of the limited resources, is done by investigators answering the phone and trying to call the employer and get things settled. It is not sufficient. We need to figure out these industries and devote half of the resources to doing investigation.

In 1941 the division conducted more than 48,000 on-site investigations. They inspected 12 percent of the establishments covered by the law. Today there are 30,000 enforcement actions, and half of them are simply phone calls to the employers. That is about a third of 1 percent of workplaces have any action whatsoever.

Third recommendation, we must punish those who steal wages in meaningful ways. Usually, the worst thing that will happen to an employer who does not pay a worker's wages is that they have to pay the back wages that should have been paid in the first place. More often, the employer will pay less than was actually owed.

Now, Mr. Passantino just suggested that it is a trade-off between prompt payment versus penalties. I would suggest to you today that, if we do more rigorous penalties—using liquidated damages, fines, interest—and if we do this consistently and we publicize it regularly that we will more often get prompt payment. It is not an either/or that, if we do penalties, it will force prompt payment on a more regular basis.

Four, we must experiment with new educational enforcement approaches. This includes more pilot projects with these worker centers that are on the ground working, exploring creating one-stop centers for workers to come find out about not only Wage and Hour but OSHA problems, and also to create some joint task forces between Wage and Hour, particularly to focus on industries that are known to both steal wages and injure workers.

Finally, we have got to increase the number of enforcement staff and the attorneys devoted to Wage and Hour compliance. No matter how effectively the division uses its resources, it can't do the job with only 750 enforcement staff around the country to protect 130 million workers. It is not enough.

And when there are cases filed, you have got to have attorneys that are going to back them up. Last year there were 7,000 FLSA cases filed in federal court. The Department of Labor only did 151 of those. The Department of Labor needs to back up its investigators by taking employers to court.

Wage theft is bad for America. It hurts workers, it places ethical employers at a competitive disadvantage, it robs resources from the public coffers, and it denies communities of the economic stimulus.

Chairman MILLER. Ms. Bobo—

Ms. BOBO. Thank you very much.

[The statement of Ms. Bobo follows.]

Prepared Statement of Kim Bobo, Executive Director, Interfaith Worker Justice

Thank you for allowing me to testify.

My name is Kim Bobo. I am the Executive Director of Interfaith Worker Justice, a position I've held since 1996 when a group of 45 religious leaders and I founded the organization. We are a national network of 60 local affiliates that engage the religious community in issues and campaigns to improve wages, benefits and working conditions for workers, especially workers in low-wage jobs. We coordinate 19 workers centers that are drop-in centers for workers who are having serious wage or health and safety problems in their workplaces.

Last week I finished a book that will be published this fall on wage theft. The book grows out of the experiences our workers centers have had with wage theft. There are approximately 200 workers centers around the country, including the 19 affiliated with Interfaith Worker Justice. The number one problem addressed by these centers is wage theft. Wage theft has become a national crisis, and yet most Americans with whom I talk are surprised to learn the scope and breadth of the problem.

If the goal of Wage and Hour's labor law enforcement is to stop and deter wage theft, then the answer to the question posed by this hearing, "Is the Department of Labor Effectively Enforcing Our Wage and Hour Laws?" is a resounding "NO."

As a nation, we face a crisis of wage theft.

- Two million workers aren't paid the minimum wage.¹
- Three million are mis-classified as independent contractors instead of employees.²
- Millions more are illegally denied overtime pay.³

Millions of workers are having wages stolen each and every year. Workers are confused by the laws and unsure about which agencies can help them. Employers understand that the consequences of stealing wages are negligible. Wage stealers have no fear. The general public doesn't understand there is a crisis. Consequently, one must conclude that the Wage and Hour Division is failing to protect workers from wage theft because of its woefully inadequate enforcement of the federal wage and hour laws.

Unlike many issues that face our nation, stopping wage theft is not that complicated of a problem to solve. There are many of us who are willing to help—the religious community, ethical businesses and trade associations, unions and workers centers. But we can't do it by ourselves. We need a strong Wage and Hour Division of the Department of Labor that works collaboratively with all of us to protect workers from wage theft and enforce the nation's labor laws.

Interfaith Worker Justice offers five recommendations for strengthening the Wage and Hour Division: It must:

1) Develop a community policing model for wage enforcement. Local police forces learned years ago that the most effective way to stay abreast of community problems is to involve the community in addressing problems. Police who attempt to enforce the laws in their precincts without working collaboratively with community residents are bound to fail.

Although the Wage and Hour Division has a number of formal community collaborations, such as JEWEP in Houston and Dallas and EMPLEO in Las Vegas and Los Angeles, our experience around the country is that these partnerships are inadequately staffed and fail to take advantage of the possibilities these partnerships could provide. In addition, the Division does not consistently work with community partners, refuses to involve workers and advocates in helping gather information for supporting cases, ignores recommendations for targeted investigations, and sometimes won't even return our phone calls. Last week I heard the Director of our Northwest Arkansas Workers Center say that she and her colleagues had sent the Wage and Hour Division 60 wage complaints. Two were investigated and one resulted in back wages to workers. If the 58 other complaints we submitted did not have adequate information or were deficient in some other way, we should discuss it and figure out what can be done together to recover wages for workers.

The Wage and Hour Division can't operate as if it can stop wage theft all by itself. It cannot. It needs to work with the community, but it must commit to working with them in meaningful ways. Complaints generated must be quickly addressed. Worker advocates must be trusted and treated as allies. New approaches for targeting and enforcement should be tried and evaluated. Enforcement actions should be publicized to deter further wage theft. The Wage and Hour Division must be both transparent and accountable in appropriate ways.

2) Devote 50 percent of the Wage and Hour Division's staff and resources to targeted investigations. The Division should focus at least half of its resources on targeted investigations that have the possibility of recovering significant back wages for tens of thousands of workers in low-wage jobs, punishing those employers who systematically and willfully violate the nation's labor laws and bringing entire industries into compliance with the labor laws. When the agency primarily responds to complaints, it doesn't have much chance of changing the behavior of entire industries because employers will (rightly) gamble that only a small percentage of workers will have the courage to complain, given a tight labor market. In contrast, if entire industries are investigated, back wages collected and meaningful penalties levied, the industries known to steal wages will be challenged to change their business practices.

In 1941, when the Division began monitoring the 360,000 workplaces it was responsible for monitoring, it conducted more than 48,000 on-site investigations. The Wage and Hour Division physically inspected 12 percent of the establishments covered by the law.⁴ Today, the agency conducts only 30,000 “enforcement actions” and approximately half of those “actions” are simply phone calls to an employer. In 2007, the Wage and Hour Division only devoted 23 percent of its resources to targeted inspections,⁵ compared to 30 percent in 2000,⁶ 60 percent in 1968⁷ and more than half in 1941. Raising this percentage will be almost impossible to do without more enforcement staff for the Wage and Hour Division. The Secretary of Labor should fight for more staff over a six year time period and the percentage of investigators focused on investigations should increase from its current level to 50 percent of investigators’ time devoted to targeted investigations.

3) Punish those who steal wages in meaningful ways. In the vast majority of situations, the worst thing that will happen to an employer who does not pay a worker for all the hours worked is that the employer will have to pay back the wages that should have been paid in the first place. Often, the employer will pay the worker less than the worker should have earned because the Division only recovered wages for a two-year period and the wages may have been stolen for longer periods, or the case took so long to settle that the recovery amount was diminished, or the enforcement staff wasn’t sure its case was strong or that the Solicitor’s office would back it up, so the staff settled for lower amounts of wages than may have been owed. As a result, those who steal wages come out better off than if they had obeyed the law.

If my organization doesn’t pay its payroll taxes, I know that the IRS could take my house. I know that if I park in a no parking zone, I will get a fine and have my car towed, an expensive proposition in Chicago. Meaningful consequences deter crime, including wage theft.

The Wage and Hour Division has a variety of tools at its disposal for punishing unethical employers who steal wages, but does not consistently use them, even against employers who willfully and repeatedly steal wages, nor does it publicize either those who steal wages or the consequences it imposed as means for deterring others from stealing wages. In 2006 and 2007, the Wage and Hour Division issued civil money penalties (CMP) “fines” against fewer than half of companies that were found to have either repeat or recurring violations and almost half of those fined were for child labor violations, not minimum wage or overtime violations.⁸ In reviewing 294 consent decrees (court settlements) that were entered from 2002 to 2006 in federal court cases brought by the Secretary of Labor that resulted in payment of FLSA back wages, only 28 cases (9.5 percent) were awarded CMPs and only 66 cases (22.4 percent) were awarded liquidated damages (double wages). These were cases that had to be taken to court because the employers would not pay workers quickly, and still the attorneys representing the Department of Labor did not routinely press for CMPs and liquidated damages.

Some might argue that the laws are confusing and so employers shouldn’t be punished. Although I admit that some of the overtime issues can be confusing despite many efforts to clarify who is exempt and who isn’t, nonetheless if employers knew that there were serious consequences for noncompliance, employers would focus more on understanding the rules. And the second time an employer violates the same law, the consequences should be very serious.

The Wage and Hour Division should consistently seek:

- Liquidated damages (double wages).
- Interest on the wages owed.
- Civil money penalties (fines).
- Debarment from government contracts of companies that steal significant amount of wages or steal wages willfully or repeatedly.

In addition, the Division should maintain a list on line of all those who have stolen wages from workers and publicize every settlement in local papers, both to publicize the bad behavior, which deters other wage theft, and to encourage other workers to file complaints. All of these things could be done with no legislative changes.

If these punishments aren’t sufficient, the agency should seek the authority to extend the look back period, increase the civil money penalties, and mandate certain penalties.

4) Experiment with new educational and enforcement approaches. The Wage and Hour Division is not adequately protecting workers from wage theft and consequently it must try some new approaches. Interfaith Worker Justice recommends that the Division:

- Create pilot projects, in collaboration with workers centers and other worker advocates to conduct educational outreach and enforcement activities targeted on se-

lected industries known for stealing wages. These collaborations must be built upon transparency and accountability.

- Explore creating one-stop centers to address workplace problems where the alphabet soup of agencies, Wage and Hour, OSHA, EEOC, Worker Comp and State agencies could collaborate to help workers address workplace problems. These centers would be modeled on the one-stops the DOL created for job training.

- Create at least three joint Wage and Hour and OSHA taskforces to collaborate on protecting workers in industries like poultry and construction that are known for both wage violations and health and safety problems.

5) Increase the number of enforcement staff and attorneys devoted to wage and hour compliance. No matter how effectively the Division used its resources and enforcement tools, it could not possibly protect the nation's workers against wage theft and reasonably deter more wage theft without more enforcement staff and attorneys to back them up. The Wage and Hour Division has many dedicated, hard-working career staff, but 750 enforcement staff cannot protect 130 million workers against wage theft when stealing wages has become common practice in many industries.

The most comprehensive law the Wage and Hour Division enforces is the Fair Labor Standards Act, passed in 1938. It took a few years to get the Wage and Hour Division up and functioning, but by 1941 the Division had hired, trained and deployed 1500 field staff around the country inspecting workplaces covered by the Fair Labor Standards Act. That 1500 number is double the current enforcement staff, despite the fact that the current Wage and Hour staff is responsible for enforcing many more laws and protecting eight times as many workers employed in 20 times more workplaces.

Using the 1941 ratio of investigators to workers covered by wage and hour laws, the Wage and Hour Division would need more than 12,500 investigators. Using the 1941 ratio of investigators to workplaces covered, the Wage and Hour Division would need 34,000 investigators. Clearly having only 750 wage and hour investigators protecting the nation's workers against wage theft is inadequate. So what's the right number?

The best estimate of the number of investigators needed today must start with the premise that the Wage and Hour Division should attempt to maintain the 1941 ratio of investigators to workers. The Division's mission is to protect workers; the number of workplaces does not significantly impact investigator workload. If instead of using the 1941 figures for comparison we use the 1962 figures, we find a similar, albeit slightly less dramatic, need for more staff. Using the ratio of investigators to workers covered by wage and hour laws, the Wage and Hour Division would need over 7000 investigators. Using the 1962 ratio of investigators to workplaces covered, the Wage and Hour Division would need almost 10,000 investigators. Either calculation suggests the Division needs significantly more staff to be able to stay abreast with the enforcement responsibilities assigned to it. Because of the improved productivity that should be available to investigators from cellphones, computers and other technology, the ratio of investigators to workers could certainly be lower and still be effective in combating wage theft. Interfaith Worker Justice recommends that the agency quadruple its enforcement staff over the next six years in order to effectively stop and deter wage theft.

An additional challenge to immediately adding thousands of new investigators is the Wage and Hour Division's capacity to adequately train a large number of new investigators without bringing the agency's work to a halt. Quadrupling the agency's staff would be an overwhelming training challenge. Given the departure over the last few years of many dedicated career staff leaders with decades of experience, perhaps a strong team of retirees could be recruited to oversee the intensive training and mentoring program for new investigators.

Given the crisis of wage theft in the nation, the huge responsibility for protecting the nation's workers and deterring wage theft, and the critical Wage and Hour Division rebuilding needs, the following is a modest and reasonable recommendation:

- Immediately add three new investigators, two new assistant investigators, and one new administrative staff person for each of the 74 District and Area Offices. The majority of these investigators need to be bilingual. This would require each office to train and orient six new staff people. This is challenging, but possible, bringing the total number of new staff focused on investigations to 444. If there are significant backlogs in one region compared to another, the staff allocations could be shifted to address the backlogs. This would cost approximately \$25 million.

- Immediately add 25 professional staff in the national Wage and Hour Division headquarters to coordinate national surveys, national industry initiatives, worker outreach programs, work with state agencies and other new and expanded initiatives. This would cost approximately \$3 million.

- Over the next five years, continue to add additional investigative staff at this pace, adding 444 divided in an appropriate manner among the 74 District and Area offices. At the end of six years, this process would add 2664 new field staff.

The additional costs would be at least partially covered by additional civil money penalties paid directly to the U.S. Treasury.

- Assign at least half the total investigators (222 new and 375 experienced investigators) to targeted investigations focused on low-wage industries known to steal wages from workers. Please note that it is important that the Division not evaluate itself completely based on total dollar amounts recovered for workers, because the greatest dollar amounts recovered will almost always be from upper middle-class workers who have been denied overtime. These cases are ones that the private bar is willing and interested in representing because of the potential high dollar amounts involved. The cases that the private bar are not interested in, and thus the ones the Department of Labor should focus on, are the workers in low-wage jobs whose stolen wages may not seem like huge dollar amounts, but are significant to those workers' families. The Department of Labor should focus its targeted investigations on industries such as agriculture, restaurants, day labor, residential construction, and garment manufacturing.

Using this approach, the agency could rebuild its enforcement capacity, successfully train and mentor new investigators, and return to having at least half the staff devoted to targeted investigations.

In addition to adding enforcement staff, primarily in field offices around the nation, there must be enough attorneys in the Solicitor's Office to back up the work of the investigators. In 2007, there were 7310 cases filed in federal courts under the Fair Labor Standards Act. Only 151 cases were filed by the Department of Labor.⁹ No matter how well an investigator pursues a case, it will be meaningless if the ultimate threat of taking the employer to court is not used regularly and aggressively.

As a nation, we know that if something is a priority, we do it. If fighting wage theft is made a priority, we will find the resources to hire enforcement staff.

Fighting wage theft in the nation must become a priority for the Secretary of Labor and the Wage and Hour Administrator. New approaches must be developed and additional resources sought.

The American public will support efforts to stop wage theft. Collectively we believe that workers should be paid for all the work and that stealing is wrong.

Wage theft is bad for America. It hurts workers and their families, places ethical employers at a competitive disadvantage, robs resources from public coffers in unpaid taxes, and denies communities of the economic stimulus provided by wages spent in local communities. Wage and Hour's role is absolutely essential in restoring wages to workers, fairness to ethical businesses, monies to the public coffers and economic resources to communities. Wage theft is wrong. It should be stopped.

Thank you for this opportunity to testify.

ENDNOTES

¹The Urban Institute, Immigration Studies Program, A Profile of the Low-Wage Immigrant Workforce, November 2003. This figure of two million is based on this report profiling low-wage immigrant workers, which found that 13 percent of foreign-born female workers and 9 percent of foreign-born male workers are paid less than minimum wage. Based on immigrant workers alone, there are more than two million workers earning below minimum wage.

