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EXAMINING REGULATORY AND ENFORCEMENT ACTIONS UNDER THE FAIR LABOR STANDARDS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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EXAMINING REGULATORY AND ENFORCEMENT ACTIONS UNDER THE FAIR LABOR STANDARDS ACT

Thursday, November 3, 2011
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:04 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Bucshon, Gowdy, Woolsey, Payne, Kucinich, and Bishop.

Staff present: Katherine Bathgate, Press Assistant/New Media Coordinator; Casey Buboltz, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Barrett Karr, Staff Director; Ryan Kearney, Legislative Assistant; Donald McIntosh, Professional Staff Member; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Joseph Wheeler, Professional Staff Member; Kate Ahlgren, Minority Investigative Counsel; Aaron Albright, Minority Communications Director for Labor; Jody Calemine, Minority Staff Director; John D'Elia, Minority Staff Assistant; Celine McNicholas, Minority Labor Counsel; Meredith Regine, Minority Labor Policy Associate; Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director; and Michael Zola, Minority Senior Counsel.

Chairman WALBERG. Well, good morning. A quorum being—boy, this sounds like the voice from on high. If I could of only had this back when I was in the pulpit, right?

Having said that, I understand that this morning is a special morning with a birthday? I think I am a good voice today—well, no.

Happy birthday. Happy birthday——

Ms. WOOLSEY. Thank you, very much.

Chairman WALBERG [continuing]. And many more.

Ms. WOOLSEY. Thank you.

Chairman WALBERG. Yes. I have been trying to keep up with you and the 900 feet down in a mine shaft. You are doing very well—very well. It doesn't work.

So, getting back to the point, a quorum being present, the subcommittee will come to order. Good morning. I welcome each of you. I welcome our guests and express my appreciation to the witnesses for being with us today.

Thank you, Deputy Administrator Leppink, and—Leppink, let me get that right—for participating in our hearing this morning.

Today we will examine the Obama administration's regulatory and enforcement agenda under the Fair Labor Standards Act. This law affects the lives of an estimated 135 million workers and the business decisions of at least 6 million private employers. Given the law's broad reach, it is critical we have smart policies that enforce the law in a responsible manner, a task even more important in the midst of the nation's budget crisis.

For this reason, many have expressed concerns with enforcement policies adopted in recent years. Without a doubt, the overwhelming majority of employers want to do the right thing; they want to run a successful business and they don't want to break the law. Federal resources should educate employers about their legal obligations, offer assistance to promote compliance, and when necessary, hold bad actors accountable.

However, not only has the administration proposed budget cuts to important resources that assist and educate employers, it has also taken an adversarial approach to enforcement of the law. The bureaucracy is growing, with more staff dedicated to punitive enforcement activities and drafting burdensome regulations, which means employers will have fewer resources to help follow the law and face an ever growing bureaucracy ready to catch them when they don't.

The effect of this decision can be seen in the Department of Labor's recent launch of a broad investigation into the nation's home building industry. Without basis, the department sent letters to numerous home builders warning a comprehensive investigation was underway. The department is demanding these employers—again, without basis—make available documents concerning payroll, subcontractors, and projects that have been or may be completed, as well as detailed information regarding every supplier of materials associated with their business.

The department concludes by suggesting this may only be the beginning of their intrusive request. Imagine you are an employer in an industry that has been shattered by the recession and you receive this letter. You have no reason to believe you have violated the law, but now you must dedicate substantial time and resources to meet the demands of this unwarranted investigation.

When we suggest federal action can have a chilling effect on job-creators, this is what we mean. Those who support more stimulus spending say that our economy simply lacks demand. Well, I think our economy lacks sensible policies and practices from Washington, and it is time to demand better.

If an employer is fortunate enough to avoid a baseless investigation they may still face the burden of department's regulatory efforts. For example, the department is developing a regulation that

requires employers to create a written legal analysis explaining why certain workers are considered exempt under the law. This may stimulate demand for lawyers, but it will cost businesses time and money.

The department is also crafting a proposal to eliminate an exemption for certain home care workers. These workers provide invaluable services to the elderly and infirm at private residences, yet this regulatory effort may increase the cost of care, forcing some individuals to abandon their homes and enter institutional support. I, along with Representative Lee Terry, of Nebraska, and other members of Congress, have raised significant concerns about this proposal and will continue to as long as these concerns are not adequately addressed.

Finally, in direct contrast to the demands set on employers, the department now releases little public information about its own activities, denying Congress and the American people an opportunity to properly judge the success or failure of its actions. As is always the case, federal policies lead to real world consequences. Wasted resources on flawed enforcement agenda may deny workers the wages and benefits they deserve, and job creators—men and women trying to survive in this tough economy and provide a livelihood for their employees—face greater uncertainty. At a time when millions of Americans are searching for work, this is simply unacceptable.

In closing, let me say that the Congress and this committee have a constitutional responsibility to conduct oversight of the executive branch. The administration prides itself on running the most open and transparent government in modern history. However, responses to basic congressional inquiries are routinely delivered late, and when they do arrive they are largely incomplete.

I hope the administration will abandon this obstructionist course and begin to work with Congress on policies that benefit the American people.

I am dedicated to that work, Administrator Leppink, and I am hopeful that you are, too. I look forward to working closely with you in the weeks and months ahead.

With that, now I recognize the senior Democrat member of this committee, Ms. Woolsey, for her opening remarks.

[The statement of Chairman Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections

Good morning. I would like to welcome our guests and express my appreciation to the witnesses for being with us today. Thank you, Deputy Administrator Leppink, for participating in our hearing this morning.

Today, we will examine the Obama administration's regulatory and enforcement agenda under the Fair Labor Standards Act. This law affects the lives of an estimated 135 million workers and the business decisions of at least six million private employers. Given the law's broad reach, it is critical we have smart policies that enforce the law in a responsible manner—a task even more important in the midst of the nation's budget crisis.

For this reason, many have expressed concerns with enforcement policies adopted in recent years. Without a doubt, the overwhelming majority of employers want to do the right thing; they want to run a successful business and they don't want to break the law. Federal resources should educate employers about their legal obligations, offer assistance to promote compliance, and when necessary, hold bad actors accountable.

However, not only has the administration proposed budget cuts to important resources that assist and educate employers, it has also taken an adversarial approach to enforcement of the law. The bureaucracy is growing with more staff dedicated to punitive enforcement activities and drafting burdensome regulations, which means employers will have fewer resources to help follow the law and face an ever growing bureaucracy ready to catch them when they don't.

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The department concludes by suggesting this may only be the beginning of their intrusive request. Imagine you're an employer in an industry that has been shattered by the recession, and you receive this letter. You have no reason to believe you've violated the law but now you must dedicate substantial time and resources to meet the demands of this unwarranted investigation.

When we suggest federal action can have a chilling effect on job-creators, this is what we mean. Those who support more stimulus spending say that our economy simply lacks demand. Well, I think our economy lacks sensible policies and practices from Washington, and it is time to demand better.

If an employer is fortunate enough to avoid a baseless investigation, they may still face the burden of the department's regulatory efforts. For example, the department is developing a regulation that requires employers to create a written legal analysis explaining why certain workers are considered exempt under the law. This may stimulate demand for lawyers, but it will cost businesses time and money.

The department is also crafting a proposal to eliminate an exemption for certain home care workers. These workers provide invaluable services to the elderly and infirm at private residences, yet this regulatory effort may increase the cost of care—forcing some individuals to abandon their homes and enter institutional support. I, along with Rep. Lee Terry of Nebraska and other members of Congress, have raised significant concerns about this proposal and we will continue to as long as those concerns are not adequately addressed.

Finally, in direct contrast to the demands set on employers, the department now releases little public information about its own activities, denying Congress and the American people an opportunity to properly judge the success or failure of its actions.

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In closing, let me say that the Congress and this committee have a constitutional responsibility to conduct oversight of the executive branch. The administration prides itself on running the most open and transparent government in modern history. However, responses to basic congressional inquiries are routinely delivered late and when they do arrive, they are largely incomplete.

I hope the administration will abandon this obstructionist course and begin to work with Congress on policies that benefit the American people. I am dedicated to that work Administrator Leppink, and I am hopeful that you are too. I look forward to working closely with you in the weeks and months ahead.

With that, I will now recognize the senior Democrat member of the subcommittee, Ms. Woolsey, for her opening remarks.

Ms. WOOLSEY. Thank you, Mr. Chairman. Mr. Chairman, the Fair Labor Standard Act was passed nearly 80 years ago to ensure that working people earn a fair day's pay for a fair day's work.

In the decades leading up to this law, working people were at the mercy of their employer, with little leverage to improve their working conditions, while employers had few limitations on treatment of employees. Policies we take for granted today, such as the minimum wage, did not exist before Congress passed the FLSA. Since then, the rights guaranteed under this groundbreaking law—

among them, the 40-hour work week, the minimum wage, and compensation for overtime—have helped millions of Americans improve their standard of living while providing the appropriate level of balance between workers' rights and the rights of the employer.

In order for the law to work it has to be enforced. I applaud the Department of Labor for stepping up its enforcement of the FLSA and I reject the notion that doing so somehow hurts employers. As we know, the prior administration decreased the ability of the department to enforce these and other basic protections for working people. When President Obama came into office, for instance, the number of staff at the department's Wage and Hour Division was at a record low; the administration has since hired 300 investigators to ensure that workers are paid fairly and good employers are not put at a competitive disadvantage.

Since many of the workers covered by the FLSA are vulnerable to economic upheaval and may depend on unemployment compensation it is especially important to enforce the law during these difficult economic times.

Mr. Chairman, imagine losing your job, going to the unemployment office, being told you don't qualify because, for example, you were considered an independent contractor and your employer didn't make payments into the unemployment insurance system on your behalf. This happens. Unemployment can be denied if an employer has misclassified that employee.

The consequences of misclassifying an employee go beyond unemployment. Workers improperly classified as independent contractors aren't covered by workers' compensation, overtime protections, family and medical leave, and the right to organize and bargain collectively.

In 2005 a Bureau of Labor Statistics survey found that over 10 million United States workers—7.4 percent of the workforce—had been classified, rightly or wrongly, as independent contractors. In the year 2000 a Department of Labor study found that 10 to 30 percent of companies nationwide had misclassified their employees.

Misclassification cheats workers and it cheats taxpayers. According to a 2009 report by the Government—well, the GAO, misclassification costs the federal government $2.7 billion in lost revenue because employers do not pay payroll or unemployment insurance taxes for these workers.

Mr. Chairman, I recently reintroduced H.R. 3178, the Employee Misclassification Prevention Act, which would be—would make it a violation of the record-keeping provisions of the Fair Labor Standards Act to make an inaccurate classification. It would also ensure workers have the protections and benefits that they are entitled.

The misclassification of workers is one of the most odious forms of wage theft, and I look forward to working with you to correct this. Because the bottom line, Mr. Chairman, is this: Responsible employers who comply with the minimum wage and overtime laws are placed at a great disadvantage when we allow their law-breaking competitors to undercut them on labor costs.

In closing, I would like to remind my colleagues how important the FLSA has been for our economy and our way of life as Americans. It has provided the appropriate balance between the need to make profits and workers' rights.

The last thing we want to do is slip backwards to the days when we did not have clear rules that protect both employers and workers. We should oppose any attempt to undermine the FLSA and work together to strengthen it.

And I thank you, and I look forward to this hearing and the testimony from today's witnesses. With that, I yield back.

[The statement of Ms. Woolsey follows:]

Prepared Statement of Hon. Lynn C. Woolsey, Ranking Member, Subcommittee on Workforce Protections

Mr. Chairman, the Fair Labor Standards Act (FLSA) was passed nearly 80 years ago to ensure that working people [are able to] earn a fair day's pay for a fair day's work. In the decades leading up to this law, working people were often at the mercy of their employer, with little leverage to improve their working conditions. Employers had few limitations on treatment of employees.

Policies we take for granted today, such as the minimum wage, did not exist before Congress passed the FLSA. Since then, the rights guaranteed under this groundbreaking law—among them the 40 hour workweek, the minimum wage, and compensation for overtime—have helped millions of Americans improve their standard of living and provide the appropriate level of balance between workers' rights and the rights of employers.

In order for the law to work it has to be enforced. I applaud the Department of Labor for stepping up its enforcement of the FLSA and reject the notion that doing so somehow hurts employers.

As we know, the prior Administration decreased the ability of the Department to enforce these and other basic protections for working people. When President Obama came into office, for instance, the number of staff at the Department's Wage and Hour Division was at a record low. The Administration has since hired 300 investigators to ensure that workers are paid fairly and good employers are not put at a competitive disadvantage.

Since many of the workers covered by the FLSA are vulnerable to economic upheaval and may depend on unemployment compensation, it is especially important to enforce the law during these difficult economic times.

Imagine losing your job and going to the unemployment office and being told you don't qualify because for example, you were considered an independent contractor and your employer didn't make payments into the unemployment insurance system on your behalf. This happens—unemployment can be denied if an employer has misclassified an employee.

The consequences of misclassifying an employee go beyond unemployment. Workers improperly classified as independent contractors instead of employees aren't covered by workers' compensation, minimum wage and overtime protections, Family and medical leave, and the right to organize and bargain collectively.

In 2005, a Bureau of Labor Statistics survey found that over 10 million U.S. workers—7.4 percent of the workforce—had been classified, rightly or wrongly, as independent contractors. In 2000, a Department of Labor study found that 10 to 30 percent of companies nationwide had misclassified their employees. Misclassification cheats workers and taxpayers. According to a 2009 report by the Government Accountability Office, misclassification cost the federal government $2.72 billion in lost revenue because employers do not pay payroll or unemployment insurance taxes for these workers.

Mr. Chairman, I recently re-introduced H.R. 3178, the Employee Misclassification Prevention Act, which would make it a violation of the recordkeeping provisions of the Fair Labor Standards Act to make an inaccurate classification. It would also ensure workers have the protections and benefits that they are entitled. The misclassification of workers is one of the most odious forms of wage theft and I look forward to working with the Chairman to correct it.

The bottom line, Mr. Chairman is this:

Responsible employers who comply with minimum wage and overtime laws are placed at a disadvantage when we allow their law breaking competitors to undercut them on labor costs.

In closing, I'd like to remind my colleagues how important the FLSA has been for our economy and our way of life. It has provided the appropriate balance between the need to make profits and workers' rights. The last thing we want to do is slip backwards to the days when we did not have clear rules that protect both employers

and workers. We should oppose any attempt to undermine the FLSA and work together to strengthen it.