²Government Accounting Office, Employee Misclassification: Improved Outreach Could Help Ensure Proper Worker Classification (Washington, D.C.: U.S. Government Accountability Office), May 2007.

³There are no comprehensive studies documenting the precise numbers affected by unpaid overtime, but 85 percent of FLSA violations were related to overtime and almost all the large FLSA lawsuits filed are for overtime violations. Mis-classifying workers as exempt when they are really non-exempt and mis-classifying workers as independent contractors when they are really employees are both widespread practices that deny workers overtime.

⁴Wage and Hour Division, Annual Report, Wage and Hour Division, 1941.

⁵Interfaith Worker Justice, Working on Faith: A Faithful Response to Worker Abuse in New Orleans, 2007.

⁶USDOL, Wage and Hour Division, 1999-2000 Report on Initiatives, February 2001, page 11.

⁷USDOL 1968 Budget Estimate, Volume II, 90th Congress, First Session, WJ-14.

⁸49 percent in 2007 and 48 percent in 2006 according to data provided in the DOL FOIA letter to me (Kim Bobo) dated May 1, 2008.

⁹James C. Duff, Judicial Business of the United States Courts: 2007 Annual Report of the Director (Washington, D.C.: Administrative Office of the U.S. Courts), Table C-2A.,??

Chairman MILLER. Thank you.

Under a previous agreement, the chair will have 10 minutes and the senior Republican will have 10 minutes in the opening questioning.

As I understand the testimony in the GAO report—and I think—I just want to establish this as a base. On page 7, Ms. Lasowski, in your statement you state a majority 72 percent of the Wage and Hour Division's enforcement actions were initiated in response to complaints from workers. From 2000 to 2007, more than half the enforcement actions—approximately 52 percent—were conciliations, which Wage and Hour Division conducted over the phone. Is that agreed upon? I mean, is that a benchmark here?

Mr. Passantino, does that sound right to you?

Mr. PASSANTINO. That is approximately.

Chairman MILLER. Excuse me?

Mr. PASSANTINO. That is approximately right. I don't know the specifics for each year, but that seems about in the ballpark.

Chairman MILLER. You go on in to point out the question of whether or not these complaints are then—Mr. Kutz has a different problem with these phone complaints—but you suggest, if I am reading it correctly, Ms. Lasowski, that these complaints are sort of handled as they will be but there is really no data developed about what is taking place and how they might be used to further the mission of the Wage and Hour Division. Is that a fair reading, and can you explain that?

Ms. LASOWSKI. Yes, Mr. Chairman. In terms of what we said about complaints, we indicated that it is really up to the discretion—based on their field office handbook—as to whether or not a complaint is actually put into its database system. And not all complaints are recorded. Wage and Hour has the discretion, for example, based on workload and travel resources to screen out a complaint before entering it into the database. They have indicated that—

Chairman MILLER. Screen? What do you mean by screen out a complaint?

Ms. LASOWSKI. That they do not record all complaints into their database system. One field office that we visited tracks it separately, but that is not consistent across all field offices.

Chairman MILLER. So you—if I may interrupt you—so you were not able to determine or they or—and I am going to get Mr. Passantino to comment on this—they do not record all incoming actions?

Ms. LASOWSKI. That is correct. And, therefore, they are not accountable for every phone call or complaint that they receive in terms of what they have done with that particular complaint. The—

Chairman MILLER. So you don't know if that was—if an incoming call, when you don't know—if it was resolved, how it was resolved, in whose favor and what kind of complaint it was? You don't necessarily know that?

Ms. LASOWSKI. Only the ones that are entered into the database.

Chairman MILLER. And that is a discretionary decision?

Ms. LASOWSKI. That is correct at the local level. The data that we present here is based on the data that we had obtained in their database, which then shows that most of their enforcement actions

were driven by complaint, and then the information that we have here is based on those that were recorded in the system.

Chairman MILLER. Mr. Passantino?

Mr. PASSANTINO. Thank you, Mr. Chairman.

I guess the first point, with respect to whether we take and record every incoming call in the Wage and Hour Division, the answer to that is no. And we don't record every call because in many ways we are the great dumping ground for labor issues. People call us with every possible labor-related issue, whether it is unemployment insurance or what have you, and there are issues that—

Chairman MILLER. So are you telling me those are the only calls—the unrelated calls are the only ones you don't record?

Mr. PASSANTINO. I am saying that we record complaints. And a complaint for us is a call that provides a reasonable likelihood of a violation of a law that we enforce.

Chairman MILLER. And who gets to make that determination?

Mr. PASSANTINO. It is the local investigator or technician on the call—

Chairman MILLER. Person on the—

Mr. PASSANTINO [continuing]. In consultation with management if they—

Chairman MILLER. So that person makes the decision. If that didn't meet that threshold, that call is not recorded?

Mr. PASSANTINO. That is correct.

Chairman MILLER. So we don't know whether or not that person is sloughing off calls or not informed with the law? We don't know why that person may not be recording 20 percent of the calls, for example?

Mr. PASSANTINO. Well, I think we have to rely on the expertise of our field staff and the training that they receive.

Chairman MILLER. But you don't have any ability to check on that? You don't have any comparisons between field staffs if this is a discretionary decision and you never get a second complaint for somebody who was told that they didn't have a real complaint in the first part?

Mr. PASSANTINO. We do not record the information for calls that we receive that do not provide a reasonable basis for proceeding.

Chairman MILLER. Mr. Kutz, what was the situation with the calls that you saw? Those were recorded?

Mr. KUTZ. Yes, those were reported in the system. Correct.

Chairman MILLER. And so the calls where people were not—their claims were not met or their grievances were not met, even though, when you checked later, the suggestion was that they were in the right or they could—or they should have been met or what have you, those were still recorded?

Mr. KUTZ. Yes, they were all recorded. I mean, seven of them, there were indications of labor-law violations, either determined by Labor or the employer admitted to it. The other eight were ones that were just not worthy because of resource issues, the statute of limitations or whatever.

Chairman MILLER. But the statute of limitations may have been because the failure or breakdown in the process?

Mr. KUTZ. That is correct. There was a backlog—

Chairman MILLER. Complaints were taken—

Mr. KUTZ. Right.

Chairman MILLER [continuing]. But they were not acted on within that time.

Mr. KUTZ. That is correct. They appeared to be within Labor's jurisdiction for—

Chairman MILLER. It wasn't that the person calling was outside the statute of limitations?

Mr. KUTZ. Correct. But they were—

Chairman MILLER. The complainant was not outside the statute of limitations. The action was outside the—

Mr. KUTZ. The action was. Correct. I mean, they were received, and Labor determined that they were within their jurisdiction. They just didn't get to them until it was too late.

Chairman MILLER. Ms. Lasowski, does that description of why calls were recorded or not recorded comply—or comport with what you found?

Ms. LASOWSKI. The local investigators do have the discretion to make a decision, and regional offices can also weigh in in terms of what their workload is and whether or not they have travel resources. So, yes, there can be decisions that are made at the local level that impact as to whether or not they register the complaint.

Chairman MILLER. So you are telling me that a person's complaint may not get answered simply because there are complications within the office in terms of staffing time or travel time or other requirements such as that so we don't go to the merits of that case?

Ms. LASOWSKI. The policy that the Department of Labor has in terms of their field office handbook does allow them for that discretion.

Chairman MILLER. I have to tell you, I would have a lot of trouble, I guess, if I was on the other end of the phone, and I was looking to recover wages. In the cases that Mr. Kutz suggested, some people are owed a couple thousand bucks, and most of these were low-income occupations. So I make the decision I just can't deal with that now, and that is it?

Ms. LASOWSKI. That is possible. And then the other thing that I would—

Chairman MILLER. How the hell can that be sort of equal treatment? How do you do this, Mr. Passantino? The person picks up the phone—

Mr. PASSANTINO. Frankly, I think—

Chairman MILLER [continuing]. They say, "I can't get to this. I can't investigate this" as Mr. Kutz pointed out, "I can't find the address of this employer so you are out your wages. We agree that you are owed—they are owed to you, but I can't get there."

Mr. PASSANTINO. I think you underestimate the dedication of the career—

Chairman MILLER. No, no, I don't underestimate it. I am trying to determine the standard. Don't hide behind the dedication. I assume they are dedicated. I am trying to determine what the standard is so that people can get their complaints answered. And it goes to the question back, that has been raised here, whether or not you have sufficient people and resources are allocated based upon workloads. This has nothing to do with the dedication of the

people. It might be quite rational for that person to say that, but that may not be the standard that workers in this country deserve. Don't get them all mixed up here.

Mr. PASSANTINO. I believe that we have——

Chairman MILLER. Do you know the extent to which people sort of disconnect on a caller for those reasons?

Mr. PASSANTINO. I do not——

Chairman MILLER. It is not recorded, right?

Mr. PASSANTINO. I do not know that——

Chairman MILLER. So you don't know the efficiency of your offices?

Mr. PASSANTINO. I am sorry?

Chairman MILLER. You don't know the efficiencies of your offices?

Mr. PASSANTINO. I know their efficiencies based on the number of workers that they have impacted over the past several years.

Chairman MILLER. Yes, but you don't apparently know the number that they have failed to take because they either were short staffed, short time, didn't have allowances to investigate or to follow up.

Mr. PASSANTINO. We don't record information——

Chairman MILLER. So it might be that you should have collected \$2 billion?

Mr. PASSANTINO. I am sorry?

Chairman MILLER. It might be that you should have collected \$2 billion in back wages? You are crowing about collecting a billion whatever it was. Maybe it should have been \$2 billion if you had responded to the cases that Mr. Kutz found.

Mr. PASSANTINO. I believe that we have made requests for additional funding, and those requests for funding have not been granted. We have requested that the H-1B program be fixed in order for us to access that information, that funding for low-wage industries——

Chairman MILLER. Let me just ask you one question: As I understand it, on the—that for 2007 we experienced one of the higher recidivism rates. Is that accurate? I mean, the dollars have been going up, but then we see an increase in the recidivism rates——

Ms. BOBO. Mr. Miller——

Chairman MILLER [continuing]. Of what appear to be about 34 percent? Just a second.

Mr. PASSANTINO. I am sorry. I am——

Ms. BOBO. Can I give an example while he is looking for that?

Chairman MILLER. No. [Laughter.]

Ms. BOBO. Okay.

Chairman MILLER. We will get back to you in a little bit here.

Ms. BOBO. All right.

Mr. PASSANTINO. I am sorry. I don't have that information in front of me.

[OFF MIKE]

Chairman MILLER. No, it is not.

According to—this is a document from——

Mr. PASSANTINO. The White House.

Chairman MILLER [continuing]. From the White House. Recidivism rates have gone up substantially in 2007. I just—again, I am

trying to determine the data which the department is working off of. The GAO report—and we will get back to this because my colleagues have a chance here—raises serious management questions. Again, these are not questions about the dedication of the workforce. They are whether or not you have sufficient evidence so you can target and deploy your resources and you can respond to the needs of many citizens that, unfortunately, find themselves in this position of having their wages stolen from them.

I will just stop with that because I want to come back to it, and I want to turn—I am out of time.

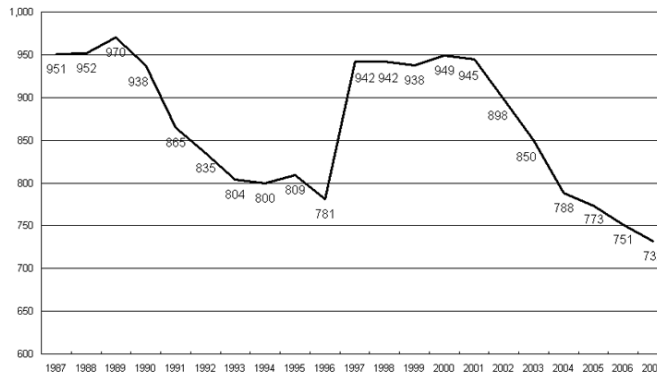
Recognize Mr. McKeon.

Mr. MCKEON. Mr. Chairman, before I begin my questions of the witness, I would ask unanimous consent to include in the record of today's hearing two documents reflecting data provided by the Wage and Hour Division. The first shows the trend in the number of Wage and Hour investigators from 1987 through 2007, which I think represents a fuller picture of these trends. And the second chart shows a trend in the number of enforcement hours per Wage and Hour investigator over the period of 1993 to 2007.

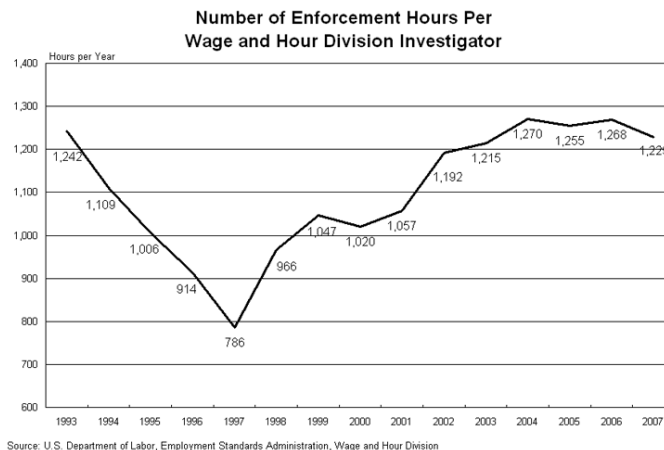
Chairman MILLER. I have no objection.

[The information follows:]

Number of Wage and Hour Division Investigators



Source: U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division



Mr. MCKEON. Thank you.

Also, could we get a copy of that—

Chairman MILLER. I will put it in the record.

Mr. MCKEON. Great.

Mr. Passantino, during the chairman's questioning, we just heard some discussion about the statute of limitations running on certain complaints or claims. Can you tell me, does the department have any policy with respect to claims on which the statute of limitations may be ready to run? Can and does the department seek waivers on the statute of limitations and Fair Labor Standards Act cases?

Mr. PASSANTINO. Yes. In certain cases we will seek what is called a tolling agreement. In the tolling agreement the department and the employer agree to toll the statute of limitations, that is, to stop the statute of limitations from running from that point going forward.

Mr. MCKEON. You know, as I look at these charts that I just put in the record that show the number of investigators went from like in 1987 951, it went up to 970, it went down to 781 in 1996, then it jumped up to 942, then it went last year down to 732.

You have a copy of that; right?

Then on the enforcement hours per Wage and Hour Division investigator, it went from in 1993 at 1,242 down to—1997 down to 786, then it worked its way back up to 1,255, 1,268, 1,229 last year.

It looks to me like your people are working very hard and maybe there is an insufficient number of people to keep up with all the complaints. You have said that you have requested additional funding and haven't been able to receive that. I think we may be looking at something here that—again, we have had these kind of hearings before where—I don't dispute what you say or what you say or what you say, but, again, you look at the elephant, and you have different people, different perspectives—different perceptions. If you have three blind people, look at the elephant, some see a wall, some see a tree trunk, some see a rope.

It sounds to me like you could pick out 15 of these investigations and have some problem, and like you concluded, we don't know if that is systemic or if those were an anomaly. We don't really know.

I think, if you looked at full disclosure of anything—if you looked at your office or my office, we could find some things that we could be doing better. We could also find some things that we are doing a good job of. And I think we could probably find that, if we were able to give the Wage and Hour Division more money and these division directors—I would like to hear from some of them, if we had had the opportunity—that are on the frontline trying to handle some of these problems—if they could have additional people so that phone calls don't go unanswered, so that all complaints—every complaint—is answered—at least that fits—I would assume, Mr. Passantino, you said that you are kind of a dumping ground for any kind of complaint. Somebody calls up and, for whatever reason, they are fired or whatever, they go to you, and maybe that—it doesn't even fall within your realm. I can see where you shouldn't have to record that.

By the same token, if you have a list of 25 people that have called that you have recorded because you do think they fall under your jurisdiction and you have—and you have reasonable needs to go after those, but you have one investigator, and they are working 40 hours a week, and they can only do so many in a day and that 25, they are also answering calls, and that goes up to 30 during the day, and they have only been able to operate—work on 2 or 3, that the load would just overwhelm them.

And let me just—Mr. Passantino, I would like to give you an opportunity to respond to Mr. Kutz's testimony regarding case studies of wage and hour investigations. In that testimony, the GAO highlights 10 cases where they allege that the Wage and Hour Division inadequately investigated wage and hour claims.

First, I would ask you, can you put these in context for us? Roughly, how many investigations does the division conduct annually? And as a follow up, I would ask do you view these 10 cases selected by GAO as representative of the broader universe of wage and hour claims your agency investigates?

Mr. PASSANTINO. Thank you. On the first point, the period in question was the last 3 fiscal years. During that time, we have done about 90,000 cases, although I think there are about 70,000 complaint cases, which is probably the more appropriate universe.

Mr. MCKEON. Ninety-thousand cases over 3 years investigated by 800 people roughly average?

Mr. PASSANTINO. Correct.

Now, as has been testified, about 50 percent of those are what we call conciliations. And those—50 percent of those cases take up about 5 percent of our FLSA enforcement time.

Mr. MCKEON. Would that be like, if they take a complaint, they call the employer, they agree, and they work it out and it gets taken care of?

Mr. PASSANTINO. Typically, conciliations arise out of last-paycheck issues. We use the conciliation tool when it is one employee with a limited issue that is not likely to impact other employees in the company. And in that case, yes, we will call the employer in an effort to resolve that particular last-paycheck issue.

Mr. MCKEON. Excuse me. I interrupted you.

Mr. PASSANTINO. I am sorry. I forgot the second part of the question?

Mr. MCKEON. You were at 90,000—the last part was do you view those 10 cases selected as representative of the broader universe of wage and hour claims your agency investigates?

Mr. PASSANTINO. I don't believe that it is. I think that, whenever you have an agency that has human beings, there is going to be human error. I think that our management-review process and our accountability-review process is intended to go—to root out problems in particular places. And I do not believe that the 15 cases that were identified out of the 70,000 complaints in the last 3 years are indicative of the agency's performance.

Mr. MCKEON. Thank you.

Mr. Kutz, how did you pick those 15 cases?

Mr. KUTZ. Let me just give you an indication first. There was an individual that worked in WHD that had allegations about issues with respect to cases. So we started with an allegation, interviewed an individual. And so we looked at several dozen cases to see if some of the things the individual had said were going on were in fact true. So that is how we got to the limited number of cases. So I certainly agree they are not representative.

However, some of the things that we talked to about the frontline investigators are indicative of representative situations where—and I think it is that they are stretched too thin in many cases so that they don't have time to follow up.

And the other thing that hasn't been discussed is the possibility that there aren't enough attorneys involved. Because some of these cases they had determined that there was a violation. In one case it was a \$60,000 violation for 24 people, and the investigator did a good job, from what we can tell of the investigation, but for whatever reason, it was dropped, and it appears probably because there were no attorneys to prosecute a case. And so that could be another cause here of what is going on—a matter of resources.

So, yes, these cases are not necessarily representative, but on the other hand, there appears to be some systematic things underlying why they were dropped.

Mr. MCKEON. Interesting to hear that there are not enough attorneys. That is just a joke around here. We have got lots of attorneys.

But, you know, I would think if you—did you find any cases that you looked at where they had done a good job?

Mr. KUTZ. There were some that it appeared—especially the ones that I said where they did a good job in the investigation but unexplainably—can't tell for sure why—the case was closed—

Mr. MCKEON. Did you find any that they had done a good job in the investigation and had followed through and had been satisfied and both parties were—

Mr. KUTZ. No, because we were not allowed to talk to the employer or employee so we could not conclusively determine on any cases. We are trying to work out protocols with Labor where we can contact some of these people. Absent being able to contact, we are unable to determine a successful resolution of any case.

Mr. MCKEON. So we probably—there should be a little more investigation in this because it would be hard to me—hard for me to think that out of 90,000 cases handled in the last 3 years they didn't do a good job on 1 or 2—you know?—or maybe even 50,000 or 80,000, you know. It is hard to think that everything they did was bad, you know, or led to a bad conclusion. So I—

Chairman MILLER. Would the gentleman yield?

Mr. MCKEON. I would be happy—well, my time is up—

Chairman MILLER. I just—

Chairman MILLER. On the question of—you said you were not allowed to contact the employer or the employee?

Mr. KUTZ. That is correct.

Chairman MILLER. That is why?

Mr. KUTZ. Because I think the issue is at the hotline and they want to work out protocols with us as to maintaining the confidentiality of these individuals.

Chairman MILLER. This is an ongoing investigation, correct?

Mr. KUTZ. Yes, that is correct.

Chairman MILLER. So it is—you are in the process—

Mr. KUTZ. So we would hope to work with Labor on acceptable protocols, where we can—if the person is willing to talk to us, that we can actually speak to the—

Chairman MILLER. But you are not referring to being able to talk to people within the agency?

Mr. KUTZ. No. We have talked to investigators. The frontline investigators for these 15 cases, we talked to them. So that is where we got a lot of our information. We had all the case-file information.

Mr. MCKEON. I am claiming my expired time.

Can I just follow up and say could there be a chance that we could continue this dialogue after this investigation is complete, once they—I mean, it would be more meaningful, I would think, if we could have a final conclusion to this and hear the whole story once you work out that protocol. And I am not saying—

Chairman MILLER. We plan to. I think we plan to.

Mr. MCKEON. I think it would be a good thing.

Chairman MILLER. Mr. Kildee?

Mr. KILDEE. Thank you, Mr. Chairman.

My questions are directed to Ms. Lasowski and Mr. Kutz.

Does no enforcement or puny enforcement of wage and hour laws become contagious, in that employers know that they can get away with violating the law or be treated gently? And is the present level of enforcement always been that case at DOL? Have there been times when enforcement was more stringent? We have had the law on the books since June 25, 1938. Are there times when the enforcement was much better? Is this a low point?

Ms. LASOWSKI. In terms of its performance, we were not able to assess over time what progress it has actually been able to demonstrate and make because the department has changed frequently its performance measures and what it actually reports. So, for example, for the 10-year period that we looked at, there are 131 measures that were established but 90 percent of those changed every 2 years, and 67 percent of those changed each year.

In addition, of the 131 measures, only 6 were reported for more than 1 year. So it is difficult to see the progress that has been made at Wage and Hour given the constantly changing performance measures and reporting of those measures.

The department has reported number of actions it has taken over the course of that 10-year period, and there has been a decline in the number of enforcement actions from 1997 to the present.

Mr. KILDEE. So it may be difficult to determine that, but you must be able to see some signs where in certain periods enforcement seemed to be better.

Ms. LASOWSKI. We were not able to make that determination because of the frequently changing performance measures.

Mr. KILDEE. So there is no way over the 70 years we can say that during this time there was greater compliance than there is today?

Ms. LASOWSKI. We only looked at a 10-year period so we would not be able to comment in terms of the entire period of time. And, no, we are not able to indicate what progress the department has actually made given the changing performance measures and what it reports.

Mr. KILDEE. I can just recall, when I served in state legislature, that it seems to me that the effectiveness of the DOL in enforcing these things was much greater. That is just my anecdotal remembrance of when I was serving on the committee in the state legislature.

Mr. Kutz, do you have any comment on that?

Mr. KUTZ. Not on a historical respect, no.

Mr. KILDEE. Wouldn't that be interesting to find out, though, whether there is a certain contagion in this? If employers know that there is a certain—dismissing of certain or failure to investigate further, is it not likely that this will become contagious?

Mr. KUTZ. Well, I can just comment on this: Some of the frontline investigators that we interviewed did indicate that the employers out there that are the shysters, if you will, are aware that Labor's WHD is stretched thin. I think that would be something that people would know out there, and, therefore, they may be more likely to try to take advantage of certain employees.

Mr. KILDEE. So there is a certain knowledge out there that can become contagious that these—

Mr. KUTZ. That is what frontline investigators told us in a couple of cases. I can't say that that is representative, but that was what several had told us.

Mr. KILDEE. So beyond the 10-year period—and we cannot find any trend or any time when the employer might be a little more concerned that enforcement will take place?

Ms. LASOWSKI. We were not able to make that kind of assessment.

Mr. KILDEE. Okay. Well, I think we could say that, generally speaking, when you have no policemen around that maybe crime—other types of crimes—can be committed, and that you have to have—the idea that apprehension and enforcement is going to be there in order to get compliance.

This is really, to my mind—and I was 7 years old when Franklin D. Roosevelt signed this bill into law, and then going through my legislative career in Lansing, Michigan, I do know that I could play

a role in making sure that someone would make a complaint, and they had greater assurance that the employer would be forced to comply with the law, but I don't see that as much now.

Thank you, Mr. Chairman.

Chairman MILLER. Mr. Kline?

Mr. KLINE. Thank you, Mr. Chairman.

Thank you, ladies and gentlemen, for being with us today.

Mr. Chairman, I hope that at some time we will be able to have a hearing on the impact of the underfunding of the Office of Labor Management Standards, what impact that might be having on the abuse by some union leadership to their union members.

But that is not the subject today. I am interested—because we have some anecdotal information here, and some anecdotal information we don't even have, we are just guessing at but—sorry. I guess we have got bells going off here somewhere.

As I understand the 10 or 15 cases, sir, that you were looking at, that—you have got information from talking to the investigators, but you don't have any information from either the employers or the employees to reach your conclusions; is that right?

Mr. KUTZ. Not oral information. Written information that was in the case files, yes. But not the ability to speak to them.

Mr. KLINE. Okay. I see. Thank you very much.

We have got some anecdotal information, but we are also looking for some—something a little bit more objective, and it seems to me that we have some of that. We heard testimony from Mr. Passantino—I think, in response to Mr. McKeon's question—that there were some 90,000 cases, 70,000 complaints that were dealt with in the last 3 years.

And I think, Mr. Passantino, in your testimony you said that in 1997 30 percent of wage and hour cases investigated by the agency resulted in findings of no violation but in 2007 that number was down to 19 percent. Those would be the policemen that Mr. Kildee was talking about, I suppose. Meaning that more than four out of five investigations did find violations of the law. Can you expand on what these numbers mean as a practical matter? What accounts for this change?

Mr. PASSANTINO. Thank you, Congressman.

With respect to the numbers that you cite, I believe it is actually—it went from 35 percent down to 19 percent, and it reflects an emphasis on taking quality complaints and working cases in such a way to ensure that the worker's rights are preserved. Meaning a case comes in the door or a call comes on a—we get a phone call, and when we are doing our screening and realize that there isn't a violation of the law at that point, we don't record that as a complaint, and we don't spend the agency's limited resources on responding to that. So in doing that and doing a better job of screening, we have been able to reduce the percentage of cases that the agency takes in which we found no violation of the law.

Mr. KLINE. Okay. Thank you.

I have got a note here that I don't fully understand. Maybe you can help me with it. Why did your agency not use information on whether back wages and penalties assessed are actually collected to determine if you are fulfilling your mission? The GAO report

mentions that you are able to track this information. What is that about?

Mr. PASSANTINO. We do track the information with respect to back wages and civil money penalties. We don't use it in the planning process because it doesn't assist us in targeting the appropriate entities. It doesn't assist us in targeting the appropriate industries. It just assists us in determining whether the people that we have recovered back wages from—or the employers we have recovered back wages from and assessed penalties against—have had the ability to pay or have paid.

Mr. KLINE. Okay. Thank you.

I was thinking about Mr. Kildee's questions and observations about do we have historical information, and the GAO said no, I believe, was the answer. We can't go back in history to see whether we are doing better or worse.

But your numbers, Mr. Passantino—the number of cases that you are taking—the number of complaints—and the improvement in the number where you have found actual violations would seem to me to be an indication of a system that is working and not one that is sliding in the wrong direction.

Of course, we don't have that historical information to go by, but it is hard to understand why Ms. Bobo would claim that we are in a crisis. I am not sure what that is in relation to, historically or just today. Would you care to answer?

Ms. BOBO. Well, if you look at the FLSA lawsuits that have been filed, they have quadrupled in the last 10 years. Now, you know, you could say, well, lawyers are just going out of control, but I don't really think that is the problem. I think we have employers that are routinely stealing wages from workers, and it is a crisis, and as a result, we have seen—there is a 73 percent increase in the number of FLSA suits filed from the previous year to last year. So we are seeing an explosion of workers not being paid and filing lawsuits in part because the Wage and Hour Division is not able to handle cases and they are referring people to the private bar to handle many of these cases.

Now, I am glad the private bar is helping out, but particularly for low-wage workers and where it is one or two workers in a workplace, it is not sufficient. They need to know, if they go to the Department of Labor, that their case will be handled.

Mr. KLINE. Thank you very much.

I yield back.

Chairman MILLER. Thank you.

Mr. Courtney?

Mr. COURTNEY. Thank you, Mr. Chairman.

I actually wanted to follow up on Ms. Bobo's comment, which is that the failure of the agency to do its job is actually resulting in a shift to—

Ms. BOBO. Absolutely.

Mr. COURTNEY [continuing]. To employees having to find legal representation—

Ms. BOBO. That is right.

Mr. COURTNEY [continuing]. Privately.

Mr. Kutz, your report—actually out of the 15 cases, 5 of the cases, by my count just reading the notes, resulted in referrals to—or advice to go seek their own private remedy; isn't that correct?

Mr. KUTZ. At least five, possibly seven. But, yes, at least five.

Mr. COURTNEY. Well, the irony is is that in this morning's New York Times—and maybe this article can be made a part of the record, Mr. Chairman—the comment from the Labor Department in terms of, you know, dismissing the GAO report was—the Labor Department said, “The Wage and Hour Division is delivering pay for workers, not a payday for trial lawyers.”

I mean, Mr. Kutz, in fact, the opposite is true. I mean, the inability of this department or unwillingness of this department to use its—to do its job is resulting in, in fact, a payday for trial lawyers; isn't that correct?

Mr. KUTZ. I can't speak as broad as Ms. Bobo. One of the five cases you mentioned, there actually was one where Labor didn't go after it, there was a private lawsuit and there was a settlement with the employees. So—and that was a case that Labor decided not to pursue.

Mr. COURTNEY. Ms. Bobo, I mean, is that what you are seeing out there on the street?

Ms. BOBO. Yes. That is what our 19 worker centers around the country report.

And, again, 10 years ago there were no worker centers in the country. Today there are almost 200 worker centers, and they all—the number-one thing they work on is helping workers collect back wages. And across the country these worker centers don't want to refer things to the Department of Labor because it either takes so long or they don't follow through on things. And so, you know, we are doing all these things that don't really make sense. We need a strong Department of Labor that we can refer cases to.

Mr. COURTNEY. And I guess the other question I was going to ask you is that, based on your experience dealing with low-income individuals, some who are homeless—I think there was a reference to one of the cases—I mean, in fact, their ability to access private counsel is not universal. I mean, the last time I checked, in fact, this was really not the plaintiff's bar's, you know, prime area of litigation is—

Ms. BOBO. Especially where it is one or two workers and it is a small amount of money. Absolutely.

Mr. COURTNEY. Okay. And I guess, you know, Mr. Passantino, I mean, we have this chart sitting in front of us, which is, again, not a verbal account of a case, but actually, you know, your department's written comments. I mean, what is your response to that letter that was presented by Mr. Kutz?

Mr. PASSANTINO. I am not familiar with the specifics of that particular case. I am not—I can't even see what the—who the addressee is.

But I will say that each day we have to make determinations of where our resources are best spent. And every week I get a weekly report from each of our regions that contains information on the highlights of their cases from all the district offices, and I see the types of violations and the industries that those violations take place in.

We are never going to be able to handle all of the cases. We are never going to be able to handle every violation and ensure 100 percent compliance. It is not going to happen. Even if you went to historically high levels of cases that the Wage and Hour Division has done and assume that each one of those cases was conducted in a separate establishment—in a separate location—it would take the agency somewhere in the neighborhood of 100 to 150 years to visit every employer. And that doesn't include the opportunity for new businesses to be created and who goes out of business.

And so we have to make decisions based on the resources that we have available to us on which cases we are able to take that are going to impact the workforce most significantly. And while we try to get recovery—I mean, the whole point of conciliations is to get recovery and to make an effort to recover, you know, a relatively small amount of money for one person where it is not indicative of the systemic violation, if we are not successful in doing that, there is not a whole lot that we can do given the resources that we have.