Thank you and I look forward to hearing testimony from today's witnesses.

Chairman WALBERG. I thank the gentlelady.

Pursuant to Committee Rule 7c, all members will be permitted to submit written statements to be included in the permanent hearing record, and without objection the hearing record will be open for 14 days to allow questions for the record, statements, and extraneous material referenced during the hearing to be submitted for official hearing record.

We have two distinguished panels today, and I would like to begin by introducing the first panelist, deputy administrator of the Wage and Hour Division, Nancy Leppink.

We appreciate you being here. Before you begin your testimony, just go through the process that you are probably well aware of—the three lights there. The green light, you have 5 minutes to present; the yellow light comes on, a minute remaining; when the red light is there, wrap up as quickly as you can. We will have 5 minutes of questioning from each of our members on the committee, and a lot of information can get out then.

But thank you for being with us this morning. And so I recognize Ms. Leppink for her testimony.

STATEMENT OF NANCY J. LEPPINK, DEPUTY ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR

Ms. LEPPINK. Good morning, Chairman Walberg, Ranking Member Woolsey, and members of the subcommittee. Thank you for the invitation to testify today.

During these difficult economic times it is important to remember that the Fair Labor Standards Act was enacted in 1938, in the midst of the Great Depression, when unemployment was at 19 percent. Congress recognized the critical need to establish a minimum wage, overtime compensation, and child labor standards for America's workers, and the need to level the competitive playing field for employers.

Together, the minimum wage and overtime compensation requirements provide a basic level of economic security to our nation's workers. Enforcement of these protections also eliminates an unfair competitive advantage unscrupulous employers gain from paying workers substandard wages.

The act's protections are also essential to a healthy economy. The overtime compensation requirement spurs job creation by encouraging employers to hire additional employees instead of working a few employees long hours; the child—the act's child labor provisions were also included by Congress because Congress recognized that when children work they should do so in safe conditions. One child injured or killed while working is one too many.

The Wage and Hour Division is charged with the enforcement of the employment laws on its watch for over 130 million workers in 7.3 million workplaces. Every year, the division receives tens of thousands of complaints. Violations run the gamut, from employers paying significantly less than minimum wage; not paying overtime

for 60, 70, 80 hours or longer work weeks; and simply not paying their workers at all.

Secretary Solis made the rebuilding of the division into a modern, effective law enforcement agency a priority. Over the last 2 years, the division has hired and trained 300 new investigators and we have added and upgraded equipment and technology that has increased our effectiveness and efficiency.

With its directed enforcement actions, the division is focusing on industries with a prevalence of low-wage and vulnerable workers who often don't file complaints, and because—and based on available data and evidence have significant levels of noncompliance. Engaging in directed enforcement actions is a more efficient use of our resources and has a greater impact on compliance.

In addition, providing compliance assistance to employers is an important part of an effective enforcement strategy, and the division staff stand ready, willing, and able to provide that assistance. In the past year the Wage and Hour Division has conducted nearly 900 outreach events, where the target audience was employers. Making reliable and acceptable information available to employers is critical to ensuring that workers receive their proper wages.

The results of these efforts speak volumes. In fiscal year 2011, Wage and Hour collected almost $225 million in back wages for more than 275,000 of the nation's workers, which is the largest amount collected in a single fiscal year in the division's history.

These back wages demonstrate that the division has become a stronger, more effective law enforcement agency. Furthermore, these back wages represent more than $225 million in the pockets of America's workers, a return of their rightfully earned wages which they, in turn, will spend on goods and services, stimulating our economy and helping to create jobs.

Our work and its result, however, is more than about numbers. It is about the cable installer in Minnesota who was being paid less than the minimum wage and facing foreclosure on his home. He was able to pay his mortgage when he received the $3,000 in back wages he was owed. It is about the construction worker from South Dakota who was able to buy back, with the $5,500 in back wages he received, his wife's and his wedding rings they pawned to pay their rent to avoid eviction.

Our child labor enforcement also impacts lives—young lives. In 2009, Wage and Hour found egregious child labor violations in the blueberry fields of New Jersey, North Carolina, and Michigan.

In addition to assessing penalties, division staff met with employer associations, farm groups, community organizations, and state and local agencies to be sure that employers understood their obligations and workers understood their rights. When the Wage and Hour Division went back into the blueberry fields in 2010 there were no children working unlawfully in those fields.

These workers' stories are a testament to the fact that the FLSA stands for how as a nation we value work and the responsibility and opportunity that it affords our citizens. It is through such laws that societies recognize that value and worth of human effort and provide their members with the means to support and nurture strong families, and it is an affirmation of these American values

that the Fair Labor Standards Act has stood the test of time even as the workplace has changed many times over.

Thank you for the opportunity to testify today. I am ready to answer your questions.

[The statement of Ms. Leppink follows:]

Prepared Statement of Hon. Nancy J. Leppink, Deputy Wage and Hour Administrator, Wage and Hour Division, U.S. Department of Labor

Good morning Chairman Walberg, Ranking Member Woolsey, and Members of the Subcommittee. Thank you for the invitation to testify at this hearing on the Fair Labor Standards Act, a law of critical importance to our nation's workers, businesses, and economy.

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime compensation, recordkeeping, and child labor standards affecting employees in the private sector and in Federal, State, and local governments. As the agency charged with administering and enforcing the protections afforded by the Act, the Wage and Hour Division (WHD) is uniquely situated to attest to the public benefit of the Act and the necessity for strong enforcement of its provisions.

During these difficult economic times, it is important to remember what we faced as a nation when the FLSA was enacted in 1938. We were in the midst of the Great Depression. Unemployment was at 19 percent. In response to those circumstances, far worse than we are experiencing now, Congress recognized the critical need to establish minimum wage, overtime compensation, and child labor standards for America's workers and the need to level the competitive playing field for their employers.

We all know, just as Congress did in 1938, that workers who work hard and play by the rules—responsibly fulfilling their roles as productive members of society—should earn enough to be able to support themselves and their families. The minimum wage helps meet that fundamental societal good by providing a wage floor that ensures workers receive fair compensation for their labor. Being paid at least the minimum wage makes the difference between living with the hope of sharing in the American dream or not. Similarly, the overtime compensation requirement is in part intended to guarantee that employees are fairly compensated for the burdens of working long hours for their employers. Together, the minimum wage and overtime compensation requirements help provide a basic level of economic security to our nation's workers.

In addition to being necessary for the well-being of workers and their families, the FLSA's protections are also essential to a healthy economy. The overtime compensation requirement spurs job creation. It is intended to spread available employment opportunities by encouraging employers to hire more workers instead of working a few employees long hours. This is particularly important in a time of 9.1 percent unemployment. Further, the FLSA's protections allow workers to earn enough to purchase the goods and services necessary to support themselves and their families. That purchasing power in turn enables other workers to earn enough to purchase goods and services, thus sustaining the efficient functioning of our economy. Enforcement of these protections also eliminates an unfair competitive advantage unscrupulous employers gain from paying workers substandard wages in order to increase profits or underbid law-abiding competitors, helping to ensure a level playing field throughout the economy.

The Act's basic requirements of a minimum wage and overtime compensation are no less important today than they were in 1938. Every year, the WHD receives tens of thousands of complaints about FLSA violations and, with our current economic difficulties, the number of complaints has increased.[1] The complainants work in all industries and in almost all occupations. The violations run the gamut from employers paying significantly less than the minimum wage, to failing to pay overtime for hours worked over 40 in a workweek, to paying employees only in tips they receive from customers, to failing to make payroll or to pay workers at all, to making illegal deductions from wages, to misapplying exemptions to the Act's minimum wage and overtime protections. The impact these violations have on the welfare of the nation's workforce is significant. An employer's failure to pay his workers the minimum wage may mean a dishwasher cannot buy food for his or her family. An employer's improper classification of her employees as exempt from overtime compensation may mean a customer service representative is unable to spend time meeting the needs

[1] In FY 2008, the WHD received 21,558 FLSA complaints. That number rose to 26,376 in FY 2009 and 32,916 in FY 2010, and remained high at 28,595 in FY 2011.

of her family because she is working 60 or more hours a week with no overtime pay just to keep her job.

The Act's child labor provisions were included because Congress recognized that, when young people work, they should do so in safe conditions that do not jeopardize their health, well-being, or educational opportunities. Unfortunately, even today there are still employers who continue to improperly hire children to work in hazardous conditions. The absence of a private right of action to address oppressive child labor makes this agency's role in safeguarding young workers all the more important. Even with current laws on the books, young workers are still killed or injured on the job, and one child injured on the job is one too many. In the last two years, WHD has investigated cases involving the deaths of three young workers employed in two different grain storage facilities. In May 2009, a 17-year-old worker was killed at an Omaha meat rendering plant while operating a forklift in violation of the FLSA. Increasing compliance with the child labor provisions of the FLSA is a cornerstone of the agency's responsibilities.

In addition to the Fair Labor Standards Act, the Division is also charged with administering and enforcing a number of other federal labor and employment laws, including those covering family and medical leave, migrant farm work, the terms and conditions of employment of certain temporary non-immigrant workers, and the wages and benefits received by construction and service workers fulfilling government contracts. These critical protections provided by Congress cannot be fully realized in the absence of the effective enforcement of these laws by the Department.

The Division's longstanding mission is to promote and achieve compliance with employment standards to protect and enhance the welfare of the Nation's workforce. In an effort to rebuild the Division's enforcement capacity, WHD hired 300 new investigators beginning in late in FY 2009. The WHD now has more than 1,000 investigators, a 40% increase after a low of 731 in 2008, who are charged with enforcing these protections for over 130 million workers in 7.3 million workplaces. Secretary Solis made building the WHD into a modern, effective law enforcement agency a priority because of the magnitude of this charge—a goal I was happy to take up when I arrived at the Department a little over two years ago. In addition to hiring 300 new investigators, we have made every effort to upgrade the technology and equipment our employees use in order to increase their effectiveness and efficiency. Equipment such as Blackberries, laptops, and portable printers, for example, have given our investigators the ability to access and transmit information remotely and to engage in communications necessary to conduct an investigation in the field, without having to return to the office. Similarly, an investigator equipped with a wand scanner is able to readily copy documents and other evidence and to thus reduce the number of times the investigator may have to visit an employer's worksite during the course of an investigation.

In addition to ensuring that our investigators are equipped with the technology and equipment needed to be an effective and productive investigator, we are using all of the enforcement tools available under the law to make sure we are doing an effective job of enforcing the law. This means, for example, that we are fully utilizing all of the remedies provided by Congress. We are also making more transparent the results of our enforcement efforts, which will help to further achieve compliance both within and across industries by helping employers and employees understand their obligations and rights under the law.

We are increasingly sharing information about our investigations with law enforcement agencies, which is particularly important with respect to our efforts to combat the violations of our laws that occur because of employees who are misclassified as independent contractors or other non-employees. This sort of employee misclassification is a serious and, according to all available evidence, growing problem. When employers improperly classify their workers, it deprives those employees of many of the rights and benefits they are legally entitled to, including the minimum wage and overtime. Misclassification also has a significant negative impact on both federal and state revenues because, when employees are misclassified, it often means that employers are not meeting their employment tax, including unemployment insurance, and workers compensation obligations. Misclassification also makes it difficult for law-abiding employers to compete—and no employer should have to choose between success and obeying the law.

For these reasons, the Administration is committed to working to end employee misclassification. The Department is a part of a multi-agency Misclassification Initiative that will strengthen and coordinate Federal and State efforts to enforce violations of the law that result from employee misclassification. As an important step in this Initiative, on September 19 of this year the Secretary signed a Memorandum of Understanding (MOU) with the IRS that will allow us to share information about our investigations with that agency so that it may follow up to make sure that the

employers we have found in violation of our laws have paid the proper employment taxes. Similarly, the WHD also entered into MOUs with several state labor agencies, including agencies in Minnesota, Missouri, Utah, Washington, Illinois, Connecticut, Montana, Hawaii, Maryland, and Massachusetts. These MOUs with the states allow us to share information about our investigations and coordinate misclassification enforcement when appropriate. These agreements mean that all levels of government are working together to solve this critical problem.

One of the most important enforcement tools we have as an enforcement agency is our ability to conduct directed investigations. Too many employees are reluctant to complain, afraid that they will lose their jobs or suffer other retaliation if they do. Others are simply unaware of the law's protections and of their right to be paid the minimum wage and overtime compensation. Furthermore, the WHD will never have the resources to address every complaint it receives, let alone investigate every employer who may not be complying with the law. For these reasons, the WHD is putting more of its resources into directed national, regional and local enforcement initiatives and, with a focus on industries with a prevalence of low wage and vulnerable workers, strategically targeting industries when available data and evidence tell us that there are significant levels of non-compliance in those industries. This is not a new strategy for the WHD, but we have certainly increased the share of our resources that we put toward it. Engaging in directed enforcement initiatives instead of relying so heavily on individual complaints the agency receives is a more efficient use of resources and has a greater impact on compliance both in general and in targeted industries.

In addition to its enforcement efforts, the WHD has always considered providing information to employers and employees about their responsibilities and their rights an important part of an effective strategy for achieving compliance. The Division's staff is available to provide assistance to employers, whether it is in person, over the phone, or by e-mail, to determine whether they are in compliance and what steps they should take to achieve compliance. In the past year, WHD has conducted nearly 900 outreach seminars, conferences, speeches, symposiums, panel discussions, and presentations where the target audience is geared to employers, employer representatives, human resource professionals, and/or employer associations. The WHD also makes guidance in many forms available to all employers and employees on our website (www.dol.gov/whd). This guidance includes fact sheets, field assistance bulletins, e-laws, and Administrator Interpretations. In whatever form the guidance takes, the WHD endeavors to find ways to assist employers and employees and to help them understand how the laws the Division enforces apply to their situations. Assisting businesses in understanding and complying with their obligations under the FLSA is a critical strategy for ensuring that workers receive their proper wages from the beginning of their employment—a goal I think we all share.