Mr. COURTNEY. Well, that statement, frankly, is a far cry from what your department told The New York Times in the paper this morning. Because, what you are basically saying is is that you really, you know, surrender when you sort of run into a stone wall and really leave workers with no other option but to seek their own private remedies, which, you know, I guess we should give you the trial lawyers, you know, government employee of the year award.

But the fact of the matter is is that, you know, what the statement was by your department in The Times this morning was completely misleading in terms of what really is happening to workers out there based on your own agency's determination of cases where you feel like you have just sort of run out of options.

So I yield back.

Mr. KUTZ. Congressman, could I just add to that real briefly.

That was actually probably the more difficult case because those were painters who were not legal U.S. citizens who had worked for a month. So it is even less likely they are going to be able to find a legal resolution because they are scared of being deported.

Chairman MILLER. Mr. Payne?

Mr. PAYNE. Thank you.

Mr. Passantino, in your statement you indicate that the department had recovered about \$1.25 billion since 2001. So I am wondering if you would give us estimate of the \$1.25 billion in recovered wages? What steps has the department taken to make sure that the correct employees actually receive the money that the department determines that these folks are owed? In other words, what percentage of the \$1.25 billion can the department confidently say was actually paid to the correct employee?

Mr. PASSANTINO. Thank you for your question.

I believe that our most recent data indicates that we have collected 93 percent of the amounts that employers agreed to pay on behalf of the workers. What we do in order to ensure that workers are paid varies depending on the circumstances. You know, Ms. Bobo was instrumental in getting us what is—we call the backwage locator, which is something on our Web site that allows employees who believe that they might have payments made to—as a result

of a Department of Labor proceeding, they might have monies that are due to them, they are able to go on the Web site and check to make—and see whether they have those funds available.

Mr. PAYNE. So it is up to them to contact you? You don't go out to reach them? And you are saying 93 percent, you think, have gone back to those people who were given the shaft?

Mr. PASSANTINO. I am sorry. That was one example of what we do. I mean, we do outreach events. I was—personally attended one in Mississippi, where an advocacy group was there with us handing out checks to the workers to make sure that the workers received the payments that they—

Mr. PAYNE. Okay. Well, maybe, if you could follow up in writing in answer to the question, I would be interested in that.

Also, you mention that some GAO case studies involved employees who are repeat offenders, who owe back wages of over \$60,000—who admit to owing back wages, who were deliberately—lied to the Wage and Hour investigators. Yet none of these cases were pursued by the Department of Labor. My question is why is the department not pursuing these violations? I know you didn't—you are unfamiliar with this particular letter, but maybe in general you might answer.

Mr. PASSANTINO. And, again, I am not familiar with the specifics of that case, but I would be glad to look into them for you.

Mr. PAYNE. Okay. If you get that back to me.

And just, finally, at the beginning of your remarks, when you were characterizing the GAO, could you repeat the wrongs? I was kind of curious.

Mr. PASSANTINO. They are wrong about the purpose of the list of the nine industries. They are wrong on where the independent reports direct us to focus our resources. They are wrong on where we should be focusing our resources. Wrong on the value of stakeholder meetings at the district office level. And wrong on whether district offices consider complaints in the planning process.

Mr. PAYNE. Have you informed the GAO that they are so wrong and have you had any consultation with this wrong—totally wrong group that is coming up with these wrong reports because—

Mr. PASSANTINO. Well—

Mr. PAYNE [continuing]. Your reports are all right when you can't answer a simple question about a letter, when you can't follow up with the questions that I have asked. You don't know the answers. You just know how GAO is totally wrong.

Mr. PASSANTINO. We received a copy of the testimony on Thursday afternoon. In that time and before this morning, we have not had the opportunity to speak to GAO about those concerns. When we met with GAO during the final conference about a month ago, we understood that a written report would be coming out towards the end of July and that we would be given the opportunity to formally comment on that. We have not been provided that opportunity other than in this hearing.

Mr. PAYNE. So you conclude that they are all wrong.

Mr. PASSANTINO. Well, we have reviewed the statements that they have made with respect to each of those items that I identified, and they are, in fact, wrong.

Mr. PAYNE. Well, Mr. GAO representative, are you all wrong?

Mr. KUTZ. I don't think he is talking about the 15 cases. I think he is talking about some broader issues. So I don't believe they would agree the 15 cases are wrong because we took it right out of their records and it is what their people told us.

Mr. PAYNE. Okay.

Chairman MILLER [continuing]. Ms. Lasowski's—

Mr. PAYNE. Yes.

Chairman MILLER. I think it was her testimony that he is referring to.

Mr. PAYNE. Okay.

Ms. LASOWSKI. Mr. Congressman, we stand behind our statement and the analysis and work that we did over those past 9 months in terms of this particular review. We did have an opportunity to discuss these findings and our potential recommendations with the department in June. Afterwards, we received the official request to actually testify, whereby we then transferred our statement into this, which you have before you today.

In terms of where Mr. Passantino says we are wrong, we did not mischaracterize the purpose of the 9. We did review the actual commission study, and the study, while it did indicate there were 33 low-wage industries, there were 9 in particular that they indicated would be the ones where the greatest potential of violations would occur. When we did an analysis of those particular 9, we saw that there was not a substantial refocus on those particular 9. There was only a 2 percent increase from the time that the commission studies were completed.

In terms of resources, we recognize that there has been a decline in the number of resources and, therefore, like every other government organization, it is important for an agency to strategically manage those resources. We see that there were opportunities for leveraging existing tools and available information to better strategically manage those resources.

In terms of stakeholder input, we do have the timeline in which stakeholder input is provided, and indeed it does occur after the national priorities are set. Previously, the national headquarters did receive direct information from stakeholders. That process did change, and now they are reliant on second-hand information that comes later in the process, and, therefore, external stakeholders don't really have that input early in the planning process.

Mr. PAYNE. Thank you very much.

Chairman MILLER. Time is expired.

Ms. Woolsey?

Ms. WOOLSEY. Thank you, Mr. Chairman.

And thank you to the panel.

First, just a comment.

I can tell you, Mr. Passantino, that, if you actually had enforcement standards that were—and penalties that were meaningful and fines and back pay that was collected, there would be fewer stolen wages. And it is absolutely important that your agency understands this and finds a way to make it happen.

I was really surprised that there wasn't a tracking system in the agency that could actually prove wrong and prove right and prove successes and prove need for your agency. I can't—when Mr. McKeon circulated the hour division investigators and the hours

per wage division investigators—hours worked actually—I said, “Oh good, something.” It doesn’t tell me anything.

What we want to know is the number of claims, the number of enforcement actions, the enforcement itself, for the fines, the—what—and penalties, what was collected, what wasn’t—

Mr. MCKEON. Would the gentlelady yield?

Ms. WOOLSEY. Yes, sir.

Mr. MCKEON. It does tell you something. It tells you how many investigators there have been and—

Ms. WOOLSEY. Oh, I understand that. I agree with you totally.

Mr. MCKEON. Oh, I thought you said it doesn’t tell you anything.

Ms. WOOLSEY. It tells us something. It tells us something, but it doesn’t give—

Mr. MCKEON. I guess I didn’t—

Ms. WOOLSEY [continuing]. GAO, and it doesn’t give Ms.—the division—

Mr. MCKEON. Gentlelady yield?

Ms. WOOLSEY [continuing]. What they need to defend themselves.

Mr. MCKEON. I didn’t mean that it was all inclusive but—

Ms. WOOLSEY. No, I know that. I wasn’t putting you down.

Mr. MCKEON [continuing]. Just more for the record.

Ms. WOOLSEY. I was excited to get this. I wanted more. I think they need more. That is what I am saying. It can’t be fluid. We—they need to put together—we need a two-track system. We need reports, statistics that show trends and point out needs and point out successes. What a difference that would make instead of just saying that the GAO is wrong because Congressman Payne was correct in that. If it is wrong, prove it.

But what is—and we need to know what we need. And we also need—the second track has to be what we need to do to build up the enforcement side of your agency to the intake part, the consideration and the enforcement.

And part of my question, I believe—I will ask a question. Mr. Passantino, who do you get your information from when you are—there is a case? How much is the information coming from the employer only? How much from the worker?

Mr. PASSANTINO. I am sorry. Are you asking in a typical investigation?

Ms. WOOLSEY. Yes, in an investigation. I mean, it is my understanding that the employer—because they do have records, but they don’t—I mean, they can give you what they have. But when does the employee get heard in your system?

Mr. PASSANTINO. In a complaint case, the employee is heard first. The employee will call and make a complaint, and we will interview that employee, visit the employer, obtain records, review records, interview additional employees if it appears that there are other issues. In a directed case or a targeted case, we will likely show up at the employer first, but during the course of that investigation, we will interview employees, review records and discuss—talk to former employees, current employees in all of those investigations.

Ms. WOOLSEY. All right. And I do understand that. But then, when it comes to the fine and the penalty and the payment, you

do not go back to the employee to see if they were—if they received the pay?

Mr. PASSANTINO. In some cases we supervise the settlement directly and we pay—the money comes from the Department of Labor to the employee directly. And in those cases, we assume—unless we hear otherwise—that the employee has been paid.

In other cases, employers will make the payments, and they will provide us with proof of payment, and, again, we assume that that money has been paid unless we hear otherwise.

Ms. WOOLSEY. All right. I am going to end there and ask Ms. Bobo. You wanted to give an example back when. Do you want to give your example now?

Ms. BOBO. Thank you. Actually, in response to that, we just had a case from our worker center in Cincinnati, where a group of workers weren't paid. It was investigated because it was some workers working for a company based in Northwest Arkansas. They investigated, they found that indeed the workers were owed money, they reached a settlement, the employer agreed to pay, and then the workers came back to our worker center and said, "But the employer hasn't paid."

So then we called the investigator and said, "Okay. They agreed to pay, but they are not paying. Can you do something?"

And the investigator said, "I don't know if I can do anything." Well, that is not much of a response for workers who have had their wages stolen.

We have our worker center in Madison, where La Hacienda Restaurant—there was an agreement made in 2006 to give the workers \$38,000 in back wages. Then again in 2007, there was another problem, and so again there were more back wages paid and some fines issued at that point. Then again this year, there is a group of workers who have now been waiting a year for a case to be handled, and they estimate that they are owed about another \$40,000 in back wages.

So we have the same company three different times. Clearly, it is a business practice that is not being stopped. And so part of this is not only is the division helping people get their back wages, which of course they should do, but we have got to do enough penalties so employers say, "It is not worth doing it. I have got to pay people instead of just going through this practice every other year of not paying."

Chairman MILLER. Mr. Hare?

Mr. HARE. Thank you, Mr. Chairman.

I am a bit confused in listening to Mr. Passantino say the GAO is wrong, wrong, wrong and everything is just going along swimmingly. And then we hear stories about these different cases—15—and seeing what we are seeing.

So, clearly, I don't question the dedication. I agree with the chairman. I don't question the dedication of the employees here. I think a large part of this maybe it is just—would like to know your thought on this—I don't think you have enough people, A, to enforce the laws that we currently have, and I think that is certainly part of the problem. But I wouldn't, from my perspective, say the GAO is just wrong on all these things because I think they brought up some interesting points today.

Mr. Kutz, I would like to ask you, you said—in the summary section it says the case they show that the Wage and Hour Division inadequately investigated complaints from low-income and minimum-wage workers, alleging that employers failed to pay the federal minimum wage, required overtime, failed to issue a last paycheck.

Why do you think the Wage and Hour Division failed in these situations is my first question, and is it purely a lack of resources—that we just talked about—or is there a lack of will, from your perspective, to enforce the law?

Mr. KUTZ. In eight of the cases, there wasn't really much of an investigation. Either nothing was done, the statute of limitations ran out or, for whatever reason, they closed the case.

In the other seven cases, there were strong indications either Labor determined or the employer admitted that back wages were due, and in each one of those cases, there was a closure of the case, no assessment of wages, and it is kind of unclear—the trail ends a little bit on some of those cases as to why, particularly and—what were there?—24 workers and \$60,000—why nothing more was done to enforce the law in that case. Labor clearly had records. They had spent 120-hour case—one of the workers—good investigation to me—a thorough investigation—it just ended. The trail ended. They turned it over to their supervisor, and they don't know why it ever wasn't resolved. They suspected it was because, again, there was no attorneys that could actually prosecute or take the case to court.

So I think there is a combination of things so he lack of resources within Wage and Hour and potentially either lack of will or other reasons why they are not trying to enforce when they actually know there is a violation.

Mr. HARE. Would anybody on the panel like to just take a very uneducated guess as to how many thousands and thousands of people are not getting the help that they need, whether it is because the statutes are running out and the Department of Labor is not doing what they are supposed to do or they don't have enough people?

I mean, Ms. Bobo, maybe you—or anybody. I mean, we are probably talking about thousands and thousands of people who are having their wages stolen every day and—

Ms. BOBO. I would say it is millions.

Mr. HARE. Millions?

Ms. BOBO. Absolutely.

Mr. HARE. Millions of people.

Mr. MCKEON. Would the gentleman yield?

Mr. HARE. I would be happy to yield.

Mr. MCKEON. You did state this is an uneducated guess?

Mr. HARE. Yes.

Mr. MCKEON. And just a guess?

Mr. HARE. Right. But let me just say—okay. But if you are talking into the hundreds of thousands—as an uneducated guess—but if you are talking into the hundreds of thousands, I don't know what happens to these people.

What do we do, Mr. Passantino—what do we need to do to help more people? What does your agency need to be able to—whether

it is a tenth of what Ms. Bobo said or half or whether it is all or whether it is more, what do we do to help these people out when they need it, when they are being—they are being ripped off? And either the statutes of limitations—I find it—to be honest with you—to not help somebody because it drags out and the statute runs out still doesn't make it right. The person had their wages stolen from them.

So what is it we need to do—what does your agency need to do to be able to, A, help more people and to bring more people into this process because that is what you are here to do, as I understand this thing?

Mr. PASSANTINO. Thank you. I agree that there clearly were identified problems in those 15 cases. Again, I am not familiar with the specifics of those 15 cases. They are out of a sample of 70,000. There are going to be problems in cases, and I don't know what the driving reasons were behind that.

Mr. HARE. Well, beyond the 15 cases. I am saying, for those people who are out there every day that we are not—for whatever reason—that we are not being able to reach out and to help. I mean, what is it that we need to do? What does your department need—or maybe somebody from the GAO recommend or somebody suggest to us from Congress—what do we need to do to help more people who are being taken advantage of by employers?

Mr. PASSANTINO. What we do is we publicize the results of cases that we resolve. We let the world know, and we let the area know that a particular case has taken place and that we recovered back wages for particular employees.

We engage in partnerships, both formal and informal, all over the country in an effort to leverage our resources and to get more people to come to the department and to present the issues that they might have and to gain their trust.

We are doing a better job on the cases that we are working on. We are impacting more employees per case. We are getting bigger recoveries in each case because, when we conduct the cases, we are doing more comprehensive cases—more thorough cases—in an effort to impact the maximum number of employees possible.

Mr. HARE. Mr. Passantino—

Mr. PASSANTINO. That being said, for the past several years we have requested additional investigative resources, whether it is for investigators or technicians. Wage and hour technicians are the ones who are on the frontline dealing with these conciliations that we have talked about and really take a burden off of the investigators so that the investigators can go out and investigate.

Mr. HARE. Well—let me—I am sorry to interrupt. I know my time is up.

Mr. Chairman, I just—just one last quick follow up from the GAO folks.

Would you concur with that?

Ms. LASOWSKI. We have made some very specific recommendations as to how Wage and Hour can improve its planning and conducting of compliance activities. And there are several steps that we think that they need to improve, particularly in terms of having a better understanding of the actual full complaints to better manage their workload so they know what their demand is.

They need to better leverage existing tools that they have available, including partnerships. Partnerships and outreach activities do constitute about 19 percent of staff time currently, the remainder in enforcement actions.

In addition, in order to hold the agency accountable, we are recommending that they consistently establish and measure their progress and report on it because then—what we found is that, by constantly changing measures and what is reported, then you don't really know what progress is being made.

I think these basic steps, which deal with management practices that are in guidance that surround the Government Performance and Results Act would go a long way in terms of helping the department deal with a more strategic approach for managing limited resources.

Mr. MCKEON. Would the gentleman yield?

Mr. HARE. My time is up, but sure.

Mr. MCKEON. He is—you know, he is a nice chairman.

Chairman MILLER. Gentleman yielding.

Mr. MCKEON. Very, very, very brief.

What I am thinking is, when they change, it sounds like to me the things that they are doing that they are changing over the years is as different kinds of occupations become prominent that have problems, you are kind of moving in that direction. And, you know, we don't make slide rules anymore so we wouldn't have to go back and check on slide rule manufacturers.

I think they have to have some ability to move and adapt, and if they had to do things the way they did in the 1930's, we wouldn't be capturing a lot of data too. I think—

Chairman MILLER. Ms. Lasowski, that is not your testimony.

Mr. MCKEON. I yield back.

Mr. MCKEON. That is not your testimony.

Ms. LASOWSKI. No. That is correct. We are—

Chairman MILLER. It is the opposite of that.

Ms. LASOWSKI. Yes. What we are indicating is that the performance measures that have been established over a 10-year period have changed fairly frequently. Ninety percent of those were in existence for 2 years or less.

Mr. MCKEON. Maybe I misunderstood because I thought that they have changed performance measures, and they have moved to like—

Chairman MILLER. It is like a school district that changes the test every year. You can never compare one to the other. That is the concern, I think, here is—

Mr. MCKEON. And in some—

Chairman MILLER [continuing]. Is that you don't have the ability to develop baselines or to develop the variances from those or the improvements or the lack of improvement.

Mr. MCKEON. And in some ways they shouldn't change the way they measure English every year, but maybe, you know, some new—

Chairman MILLER [continuing]. Yes. We will talk on the outside.

I just want to know. That was not a quick characterization of what, I believe, you presented to the committee?

Ms. LASOWSKI. Yes. What we found is that of 131 measures that have been established from fiscal years 1997 to 2007, the majority of those changed every couple of years, and in terms of what actually got reported, only 6 measures were reported for more than 1 year. Therefore, if it—one is constantly changing the measures, then it is very difficult to see what progress is actually being made in different areas.

The department did inform us that they will change measures once they have actually reached a particular goal or if the data is not reliable or if staff are indicating that it is difficult to measure. They take a variety of factors into consideration when this—determining what measures to utilize. However, by constantly changing the measures, then there is not a way to track what progress is actually made.

Chairman MILLER. Ms. Clarke, I think we are just talking past each other. Excuse me.

Ms. CLARKE. Thank you very much, Mr. Chairman.

Let me just say that I think one word really captures what is taking place, and that is this is an entity within our government that is just totally overwhelmed. I mean, just in terms of the past comments about changing performance measures. That is an indication that your agency is overwhelmed with its work and has not captured the essence of what needs to happen to bring remedy for all of these American workers out there.

Let me ask a question to each of you because it is going to be a different perspective, I believe, of course, from Mr. Passantino from the rest of the panel list.

As the end of the fiscal year 2007 comes and the Wage and Hour Division currently has—is it 732 total investigators nationwide? That is one investigator for every 10,000 employers. If we put this in the context of being overwhelmed and in light of this, what ability does the division have to properly and efficiently handle not only current caseloads but also future caseloads?

And for your employees who, you know, have been mentioned throughout the testimony today, what are they going through psychologically? What is the impact on the quality of their work given the magnitude of the work that they have before them?

Mr. PASSANTINO. Thank you.

With respect to the investigator numbers, the 732 number is for the end of fiscal year 2007, and I believe that we have hired up since then. It is going to be a couple more than that. I am not entirely sure how many more than that—

Ms. CLARKE. Hold on a moment. A couple to me means two. How many more are you—

Mr. PASSANTINO. I am not entirely sure.

Ms. CLARKE. But—

Mr. PASSANTINO. But our fiscal year 2009 request was for 75 additional FTE, which would be investigators and wage and hour technicians.

Ms. CLARKE. But did you break out how many specific investigators you need? You must have broken that out.

Mr. PASSANTINO. I don't know exactly what we submitted. I know that it is for 75 FTE. The calculation of the funding that that will take takes into account a split between investigators and techni-

cians, and I am not familiar enough with the specifics of the budget process to know whether it is broken out in any budget document submitted to Congress. But it is 75 FTE, which is investigators and technicians, and I actually believe that that request has made it through the Appropriations Committee here in the House but—

Ms. CLARKE. So my question is basically employee morale. Because these are the folks who are on the frontline to be able to help all of these workers who are out here, and basically you are looking at around 10,000 employers—maybe even more as we, you know, roll out in the upcoming fiscal year.

If their morale is down, if they are overwhelmed with respect to the number of cases that they have, how does that go to the quality of the work and their pursuit of justice for these workers when you don't even have a baseline for quality here—for quality and success?

Does anyone else have comments on that in terms of the number—the sheer volume that this division is dealing with?

Mr. PASSANTINO. May I respond to your—

Ms. CLARKE. Sure.

Mr. PASSANTINO. We don't have a baseline. We have been focused on three long-term goals, and that is to improve compliance in low-wage industries, to decrease employer recidivism and to improve complaint management.

The measures that have been changing—these measures that have been changing are all designed to get to the core of those three goals—

Ms. CLARKE. It—

Mr. PASSANTINO [continuing]. To reflect those three goals. And when they change, it is either because we have met a goal, or sometimes during the—you know, you come up on the next fiscal planning season, where you are trying to set goals, and you realize that the goal that you have set in the previous year is influencing behavior of managers and investigators in a way that you don't want it to be influenced. So you change that goal so that you can better direct the performance of the people in the agency.

Ms. CLARKE. I got you.

I just want to—Mr. Kutz, if you could respond?

Mr. KUTZ. Yes. I would just say in—especially in the cases—the 15 we looked at—7 of them there were numerous violations—dozens of people, records violations, et cetera. There does appear to be evidence of some, you know, staff stretched thin as to why they couldn't take it over the goal line, if you will, and really enforce the law. They walked away from those cases, and the explanation can only be that they didn't have enough resources to take it over the goal. I am not sure why else you would walk away from someone who is owed wages and who needs the money. I don't see how else you could walk away from it.

Ms. CLARKE. I know my time is up, Mr. Chairman.

It is very clear that there has got to be a certain level of disillusionment going on amongst the employees in seeing their task as being overwhelming.

Thank you.

Thank you very much, Mr. Chair.

Chairman MILLER. Ms. Shea-Porter?

Ms. SHEA-PORTER. Thank you.

Mr. Passantino, you know what is missing here as I am sitting here listening? A sense of outrage from you that you are unable to protect the American workers who have worked and had their wages stolen from them. And this is so disturbing to me. You should be standing there pounding the table saying, "I don't have the resources that I need. I know we have workers who have worked for free like slaves because their wages have been stolen." And I am sorry that I am upset this, but I have to tell you, you should be upset about this.

I went down to Katrina, and I saw people having their wages stolen. I was on a food truck, and they would come up, and they would say that they had been working—federal contractors had hired them, and they were working, and they showed up one day, and they were gone. Their employers were gone. And I have often wondered what happened to them because their wages were stolen and they had nothing left.

And so this is really very disturbing to me, and I was going to ask you if—if we had an event again—I mean, we are supposed to be in decent times of relative calmness compared to the aftermath of Katrina. If we had an area that was hit again like this, what would you do if you are unable to even handle the cases right now? You are talking about reducing recidivism. I mean, I think the goal should be ending it. I think an employer who steals wages from an employee should be prosecuted, period. Not saying, "Well, you know, you did better this year. You know, last year you stole from this man, and this year you are only stealing from."

And, unfortunately, this gives a black eye to most American businesses that do a good job and are honest and pay their employees, but what happens is we are breeding a kind of cynicism.

So I would like to ask what you would do right now, if there were a region with federal contractors and something happened, what do you have in place to make sure that wages would be paid to the employees?

Mr. PASSANTINO. I am actually glad you brought that up. The Wage and Hour Division, the staff in New Orleans, the staff in Mississippi and the investigators—over 30 investigators from around the country who were detailed for various periods of time to that area did a remarkable job. We have done additional hiring in those offices. We have conducted over 900 cases for hurricane either cleanup or construction. We have recovered over 12—or approximately \$12 million for 15,000 employees.

Exactly what we would do if a situation like that happened again, it is difficult to say. Obviously, the first and foremost priority of the agency is to ensure the safety of its own employees. And we made sure that everyone was okay, and we distributed them around the country to various offices that were willing to take them on and to assist workers.

Shortly after we were able to get back into the city as an agency—our offices, both in Gulfport and in New Orleans, were under water, and we were unable to get into our offices. So the New Orleans district office operated for a long period of time out of a shoe store in a mall, and the Mississippi office operated out of a trailer.

Ms. SHEA-PORTER. I was there so I am aware.

And having a limited amount of time—I hate to interrupt, but I am asking you is that I, first of all, know that many people were not paid, and you know that too, and that you couldn't possibly catch up. And I am asking what is in place right now, and what are you doing for the federal contractors, some of who contracted out and then they—you know, three or four steps away from the company so that they couldn't be discovered? Did you catch them, were they punished, and are you ready to catch them if they do this again? They were contracted to do cleanup, et cetera.

Mr. PASSANTINO. And we—it was a new experience for the agency. The levels of subcontractors—the number of subcontractors was unprecedented. We had never seen anything like it before. We had people working both in New Orleans and in our national office in an effort to track those individuals down. In many cases the prime contractor, when we couldn't find the subcontractor, because my understanding is, basically, if you had a pickup truck and you could get to New Orleans, you became a subcontractor. Where we were able to determine that, back wages were owed to an employee, oftentimes the prime contractor or a top-tier sub would make those payments to the employee.

It was part of our investigatory process to track down as many of the employees that we could, to pay as many of the employees as we could to—

Ms. SHEA-PORTER. So let me ask you again.

Mr. PASSANTINO [continuing]. And to track down all the contractors.

Ms. SHEA-PORTER. Do you have something in place now to make sure they don't do that again?

Mr. PASSANTINO. Every one of our resources—

Ms. SHEA-PORTER [continuing]. Right now.

Mr. PASSANTINO [continuing]. Has a COPA plan that discusses how we are going to respond in the event of a natural disaster in that area. Whether we can respond is going to be largely dependent on the fact and circumstances of a particular disaster. It depends on whether we can get into the location and how we can get into the location.

Ms. SHEA-PORTER. But how about your resources now? What I am hearing from you—and from all of you—is that you are so overstretched and you have few employees and you do not have the resources and you can't even handle what is facing you right now. So if we do have a catastrophe like that again, do you have the resources—yes or no—at this point?

Mr. PASSANTINO. Again, we have requested additional resources—

Ms. SHEA-PORTER. Okay.

Mr. PASSANTINO [continuing]. But the agency will step up, just as it did in Katrina. People from all over the country went to New Orleans and Mississippi.

Ms. SHEA-PORTER. But if the agency could step up, could you kindly step up now and make sure that the people who are owed money right now collect their wages? I just do not find this acceptable that people work and aren't paid. So if you think you can step up, step up now so that we are not talking about “they are doing a better job and the rates of recidivism are down.”

If somebody in this country works and puts in an honest day's wage, they should be paid an honest day's pay. And I think that is the bottom line of why we are having this hearing. I am very, very disturbed about where we are right now, and I know that you are stretched, but I would like to see that outrage on your part saying, "I don't have the tools that I need to do this job to protect American workers."

And with that I yield back.

Thank you.

Chairman MILLER. I thank the gentlewoman for her questions.

Ms. Lasowski, you looked and commented on the partnerships, and I wondered if you might just outline how they work and your sense of effectiveness of those?

And, Mr. Passantino, I will let you comment on this after she is done.

Ms. LASOWSKI. Yes. We spoke with a number of different officials from various partnerships in terms of their interaction with the Wage and Hour officials. And in terms of areas where they indicated that the Wage and Hour officials were not adequately leveraging the partnerships, some of those areas had to do with, for example, state partners. State officials may be conducting their own investigation, and yet they were not adequately informed by the Wage and Hour officials of instances where they—that Wage and Hour officials were already conducting work and had reached a particular settlement. In those kinds of cases, the state officials then were cut short in terms of being able to coordinate with Wage and Hour and then reach a different kind of settlement.

In addition, there—

Chairman MILLER. Yes. Let me just ask you—I—are you inferring a better settlement, a stronger settlement or just a different settlement?

Ms. LASOWSKI. I—we are—in that particular case, it was just an opportunity to pursue for the state officials to their full extent. We do not know if it would have altered the actual settlement, but it was an opportunity for the partners—in this case, state and federal—to cooperate, but they were not informed that Wage and Hour had already completed and had settled the particular case.

So there are opportunities for leveraging joint investigations, for example, which were not done.

In addition, partners also indicated to us that they did not believe that their partnerships were stretched to the fullest case ability possible. For example, one particular partnership wanted to—had some successful outreach activities—wanted to continue to utilize that and expand, but Wage and Hour officials were not able to participate in some of those.

So given that, there are some opportunities given that there are partnerships that have been established, there are formal agreements—about 19 percent of staff time is spent on outreach and partnerships—to fully leverage the partnerships so that way there can be further education and outreach to potential complainants, which, obviously, would have an impact on their workload.

Chairman MILLER. Thank you.

Mr. Passantino?

Mr. PASSANTINO. First, I would like the opportunity to clarify the 19 percent number that has been used. That is 19 percent of investigative time. It does not necessarily include time spent on partnerships and outreach that is conducted by management staff. Management staff doesn't always record their time—where they spent their time—the same way that investigators do. So when you are looking at that 19 percent number, that is of investigative time in the—of investigator time for—so total enforcement hours.

With respect to the particulars of the case with the state agency complaining that we didn't loop them in, I am not familiar with that case at all, and I would be glad to look into it, but I don't think it is all that uncommon for us to conduct an investigation and not consult with the state agency. We are enforcing different laws than they are—

Chairman MILLER. Let me just ask you—I am asking this out of ignorance. My assumption is there is some—this is a discussion of a partnership where there is some formal arrangement. Is that what we are talking about here?

Ms. LASOWSKI. Yes, that is correct.

Chairman MILLER. Okay. So I understand you—I mean, I assume you conduct most of these investigations independently. But where you have entered into a partnership—

Mr. PASSANTINO. Again, I don't know the specifics of what that partnership required. Different partnerships have different obligations on the agency. I view the obligation—and I think most people in the agency view the obligation—as primarily one of providing bodies, of providing people to conduct outreach to employees, to conduct investigations when they are referred by the partnership.

Some of the complaints or criticisms in the GAO report were about us failing to fund billboard or failing to fund a toll-free hotline. A toll-free hotline which also criticized for not being very effective.

When given the choice between—and we have to make choices because we have limited amount of resources, and no matter how many resources we have at our disposal, we are going to have to make those choices between funding a toll-free hotline and conducting investigations and using that time to spend on investigations, I think we are going to go with spending time on investigations just about every time.

Chairman MILLER. Ms. Lasowski, in—I think it is in your report. Yes, on page 19, Empleo—is that—am I saying that right?

Ms. LASOWSKI. Yes.

Chairman MILLER. Empleo, which was a partnership. You say, “We had received an award from the Harvard University Kennedy School for successful innovation to other areas of state to hold certain outreach events because these efforts would generate more referrals than the agency could handle.” What is going on there?

Ms. LASOWSKI. Yes. They had conducted through this partnership a very successful outreach event, which did increase the number of referrals to the agency when opportunities arose to further expand this kind of effort. Then Wage and Hour officials had indicated that they would not be able to participate, that it would generate a lot of referrals and how would they be able to handle the workload.

Chairman MILLER. Mr. Passantino?

Mr. PASSANTINO. My understanding is that partnership—the Empleo partnership—it started in Los Angeles and it has now been expanded to cover all of Southern California. The expansion that we are not participating in at this time is to cover the entire state of California. There is also an Empleo program in the city of Las Vegas.

Chairman MILLER. What is going on here? I mean, it was expanded, or it wasn't expanded?

Ms. Lasowski?

Ms. LASOWSKI. With the officials that we spoke with, they had indicated that there was not an expansion throughout the state as was had initially intended, to increase outreach activities, which would, therefore—would have an impact in terms of referrals.

Chairman MILLER. Ms. Bobo, you are obviously very familiar with these partnerships, and I just—I will yield to my colleagues here in a minute—but you seem to believe that they could be very helpful in terms of getting people's complaints satisfied?