The results of all of these efforts speak volumes. In Fiscal Year 2011, the WHD collected $224,844,870 in back wages for this nation's workers, which is the largest amount collected in a single fiscal year in the Division's history, exceeding the Fiscal Year 2003 amount of $212 million, which included several very large multi-million dollar settlements, and the Fiscal Year 2007 amount of $220 million, which included a $32 million settlement with a large retailer. These back wages, collected on behalf of 275,472 workers, including almost 90,000 who had not been paid the minimum wage for all of the hours they had worked, demonstrate that the WHD has become a stronger, more effective law enforcement agency. These results are just one demonstration of the extraordinary capability and commitment of the WHD's employees, who endeavor every day to ensure our nation's workers receive the protections provided them under the FLSA. Furthermore, these back wages represent almost $225 million dollars in the pockets of America's workers, a return of their rightfully earned wages that they will directly spend on goods and services, stimulating our economy and helping to create new jobs.

Our work, and its results, however, is about more than numbers. It is about the people we have helped. Because we focus on low wage and vulnerable workers, the amount we collect per individual may seem small but it can make all the difference for that worker and his or her family. For example, because of one of our investigations, a cable installer in Minnesota who had been paid less than minimum wage by his employer and was facing foreclosure of his home was finally able to pay his mortgage when he received the $3,000 in back wages he was owed. Because of one of our investigations in South Dakota, a construction worker's $5,500 in back wages received meant that he and his wife were able to buy back the wedding rings they had to pawn in order to pay their rent to avoid eviction.

Our child labor enforcement also makes a real difference. In 2009, WHD found egregious child labor and other labor-related violations in the blueberry fields of New Jersey, North Carolina, and Michigan. In addition to assessing penalties, WHD

took a comprehensive approach to ending the dangerous practices it had uncovered. Our staff met with employer associations, farm groups, community organizations, and state and local agencies to be sure that employers understood their obligations and that workers understood their rights. When WHD went back into the blueberry fields in 2010, there were no children working unlawfully in those fields. All of us at the Department are proud of our work to help American's children remain in safe working conditions.

These workers are a testament to the fact that the FLSA stands for how, as a nation, we value work and the responsibilities and opportunities that it affords our citizens. The Act's minimum wage and overtime laws codify the value of a fair day's pay for a fair day's work. It is through such laws that societies recognize the value and worth of human effort, and provide their members the means to support and nurture strong families. And it is an affirmation of these American values that the FLSA has stood the test of time, despite all of the changes that have taken place over the past 73 years. Thank you again for the opportunity to testify today. I am happy to answer your questions.

Chairman WALBERG. Thank you. I appreciate that, and I yield myself time for questioning to begin.

There is no doubt that health care and Medicare and Medicaid expenses will likely increase a result of the potential to narrow the companionship exemption. For example, if this were to go into place, seniors and their families would be less able to afford home care, which is typically paid not by insurance but by families themselves, caring for their loved ones. This trend would require a greater commitment of federal spending to cover seniors living in institutions.

Has the Department of Labor considered any increased Medicare or Medicaid expense by the federal government in considering this, and have you consulted with the Department of Health and Human Services?

Ms. LEPPINK. Well, first of all, let me make clear that the regulation—the proposed regulation on the department's regulatory agenda is still under consideration, and so consequently, we are continuing to consider many of the issues that you have just mentioned. But yes, in fact, we have consulted with a whole variety of stakeholders, including Medicare and Medicaid, regarding the impact of any of the proposals that we are considering.

Chairman WALBERG. How close are we to concluding that discussion, that study?

Ms. LEPPINK. I am not really in a position to say because it is not always totally in my hands, but the rule was submitted to OMB—the Office of Budget and Management—this week, so the consideration will be ongoing now in that form.

Chairman WALBERG. Okay.

Recently, the Wage and Hour Division began an information request on large residential construction companies. While these industries and their employees are struggling to make a living the Wage and Hour Division is hanging the threat of subpoenas and lawsuits over their head and demanding information on their contractors and subcontractors that, frankly, there are really—they aren't required to keep.

Have you taken into account the record lows the industry is facing and the chilling economic effect on these job creators?

Ms. LEPPINK. Chairman Walberg, first of all, conducting direct investigations is not a new enforcement strategy for the Wage and

Hour Division. The division has engaged in directed investigations for many years.

I cannot speak to the specifics of an open investigation, but I can assure you that the construction industry is an industry with violation levels amongst the highest that Wage and Hour sees. In fiscal year 2011 the Wage and Hour Division collected over $39 million for 3,200 workers in the construction industry. In the residential construction industry alone the Wage and Hour Division collected over $4 million in back wages for nearly 2,500 employees.

All of our strategic enforcement initiatives are data-driven and based on evidence that there are significant compliance problems in the targeted industry.

Chairman WALBERG. You know, I hear that, and certainly that is the responsibility of Wage and Hour——

Ms. LEPPINK. Right.

Chairman WALBERG [continuing]. But the question is, the requests that are being posed to these companies that are asking for material and information that they have not been required to keep.

And I guess the concern is, there, that the largest ones may understand, well, we will take that on; we have the lawyers to do it, or we have the knowledge of what we are expected and what we aren't. There are plenty of others that don't have that, and now they are put in the situation where the large and strong arm of government has come down and said, "You must supply this," when, in fact, they are not required. That is a concern.

Ms. LEPPINK. Chairman Walberg, employers are required by law to maintain payroll records and other employment records. And payroll records are often critical to determining whether an employer has complied with the minimum wage and overtime.

It is a regular practice of investigators—Wage and Hour investigators—to ask these—request these documents as part of a Wage and Hour investigation. And furthermore, the Wage and Hour Division has an obligation to request documents that it thinks are critical to conducting and effective enforcement action.

Chairman WALBERG. In the few remaining moments here, let me ask a final question. Can you give this committee detailed information on the past 2 years' enforcement data? How many cases were examined, how many millions of back wages were won, and how many employees benefited from this?

Ms. LEPPINK. Yes, I can. Some of them I could give to you right now, if you would like, but I can also have my staff supply them for you.

Chairman WALBERG. I appreciate that. Try to keep to my own rules. I won't violate them.

Ms. LEPPINK. Okay.

Chairman WALBERG. And I will turn the—recognize the ranking member of this committee for her questions.

Ms. WOOLSEY. So, just to be clear, all employers—every employer—is required by law to keep wage and hour records?

Ms. LEPPINK. All employers who are covered by the Fair Labor Standards Act. Not all employers are covered by the Fair Labor Standards Act, but those that are are required to maintain payroll records.

Ms. WOOLSEY. Okay. Who wouldn't be covered by the Fair Labor Standards Act?

Ms. LEPPINK. Well, there is a whole variety of—some of it is based on just the amount of money that they make, you know, what is their income. Some of it is based on, so, it is size. Some of it is based on whether their employees are actually engaged in interstate commerce.

Ms. WOOLSEY. So once they reach that threshold——

Ms. LEPPINK. Right. Yes.

Ms. WOOLSEY [continuing]. They know they are required to do this.

Ms. LEPPINK. Yes.

Ms. WOOLSEY. So it should not be a surprise. Actually, they would be breaking the law by not keeping records.

Ms. LEPPINK. Correct.

Ms. WOOLSEY. All right.

Okay, ask I mentioned in my—I am changing the subject now, thank you—in my opening statement, I am very concerned about the misclassification of workers. I know that the Department of Labor recently signed a memorandum of understanding with the IRS and several states, actually, that are aimed at improving enforcement efforts surrounding misclassification. Tell us, if you can, more about what you hope to accomplish with these agreements, and, you know, what does this mean to state and local government budgets when employees are misclassified?

Ms. LEPPINK. Well, misclassification is a serious and growing issue. It is an issue both for the federal government and for state governments. I dealt with and worked with the issue of misclassification as general counsel for the Department of Labor and Industry in Minnesota, and have worked with it here with the Department of Labor.

The seriousness of misclassification of workers or of employees as independent contractors is felt by businesses who comply with the law who are confronted with competitors who can illegally reduce their labor costs by up to 30 percent by misclassifying their workers. It is a cost to workers because it denies them benefits, such as minimum wage and overtime, workers' compensation, unemployment insurance, and also, of course, obligates them to carry the payroll tax burden that would otherwise be carried by their employer. And of course, it is a difficult problem for state and federal revenues because, of course, if people are not paying their payroll taxes then those revenues are not going in to state coffers.

These MOUs are actually a recognition that in order to tackle this issue we need to be working collaboratively with our state partners because their issues are our issues; our issues are their issues. And so consequently, the MOUs allow for us to share information and to have conversations about collaborating on various enforcement actions that we would be taking that would affect their particular state. It is a very important step, particularly with the idea that, you know, we will be having ongoing conversations about how we are going to tackle this issue.

Ms. WOOLSEY. So basically, everybody loses when employees are misclassified, particularly the taxpayers who have to make up the difference?

Ms. LEPPINK. Correct.

Ms. WOOLSEY. Okay. As our chair has worried, and worried to a degree that we need to answer this—the Wage and Hour Division, he worries, has adopted a more punitive agenda. And we need you to tell us one more time to ask—would you walk us through what kind of assistance the department actually provides to assist employers with their compliance? It is just not one-sided.

Ms. LEPPINK. Oh, compliance assistance for employers is absolutely critical to effectively enforcing the law. We have an obligation to provide employers with compliance assistance. We do so in any number of ways.

We have a very robust website that provides information in all kinds of forms, whether their field assistance bulletins, facts sheets, we have an e-law provision that literally is sort of an iterative process that walks employers through some of our more knotty provisions. We also, of course, are available. We have district offices—52 district offices across the country that are available to deal with, you know, the person face to face, if necessary, if not on the telephone.

Plus the fact, we—as I indicated, in this fiscal year 2011 we did over 900 presentations for employers on the issues that they wanted to hear about. And that doesn't include the conversations that we had when we were dealing with violations in the blueberry fields. So we have ongoing relationships with employers.

Ms. WOOLSEY. So if the chairman and I, or I, invited you to our district, somebody—would you present—give one of these presentations to our employers?

Ms. LEPPINK. Absolutely.

Ms. WOOLSEY. Thank you.

Chairman WALBERG. I recognize the chairman of the full committee, the gentleman from Minnesota, Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman.

And thank you, Ms. Leppink, for being here. I am always astonished when somebody voluntarily chooses to leave the great state of Minnesota for any reason. [Laughter.]

Ms. LEPPINK. Particularly when I lived in your district.

Mr. KLINE. But here you are. Here you are. And nobody should ever want to leave that district.

Chairman WALBERG. Was that the reason? [Laughter.]

Ms. LEPPINK. Of course not.

Chairman WALBERG. Only kidding.

Mr. KLINE. Thank you for that vote of confidence. As the former chair of the subcommittee, that is——

[Laughter.]

Mr. KLINE. I heard you say, and I had noticed in some preparatory material here that you have increased the size of the department by some 300 investigators, and you underscored that very proudly. And perhaps that is necessary, but I would argue that at a time when we are running huge, huge deficits you have added 300 more government employees and we are having to borrow 40 cents of that of every dollar to pay them. So I am not sure that is really what we need to be doing as we are trying to get Americans back to work, just hiring more people here in Washington, but

that is part of the larger discussion we are having about what to do to get the economy growing and putting people back to work.

And part of that discussion has been about the number of regulations and their impact. And so in January of this year President Obama noted that, quote—"Sometimes government rules have gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs." His words exactly.

Then he ordered a government-wide review of the rules already on the books to, quote—"remove outdated regulations that stifle job creation and make our economy less competitive." How many such rules have you discovered within your jurisdiction?

Ms. LEPPINK. Well, actually, we just having had the privilege of meeting with Chairman Walberg yesterday evening, and we were talking about how critical it is for the Fair Labor Standards Act and the guidance that the department puts out to stay current with the times and to be updated when—as the workforces change—as the workplace and the workforce changes. And so in particular, the three regulations that are on the agency's regulatory agenda are there in part because of a concern by the department that those regulations—several of them that are—all three of them—the right to know regulation, companionship, and the child labor regulation—are 30 and 40 years old and have not been updated.

So consequently, we take very seriously the charge of the president to look at our regulations, to ensure that they are responsive to current day conditions and that, obviously that they are clear and result in the least burden on employers possible.

Mr. KLINE. So you haven't actually removed any?

Ms. LEPPINK. I am sorry?

Mr. KLINE. You haven't removed any outdated regulations? You are just reviewing them and thinking about rewriting them, and so forth?

Ms. LEPPINK. Well, every regulation, whether you promulgate them, modify them, or remove them, needs to go through the rulemaking process. And so——

Mr. KLINE. But it is not part of the 500 or so that the president announced are these old rules and regulations that we need to get rid of? No.

Okay. I want to come back to the subject that was touched on a couple of times here. You mentioned it. You announced that the Wage and Hour Division, the IRS, and 11 states are coordinating investigations and audits.

In some industry there has been a great deal of concern that has been expressed—the home building industry, for one, which is the whole industry model is built on a system of contractors and subcontractors. So before you launched the investigation into the home building industry did you consider in this time of economy and unemployment—did you consider the builders would have to devote and divert all the time and energy to gather the resources of responding to this investigation and the uncertainty that that put into everybody in the industry? Did you assess the economic impact and the impact on job creation?

Ms. LEPPINK. Well, first of all, I can't speak specifically about any open investigation, but I can assure you that we——

Mr. KLINE. Well, you could address whether or not you considered that before you started.

Ms. LEPPINK. We have the responsibility to enforce the law to protect workers in all industries, even in difficult times. Even in difficult economic times workers still need to put food on the table. They still need to pay the rent.

Mr. KLINE. And so if their employers are put out of business and go out of business because of this effort, well, that doesn't help them with the food on the table. The question was, did you look at it beforehand, and the answer was no. And frankly, that is what I thought. I yield back.

Ms. LEPPINK. No. The answer was not no.

Chairman WALBERG. I recognize Representative Kucinich, the gentleman from Ohio.

Mr. KUCINICH. Thank you very much, members of the committee, gentlelady. We want to get America back to work, but guess what? America gets back to work, we ought to make sure people are paid. There is this connection between working and getting paid that we shouldn't lose sight of, and the Fair Labor Standards Act is set up to make sure that when people work they get paid—that they get paid minimum wage, that they get paid for overtime, and there is a whole range of other issues that come up.

So let's talk about these 300 investigators. Have they been hired?

Ms. LEPPINK. Yes. We began hiring—we received the appropriation in March of 2009; we engaged in ambitious hiring and recruiting over the summer of 2009; and we brought on the first group of new investigators in the fall of 2009. We brought on, then, sequential groups of investigators over the fiscal year——

Mr. KUCINICH. Asking an obvious question, why were they needed? Explain to this committee, why were these investigators needed? And who needed them?