Ms. BOBO. Absolutely. If you look just physically at where most of the Wage and Hour Division offices are, they are in downtown government buildings, and they are there roughly from 9:00 to 5:00 Monday through Friday. They are not like, you know, worker-friendly centers. And so if you create these partnerships, you can create alternative places where people can go and institutions that workers—especially immigrant workers—trust in terms of providing them information. So it really allows you to outreach to lots of workers.

The problem is, when you have an agency that is so stretched that they can't handle the cases that they currently are getting and they are doing triage on a daily basis, you know, they are discouraged from wanting to reach out.

Chairman MILLER. Given that that is the underlying fact here—I think we sort of all stipulated to that fact—then what do you know about the ability to screen the cases so that you know that the referrals are legitimate because you have an agency that is stretched?

Ms. BOBO. I think that is one of the ways that these worker centers and other advocacies and other partnerships can help is that we can sort of help ferret out which things they could handle, which ones meet the criteria, particularly the \$500,000 limit, and which things should go to state offices. These partnerships could be absolutely critical.

And I think the agency—they have expanded them, and they have committed some resources. I think what we are seeing, though, is there is not enough resources committed to really make them take advantage of all the potential there.

Chairman MILLER. Thank you.

I yield to my other colleagues seeking a second round.

Ms. Woolsey?

Ms. WOOLSEY. Yes. Thank you.

With all that we are talking about of the confusions that are going on and the lack of appropriate amount of staffing and reporting, I want to talk about the misclassification of independent contractors, Mr. Passantino. And right now it is—the enforcement is

particularly lax, and so Mr. Andrews and I—Congressman Andrews and I—have introduced a bill to make it harder to misclassify and hopefully assist in the enforcement efforts.

But could you tell me from your perspective—and any other witnesses—what you see happening with misclassified independent contractors?

Mr. PASSANTINO. Thank you for that question.

With respect to the independent contractor issue, it is an issue that we are aware of, and, in fact, our fiscal year 2008 plan—the one that is going on right now—contains a slight tweak to our typical low-wage industry priority. The low-wage industry priority has been modified to focus resources in investigations in low-wage industries that are likely to employ independent contractors. So the agency is conducting investigations with the specific intent of determining whether there is compliance in industries that use independent contractors.

In every single case, the very first—or one of the first things that gets done is a determination of whether there is an employment relationship, which is ultimately what the independent contractor relationship is about. It is is this person an employee—the company an employer under the Fair Labor Standards Act, and if that is the case, we proceed in the case regardless of what their classification may be.

Ms. WOOLSEY. Right.

Anybody else? Ms. Lasowski?

Ms. LASOWSKI. Yes. We did not cover specifically that particular issue during our interviews with Wage and Hour officials. However, it did come up as an issue that investigators in district and regional offices were aware of. The magnitude of it was—was not known to them, but they were certainly aware of it.

And I just wanted to point out that GAO has done some work on misclassifications, in fact, testified on that particular issue last year and made some recommendations in terms of better outreach and coordination on the part of the Department of Labor. Be happy to provide those reports and prior testimonies for the record.

Ms. WOOLSEY. Thank you very much.

Mr. Chairman, is that accepted in the record?

Chairman MILLER. Yes.

[The information referred to may be accessed at the Committee's hearing description page at the Government Printing Office Internet address. The hearing serial numbers referred to are 110-16, dated March 27, 2007, and 110-56, dated July 24, 2007:]

<http://www.access.gpo.gov/congress/house/house06ch110.html>

Ms. WOOLSEY. Okay.

Mr. Kutz, did you have anything? Did either of you?

Okay.

Thank you, Mr. Chairman.

Chairman MILLER. Thank you.

Mr. Kutz, I have been told that you had experienced some problems with the department's cooperation in your investigations and in at least one instance a department district director actually in-

structed his staff, apparently, to leave the office prior to your arrival so that you would not be able to ask them questions. Is this accurate?

Mr. KUTZ. Yes. That happened in Dallas, and we did in fact interview the individual who is in charge of the office, and they acknowledged that they told their people to leave so they wouldn't have to speak to us.

Chairman MILLER. Since this is an ongoing investigation, Mr. Passantino, can you assure us, and will you let us know when you have informed your offices that they are to cooperate with this investigation?

Mr. PASSANTINO. Yes. I was not aware of that incident, and I will look into it and ensure that we are giving our full cooperation.

Chairman MILLER. And you will notify me when you have informed the offices that they are to cooperate?

Mr. PASSANTINO. I would be glad to do so.

And just so—I mean, we still have an ongoing issue with respect to GAO's ability to contact employers and employees—

Chairman MILLER. No. I understand that. I understand this. But I do expect cooperation—this committee expects cooperation from the—your agency—

Mr. PASSANTINO. As do I.

Chairman MILLER [continuing]. With respect to this investigation.

The recoveries you—in your testimony you mentioned that this last year we recovered \$220 million. Those have been running what year to year? I know what you said. You said from 2001 to 2007, but I don't have your—your testimony is here somewhere. It is a big chunk of change. It represents a 67 percent increase over back wages recovered in 2001.

What are the annual recoveries been from 2000 or the last 3 or 4 or 5 years?

Mr. PASSANTINO. I can get you all of that information. I have it right here from fiscal year 2003 forward.

Fiscal year 2003 was \$212 million, fiscal year 2004 was \$196 million, fiscal year 2005 was \$166 million, fiscal year 2006 was \$171 million, fiscal year 2007 was \$220 million.

Chairman MILLER. And most of that is minimum wage and overtime violations?

Mr. PASSANTINO. The majority of the damages we recover are, in fact, for minimum wage and overtime violations.

Chairman MILLER. And do you know what percentage of that is worker complaints? I mean, coming through—

Mr. PASSANTINO. Of the back wages recovered? I don't know that number.

Chairman MILLER. As opposed to investigations? I mean, this kind of goes to the management question. Do you know if—not whether you have it in front of you right now—but is that available to break out?

Mr. PASSANTINO. I suspect that it is. We spend—because we can track investigator time and actual cases, that we can break out. Although I am not 100 percent certain, I suspect that we can break out by complainant directed.

Chairman MILLER. Ms. Lasowski, is—do you know if that is available?

Ms. LASOWSKI. In terms of back wages assessed and what wages were agreed to be paid by employers, we do have information that we obtained from the department over a 10-year period and can—do have information of that in our statement.

What we did not—what we repeatedly asked for and did not obtain was how much was actually collected.

Chairman MILLER. Collected pursuant to an agreement?

Ms. LASOWSKI. That is correct. And that was information that at the time was—

Chairman MILLER. Which is different than what was paid to the employee?

Ms. LASOWSKI. What was agreed to by the employer to pay or what was agreed to be in terms of an assessment.

Chairman MILLER. Now, wait a minute. What are you suggesting that some of these employers who have been caught shorting the employee once shorted them on the payment? That is a great group of people.

Ms. LASOWSKI. The information, we understand, is available in financial accounting system, but when we asked for those types of breakout and information or even looked for it in any of its public reports or Web site, we were not able to find what the actual collection was. The only information that we have available broken out by year is what has been assessed or what the employer—

Chairman MILLER. Mr. Passantino, can we get that for the committee?

Mr. PASSANTINO. We have that information, and I—the communications between the Wage and Hour Division and GAO indicated that information was available, it just was not available from the system that GAO was using. It comes from our backwage system, and I believe I testified earlier in response to someone's question that, for the last fiscal year, it was 93 percent of back wages agreed to pay that were collected.

Chairman MILLER. Ms. Lasowski?

Ms. LASOWSKI. In terms of the back wages assessed and what was agreed to by the employers, our evaluation of what was assessed indicated that 90 percent of the time the employer agreed to pay back wages. But, once again, we wanted specific information on what was actually collected, and planning enforcement officials were not able to provide us with that information.

Chairman MILLER. Okay. Well, we need to get that information, Mr. Passantino.

Now, some of this is self-initiated. You had the big Wal-Mart case, where they walked through the door and were looking for justice. So that was \$30 million. So you get this big bump in 2007—one of that is \$30 million of \$220 bumps you up big time.

How many of those do you do a year, where they walk in and recognize that they are probably better off in dealing with you than—

Mr. PASSANTINO. How many cases do we do where an employer comes to us and says, "I want to pay back wages"?

Chairman MILLER. Of that—certainly, of that size, not many; right?

Mr. PASSANTINO. Of that size, not a whole lot of, you know, significant size. There have been several over the past couple of years. I am not familiar with the specific numbers on that.

Chairman MILLER. I think that would be helpful. I am just trying to determine because, you know, it sounds like a minor item when somebody gets told on the phone, "You don't have a case," or what have you, but if the people who do call and, as you screen them, they turn out developing a significant—these complaints turn out developing a significant amount of what you eventually collect, I would just like to—I would like to know that breakdown and what of the \$220 is self-initiated.

Your investigations—I think you may have this information—maybe I am just not doing it right—and wage and—I mean, minimum wage and overtime violations, which I think run about \$170 to 80 million—something like that—most years.

Mr. PASSANTINO. And just so we are clear, it was more than simply a financial recovery on behalf of those employees. As a result of that settlement agreement, there was a consent decree that pertained to—

Chairman MILLER. That they obey the law.

Mr. PASSANTINO. I am sorry?

Chairman MILLER. That they would obey the law.

Mr. PASSANTINO. We put them under an injunction, and it makes it a lot easier for us to enforce in the future because now we have an injunction that they will be in contempt of court if they violate the law in the future.

Chairman MILLER. What do you do with recidivists?

Mr. PASSANTINO. We have—

Chairman MILLER. I mean the IRS—every now and then you go to your favorite restaurant, there is a notice on the door that somebody forgot to pay their taxes and you can go somewhere else to get your dinner.

What do you do? I know in the early garment, you know, back years ago, when I was chair of the subcommittee here, in the garment industry we were seizing goods out of Los Angeles and Chicago and New York. But you can't seize a business; right? You don't have the authority?

Mr. PASSANTINO. The hot ditch provision allows us to get an injunction that will prohibit the shipment of certain goods—

Chairman MILLER. Right. Right. But you don't have the right to—

Mr. PASSANTINO [continuing]. Violation of—

Chairman MILLER [continuing]. Prohibit somebody to open for dinner at 5:00 o'clock tonight?

Mr. PASSANTINO. Not that I am aware of, no.

Chairman MILLER. Well—

Mr. PASSANTINO. But in response to your—

Chairman MILLER [continuing]. I would assume—

Mr. PASSANTINO [continuing]. question about recidivism—

Chairman MILLER. We will have to look at this because I would assume that people's wages would be every bit as important as taxes somewhere out there in the—

Ms. BOBO. But we could put all the wage violators on a Web site and put their names and the information.

Chairman MILLER. Shame.

Ms. BOBO. Other government agencies do that sort of thing. We could—Wage and Hour could do it.

Chairman MILLER. Or we could—and then collect the money.

Ms. BOBO. Absolutely.

Chairman MILLER. I will take the second choice, and then we can put the names on the Web site.

Well, I am going to let you go. You have been very generous with your time, but I am not completely satisfied here with respect to the process that is in place to assure that people with legitimate claims—or in the case of Mr. Kutz's studies—validated legitimate claims are unable to recover their wages. And I think we all stipulate here at the table and then both sides of the dais here that this agency is strapped. I am—you know, but from 2001 to 2007, there was a constant request to decline the number of people in this agency, and this year, hopefully, we get through this appropriations process, there will be an increase in this Congress and in this fiscal year.

But no matter what the number of people, I am concerned that Ms. Lasowski's study raises questions about whether or not data is being used in the most beneficial way to deploy the assets in this agency. And then when you come back with Mr. Kutz's examples of where appears to be clearly worthy cases in some cases that, in fact, had even been resolved by the agency that people owed the money and people admitted they owed the money and then they just decided they weren't going to pay it. That is just—that just won't work. I mean, again, we know that in most of these instances we are working with people with in low-wage occupations and with, you know, very difficult means to meet their obligations of them and their families.

So this is a continuing effort and a continuing investigation, but we have got to be able to improve the performance. And part of that falls on the Congress to provide the resources and the administration to provide the resources. But even as we do that, I take very seriously this question of whether or not we are really providing for the best implementation of the knowledge that potentially you have that you may not be gathering and using to the benefit of these workers. But we will continue that conversation.

Thank you very much for your time and for your expertise. We will have—I will have several questions I would like to submit in writing, and I don't know if the other members will, but we would expect you to respond to those questions. And as I mentioned earlier, members will have 14 days to submit materials or questions on this hearing record.

And with that the—do you have any other requests? No, you are fine; right?

The committee stands adjourned.

[The statement of Mr. Altmire follows:]

**Prepared Statement of Hon. Jason Altmire, a Representative in Congress
From the State of Pennsylvania**

Thank you, Chairman Miller, for holding this important hearing on the enforcement of wage and hour laws by the Department of Labor.

Last month marked the 70th anniversary of the Fair Labor Standards Act, law that requires employers to pay their workers at least the minimum wage and at

least time-and-a-half for overtime work. The FLSA equips the DOL with the resources it needs to protect employees and combat wage theft. However, a new report done by the Government Accountability Office suggests that the DOL is failing to fully investigate and address violations of FLSA.

Today we will hear testimony from several witnesses, including a representative from the GAO and DOL, to determine if the DOL is in fact doing all that it can to stop wage theft. I look forward to hearing about how the DOL plans to address the inadequacies cited in the GAO report.

Thank you again, Mr. Chairman, for holding this hearing. I yield back the balance of my time.

[The statement of Ms. Sánchez follows:]

**Prepared Statement of Hon. Linda T. Sánchez, a Representative in
Congress From the State of California**

Thank you, Mr. Chairman, for convening today's hearing on wage theft, an important issue that is too often overlooked. In 1938, Americans celebrated when newly enacted federal legislation created minimum wage and maximum hour standards for all workers. The Fair Labor Standards Act gave American workers assurances that they would work reasonable hours and be paid reasonable wages.

The FLSA was a tremendous victory for laborers across the country. Unfortunately, there is now a significant disconnect between the protections promised to workers and protections that workers actually receive. Many employers in this country do not pay their employees the full amount owed for actual work performed. Wage theft happens across the board, regardless of an employee's age, race, sex, geographic location, wage rate, or industry.

Our federal labor statutes tell workers that they will receive a minimum wage, they will get time and half for overtime work, and that they will earn a prevailing wage for work on federal property. Most importantly, our statutes tell them that these things are not suggestions, but rights that the federal government will help enforce. As we will explore today, that promise has been betrayed.

The burden of recovering fair wages when they have been denied should not rest entirely on the shoulders of workers. The federal government should vigorously enforce its own laws. Unfortunately, under the current Administration, this is not the case. Just as it has ignored its responsibility to protect the environment from polluters and to protect consumers and small businesses from anti-competitive trusts, it has ignored its responsibility to protect hourly employees from wage theft by their employers.

This Congress has secured many protections for American workers, including increasing the minimum wage and approving a plan to provide paid family leave to federal employees. There is no worker protection as basic, however, as ensuring that a person actually receives the wages owed for work performed.

Mr. Chairman, all American workers are entitled to receive the wages that they earn. I'm disappointed that this basic principle has not been respected by the Bush Administration. But I am grateful that you're holding this hearing to expose this failure and look forward to working with you to address it.

[Questions for the record and their subsequent responses follow:]

[VIA FACSIMILE]

U.S. CONGRESS,

Washington, DC, July 21, 2008.

Mr. ALEXANDER PASSANTINO, *Acting Administrator,
Wage and Hour Division, U.S. Department of Labor, Washington, DC.*

DEAR MR. PASSANTINO: Thank you for testifying at the July 15, 2008 full Committee hearing, "Is the Department of Labor Effectively Enforcing our Wage and Hour Laws?" Enclosed are the questions which Committee members have asked you to respond for the record. Please send an electronic version of your written response to the Committee staff by Tuesday, July 29, 2008, the day on which the record closes. If you have any questions, please contact the committee.

Sincerely,

GEORGE MILLER,
Chairman.

Questions from Chairman Miller

We discussed during the hearing that there were situations where an employer recognizes that it is easier, and probably cheaper, to approach the Department and agree to pay back-wages than to go through private litigation with employees. In one instance, Wal-mart self-initiated a back payment of around \$30 million. Please provide a breakdown, by year, of the total amount of back-wages your office has collected, and of that number, how much was employer self-initiated.

During the hearing, Mr. Kutz (of the Government Accountability Office) discussed some of the problems his staff has faced with their investigation. In one situation, the head of the Dallas field office asked his staff to leave the office while the GAO staff interviewed him. You said you were unaware of this particular incident and would assure the Committee that your staff is fully cooperating with the GAO investigation. I would appreciate an explanation surrounding this interview, as well as your commitment that Wage and Hour staff will fully cooperate with the GAO investigation going forward.

In their testimony, GAO described some of the investigative work performed by WHD, which consisted of nothing more than a phone call. In some cases, GAO was easily able to find information about the location and existence of businesses that Wage & Hour investigators could not. What is the minimum that a Wage & Hour investigator must do to complete a successful investigation? And, do you consider these cases outlined by GAO to be successfully resolved?

It's clear that a growing population of the American workforce are not fluent in the English language. They may understand enough to do their jobs and to navigate their communities, but many may not understand all of their rights as workers, and how to assert those rights to employers. What efforts has your office made to educate and post materials to workers in languages other than English? Does the division make it an initiative to recruit investigators who are multilingual?

Your office has recently changed the operating hours of its national hotline from 8 am to 5 pm ET to 8 am to 8 pm ET—what was the impetus for this change and have you received a greater number of complaints from workers on the West Coast since changing the hours? Do you think that the additional three hours is adequate?

Other DOL agencies such as the Occupational Safety and Health Administration (OSHA) posts employer information on their website so that workers and the public can view which employers have complaints against them, have reached settlement agreements, and judgments against them. Does the WHD have a position on this type of disclosure?

How many of the complaints you receive from workers are made against companies who are federal contractors? If WHD finds that these complaints have merit, what additional steps are taken against the contractor, including but not limited to suspension and debarment from future federal contracts?

We heard during the hearing, and from other GAO reports that many employers throughout the country are purposely misclassifying their workers to avoid compliance with FLSA. What efforts has your office made in the area of identifying and prosecuting these employers? And, given the documented cases where repeat offenders of FLSA have gone unpunished, are there immediate plans to use the FLSA's stronger remedial provisions of fines and imprisonment against future willful violations?

Ms. Lasowski's (of the Government Accountability Office) testimony reported that there were policy differences between field offices on handling complaint phone calls. I seek the written policy for each field office on handling these complaints.

Additionally, Mr. Donald Payne (NJ-10) and I both had concerns that Ms. Lasowski reported that the data the GAO received from your office only represented the total amount of money employers agreed to pay workers, rather than the amount of money that was actually paid to workers. WHD asserted that it "recovered" more than \$1.25 billion for nearly two million workers since 2001. Please provide the Committee with a description of the policies and procedures WHD follows to ensure that employers who have agreed to pay money to employees, actually pay the correct employee (this description should include any policies and procedures addressing difficult to locate employees such as immigrant workers). In addition, please provide the Committee with the portion of the total of \$1.25 billion that WHD can confidently claim was actually paid to the correct employee owed money, listed by year.

**Questions for the Record
Mr. Alexander Passantino**

Questions from Chairman George Miller (CA-07)

Question 1

We discussed during the hearing that there were situations where an employer recognizes that it is easier, and probably cheaper, to approach the Department and agree to pay back-wages than to go through private litigation with employees. In one instance, Wal-mart self-initiated a back payment of around \$30 million. Please provide a breakdown, by year, of the total amount of back-wages your office has collected, and of that number, how much was employer self-initiated.

Response:

The Wage and Hour Division's (WHD) investigation database (Wage and Hour Investigator Support and Reporting Database (WHISARD)), does not separately identify cases in which an employer asks WHD for assistance in ensuring that they are in compliance with applicable labor laws. The majority of such cases, however, are typically identified in the database as directed self-audits. WHISARD does track the number and results of directed self-audits. The employers in such cases include establishments and enterprises of many sizes, as well as public agencies, such as school districts. The following chart provides the number of directed self-audits, the back wage amounts, and the number of employees receiving back wages for all cases and for all directed self-audits from FY 2001 through FY 2007. As we advised the Government Accountability Office (GAO), data on investigations, and in particular on directed self-audits, fiscal years prior to 2001 are not comparable to the more recent data because of the conversion to the new WHISARD database in late FY 1999 and FY 2000. For example, in the prior legacy management information system, a case could be concluded in the data system, but still partially active, which complicated annual results reporting. In WHISARD, the receivable amounts for back wages and civil money penalties must be zero or the system will not permit a case to be concluded.

	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Total Concluded Cases	38,051	40,264	39,425	37,842	34,858	31,987	30,467
Total Directed Self-Audit Cases	676	441	820	455	338	408	318
Percent	1.78%	1.09%	2.08%	1.20%	0.97%	1.28%	1.04%
Total Back Wages	\$131,954,657	\$175,640,492	\$212,537,554	\$196,664,146	\$166,005,014	\$171,955,533	\$220,613,703
Back Wages for Directed Self Audit Cases	\$6,674,909	\$18,582,922	\$45,554,792	\$12,469,262	\$13,097,796	\$9,676,787	\$39,974,702

Percent	4.0%	10.3%	21.5%	30%	49%	55%	76.5%
Total Employees Receiving Back Wages	216,647	263,593	342,358	288,296	241,379	246,874	341,624
Employees Receiving Back Wages on Directed Self-Audits	25,086	30,355	68,789	24,514	13,553	18,552	100,380
Percent	11.6%	11.5%	20.1%	8.5%	5.6%	7.5%	29.4%

Question 2:

During the hearing, Mr. Kutz (of the Government Accountability Office) discussed some of the problems his staff has faced with their investigation. In one situation, the head of the Dallas field office asked his staff to leave the office while the GAO staff interviewed him. You said you were unaware of this particular incident and would assure the Committee that your staff is fully cooperating with the GAO investigation. I would appreciate an explanation surrounding this interview, as well as your commitment that Wage and Hour staff will fully cooperate with the GAO investigation going forward.

Response:

On April 7, 2008, GAO notified WHD national office personnel that they would like to meet with the investigators who worked on two investigation files that GAO had received from WHD's Dallas district office. The two investigators were no longer employed by WHD, so GAO instead met with their former supervisor—the director of the Dallas district office. That meeting was held on April 21, 2008.

On May 9, GAO asked to meet privately with the Dallas district director to discuss a matter unrelated to the investigation files. That meeting occurred on May 14. We understand that the meeting was to discuss a call that GAO received from a district office staff member who reported to GAO that the district director had asked the investigators to leave the office prior to and during his meeting with GAO. The district director confirmed that he had made such a request.

The following week, on or before May 21, GAO notified WHD's national office personnel that the director of the Dallas district office had asked current investigators to leave the district office prior to and during his April 21 meeting with GAO. According to GAO, an individual from the Dallas district office told GAO that the investigators had been asked to leave the office. Also according to GAO, the same individual again called GAO to report that, following the May 14 meeting, the district director had publicly expressed his concern about staff reporting his actions back to GAO and indicated that he had done nothing wrong in advising the investigative staff to leave the office.

On May 21, national office personnel advised the Southwest regional administrator of GAO's concerns regarding the district director's actions. The regional administrator was on travel status at the time. To avoid any delay, she asked the deputy regional administrator to discuss the matter with the district director. The deputy regional administrator advised the district director to limit any further discussion about the ongoing GAO audit with investigators or office support staff.

It should be noted that none of the Dallas district office investigators were involved in the subject investigation files, that GAO had not asked to speak to any of the investigators in the Dallas district office at that time, and that GAO had been previously advised that the National Council of Field Labor Locals, AFL-CIO—*i.e.*, the union representing WHD field staff—must be notified prior to any interview with a WHD investigator. In no way did the district director's actions impede the GAO auditors or demonstrate a lack of cooperation.

GAO has since asked for and been granted interviews with WHD investigators in other offices throughout the regions. Following my assurance to the Chairman at the hearing, on July 24, 2008, I sent an e-mail notice to all WHD managers reminding them of my and the WHD Executive Leadership Team's expectation that they and their staffs cooperate fully with GAO during any ongoing audits.

Question 3:

In their testimony, GAO described some of the investigative work performed by WHD, which consisted of nothing more than a phone call. In some cases, GAO was easily able to find information about the location and existence of businesses that Wage & Hour investigators could not. What is the minimum that a Wage Hour investigator must do to complete a successful investigation? And, do you consider these cases outlined by GAO to be successfully resolved?

Response:

WHD utilizes a number of different enforcement techniques to resolve complaints. The two primary methods for dealing with complaints are "full investigations" and "conciliations."

A "full investigation" consists of all fact-finding steps, which typically include an opening conference with the employer, a tour of the establishment, a review of records, and interviews with employees to determine which, if any, statutes are applicable and which, if any, exemptions apply. These fact-finding steps are taken to determine the establishment's status of compliance. WHD investigators who have reached journey level status, *i.e.*, GS-12 grade level usually obtained within three to four years, have wide latitude in determining the extent of the investigation, such as who to interview, which records to check, and when to end the fact-finding stage of an investigation.

A "conciliation," in contrast, is a customer service response intended to provide fast service to a complainant by limiting the scope of the compliance action to a single employee and a single issue, typically when an individual is not paid his or her last pay check. It is through this process that WHD quickly recovers back wages for individuals, many of whom cannot go unpaid for the duration of a "full investigation." The decision to handle a complaint as a conciliation depends upon, among other things, the extent and seriousness of the allegation. When the conciliation procedure is used, WHD investigators still must obtain sufficient information to determine coverage and the application of exemptions, but WHD conducts no additional fact-finding other than to discuss the matter with the complainant and the employer in an effort to resolve the complaint. Generally, conciliations are handled by telephone. Often, they are handled by WHD technicians.

WHD will consider pursuing further action if a conciliation attempt is unsuccessful. Those further actions may include expanding the conciliation to an investigation or advising the complainant of his or her right to pursue a private action to collect back wages under section 16(b) of the Fair Labor Standards Act (FLSA). When WHD district office management encounters repeated conciliations involving the same employer, they closely scrutinize those case actions to ensure that conciliations are not being used to substitute for an on-site investigation.

As of the date of the hearing, GAO had examined a database of 79,000 cases. They had received copies of 79 case files and documents from another 13 cases. The 15 cases that GAO highlighted in the hearing were specifically chosen by GAO. The 15 cases certainly do not, in any way, represent the universe of WHD cases. As stated in their testimony, GAO has not made any determination on whether these 15 cases were handled properly, and their findings were preliminary. GAO only recently (August 11, 2008) asked for clarification from WHD about investigative policies and procedures. Absent that basic background information, GAO is not in a position to make any determination on whether the cases were properly handled. WHD is in the process of assessing the procedures used in these 15 cases.

Question 4:

It's clear that a growing population of the American workforce are not fluent in the English language. They may understand enough to do their jobs and navigate their communities, but many may not understand all of their rights as workers, and how to assert those rights to employers. What efforts has your office made to educate and post materials to workers in language other than English? Does the division make it an initiative to recruit investigators who are multilingual?

Response:

WHD has made it a priority every year since 2003 to translate key compliance assistance materials into Spanish and Asian languages, specifically Chinese, Thai, Vietnamese, and Korean. WHD provides worker rights cards that outline employee protections in a range

of industries; these are available in English and Spanish. WHD disseminates Spanish and Asian language fact sheets on the basic requirements of the laws it enforces, such as hours worked, the employment relationship, child labor, overtime, recordkeeping, and on the common problems in industries such as day labor, food service, home health care, and retail. WHD Fact Sheet No. 48, which notifies workers that they retain rights under WHD statutes regardless of their immigration status, is available in six languages—English, Spanish, Chinese, Korean, Thai, and Vietnamese. As district offices identify other growing immigrant communities, WHD personnel translate key publications into those languages, such as Russian and Hmong. WHD regularly monitors and tracks the number of translated materials. These translated materials are disseminated in numerous outreach events throughout the year and are available on the WHD's web site. Moreover, WHD's web site provides direct access to translated materials through Spanish, Chinese, Korean, Thai, and Vietnamese portals.

All WHD offices participate in outreach events in immigrant communities. These events and activities range from attendance at community fairs, participation in Spanish-language radio shows, issuance of Spanish and Asian language press releases, presence at mobile Consulate visits, and involvement in non-traditional community partnership initiatives. WHD has partnerships with 11 Mexican Consulates and participates informally with other Central and South American Consulates to reach workers employed in this country.

In one example of WHD's efforts, the agency's Los Angeles area district offices have been working to improve compliance with employment laws in the Asian American Pacific Islander communities of Southern California. In FY 2007, WHD's three Los Angeles offices participated in 74 activities, including presentations to non-profit organizations, public events, meetings with small businesses, and establishing new and existing collaborative partnerships with various Asian Consulates. Through these events, resource materials were provided to employees and employers in their native languages of Chinese, Thai, and Korean to increase their understanding of WHD requirements in the workplace.

As mentioned during the hearing, local WHD offices have developed, or been a catalyst in developing, a number of initiatives specifically designed to ensure that workers of Hispanic and Asian descent are employed in compliance with the nation's labor statutes. Among the more successful are the Justice and Equality in the Workplace initiatives in Houston and Dallas, TX; TIGAAR (The Information Group for Asian American Rights) in Houston, TX; Alza Tu Voz (Lift your Voice) in Philadelphia, PA; AYUDA (Help) in St. Louis, MO.; COACH (Compliance Outreach to the Asian Community and Hispanics) in New Jersey; EMPELO (Employment Education Outreach) in Las Vegas, NV, and Southern California; HOLA (Hispanic Outreach and Labor Assistance) in Central VA; HELP (Hispanic Employment Low-Wage Program) in Long Island, NY; PIECE (Protecting Immigrant Employees with Compliance and Education) in Kansas City, MO; and REACH (Rapid Employee Assistance in Chinese Hotline) in New York City, NY. As a result of the four major partnership initiatives (Justice and Equality in Dallas and

Houston and the two EMPLEO partnerships), WHD has recovered nearly \$15 million on behalf of over 10,000 workers.

WHD actively recruits staff with language capabilities in addition to English. Over half of the WHD field staff speak a language other than English. In total, WHD staff cover 30 different languages. In the last two Investigator Basic I Training classes, 41 of the 52 trainees (79%) spoke another language.

Question 5:

Your office has recently changed the operating hours of its national hotline from 8 am to 5 pm ET- what was the impetus for this change and have you received a greater number of complaints from workers on the West Coast since changing the hours? Do you think that the additional three hours is adequate?

WHD has maintained the same hours for its toll-free number (1-866-4US-WAGE) since its inception in March 1999. The call center is and has always been available to the public from 8 a.m. to 8 p.m. Eastern Time.

Question 6:

Other DOL agencies such as the Occupational Safety and Health Administration (OSHA) posts employer information on their website so that workers and the public can view which employers have complaints against them, have reached settlement agreements, and judgments against them. Does the WHD have a position on this type of disclosure?

As a matter of long-standing policy to protect the confidentiality of complainants and to preserve the integrity of the complaint process, WHD does not disclose whether employer investigations originate from a complaint or are self-directed investigations. Moreover, WHD does not disclose any information regarding open investigations. It would be detrimental to the agency's law enforcement responsibilities and to potential complainants to post unresolved allegations of violations against employers in a public forum. Certain data from the agency's investigative database is released on closed investigations under the Freedom of Information Act. WHD does, however, post its press releases regarding enforcement actions against employers on its web site.

Question 7:

How many of the complaints you receive from workers are made against companies who are federal contractors? If WHD finds that these complaints have merit, what additional steps are taken against the contractor, including but not limited to suspension and debarment from future federal contracts?

Of the total complaints received by WHD, approximately 3.5% are complaints alleging violations of one of the five government contract statutes: the Copeland Act (CA), Contract Work Hours and Safety Standards Act (CWHSSA), Davis-Bacon and related Acts (DBRA), Walsh-Healy Public Contracts Act (PCA), and the McNamara-O'Hara Service Contract Act (SCA). Other statutes enforced by WHD do not provide the agency with the authority to debar employers from future government contracts. For example, a violation of the FLSA is not grounds for debarment, even if the violator is a government contractor.

The following chart shows the total number of complaints received and the total number received alleging a government contract act violation.