Ms. LEPPINK. At the end of the prior administration the staffing levels, particularly of investigators, was at its lowest point in history; 731, I believe, investigators.

Mr. KUCINICH. If you don't have enough investigators what happens?

Ms. LEPPINK. We can't investigate——

Mr. KUCINICH. Okay. But what can't you investigate? Who gets hurt?

Ms. LEPPINK. People who come to us for help.

Mr. KUCINICH. Who are those people——

Ms. LEPPINK. How many?

Mr. KUCINICH. Who are they?

Ms. LEPPINK. They are low-wage and vulnerable workers, sir. So those are the people who we cannot—we were not in a position to help at the end of—at the beginning of this term.

Mr. KUCINICH. So I just want everyone to be very clear on who we are talking about here. We are talking about having enough investigators who can investigate violations that have been committed against low-wage workers.

You know, I fail to understand how in the world we are helping our economy by ignoring the fact that low-wage workers aren't being paid for work that they are doing. So tell me about your enforcement. What do you do?

Ms. LEPPINK. Well, the Wage and Hour Division engages in—responds first to complaints that it receives. It is contacted up to 35,000 times in a year by individuals who are seeking assistance—25,000 times a year with people who are seeking assistance with their Fair Labor Standards Act complaints or Family Medical Leave Act complaints.

We also put a significant portion of our resources into directed investigations because we have found that directed investigations one, go into places where people are too afraid to complain, and they also are directed at the——

Mr. KUCINICH. They are too afraid to complain because they might be exposed because of immigration status, or some other——

Ms. LEPPINK. They are too afraid to complain because they are afraid they are going to lose their jobs.

Mr. KUCINICH. All right.

Ms. LEPPINK. So part of the purpose of the directed enforcement initiatives are to get into industries where we know there are violations based on our own experience and based on our data, but they are not—we are not receiving complaints from those industries. Our directed investigations this past year, 70 percent of them found violations when we went in; 80 percent of our complaint—80 percent of our investigations of a complaint found violations.

Mr. KUCINICH. Violations meaning that people weren't being paid?

Ms. LEPPINK. People were not being paid.

Mr. KUCINICH. I mean, think about this economy. You get poor people who aren't being paid for work they are doing. It is bad enough that people can't get jobs, but people who are getting jobs aren't getting paid for what they are doing and we are attacking an act that is designed to make sure they get paid. Sometimes this place is a little bit hard to understand.

I yield back.

Chairman WALBERG. I thank the gentleman.

I now recognize Representative Bucshon, from Indiana.

Mr. BUCSHON. Thank you, Mr. Chairman.

First of all, I would like to challenge the fact that we are attacking an act—the Fair Labor Standards Act. We are serving in our oversight role as Congress, getting information, which you are kindly giving us, to make sure that the federal government is being effective and efficient in its role enforcing the Fair Labor Standards Act, which I think everyone in this room would agree is in federal law and needs to be enforced.

That said, I am going to focus my attention on the level of manpower within your division. And from 2005 to 2009, the data that I have, the average was $141 million in back wages, affecting 254,000 employees. You reported some new data that I didn't have here on fiscal year 2001, I guess, but in 2010 it was $130 million in back wages, 219,000 workers in fiscal year 2010, which is actually a slight drop from the average between 2005 and 2009.

So could you go over the—you presented data that said $225 million in back wages for 275,000 workers, and that—is that in fiscal year 2011?

Ms. LEPPINK. At the end of—for fiscal year 2011.

Mr. BUCSHON. Okay. Great.

And so, of the workers that were added—and I am not denying the fact that maybe they needed to be, I just, again, in our oversight role we want to make sure we are being as effective and efficient as we can be——

Ms. LEPPINK. Absolutely.

Mr. BUCSHON [continuing]. To do the job. How many of those people are Washington, D.C.-based, versus people that are based, for example, in district or regional offices around the country? Do you have any idea?

Ms. LEPPINK. All 300 are in—out in the field.

Mr. BUCSHON. Great. That is good information, because I was hoping that would be your answer.

Ms. LEPPINK. Absolutely. No, that is where they need to be.

Mr. BUCSHON. Because I think that that would be the important place to have them. And——

Ms. LEPPINK. In fact—sorry.

Mr. BUCSHON. No, go ahead.

Ms. LEPPINK. In fact, we have worked very hard, and one of the things that adding these staff has allowed is allowed us to get into particularly rural parts of the country where we have not had a—did not have a presence in the prior years.

Mr. BUCSHON. Can you just maybe inform me, what is—what type of person do you look for when you look for an investigator for this? I mean, do they have a—what, I mean—say, for example, a person wanted a career in the—in this area. I mean, is there a particular type of person that you look for—experience, background, familiarity with the law, and that type of thing?

Ms. LEPPINK. We look for a wide variety of things. One of the things is that currently at the Wage and Hour Division, 60 percent of our investigators speak a language other than English. We feel it is critical that we are able to communicate with employers and with employees in their language that they are most comfortable.

We have an incredibly diverse workforce. We recruit—we have a significant number of veterans, former military members; we have a certain number of Peace Corps volunteers; we have people who come in from—who have done human resources work. We have folks that come from other federal agencies, from state agencies, from community organizations. So there is——

Mr. BUCSHON. They are really a diverse group of people——

Ms. LEPPINK. It is very diverse, and it makes for a very strong organization.

Mr. BUCSHON. Good. I would agree, diversity is good.

So once they are hired by the Department of—by your department, what is their training? What training do they undergo so that they understand their job?

Ms. LEPPINK. That is a good question, because the Wage and Hour Division enforces more than just the Fair Labor Standards Act. We enforce the Fair Labor Standards Act, the Family Medical Leave Act, the Davis-Bacon Act, the Service Contract Act, Child Labor, we enforce the Migrant and Seasonal Farmworker Protection Act. So we have quite a heavy load.

Mr. BUCSHON. Sounds like you are overworked.

Ms. LEPPINK. We are challenged.

Mr. BUCSHON. I think the point of the question is I think—I am interested in how a person might be trained because I think that is critical to properly enforcing the laws that the people that are investigating are well trained.

Ms. LEPPINK. So it is actually a 2-year training process, which is part of the reason when you look at our 2009 and 2010 numbers we were in a rebuilding. You know, when we brought on those investigators we needed to train them to be certain that they could do their jobs.

So we have the—in the first year they have a whole coursework book work that they do. We bring them in, then, to do intensive training, particularly on investigation skills, how to conduct an effective investigation. We have to train them, of course, on our technology and our data collection systems.

But we primarily focus on the Fair Labor Standards Act in the first year that an investigator is being trained. They do, then, they do a lot of team investigations where they shadow an experienced investigator, so through that year.

Then in the second year we do another round of intensive coursework that they do over a period of time, then we do another round of classroom work, and then we do—then they are then trained to enforce the rest of the laws on our watch.

Mr. BUCSHON. Okay, thank you.

I yield back.

Chairman WALBERG. Thank the gentleman, and I recognize the gentleman from New York, Mr. Bishop.

Mr. BISHOP. Thank you very much, Mr. Chairman.

And thank you for being here and——

Ms. LEPPINK. My pleasure.

Mr. BISHOP [continuing]. Your testimony has been very helpful. I want to read to you the opening couple of sentences of a GAO report that was released in June of 2009 that, as I understand it, reflected the results of an investigation conducted by the GAO in 2006 and 2007. There has been a great deal of concern expressed by my colleagues about the 300 people that have been added.

Let me just read this opening sentence, what the GAO found: The GAO found that Wage and Hour division frequently responded inadequately to complaints, leaving low-wage workers vulnerable to wage theft and other labor law violations. Posing as fictitious complaintants, GAO filed 10 common complaints with Wage and Hour Division district offices across the country. These tests found that WHD staff deterred fictitious callers from filing a complaint by encouraging employees to resolve the issues themselves, directing most calls to voicemail, not returning phone calls to both employees and employers, and providing conflicting or misleading information about how to file a complaint.

Now, I would ask, was it information such as that that stood behind the department's request to increase its staff so that it could begin to do A, a better enforcement job; and B, do a better job of assisting low-wage workers who were being taken advantage of by unscrupulous employers?

Ms. LEPPINK. Absolutely.

Mr. BISHOP. Okay. And I know we are early into it, but are you finding that the efforts of these additional staff are succeeding as the department hoped that they would?

Ms. LEPPINK. Yes. Between our low point at the end of fiscal year 2009, where we completed 24,000 compliance actions, this year we completed over 33,000 compliance actions, and that is within the time period where we were still engaging in the training that I was talking about earlier of these new investigators. So they are not even fully productive yet.

Mr. BISHOP. I want to go to the subject that both the chairman and Chairman Kline spoke about, and this is this new investigation of large residential home builders.

Ms. LEPPINK. Yes, sir.

Mr. BISHOP. I represent the eastern end of Long Island, which is a resort area, and as a consequence, the second home industry is a huge part of our economy, and large residential construction is a huge part of our economy. If I had a dollar for every time a legitimate home builder came to me and said, "You have got to do something about our competition, which is undercutting us when they bid for jobs because they are not paying minimum wage, they are hiring undocumented workers, they are not paying overtime"—if I had a dollar for every time one—a legitimate worker—builder complained to me about that I could retire.

So is it fair for me to assume that the investigation that is in its early stages is designed to level the playing field between the illegitimate employer and the legitimate employer who is trying to comply with existing law?

Ms. LEPPINK. Yes, particularly in the residential construction industry, where 80 percent of the—it is estimated that 80 percent of the home builders subcontract the work that they do, that this is a place where we are particularly concerned about leveling the playing field for employers so that they can not faced with the untenuous position of having to choose to comply with the law or to go out of business.

Mr. BISHOP. But just to be clear, if an employer—a legitimate employer—complies with the law but his business advantage is undercut or eliminated because he is competing against an unscrupulous employer, your investigation would be of benefit to that legitimate employer, the people we call the job creators. Is that correct?

Ms. LEPPINK. Absolutely.

Mr. BISHOP. Okay.

Ms. LEPPINK. Because their practices would be supported because now they aren't going to have—they can comply with the law and still be able to compete. And the focus we will have is on the employer who hasn't been paying their workers properly and insist that that employer does so.

Mr. BISHOP. I know Chairman Kline raised the specter of an employer being put out of work by virtue of having to comply with these onerous requests—I am putting onerous in quotes—that are coming from the department. I would think it would be an equal tragedy if a legitimate employer were put out of work because he couldn't compete with an illegitimate employer. Would you agree with that?

Ms. LEPPINK. Absolutely.

Mr. BISHOP. Okay.

Thank you, Mr. Chairman. I yield back. Thank you.

Chairman WALBERG. I thank the gentleman.

And just following up on that, if I could ask, Ms. Leppink, if you could supply us with any changes that Wage and Hour Division implemented to address the GAO concerns, the deficiencies that they——

Ms. LEPPINK. Or I can answer them now, or I can—we would be happy to provide them——

Chairman WALBERG. If you would provide that just for the record so we could have that.

Ms. LEPPINK. Absolutely.

Chairman WALBERG. Thank you. And I thank you for spending your time with us this morning and addressing questions as well as giving updated information. I appreciate that.

Ms. LEPPINK. I very much have enjoyed it. Thank you.

Chairman WALBERG. I would ask at this time the second panel to come to the table as we begin our second round here.

It is now my pleasure to introduce the second panel of distinguished witnesses. Joining us this morning is Tammy McCutchen, shareholder, Littler Mendelson; Kim Bobo, executive director, Interfaith Worker Justice; and David Fortney, cofounder, Fortney and Scott.

Thank you for agreeing to spend your time with us this morning on our search for answers in dealing with the issues addressed today with Wage and Hour. Again, before I recognize you for your testimony I will just go through reminding you—you heard already about the lights. They are simple, traffic light format. And I think the way it was handled so far with the first panel, that is an example of how we want to continue this morning.

I recognize Tammy McCutchen for your testimony. And again, thank you.

STATEMENT OF HON. TAMMY D. MCCUTCHEN, SHAREHOLDER, LITTLER MENDELSON, P.C.

Ms. MCCUTCHEN. Thank you, Chairman Walberg, and Ranking Member Woolsey, members of the subcommittee, for allowing me to come and speak to you today. As you may recall, I am a former administrator at the Wage and Hour Division and remain a close observer of the agency.

The last 3 years have seen significant changes in the Wage and Hour Division's approach to its most important mission: increasing employer compliance with the FLSA. I want to spend my time today discussing some of these changes—changes from policies that have been in place at the division for decades—and the impact that I believe they are having on the department's effectiveness.

The division's approach to enforcement has become increasingly punitive over the last 3 years, regardless of whether the agency is investigating a legitimate employer with no history of violations or an illegitimate employer with a long history of violations. Let me provide some examples.

Recently, the division sent four investigators unannounced into a fast food restaurant with no prior violations, effectively shutting down the business while the investigators were there. Additionally,

they put a small, minority-owned business out of business by stopping FCA contract payments even when the business owner agreed to pay back wages but needed some installment payments in order to do that. The division declined to give him an installment plan.

The division has threatened to bring subpoena actions in federal court against employers who fail to respond to large document requests within 72 hours, and those document requests are requesting documents that are not required to be maintained under the regulations, such as lists of suppliers, lists of subcontractors, and the basis for claimed exemptions, which they have not yet issued regulations on.

They have mandated that field staff impose civil money penalties in almost every case, rather than allowing those field career employees to exercise their own expert discretion regarding the appropriate remedy. And they have increasingly refused to issue the WH-58 waiver forms even when an employer has agreed to pay 100 percent of back wages.

At the same time, the division has closed its door to employers who are seeking guidance regarding what the FLSA actually requires. After withdrawing about 20 opinion letters the prior year for no other reason than that they were not put in the mail before Inauguration Day, in March 2010 the division announced that it would stop issuing opinion letters altogether. Opinion letters are the primary means for employers to learn what the Department of Labor believes is required by the FLSA.

The division now also refuses to supervise the payment of back wages for employers who want to voluntarily disclose and correct violations, and in its 2012 budget request, which seeks an increase of $13.3 million and 95 additional investigators over 2011 levels, the division also proposes to decrease funding for compliance assistance by over $2 million and 12 FTEs.

Although officials from the Labor Department might claim that these changes strengthen enforcement and better protect workers, in my opinion, the changes have negatively impacted the division's productivity. For example, in 2010, the first full year under the current administration, with a budget of over $227 million and 1,582 FTEs, the division recovered only $130 million in back wages.