Fiscal Year	Total Complaints	Complaints Alleging Violations of a Government Contract Act	Percent
2007	28,778	1,028	3.57%
2006	30,218	1,025	3.39%
2005	34,287	1,257	3.67%

If WHD finds a violation of one or more of the government contract statutes, then the agency will seek back wages from the employer on behalf of the affected workers. If the employer is a subcontractor and the subcontractor refuses to make restitution, then WHD will hold the prime contractor responsible for the violations and request restitution from the prime contractor. When monetary violations are disclosed, WHD will typically request that the contracting agency withhold sufficient funds from the contract to ensure that employees are properly compensated.

The Davis-Bacon Act (DBA) and SCA set forth statutory criteria for debarring contractors and subcontractors from future government contracts. Under the DBA, contractors and subcontractors can be debarred for a period of three years from future government contracts if the Comptroller General of the United States finds that the person(s) or firm(s) have "disregarded their obligations to employees and subcontractors." SCA provides for a three year debarment of persons and firms who have violated the statute unless the Department determines that unusual circumstances are present. DBRA regulations provide for a regulatory debarment not to exceed three years if the contractor or subcontractor is found to be in aggravated or willful violation of any of the related Acts. Regulations 29 C.F.R § 5.5(a)(7) also provides for the termination of a DBRA contract if there is a breach of the contract clauses in 29 C.F.R. § 5.5. In addition, contractors that violate the CWHSSA are liable for liquidated damages. The contracting agencies have the authority to issue final determinations with respect to CWHSSA liquidated damages. WHD reviews and either concurs, partially concurs, or rejects any agency recommendation to adjust or provide relief from the liquidated damage assessment. Finally, CA provides criminal penalties for certain egregious violations, such as the falsification of the weekly statement of wages paid, *i.e.*, the certified payroll record, and for the forced kick back of employees' wages to the contractor.

In FY 2007, WHD debarred 12 contractors for DBA violations and 24 contractors for SCA violations. In 2006, WHD debarred 21 contractors for DBA violations and 10 contractors for SCA. In calendar year 2005, 20 contractors were debarred under the DBA and 14 were debarred under the SCA.

WHD only pursues debarment action in consultation with the Office of the Solicitor of Labor (SOL), and does so against contractors who have committed serious violations under the DBRA and SCA. A decision to proceed with a debarment action not only requires careful review of the case file and potential debarment factors, it requires consultation with SOL as to the availability of the resources necessary to successfully pursue the case through the administrative process. Even when the Department is successful in obtaining administrative debarment decisions, contractors can and do appeal these decisions to federal courts for review.

Question 8:

We heard during the hearing, and from other GAO reports that many employers throughout the country are purposely misclassifying their workers to avoid compliance with FLSA. What efforts has your office made in the area of identifying and prosecuting these employers? And, given the documented cases where repeat offenders of FLSA have gone unpunished, are there immediate plans to use the FLSA's stronger remedial provisions of fines and imprisonment against future willful violations?

The misdesignation of an employee as an independent contractor is not itself a violation of any of the laws enforced by WHD. Employees who are misdesignated, however, may not receive the legally required wages, fringe benefits, or other labor standards protections as a result of their misdesignation. WHD employs a number of strategies for ensuring that employees are paid and employed in accordance with the laws it enforces. Many of these strategies address worker designation issues. GAO acknowledged this fact in its 2006 audit, *Employment Relationships: Improved Outreach Could Help Ensure Proper Worker Classification (GAO-06-656)*. In that report, GAO accurately noted that, despite the fact that the misdesignation is not a violation of the FLSA, WHD nevertheless detects and addresses the issue of employees who have been misdesignated as independent contractors in its investigations of employer compliance with the FLSA.

WHD investigators first establish the employment relationship between the worker and employer when conducting investigations to determine whether workers are covered under the FLSA. During the course of an investigation, investigators review several documents to ascertain the employment relationship. Documents include payroll and time records, corporation papers, employer tax returns, cash receipts, IRS Forms 1099, contracts, bills of lading, claim tickets, security logs, cash ledgers, tip pool records, and check registers. Regardless of how a worker may be designated by the employer, the FLSA requires payment of minimum wage and overtime to covered non-exempt

employees. Employees who are misdesignated as independent contractors are identified during the course of investigations, and minimum wage or overtime violations are cited appropriately.

Under the FLSA, employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty (CMP) of up to \$1,100 for each such violation. According to the statute, the Department must consider the appropriateness of the penalty to the size of the business of the person charged and the gravity of the violations. Willful violations may be prosecuted criminally and the violator fined up to \$10,000. Only a second criminal conviction can result in imprisonment under the FLSA.

Prior to assessing a CMP for willful violations of the minimum wage or overtime provisions of the FLSA, WHD is required to consult with SOL to determine whether SOL agrees that the case meets the legal criteria for a willful violation. WHD and SOL consider a variety of factors in determining whether to litigate an FLSA case. These factors include the substantive merits of the case, any difficulties of proof, size of the employer's operations/number of employees affected, nature and extent of violations, amount of back wages due, whether a formal position has been taken by WHD, whether the employees are low-wage or otherwise vulnerable/abused, financial condition of the employer, whether the employer is in current compliance, and the law in the relevant judicial forum. The Department will continue to pursue all appropriate penalties against employers who repeatedly or willfully violate the FLSA.

GAO's July 15, 2008, testimony that WHD assessed penalties for 6 percent of the FLSA violation cases conducted during the period from 2000 to 2007 is misleading. GAO was advised in writing and orally that CMPs for minimum wage and overtime violations could be assessed under the statute only if the violations were repeated or willful, and in the case of willful, only with the concurrence of SOL. GAO, however, applied the total number of cases in which CMPs were assessed to the total number of cases in which an FLSA violation was identified regardless of whether the violation was repeated or willful. A more accurate picture suggests that WHD assesses CMPs in over 40% of the cases in which a repeat violation occurs.

Question 9:

Ms. Lasowski's (of the Government Accountability Office) testimony reported that there were policy differences between field offices on handling complaint phone calls. I seek the written policy for each field office on handling these complaints.

Response:

WHD has a national policy on handling complaint telephone calls. The agency's policy regarding complaint intake is stated in its Field Operations Handbook Chapter 51a01(a), (b), and (c). There are no differences between field offices in WHD's policy for handling complaint phone calls.

A complaint is defined as information from a source outside WHD that indicates a reasonable probability of a violation of one or more of the statutes enforced by WHD in an identified establishment. When telephone calls do not meet this criteria (e.g., when there is no coverage, the employee is exempt, or the matter is not within the jurisdiction of WHD), the caller is to be referred to the appropriate agency, if practicable.

WHD's first priority is the prompt servicing of all complaints that meet the criterion above; however, district directors are expected to use their expertise and judgment as to whether to accept complaints based on the particular circumstances in the district office such as staffing, workload, running of the statute of limitations, the nature of the allegations, and questionable exemptions. WHD, as a matter of practice, does not usually accept anonymous unspecific allegations of violations. Individuals who have complaints that will not be acted upon by the district office are advised of their right of private action under section 16(b) of the Fair Labor Standards Act.

Question 10:

Additionally, Mr. Donald Payne (NJ-10) and I both had concerns that Ms. Lasowki reported that the data the GAO received from your office only represented the total amount of money employers agreed to pay workers, rather than the amount of money that was actually paid to workers. WHD asserted that it "recovered" more than \$ 1.25 billion for nearly two million workers since 2001. Please provide the Committee with a description of the policies and procedures WHD follows to ensure that employers who have agreed to pay money to employees, actually pay the correct employee (this description should include any policies and procedures addressing difficult to locate employees such as immigrant workers). In addition, please provide the Committee with the portion of the total of \$1.25 billion that WHD can confidently claim was actually paid to the correct employee owed money, listed by year.

Most of the statutes enforced by WHD, including the FLSA, authorize WHD to supervise the payment of back wages found due. The processes and procedure for back wage recovery are set forth in the agency's Field Operations Handbook Chapter 53c and 53d and summarized below.

As a general rule, WHD requires employers to bear the cost and other expenditures related to making restitution to employees. Employers are instructed to provide individual checks payable to the employees in net amounts after all legal deductions have been made. If there are reasons to believe that the employer will not make full and prompt payment, then WHD will request that the employer submit checks to the investigator or to the district office made payable to the employee or "Wage and Hour Division – Labor." Under those circumstances, WHD will distribute the back wage checks.

In situations where WHD supervises the payment of back wages, employees must sign and employers must submit official receipt forms (Form WH-58) as proof of payment. Those back wage receipts are maintained in the physical case file. WHD may, in some instances, accept other proofs of payment, such as copies of cancelled checks or bank statements that prove employees were paid. A proof of payment notation is made in the case database.

For any employees who cannot be located by the employer or who refuse to accept payment, employers are generally required to submit a listing of those employees and a single cashier or certified check to WHD for the total amount due all unlocated and unpaid employees. WHD district and regional office staff will attempt to locate such employees through a variety of methods, including seeking information from located workers or others who may have had contact with the unlocated workers, using the internet address searches, issuing press releases, and employing a locator service. Further, WHD has special procedures for foreign nationals who have left the United States. For example, back wage checks can be distributed by the individuals' Consulate. The Mexican Consulates, in particular, have been successful in helping WHD locate workers who have returned to Mexico without having received proper compensation for work performed. WHD also established and maintains an employee locator search tool on its web site that allows employees who believe they may be due back wages to search the agency's database of employees due back wages. This system is updated weekly and is advertised in press releases where WHD believes it will have difficulty locating workers due back wages.

The FLSA provides that any back wage amounts not paid to an employee because of the inability to do so within a three year period of time shall be transferred to the U. S. Treasury (Treasury) as miscellaneous receipts. It is WHD's policy to deposit back wages amounts due unlocated employees or employees who refuse payment to the U. S. Treasury. WHD also has procedures for addressing agreement-to-pay cases when the employer defaults on payment. These include consideration of litigation, referral for debt collection action, and advising employees of their private right to collect back wages under Section 16(b) of the FLSA.

WHD's case database, WHISARD, was designed as an investigative support tool to record employer violations of the specific labor laws. WHISARD was not intended to be a financial transaction database. WHISARD allows users to record the proof of payment (POP) amount once an office receives evidence that the employer has paid back wages directly to the employees.

WHD's financial systems, which were first implemented in 1997, were designed to capture the financial transactions related to the collection and disbursement of back wages. Prior to April 2005, this early financial system, the Back Wage Collection and Distribution System (BCDS), recorded the POP as a "write-off." As a result of this design, WHD does not have complete and comparable information on the amount of wages paid directly to employees for the fiscal years beginning 1997 through FY 2005. In April 2005, WHD deployed a re-engineered Back Wage Financial System (BWFS),

and as a result of this improved system more detailed payment information is now available for FY 2006 and FY 2007.

For all the cases concluded in FY2006, \$146 million out of \$172 million in back wages (85%) that employers agreed to pay was paid to the employees owed money. An additional \$11.5 million is available to be disbursed to employees that have not been located yet. This represents approximately 92% of the agreed to pay amount for FY 2006. WHD's policy is to wait three years before transferring monies to the Treasury for unlocatable employees. During this time, WHD will employ the methods described above to continue to locate employees owed back wages. Since the three year period has not lapsed for FY 2006 and FY 2007, then it is not unreasonable to expect some funds to remain available for disbursement.

For all the cases concluded in FY 2007, \$179 million out of \$225 million (80%) that employers agreed to pay was paid to the employees owed money. An additional \$20.2 million is available to be disbursed. This represents approximately 88% of the agreed to pay amount for FY 2007.

The WHD's financial systems, which include both the back wage and civil money penalty systems, have been thoroughly reviewed by the Office of the Inspector General (OIG). In the FY2002-2005 OIG audits, the WHD had no findings for either financial system. In the FY 2006 audit, WHD received one finding concerning the implementation of OMB A-129. OMB A-129 calls for agencies to reclassify debt as Currently Not Correctable (CNC) when it reaches two years old. WHD has implemented the CNC policy in FY 2007, and there were no findings in FY 2007 audit. In any case, however, WHD offices may not conclude the case action and WHD does not report results on case actions until the account receivable amounts in the financial systems have a zero balance.

[Newspaper article submitted by Mr. Courtney follows:]

[Article from the *New York Times*, July 15, 2008]

Department Is Criticized on Disputes Over Wages

By STEVEN GREENHOUSE

The Government Accountability Office sharply criticizes the Wage and Hour Division of the Labor Department in two reports to be issued on Tuesday, saying it mishandled many overtime and minimum-wage complaints and delayed investigating hundreds of cases for a year or more.

The G.A.O. also criticizes the division for greatly reducing the number of enforcement actions it takes each year and for not focusing on the low-wage industries where, one report said, it is most likely to find violations.

The accountability office, the investigative arm of Congress, singled out a case in which a truck driver for an alcohol distributor complained that he was not paid

overtime even though he worked 55 hours a week. The Wage and Hour Division waited 17 months before assigning an investigator, the office found, and the investigator dropped the case six months later—after doing virtually no investigating—having concluded that the two-year statute of limitations was about to expire.

The office cited another case in which a gas station cashier earning \$7.50 an hour complained about not receiving her final paycheck. One of the owners acknowledged that to the wage investigator and said to call back in five days when his partner returned. The investigator did call five days later, but after the gas station did not return several calls, the investigator dropped the case.

The G.A.O., which will release its reports at a hearing of the House Education and Labor Committee, also faulted the wage division for reducing the number of enforcement actions it pursues each year to 29,584 in the 2007 fiscal year, down 37 percent from 46,758 10 years earlier.

According to his prepared remarks, Representative George Miller, Democrat of California and chairman of the Education and Labor Committee, will tell the hearing, “Although the Department of Labor currently has the necessary tools to fight wage theft, the G.A.O. investigation suggests that the problem of wage theft is only getting worse because of weaker enforcement.”

The Wage and Hour Division defended its performance, saying it reduced the number of enforcement actions largely because it was focusing on more time-consuming, comprehensive investigations. Other reasons it gave were improved screening of complaints to eliminate those that may not be violations and a decrease in the number of investigators covering more than 100 million workers—to 732 in the 2007 fiscal year from 945 in 2001.

In a fact sheet, the Labor Department noted that the back wages collected by the Wage and Hour Division more than doubled to \$220,613,703 in 2007 from \$96,719,108 in 1997. It said that 341,624 employees received back wages in 2007, up from 189,244 10 years earlier.

One G.A.O. report noted that the back wages collected per case had nearly doubled to \$10,500 in 2007, from \$5,400 in 2000.

The Labor Department said the “Wage and Hour Division is delivering pay for workers, not a payday for trial lawyers.”

In a report that took a close look at 15 wage cases and sifted through Labor Department data, the G.A.O. concluded that the Wage and Hour Division had inappropriately rejected complaints based on incorrect information provided by employers, failed to make adequate efforts to locate employers and did not thoroughly investigate and resolve complaints.

The accountability office said it found more than 100 cases that were closed because the wage division could not locate an employer, and 350 cases that were assigned to an investigator more than a year after the complaint was received.

One report examined a case in which a pool maintenance technician had complained about not receiving a final paycheck. The employer admitted that it did not issue that check, but then berated the wage investigator, saying it would not pay the back wages. Afterward, the investigator dropped the case.

In another case, a homeless woman who worked as a night attendant at an assisted-living facility complained that she had not been paid any wages for more than a year. The employer argued that it did not have to pay wages because it provided her with room and board. The Wage and Hour Division concluded that the employer owed her \$4,500, but the investigator nonetheless dropped the case after the employer asserted in August 2006 that it was in such dire shape that it did not have any money to pay back wages. The G.A.O. noted that the employer was still in business.

“In too many cases,” Mr. Miller said, “investigators from the Wage and Hour Division simply drop the ball in pursuing employers that cheat their employees out of their hard-earned wages.”

The G.A.O. said the wage division focused on the same industries in 2007 as in 1997 despite recommendations that it focus on low-wage industries where wage violations were most likely to occur.

“As a result,” the office wrote, “the Wage and Hour Division may not be addressing the needs of workers most vulnerable to Fair Labor Standards Act violations.”

But the Wage and Hour Division said it had broadened its efforts beyond agriculture, health care and apparel manufacturing to include other low-wage businesses, including day care, restaurants, construction and hotels.

[Whereupon, at 1:00 p.m., the committee was adjourned.]