In contrast, during the Bush administration's first full fiscal year, 2002, we recovered $175.6 million in back wages with a budget of over $155 million and 1,480 FTEs. Thus, in 2010, the division collected $45 million less in back wages although they had 102 additional employees and $72.4 million.

Now, in her testimony today Deputy Administrator revealed that they collected $224 million in back wages during the fiscal year 2011, and that is certainly an improvement. But it does not change my assessment of the division's performance.

In her written testimony the deputy administrator compares 2011 with 2007, when the division recovered $220 million in back wages—almost the same amount. However, in 2007 the division's budget was $54.5—$55.4 million less than it is today, with 382 fewer employees. Thus, today the division is spending 23.5 percent more than it did during the Bush administration to collect the same amount of back wages.

In my opinion, this significant decrease in the division's effectiveness can be tied to the changes I have discussed. Because of the division's punitive approach, investigations are taking longer to conduct and are increasingly difficult to settle, and at the same time there is no path for a good faith employer to voluntarily correct violations.

There are three immediate actions the division could take to reverse this which would not require rulemaking, statutory amendments, or any more resources. One, they could begin issuing opinion letters again to help employers understand what is required; two, they could begin issuing WH-58 forms to employers who have agreed to pay 100 percent of back wages; and three, they could implement a voluntary correction program like that which the IRS has in its misclassification initiative where employers who disclose a violation and pay 100 percent of back wages for 2 years can get the certainty of the WH-58 waiver form as an incentive for doing so.

Thank you, and I look forward to your questions.

[The statement of Ms. McCutchen follows:]

Prepared Statement of Tammy D. McCutchen, Esq., Shareholder, Littler Mendelson, P.C.

Mr. Chairman and members of the Subcommittee: Thank you for the opportunity to speak with you today regarding the Department of Labor's Wage and Hour Division and the Fair Labor Standards Act. As you may recall, I served as Administrator of the Wage and Hour Division from 2002 to 2004. I remain an interested and close observer of the Wage and Hour Division.

Currently, I am a shareholder in the Washington D.C. office of Littler Mendelson, P.C. where my practice focuses on assisting employers to comply with the Fair Labor Standards Act. In addition, I often represent employers during investigations by the Wage and Hour Division, and serve as an expert witness in FLSA collective actions. I am also a member of the National Federation of Independent Business's (NFIB) Small Business Advisory Board.

My testimony today is based on my own personal views and does not necessarily reflect the views of Littler, its attorneys, or of any other organization or client. Mr. Chairman, I request that the entirety of my written testimony be entered into the record of this hearing.

I. Executive summary

The last three years have seen significant changes in the Wage and Hour Division's approach to its most important mission—increasing employer compliance with the Fair Labor Standards Act and ensuring that employees are paid in compliance with the Act. I want to spend my time today discussing some of these changes with you, and the impact they are having on the Division's effectiveness. Before I begin, however, let me be clear that these changes are not just changes from Bush Administration policies; these are changes from historic policies and practices of the Division which long pre-date the Bush Administration.

The Wage and Hour Division's approach to enforcement has become increasingly punitive over the last three years—regardless of whether the Division is investigating an employer with a long history of violations, or an employer with no prior violations; and regardless of whether the violation is obvious and serious, or an error on an issue where the law is unclear and reasonable minds can differ. Examples of changes at the Wage and Hour Division which demonstrate this punitive approach include:

- Conducting unannounced investigations of employers without a prior history of violations, and sending multiple investigators to conduct an investigation of a single facility;
- Demanding that employers produce documents which they are not required to maintain under the recordkeeping regulations, and threatening to bring subpoena actions in federal court against employers who fail to respond to broad document requests within 72 hours;
- Prohibiting field career staff from using the "self-audit" investigation method, which is the most efficient way of determining back wages due in large cases where

an employer has already agreed to pay 100% of back wages, and instead requiring investigators to conduct "full" investigations in almost every case;

• Mandating that the career field staff impose draconian penalties—civil money penalties, liquidated damages—in almost every case, rather than allowing these experts to exercise their own discretion regarding the appropriate remedy; and

• Refusing to issue WH-58 waiver forms, or issuing only limited waiver forms, even when the employer agrees to pay 100% of back wages as calculated by the Division.

At the same time, the Division has closed its doors to employers seeking guidance regarding what the FLSA requires. In other words, the Wage and Hour Division has stopped efforts to inform employers how to comply with the law, preferring only to impose draconian punishments when an employer guesses wrong about what the law requires. Examples of changes at the Wage and Hour Division which demonstrate this "gotcha" approach include:

• Withdrawal, without replacement of nearly 20 Opinion Letters, and refusal to issue any additional Opinion Letters—or even provide informal guidance to employers who inquire regarding whether their pay practices comply with the FLSA;

• Announcing changes to enforcement policies through amicus briefs, which are publicized only through an email subscription service and an obscure web posting;

• Refusing to enter into compliance partnerships with employers;

• Refusing to assist employers who, after discovering FLSA violations, request that the Division supervise the payment of back wages; and

• Proposing in their FY 2012 budget to decrease funding for compliance assistance and the Division's call center by over $2 million and 12 FTEs.

Although officials from the Labor Department might claim that these changes have been implemented to strengthen enforcement and better protect workers, enforcement of the FLSA by the Wage and Hour Division has actually declined. Included in my testimony is are charts comparing the Division's budget, full-time equivalent employees (FTEs) and back wages collected from FY 2001 through FY 2010. Perhaps the fairest measure of performance is to compare the first full fiscal year of the Bush Administration (FY 2002) with that of the Obama Administration (FY 2010). In FY 2002, with a budget of $155.2 million and 1480 FTEs, we recovered $175.6 million in back wages. In FY 2010, with a budget of $227.6 million and 1582 FTEs, the Division recovered only $130 million in back wages. Thus, in FY 2010, with 102 more employees, the Division spent $72.4 million more to recover $45 million less in back wages.

In my opinion, this significant decrease in the Division's effectiveness is caused by the changes I have discussed. Investigations are taking longer to conduct because investigators can no longer use the "self-audit" investigation method. It is increasingly difficult to resolve investigations at agency level as employers are much less likely to settle when the Division insists on civil money penalties and liquidated damages, in addition to back wages, while at the same time depriving those employers of the opportunity to obtain waivers of FLSA claims. Finally, there is no path for a good faith employer to voluntarily correct violations under the oversight of the Wage & Hour Division or to effectively seek compliance assistance from the Division.

To summarize, the current Administration is doing less with more. The Wage and Hour Division's new "gotcha" approach towards employers—carrying a larger stick while refusing to pass out any carrots—is not working to ensure our nation's employees are paid in compliance with the Fair Labor Standards Act.

II. Investigations

The last three years have seen significant, and for the most part, unannounced, changes in the Wage and Hour Division's approach to conducting investigations. The Division has become increasingly aggressive and punitive toward employers—failing to distinguish between good faith employers with no prior violations and bad faith employers with a long history of violations; and failing to distinguish between serious and obvious violations of the FLSA and situations where the law, and DOL's policy, is unclear and reasonable minds can differ. The Division should be aggressive and punitive towards bad faith employers who willfully and repeatedly violate the FLSA. However, such an approach is counter-productive for good faith employers without a history of violations and who have taken steps to comply.

In the past, many investigations could be resolved quickly when good faith employers working cooperatively with Wage and Hour Division investigators. However, today, more and more often, the Division's initial contact with an employer is aggressive and adversarial, regardless of the employer's enforcement history. Further, more and more often, the Division refuses to settle investigations for 100% of back wages, instead insisting upon civil money penalties and liquidated damages. More

and more often, the Division also refuses to issue its WH-56 receipt forms—the form which informs employees that they waive their right to bring a private lawsuit if they accept the payment of back wages as calculated by the agency. In short, from the beginning to the end of an investigation, even good faith employers face punitive treatment. This adversarial approach has made it increasingly difficult to resolve investigations quickly as even good faith employers have little incentive to settle an investigation at the agency level.

Examples of changes at the Wage and Hour Division which demonstrate this punitive approach are set forth below:

A. Unannounced Visits

The Wage & Hour Division can begin an investigation in one of three ways: (1) a telephone call announcing the investigation and asking to schedule an on-site visit; (2) a scheduling letter which requests an on-site visit on a specific date and includes an information request; or (3) an unannounced visit by an investigator at a facility.

In the past, the investigator was given the discretion to determine which of these three approaches was appropriate in light of the employer's violation history, industry, and the type of violations alleged by the complaining employee. Unannounced visits were used rarely, and only for investigations involving employers or industries with a history of violations (e.g., garment, agriculture), or when the investigator believed it likely that the employer, if provided advance notice of the investigation, would destroy time and pay records.

Today, the Division increasingly requires investigators to begin an investigation with an unannounced visit, taking discretion away from experienced field staff. Further, the decision to make an unannounced visit no longer seems tied to the employer's enforcement history, the industry, the type of alleged violation, or the possibility that the employer would destroy records. For example, recently, the Division began an investigation of a hotel owned by a large, national hotel chain by sending four investigators to the hotel for an unannounced visit. The hotel employer did not have a history of violations, and has knowledgeable in-house employment lawyers and HR staff. The Division had absolutely no basis to believe that the hotel employer would have destroyed documents or otherwise fail to cooperate with the investigation. Although this investigation remains open, thus far, the Division has found no violations of the FLSA.

B. Information Requests

The last three years has also seen significant changes in the requests for information which the Division typically makes to employers at the beginning of an investigation.

In the past, an investigation would begin with a single facility of an employer, and the investigator would request information relating only to that single facility. The investigator would require the employer to produce time records and payroll data for its last payroll or for a sampling of two or three payrolls. Investigators generally would give employers between 14 and 30 days to produce these documents. If the investigator found violations after reviewing those records, the investigator would request time records and payroll data for a full two years at the single facility, and also could recommend to the District Director that the investigation be expanded to other facilities of the employer. This approach ensures that investigators use their time efficiently, rather than reviewing mountains of documents for employers who, it is evident, have not violated the FLSA.

Recently, however, the Division has required the field staff to begin with national investigations, requiring employers to produce, within 72 hours, a full two years of time records and payroll data for all employees nation-wide. This is the Division's approach in the recent directed investigations in the homebuilding industry, as reported in the Wall Street Journal, even though the homebuilding employers under investigation did not have a history of violations and no employee had filed a complaint. Further, when the employers informed the Division that producing this data within 72 hours was not feasible, the Division threatened to issue and enforce subpoenas in federal court. In other words, the Division began investigations on a nation-wide basis demanding production of thousands of pages of documents—and giving employers only 72 hours to produce these document—all without any basis for believing that the homebuilding employers were violating the FLSA. Although the homebuilder investigations began in August, the Division has yet to cite a single homebuilder for violating the FLSA.

Further, the Division has changed its standard information requests to seek documents that employers are not required to maintain under the FLSA recordkeeping regulations. For example, the Division has issued information requests requiring

employers to produce lists of subcontractors, independent contractors, vendors and even customers—with a contact name and telephone number. I also have seen information requests requiring employer to provide the Division with:

"Names of occupations of those employees whom the employer claims to be exempt, the specific exemptions that apply to those claimed to be exempt, and the basis for applying those exemptions."

Of course, employers are required to maintain records showing the employees classified as exempt. However, the FLSA regulations to not require employers to keep records of the specific exemptions claimed or the "basis for applying those exemptions." The Division has stated its intention to propose new "Right to Know Regulations" which would require employers to maintain such information. But, until such regulations are proposed and finalized after the legally required notice and comment rulemaking, this information request is inappropriate.

C. Investigation Methods

In the past, investigators have been trained to conduct the following five different types of FLSA investigations, and were given discretion regarding which investigation method was appropriate in a given case:

1. Full Investigation: A complete investigation of all FLSA issues—off-the-clock work, misclassification, proper calculation of the regular rate.
2. Limited Investigation: An investigation of only those issues raised by an employee complaint.
3. Office Audit: A review of documents produced by the employer at the investigator's office.
4. Self Audit: After an investigator identifies a potential violation and the employer agrees to pay back wages, the investigator requests that the employer conduct a self-audit of the issue and compute back wages due. The investigator then conducts due diligence to confirm the back wage calculations.
5. Conciliation: Employer is contacted by telephone and asked to correct minor violations.

Today, in my experience, the Division requires investigator to conduct a full investigation—which, of course, is the most resource intensive investigation method. Although conciliation is still used to quickly correct minor violations, in the last three years, I have not seen an office audit and limited investigations are increasingly rare. Further, the Division has prohibited the field staff from using the "self-audit" investigation method, perhaps based on a mistaken belief that no employer can be trusted to self-report and accurately calculate back wages. The result should not be surprising: Investigators have to spend more time per investigations and investigations take longer to complete. In my opinion, failing to conduct limited investigations or allow self-audits in appropriate cases results in the inefficient use of the Division's limited resources.

D. Mandatory Civil Money Penalties

Another important area where the Division has taken discretion away from the expert field staff is in determining the appropriate remedy for an FLSA violation. Under the FLSA, an employer who violates the minimum wage or overtime requirements is liable for: two years of back wages; an additional third year of back wages for willful violations; liquidated damages in an amount equal to the back wages, unless the employer acted in good faith; and attorneys' fees. In addition, the Division has discretion to impose civil money penalties (CMPs) of up to $1,100 per violation for repeat or willful violations. Unlike civil money penalties for child labor violations which go into the Treasury's general fund, civil money penalties for minimum wage and overtime violations go back to the Division to fund additional enforcement efforts.

In the past, the Division generally required employers to pay 100% of back wages for a two-year period. The Division did not assess civil money penalties for minimum wage and overtime violations unless an employer had a significant history of serious violations (e.g., a sweatshop employer or bad faith agricultural labor contractors). Further, the Division rarely requested liquidated damages.

Today, as reported to me by District Directors, the Division is requiring the field staff to assess civil money penalties against every employer with even one prior violation recording in the agency's enforcement database—regardless of the type of violation or when the violation occurred. For example, in an investigation that I was involved in, the Division assessed civil money penalties based on a $500 violation which was on a completely different issue and occurred a decade before at a different corporate subsidiary. The investigator conceded that the new violation was not willful, and I questioned how a decade-old violation on a totally different issue could be "repeat" violation. Unfortunately, there are virtually no standards, and few

limits on the Division, for determining when a violation is repeat or willful. More recently, although I have not yet seen this myself, a District Director reported that the national office of the Wage and Hour Division issued a directive requiring mandatory assessment of liquidated damages.

In my experience, most employers are willing to pay 100% of back wages found due by the Division for a two-year period. However, employers are much less likely to settle when the Division seeks civil money penalties, and certainly will be more likely to litigate with the Division in order to challenge an assessment of liquidated damages. Thus, the Division's approach, used even against good faith employers, delays the resolution of investigations and payment of back wages to employees. Finally, I am concerned that, because civil money penalties for minimum wage and overtime violations go back to the Division, rather than to Treasury, this provides incentives for "bounty hunting" behavior by the Division.

E. The WH–58 Receipt Form

An employer and employee cannot privately agree to waive the employee's FLSA rights. Under the FLSA, there are only two mechanisms for waiver of claims: Through a court in private litigation, or through the Department of Labor after an investigation. Because FLSA litigation can take years to resolve, the quick settlement of investigations and payment of back wages through the Wage and Hour Division is important to both employers and employees.

Accordingly, as part of the 1947 Portal-to-Portal Act amendments to the FLSA, Congress enacted Section 16(c) which authorizes the Secretary of Labor to supervise the payment of back wages and provides that employees who decide to accept back wages as supervised by the agency waive the right to bring a private lawsuit under the FLSA:

"The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages."

Section 16(c) was enacted by Congress to address the Labor Department's concern that the absence of a waiver mechanism outside of litigation was hampering its ability to quickly settle FLSA violations.

For decades, the Wage and Hour Division form WH-58 has been the mechanism for implementation of the Section 16(c) supervision of back wages and waiver process. In the past, when an employer paid back wages to resolve an FLSA investigation, the Division would issue a WH-58 receipt form for each employee receiving back wages to sign as proof of the employer's payment of the back wages. The WH-58 form also explained to employees:

"Your acceptance of back wages due under the Fair Labor Standards Act means that you have given up any right you may have to bring suit for such back wages under Section 16(b) of the Act. Section 16(b) provides that an employee may bring suit on his/her own behalf for unpaid minimum wages and/or overtime compensation and an equal amount as liquidated damages, plus attorney's fees and court costs. Generally, a 2-year statute of limitations applies to the recovery of back wages. Do not sign this receipt unless you have actually received payment of the back wages due."

The FLSA recordkeeping regulations at 29 C.F.R. § 516.2, require employers to deliver WH-58 receipt forms to employees, provide the Division with the originals signed by employees, and preserve a copy in their records:

(b) Records of retroactive payment of wages. Every employer who makes retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division pursuant to section 16(c) and/or section 17 of the Act, shall:

(1) Record and preserve, as an entry on the pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(2) Prepare a report of each such payment on a receipt form provided by or authorized by the Wage and Hour Division, and (i) preserve a copy as part of the records, (ii) deliver a copy to the employee, and (iii) file the original, as evidence of payment by the employer and receipt by the employee, with the Administrator or an authorized representative within 10 days after payment is made.

Nonetheless, over the last three years, the Division has often refused to issue the WH-58 receipt forms. Although not publicly announced, it is my understanding that the Division has prohibited the field staff from issuing WH-58 receipt forms unless

an investigator has conducted a full investigation. In one case I handled, the Division refused to issue WH-58s after a limited investigation, referring to this new directive. In response to my invitation for the investigator to conduct a full investigation so that she could issue WH-58s, the Division stated that they did not have sufficient resources to complete a full investigation. Further, even when the Division agrees to issue WH-58s, the agency often uses the new WH-58L form which purports to limit the scope of the waiver to specific issues or time periods for which back wages were found due—even when the Division conducted a full investigation and found no other violations. The Division has also refused to issue WH-58 receipt forms to employers who discover FLSA violations and voluntarily approach the agency for assistance to calculate and pay back wages.

The Division's refusal to issue WH-58 receipt forms, and use of the WH-58L form, raises serious questions regarding whether and the extent to which an employee's acceptance of back wages is a waiver of claims under Section 16(c). If an employer pays 100% of back wages as calculated by the Wage & Hour Division, and employees accept those payments, but the Division refuses to issue a WH-58, have the employees nonetheless waived their FLSA claims under Section 16(c)? If the Division determined that only two-years of back wages are due because the violation was not willful and the employer acted in good faith, but the form WH-58L purports only to cover two years, can the employees still bring a private lawsuit for an additional third-year of back wages and liquidated damages? This legal uncertainty has undermined a significant incentive for employers to quickly resolve investigations and pay back wages as calculated by the Wage and Hour Division.

III. Compliance assistance

To serve the public in an objective manner, the Division's new, more punitive approach to investigations should be combined with a vigorous program to assist employers in understanding what the FLSA requires. But, the opposite is happening: The Division has closed its doors to employers seeking guidance regarding what the FLSA requires. In fact, the Division's FY 2012 budget request—which seeks an increase of $13.3 million and 95 investigators over 2011 levels—proposes to decrease funding for compliance assistance and the Division's call center by over $2 million and 12 FTEs.

A. Opinion Letters

The first indication that the Wage & Hour Division was no longer interested in providing compliance assistance came in March 2009 when the Division withdrew almost 20 Opinion Letters because: "Some of the posted opinion letters, as designated by asterisk, were not mailed before January 21, 2009." No other reason was provided. The Division did not state that the enforcement positions expressed in the Opinion Letters were wrong, and the Division has not since replaced those Opinion Letters with other guidance expressing different views. This, of course, creates significant legal uncertainty for employees, employers, attorneys and judges trying to determine the Division's current views on the issues addressed in the withdrawn letter.

A year later, the Division announced that it would stop issuing Opinion Letters addressing fact-specific interpretations of the FLSA. Instead, as reported by Thompson publications on March 24, 2010, the Division would issue "Administrators Interpretations" (AIs) providing more general interpretations when the Wage and Hour Administrator determines that "additional clarification is appropriate with respect to 'the proper interpretation of a statutory or regulatory issue.'"

The U.S. Department of Labor's Wage and Hour Division will not be issuing new opinion letters addressing fact-specific interpretations of employment laws.

In their place, the WHD Administrator is issuing "administrator interpretations" that, in contrast to opinion letters, provide general interpretation of the laws and regulations applicable to all those who are affected by the legislative or regulative provision at issue.

The purpose of the administrator interpretations is to "provide meaningful and comprehensive guidance and compliance assistance to the broadest number of employers and employees," wrote DOL. "Guidance in this form will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees."

The administrator interpretations are to be released when the WHD Administrator determines, at his or her discretion, that additional clarification is appropriate with respect to "the proper interpretation of a statutory or regulatory issue."

Added DOL, "The Administrator believes that this will be a much more efficient and productive use of resources than attempting to provide definitive opinion letters

in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the assumed facts may result in a different outcome."

Apparently, over the last three years such "clarification" of the Division's interpretation of the FLSA has been necessary only twice, as the agency has issued only two Administrator's Interpretation on the FLSA: first, on the application of the administrative exemption to mortgage loan officers; and second, on the definition of the term "clothes" in Section 3(o) of the FLSA. Both of these AIs only served to create additional legal uncertainty by reversing enforcement policies announced by the Division just a few days earlier. Federal courts are often hesitant to grant deference to such agency flip-flops. The Division is facing an Administrative Procedures Act challenge to the mortgage loan officer AI claiming that the AI is contrary to the 2004 Final Part 541 regulations. Finally, in March of this year, a jury found that Quicken Loans had correctly classified its mortgage loan officers as exempt.

In my experience over the last three years, it is extremely difficult to obtain even informal guidance from the Division regarding whether a particular pay practice complies with the FLSA. Employer questions regarding whether a particular employee is properly classified as exempt, whether a particular activity is compensable work time, and whether a particular bonus payment must be included in the regular rate are met with silence from the agency. As quoted by Thompson publications, apparently the Division believes that responding to fact-specific inquiries from employer is a waste of its time. On the contrary, in my opinion, it is the Division's statutory responsibility to answer fact-specific questions from employers—especially, in light of the Division's new punitive approach to enforcement.

B. Amicus Briefs

Today, then, an employer often can only determine the Division's views on an issue through an enforcement action—or by reading amicus briefs filed by the Solicitor of Labor. The Labor Department does not have an open or transparent process regarding its decisions to file amicus briefs in litigation pending between an employer and employees. Rather, one of the parties to litigation will request that the Department file an amicus by letter, and the Department will review the pleadings and issues before making a decision. To the best of my knowledge, the Solicitor rarely gives notice to the opposing party that they are considering an amicus, or the opportunity for the opposing party to express its views.

Further, the filing of amicus briefs are barely publicized. Members of the public who have signed up to receive notices from the Departments email subscription service receive an email when a new amicus brief is posted on DOL's website. However, if you do not receive these emails, finding the web site on which the amicus briefs are posted is difficult, and that web site does not include any summary regarding the topic of the brief or the position taken by the Department—it contains only a list of case names categorized by statute.

Nonetheless, the Department has used amicus briefs to announce major enforcement policy changes. For example, the public learned for the first time in an amicus brief that the Division views pharmaceutical sales representatives as non-exempt. Employers also learned for the first time in an amicus brief that employers who pay tipped employees at or above minimum wage, and do not take a tip credit, nonetheless must comply with the FLSA tip pooling rules (a position, by the way, rejected by the Ninth Circuit Court of Appeal, but adopted in the April 2011 Final FLSA regulations).

C. Compliance Partnerships

In the past, both as Administrator of the Wage and Hour Division and in my private practice, I have worked with large, national employers to establish compliance partnerships with the Division designed to provide compliance assistance to the employer and to quickly resolve any violations revealed by employee complaints. I think most District Directors would agree that establishing a close relationship between a national employer and the District Office is one of the best tools for ensuring that employees are paid in compliance with the FLSA. Under such partnerships, an employer was assigned an investigator or Assistant District Director to call with questions regarding the FLSA—from programming for a new timekeeping systems or the appropriate exempt status for a new job. Under these partnerships, the employer would agree to provide training on the FLSA to key managers; to provide additional disclosures and information about the requirements of the FLSA to non-exempt employees; and/or establish and publish a process for employees to make internal complaints regarding their pay. If an employee filed an internal complaint with the company regarding his pay, the Division would assist the employer in determining whether a violation had occurred and in calculating and paying back wages. In an employee filed a complaint with the Division, often the investigation could be

resolved and back wages paid after a quick telephone call to the manager at the company responsible for wage and hour compliance.

The Division has a number of new programs to cooperate with the IRS, state agencies, unions, plaintiffs' lawyers and employee advocacy groups. Unfortunately, it is my understanding that a directive has been issued prohibiting the field staff from entering compliance partnerships with employers. Such partnerships only increase employer compliance with the FLSA, and should be encouraged by the Division—not prohibited.

D. Voluntary Correction

Finally, it is my understanding that the Division has issued a directive prohibiting the field staff from assisting employers who, after self-discovering FLSA violations, request that the Division supervise the payment of back wages.

Even good faith employers sometimes make mistakes because the law on so many FLSA issues remains unclear and the subject of litigation. But the best of employers, when they discover a practice that may violate the FLSA, want to correct the practice and pay back wages to employees. Over 75% of my practice is assisting employers to conduct internal wage and hour audits, and helping those employers to correct any violations which I uncover during those audits. Employers, in my experience, have no difficulty and, in fact, are anxious to quickly correct going forward any pay practices that might violate the FLSA.

Whether to pay employees back wages is a more difficult issue because, as discussed above, outside of private litigation, the only available mechanism for an employee to waive FLSA claims is through the Wage and Hour Division. Without a waiver, an employee can accept a large back-wage payment, and then turn around and file a collective action the next day—claiming additional hours worked, a third-year of back wages, and liquidated damages. In other words, the payment of back wages can never protect an employer against a subsequent lawsuit unless the Division supervises the payment of the back wages under Section 16(c) of the Act. Employees benefit from this process as the Division can ensure that the employer has correctly calculated the back wages due.

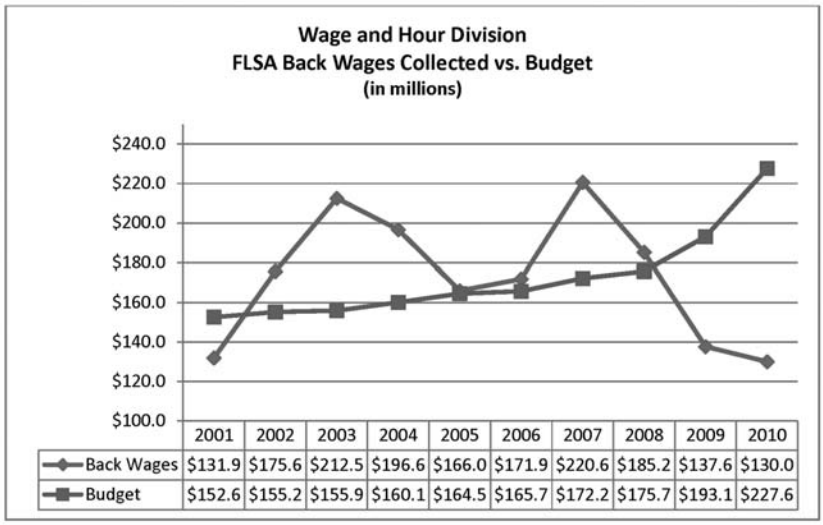
In the past, I would often advise employers to voluntarily disclose FLSA violations to the Wage and Hour Division and work with the Division to pay back wages. All parties benefit from such voluntary correction: In just months, rather than waiting years for litigation, employees receive 100% of back wages due for non-willful violations (2 years) as reviewed and approved by the Division. Employers are able to obtain waivers from employees receiving back wages and can thus be assured that the issue has been finally resolved. The Division, in turn, efficiently leverages its scares resources to collect millions in additional back wages for employees.

Today, it is my experience that the Division will not work with good faith employers to voluntarily correct violations. Even if the Division were willing to work with employers, given the current punitive focus of the agency, I doubt that the Division would be willing to provide employers with any incentives to voluntarily audit and correct. Rather, most likely, DOL would insist on three-years of back wages, civil money penalties and liquidated damages—while refusing to issue WH-58 waiver forms.

Many federal enforcement agencies have voluntary corrections programs, even agencies within the Department of Labor (for example, EBSA's Voluntary Fiduciary Correction Program and Delinquent Filer Voluntary Compliance Program). Compliance with the FLSA is often difficult. The Wage and Hour Division should continue to provide a path which provides incentives for employers to voluntarily correct violations.

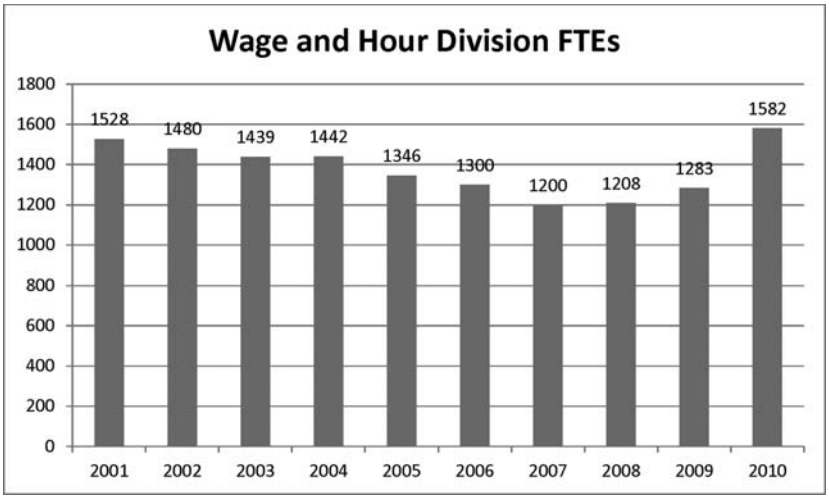
IV. Agency effectiveness

Although officials from the Labor Department might claim that these changes have been implemented to strengthen enforcement and better protect workers, enforcement of the FLSA by the Wage and Hour Division has actually declined—especially given the Division's increased budget and FTEs. The chart below compares the Division's budget versus back wages collected from FY 2001 through FY 2010:



	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Back Wages	$131.9	$175.6	$212.5	$196.6	$166.0	$171.9	$220.6	$185.2	$137.6	$130.0
Budget	$152.6	$155.2	$155.9	$160.1	$164.5	$165.7	$172.2	$175.7	$193.1	$227.6

The following chart shows the number of full-time equivalent employees working for the Wage & Hour Division each fiscal year from 2001 to 2010:



Perhaps the fairest measure of performance is to compare the first full fiscal year of the Bush Administration (FY 2002) with that of the Obama Administration (FY 2010). In FY 2002, with a budget of $155.2 million and 1480 FTEs, we recovered $175.6 million in back wages. In FY 2010, with a budget of $227.6 million and 1582 FTEs, the Division recovered only $130 million in back wages. Thus, in FY 2010, with 102 more employees, the Division spent $72.4 million more to recover $45 million less in back wages.

In my opinion, this significant decrease in the Division's effectiveness is caused by the changes I have discussed. Investigations are taking longer to conduct because investigators can no longer use the "self-audit" investigation method. It is increasingly difficult to resolve investigations at agency level as employers are much less likely to settle when the Division insists on civil money penalties and liquidated damages, in addition to back wages, while at the same time depriving those employers of the opportunity to obtain waivers of FLSA claims. Finally, there is no path for a good faith employer to voluntarily correct violations under the oversight of the Wage & Hour Division.

To summarize, the current Administration is doing less with more. The Wage and Hour Division's new "gotcha" approach towards employers—carrying a larger stick while refusing to pass out any carrots—is not working to ensure our nation's employees are paid in compliance with the Fair Labor Standards Act.

Chairman WALBERG. Thank you.

I now recognize Ms. Bobo for your testimony.

STATEMENT OF KIM BOBO, EXECUTIVE DIRECTOR, INTERFAITH WORKER JUSTICE (IWJ)

Ms. BOBO. Last year over Labor Day weekend staff members of the IWJ-affiliated worker center in Syracuse New York got a call from an emergency room worker concerning New York State Fair workers who had cooking burns, bedbug and flea bites, and they were malnourished because their employer wasn't paying them. They worked 16 to 18 hours a day and they weren't paid for it.

They were housed in subhuman conditions, and despite serving food for long hours they were hungry. Community leaders immediately called a DOL supervisor who assigned staff to pursue this case, and then this past spring the employer was fined $50,000 and told to repay the workers $115,000 in back wages.

And then this summer the DOL and community and religious leaders collaborated to make sure that this didn't happen again. They met with state fair leadership and they reached out to workers during the season.

Enforcing the fair Labor Standards Act, curbing and deterring wage theft, is critical for the Department of Labor. Wage theft is not a minor problem; it is a national crime epidemic. Billions of dollars are stolen annually from low-wage workers. It is documented in my recent book on wage theft in America, and I would be happy to share copies with members here.

Stopping and deterring wage theft is possible to do and it makes sense. It puts dollars back in the hands of low-wage workers; it helps ethical businesses who are undercut by unscrupulous employers; it helps put monies into public coffers; and it is a great way to stimulate the economy.

Now, the Wage and Hour Division, I believe has been laying some important groundwork over the last few years but it needs to do much more if we are going to really end wage theft. And unfortunately, wage theft is not a small problem of a few isolated employers.

Now, my colleagues here today, I think, believe that most employers want to do the right thing. And I agree with them that probably most employers do want to do the right thing. Unfortunately, there is a whole set of employers out there, particularly in sectors like residential construction, retail, restaurants, janitorial services, poultry, meatpacking, landscaping, farm labor, and fair workers, where wage theft is a normal practice for many employers; not all, but many.

So let's talk quickly, what is wage theft? It is not paying the minimum wage, it is not paying overtime, it is withholding a final paycheck, it is not paying workers at all, it is committing payroll fraud by lying about having employees and calling them independent contractors. Again, huge problem: 26 percent of low-wage workers

don't get paid the minimum wage; 76 percent of low-wage workers who work overtime aren't actually paid for it.

Now, the Department of Labor has done a lot of good new programs, and I am excited about those, but I think we need to do more. So let me quickly go through five things that I think need to be done more to stop wage theft.

One, engage ethical business leaders in sectors that are rife with wage theft. I have a new chapter in my book on ethical employers, like Stan Marek, from Houston, Texas, a Republic residential construction employer who is getting beat up by employers who are cheating their workers.

He is getting undercut and he is mad about it. He talks about wage theft as the dirty little secret in the residential construction industry, and he says it is not a little problem and frankly, it is not secret. We all know about it. And so in sectors like that we need to be supporting these ethical businesses.

Secondly, we need to increase the penalties for violating the law. If employers know that all they have to do is pay the back wages that they should have paid in the first place it is not enough of a disincentive. And it is not only that people should pay a penalty, but these penalties deter others from knowingly stealing wages or being careless about payroll records.

Thirdly, we need to put more cops on the job. A thousand Wage and Hour investigators to protect the 130 million workers in the country is simply not enough.

Fourth, we have got to get the proposed regulations out the door. I am excited about the right to know one because it would really help low-wage workers if they had a payroll stub that told them how they were paid and what it was for.

And finally, we have got to expand and deepen these community partnerships with community groups, with worker centers, with the religious community, and with ethical businesses to make sure that workers get paid.

Stopping wage theft is good for workers, it is good for ethical businesses, it is good for public treasury, and it is good for stimulating the economy. Thank you.

[The statement of Ms. Bobo follows:]

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

Last year over Labor Day weekend, staff members of the Interfaith Worker Justice affiliated workers center in Syracuse, New York, got a call from an emergency room worker concerning NY State fair workers who had cooking burns, bed bug and flea bites, and were malnourished, because their employer wasn't giving them enough money for food.

Community leaders went to the hospital and then convened community and religious leaders in a fair poultry barn to hear the workers' stories. They were working 16 to 18 hours a day, but not being paid for it. They were housed in subhuman conditions and despite serving food for long hours, they were hungry.

These community leaders immediately called a DOL supervisor who quickly assigned staff to pursue this case. This past spring, the employer was fined $50,000 and told to repay the workers $115,000 in back wages.

Then this summer, the DOL and community and religious leaders collaborated to make sure that similar abuses didn't occur at the state fair by reaching out ahead of time to the fair leadership and regularly reaching out to workers about their rights during the season.

Enforcing the Fair Labor Standards Act and curbing and deterring wage theft are critical tasks for the Department of Labor. Wage theft is a national crime epidemic.

Billions of dollars are stolen regularly from workers. The recent update of my book, Wage Theft in America: Why Millions of Working Americans are not Getting Paid and What We can Do about It, documents the pervasive nature of the problem and why we must collectively make sure the Fair Labor Standards Act is enforced and the crisis of wage theft addressed.

Stopping and deterring wage theft is possible and makes sense. Stopping wage theft puts hard-earned dollars back into the hands of working families—reducing the need to visit soup kitchens, shelters or to work extra jobs when parents should be at home with kids. Stopping wage theft supports ethical employers by leveling the playing field, making sure that unscrupulous employers don't prosper by stealing wages from workers. Stopping wage theft supports state and federal treasuries by ensuring employers pay their fair share of employer taxes, workers' compensation, unemployment insurance and other payroll related costs. And finally, stopping wage theft is a clear and direct way to stimulate the economy. If you put money back into the hands of working families, they will spend it in their communities.

The Department of Labor's Wage and Hour Division has begun laying important ground work, but needs to do much more to end wage theft. Unfortunately, wage theft is a not a small problem of a few isolated employers who don't understand the law. In large and significant sectors of the economy, such as residential construction, retail, restaurants, janitorial services, poultry and meatpacking, landscaping, farm labor and fair workers, wage theft is a normal practice for many employers.

What exactly is wage theft? Wage theft is when an employer illegally underpays workers for their work. It is not paying workers the minimum wage, not paying overtime premiums when required by law, stealing workers tips, withholding a final paycheck, not paying workers at all, billing the government for prevailing wages but only paying workers a portion, or committing payroll fraud by lying about having employees by calling them independent contractors.

In 2008, the Center for Urban Economic Development, UIC, National Employment Law Project and the UCLA Institute for Research on Labor and Employment released results from the largest survey ever of low-wage workers—4387 workers in the three largest U.S. cities, New York, Los Angeles and Chicago. The results were shocking. In the survey sample, 26 percent of low-wage workers were paid less than the minimum wage and 76 percent of those who worked more than 40 hours were not paid legally required overtime. The report estimated that low-wage workers are short-changed more than $2600 annually due to wage and hour violations.[1]

I believe that the situation has gotten worse rather than better since 2008, given how vulnerable many workers are in this economic environment. Interfaith Worker Justice supports a network of 26 workers centers. Last year the centers saw more than16,000 low-wage workers and 88 percent of them were victims of wage theft.[2]

This is the context from which I come to the question of Examining Regulatory and Enforcement Action under the Fair Labor Standards Act (FLSA).

First, let me review a few of the areas in which the Wage and Hour Division has laid strong ground work for strengthening enforcement, regulation and partnerships over the last two-plus years. The We Can Help program has made it clear that the agency wants to help all workers and is committed to informing people of their rights and of DOL's services. The creation of worker focused phone applications will help reach younger workers. Putting information on the DOL website about employers who steal wages offers needed information to workers and consumers. The industries that have been targeted for investigations are ones that everyone working with low-wage workers knows routinely violate the law. The Bridge to Justice program is an excellent example of a private-public partnership whereby workers whose claims cannot be pursued by DOL can get an 800 number and call a local ABA-approved bar association to find an attorney who may be able to assist them. The hiring and training of 250 new investigators and the commitment to strengthening partnerships with community organizations that have direct connections with workers is all for the good. The collaboration with the Internal Revenue Service (IRS) and state agencies to share data and jointly investigate employers who commit payroll fraud adds significant potential deterrent to such fraud. And, the IRS plan to allow businesses to voluntarily come forward and reclassify employees without IRS penalties is a common sense, business-friendly approach to a widespread prob-

[1] Center for Urban Economic Development, UIC, National Employment Law Project, UCLA Institute for Research on Labor and Employment, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, 2008. Download a copy free at www.unprotectedworkers.org.

[2] Interfaith Worker Justice, Workers Center Census, 2011. For more information about IWJ-affiliated workers centers, visit www.iwj.org.

lem. These are all important approaches and lay the groundwork for even stronger work.

But, these steps are not nearly enough to stop and deter wage theft. Let me recommend five more things the Education & the Workforce Committee, the Department of Labor and its Wage and Hour Division should do to strengthen regulatory, enforcement and partnership actions.

1. Engage ethical business leaders in sectors rife with wage theft. In the new 2011 version of my book, Wage Theft in America, I've added a new chapter on ethical employers who work in sectors like residential construction and restaurants. These employers are paying their workers fairly and legally. Consider Stan Marek of Marek Construction in Houston Texas. His company is routinely undercut by employers who mis-classify workers as independent contractors, thus cheating workers and taxpayers of about 30 percent of payroll costs. Ethical employers, like Stan Marek, believe there needs to be stronger and more consistent enforcement to level the playing field.[3] This committee should hold a hearing on how ethical employers are undercut by those who commit wage theft.

2. Increase the penalties for violating the law. If employers know that their chances of being caught engaging in wage theft are slim and that if they are caught they will only have to pay the back wages they should have paid in the first place, there is little incentive to follow the law. And with only one Wage and Hour investigators for every 135,000 workers, very few employers who commit wage theft are actually investigated.

Years ago, I messed up on my payroll taxes. It was an honest mistake, but the IRS didn't care. It slapped a heavy penalty on the mistake. Believe me, I've been extremely careful and never paid another IRS fine. Most of us fear the IRS. Few employers fear the Department of Labor, but workers and ethical employers would be better off if they did. The Wage and Hour Division should continue to expand its efforts to create meaningful and significant consequences for those who violate wage laws—not only because it punishes those who steal wages, but more importantly because it deters others from knowingly stealing wages or from being careless in calculating workers' wages.

In my book I list many ways to increase the costs of violating the law.[4] The Wage and Hour Division has begun implementing many of them. The Division should continue these initiatives, but this Committee should look at other ways to increase the costs of violating the law as a means of making sure workers are paid fairly and unlawful activity is deterred.

3. Put more cops on the job with a confirmed leader. Wage theft is a national crisis and there are only 1000 cops on the job. This committee should lead the way in advocating for more resources to recover unpaid wages. This is a cost effective way to increase money in the hands of workers, support ethical businesses, increase monies to public treasuries and stimulate the economy. What better way to stimulate the economy than making sure workers receive all their wages?

And in addition to making sure the Wage and Hour Division has adequate staff, this Committee should insist that the White House proposes a permanent Wage and Hour Administrator and that Congress not delay the nomination with frivolous objections or partisan divisiveness. Ms. Leppink is doing an excellent job as an Acting Administrator, but a Division as critical to workers as the Wage and Hour Division, deserves a permanent, confirmed leader.

4. Get the proposed regulations out the door. There are a lot of proposed regulations being talked about, but many haven't yet seen the light of day. Interfaith Worker Justice is particularly excited about the proposed regulation around transparency and paystubs. This could help workers know exactly what they are being paid for and would encourage employers to think twice before cheating them.

Let's look at all the regulations, debate them and move on. There are regulations everyone should be able to agree with. Others may be more controversial, but let's get them out the door for review.

5. Expand and deepen community partnerships. When police officers want to change criminal behavior, they engage the community in identifying law breakers and putting in place structures to change the environment. Community policing is an effective tool that police officers use. Community partnerships with workers centers, congregations and ethical business groups should be deepened and expanded to broaden the reach and effectiveness of the Wage and Hour Division. The story of the state fair workers demonstrates this. Together they not only stopped wage theft and recovered pay for workers, but they put in place a community plan to

[3] Kim Bobo, Wage Theft in America: Why Millions of Working Americans are Not Getting Paid and What We Can Do about It (New York: The New Press), 2011, page 117.

[4] Ibid., pages 172-182.

make sure it didn't happen again. Community partnerships work and deserve more serious support from the Department and this Committee.

Stopping wage theft is good for workers, good for ethical businesses who aren't placed at a competitive disadvantage by those who cheat workers, good for public treasuries by ensuring employers are paying their share of taxes and good for stimulating the economy. Stopping wage theft is the right thing to do and I thank the Committee for addressing this important issue.

Chairman WALBERG. Thank you, as well.

I now recognize Mr. Fortney for your testimony.

STATEMENT OF DAVID S. FORTNEY, FORTNEY AND SCOTT, LLC

Mr. FORTNEY. And thank you, and good morning, Chairman Walberg, and Ranking Member Woolsey, and distinguished members of the subcommittee. What I would like to do is briefly comment on a number of recent changes that the Wage Hour Division has undertaken, focusing both on the enforcement strategies as well as some of the key regulatory issues. And on some points I think you will find there is actually some agreement on the points that Ms. Bobo has made, so let's see if we can get into that.

First of all, the Wage and Hour Division has adopted what I believe is a flawed approach that assumes that employers are deliberately violating the Wage Hour law, indeed, pursuing what the department has characterized as a "catch me if you can." With all due respect, that is not my experience in dealing with hundreds and hundreds of employers, and I would submit that the department itself has developed more of a "gotcha" type of approach. And let me see if I can give some specifics that talk about that.

They proudly announced about a year ago, in December of 2010, a so-called Bridge to Justice program. This is a program where essentially the department is outsourcing to trial lawyers their duty to investigate and resolve claims.

Instead of the Bridge to Justice program I think it actually should be the Reward to Lawyers program, because that is how it is working. A critical component that is missing in this program that occurs when Wage Hour investigates is advising the employer of a claim, having an opportunity to try to reconcile the claim. That affords an opportunity for the parties, if back pay is owed, to receive the back pay promptly. That benefits the employees; it benefits the employer because it is done in a very efficient administrative proceeding as opposed to protracted litigation.

There has been a lot of discussion about the use of independent contractors, and the department has two major initiatives on that. First is the MOU that has been discussed with the IRS. On its face, a perfectly reasonable program, and frankly, coordination between the Labor Department and IRS is welcomed.

What it does underscore, if you contrast how the IRS approaches compliance and enforcement versus what the Department of Labor does. The IRS offers written guidance to folks on whether a worker should be classified as a contractor or an employee. Indeed, there is a process by which the parties can submit a written questionnaire and receive written guidance back so that they are guided so that they can understand what—whether the person—how they should be classified.

As has already been mentioned, the Labor Department has a process for doing that—issuing opinion letters—that it has elected to stop doing. That should be resumed immediately.

Second, the IRS program includes carrots, if you will—incentives for employers to step forward and pay the taxes. It includes a discount on the taxes, and so forth. In the Wage Hour context, all employers are looking for isn't a discount. My experience is they are willing to pay the wages 100 cents on the dollar; what they want is the certainty that goes with that, and that is lacking in the current environment.

Turning to the focus on the building industry—home construction industry. Targeting an industry is not unusual. What is unusual is that we would take the top tier—those that are the most compliant employers. That is unusual.

The department typically would do a statistical sampling. They might take representative—because we know the problems are more likely than not—and their enforcement evidence would bear this out—with the lower end smaller employer in that industry. There is a disproportionate impact both in scope and focus in how that is being conducted.

Finally, with regard to the so-called right to know regulations, Ms. Bobo is in favor of those; I am worried about them. They hang like a 500-pound anvil over this whole discussion.

There currently is no obligation on the part of an employer to reduce to writing whether a worker is or is not a contractor or an employee. Indeed, the IRS employs a 20-factor test. The Labor Department employs a so-called economic realities test.

The application of those legal tests are very complicated and more often than not will require an employer to consult with counsel. That is one of the reasons why there is confusion, because the legal tests both differ, and the Labor Department has acknowledged you can be a contractor for one law and an employee for another. But at the moment, the Labor Department, as I mentioned earlier, could address that by providing clarity and a process for prompt resolution.

Finally, I would just like to underscore the approaches that Ms. McCutchen identified, which I think will get us a long way down the line. Written opinion letters—they were there before, they should be resumed, costs the department nothing more in resources to do that; specific resolutions of back pay using the Labor Department release forms, and it specifies that workers know what they are getting paid; and finally, specific compliance with a written process similar to what the IRS offers on the question of whether a worker is a contractor or an employee.

So with that, I would be pleased to answer questions you have. Thank you.

[The statement of Mr. Fortney follows:]

Prepared Statement of David S. Fortney, Esq.,
Fortney & Scott, LLC

Good morning, Chairman Walberg, Ranking Member Woolsey, and distinguished members of the Subcommittee. My name is David Fortney, and I am pleased to provide this testimony to address the recent regulatory and enforcement actions by the Department of Labor under the Fair Labor Standards Act. I am a co-founder of Fortney & Scott, LLC, a Washington, DC-based law firm that counsels and advises

employers on compliance with the wage and hour laws as well as on the full spectrum of workplace-related matters. We have advised numerous employers on wage and hour compliance issues, and we regularly represent companies facing wage and hour audits by the U.S. Department of Labor. We also have conducted a great many workplace pay practice and overtime exemption job classification compliance assessments for our clients.

Background and Experience

I have practiced in the areas of employment counseling and litigation defense for more than 31 years in Washington, DC and Philadelphia, Pennsylvania, and for the last twenty years a significant part of my practice has included wage and hour compliance matters. I am a member in good standing of both the Washington, DC and Commonwealth of Pennsylvania bars.

My firm, Fortney & Scott, LLC ("FortneyScott"), has been recognized as a leading management employment law firm, Tier 2, in the highly prestigious "Best Law Firms" survey for 2011—2012 by U.S. News & World Report and Best Lawyers for Washington, DC. One of FortneyScott's key practice areas focuses on wage and hour compliance matters.

Before co-founding FortneyScott, I served at the U.S. Department of Labor from 1989 to 1992 as the Deputy and Acting Solicitor of Labor. Today, a significant part of my practice includes counseling and representing employers on wage and hour compliance matters nationwide, including audits and enforcement matters by the U.S. Department of Labor's Wage and Hour Division.

I have represented a wide range of employers on wage and hour matters, ranging from large Fortune 50 companies to small employers and also a wide range of federal contractors subject to the prevailing wage laws. Additionally, I have served as an advisor to Workplace Flexibility 2010, which is a public policy initiative that is part of the Alfred P. Sloan Foundation's National Initiative on Workplace Flexibility and is based at Georgetown University Law Center. I also have worked closely with the Society for Human Resource Management on addressing workplace flexibility issues. Finally, I co-chair the Practicing Law Institute's annual seminar on managing wage and hour risks, at which updates are provided by the Solicitor of Labor and the leading wage and hour attorneys from across the country. This seminar is widely attended by counsel representing employees as well as counsel representing private and public sector employers.

DOL Wage and Hour Division's Recent Initiatives and Regulatory Changes—Introduction

The U.S. Department of Labor ("DOL)'s Wage and Hour Division has undertaken a number of changes in how the Fair Labor Standards Act ("FLSA") is enforced. These changes have resulted in increased uncertainty and difficulty for employers attempting to comply with the FLSA's minimum wage and overtime obligations. I will address the Wage and Hour Division's recent initiatives and regulatory reforms, and Ms. Tammy McCutchen's statement and testimony will focus on some of the major changes in DOL's FLSA investigations and compliance assistance efforts.

The central question for today's hearing is whether the Wage and Hour Division is enforcing the FLSA in a manner that is most effective in the 21st Century workplace. There was detailed testimony about the shortcomings of the FLSA in meeting the needs of employers and employees in the 21st Century business environment during this Subcommittee's recent hearing in July 2011, "The Fair Labor Standards Act: Is it Meeting he Needs of the Twenty-First Century Workplace?" [1] Greater clarity on how the FLSA's requirements can be effectively employed today will result in increased opportunities for expanded employment and flexible work arrangements that meet the needs of employers and employees, while maintaining the FLSA's minimum wage and overtime protections.

The short answer, unfortunately, is that DOL is not striving to effectively implement the FLSA in today's workplaces. Indeed, just the opposite result is being achieved. The Wage and Hour Division has charted an FLSA enforcement course that fails to provide for the most positive outcome for employers and employees; instead the DOL focus has been on implementing changes that restrict flexible employment opportunities and that primarily focus on punishing employers.

As a result of the increased risks employers face, many employers are restructuring their workforce to adopt the most restrictive working arrangements in order to minimize risks and costs resulting from DOL audits and litigation challenges. These changes diminish the ability to provide working arrangements that best meet the needs of the employees and employers. For example, a recent survey by HR Policy[2] found that:

• Over half the member companies face increased FLSA litigation, primarily over the vague and inconsistent rules and exemptions governing overtime coverage "that are increasingly out of step with the modern workplace."

• Nearly half the litigation claims involve higher paid employees earning more than $50,000, rather than the low-paid and low skill workers the FLSA was intended to protect.

• To minimize legal risks, employers are imposing restrictions on popular practices such as telecommuting, flexible working hours and use of state-of-the art information technology such as smartphones outside the workplace.

A review of DOL's new initiatives and regulations under the FLSA establishes a clear pattern of the Wage and Hour Division frustrating efforts to implement modern work practices that would benefit both employees and employers.

DOL's New Initiatives

The DOL has introduced a number of new initiatives focusing solely on employer compliance, which seek to maximize the number of employers that are pursued for wage and hour violations. Certainly, we all recognize and agree that an important focus in promoting FLSA compliance and protecting workers' interests is enforcement. The question posed by the current program, however, is why the agency is not pursuing efforts to promote compliance through the issuing of clear rules and enforcement policies. Typically, effective compliance programs include clear guidance on what is expected of employers and takes into account the realities of the workplace and the statutory requirements. Enforcement then has an important role in reinforcing these clearly articulated compliance expectations.

In its current efforts, the Wage and Hour Division's focus is on maximizing the enforcement efforts without offering meaningful compliance guidance to employers.

The Wage and Hour Division has introduced a number of initiatives that are designed to promote the reporting of potential violations to either DOL or to private attorneys for follow-up enforcement actions. The Wage and Hour Division's approach assumes that employers generally are deliberately violating the wage and hour laws, and that if DOL simply can catch more employers, the result will be greater compliance. In announcing the new shift in DOL's programs in 2010, Deputy Secretary of Labor Seth Harris said DOL wanted to foster a culture of compliance among employers to replace what he described as a "catch me if you can" system in which too many companies violated employment laws.[3] Although Mr. Harris acknowledged that many companies had a culture of compliance, he posited that too many others flouted wage and safety laws after weighing the costs of compliance against the benefits of breaking the law and the risks of getting caught. Thus, the resulting Wage and Hour Division programs have been cast under the presumption that many employers operate outside the law, with this "catch me if you can" attitude.

With due respect to DOL, my experience is that employers are eager to understand and to comply with the wage and hour laws, and seek greater clarity on how the antiquated FLSA requirements are to be applied in today's workplace. This attitude among employers reflects not only the fact that most employers seek to act ethically, but also the fact that it is good business to do so. The DOL's response of encouraging claims against employers is not effective.

The Bridge to Justice Program for Referral of Employees to Attorneys

The DOL announced in December 2010 the "Bridge to Justice" program under which the Wage and Hour Division connects workers to a new American Bar Association-approved attorney referral system.[4] In essence, the program effectively outsources to private attorneys one of the Wage and Hour Division's most important functions—to investigate and respond to complaints of employees who have had the courage to come to DOL. According to DOL's announcement, "* * * the Wage and Hour Division will now connect these workers [whose claims DOL did not investigate] to a local referral service that will, in turn, provide the workers with access to attorneys who may be able to help. This collaboration will both provide workers a better opportunity to seek redress for FLSA and FMLA violations and help level the playing field for employers who want to do the right thing."

One of the significant deficiencies with the Bridge to Justice program is that it fails to include the employers—there is no notification of employee complaints or opportunity for employers to be involved, nor is the employer afforded notice when complaining employees are referred to private attorneys. As a result, common situations in which an employee's complaint is in error or simply based on a mistaken time entry by the employee or a payroll entry mistake by the employer's payroll department are not promptly identified with an opportunity for a prompt and efficient resolution. Instead, the complaint—whether bona fide or mistaken—simply is

turned over to private attorneys, who typically pursue the claims through litigation and related processes. The outcome inevitably is that the payment of any additional wages that might be owed to employees is delayed, and the employer then faces the additional—and typically significant—costs of having also to pay attorneys' fees for the employee and the company, as well as litigation costs.

The Bridge to Justice program has turned compliance upside down, because the referral by DOL to private attorneys for enforcement follow-up should be a last resort—after an employer has had an opportunity to respond and to undertake any necessary corrective actions. The Bridge to Justice is a "gotcha" program that mistakenly presumes that employers, on a widespread basis are flouting the wage and hour laws and actively embracing a "catch me if you can" business model. In my experience, that simply is not how the vast majority of employers operate. Instead of focusing on affording prompt remedial actions and compliance, the Bridge to Justice program—which more aptly should be designated as the Reward to Lawyers program—outsources DOL's responsibilities to investigate complaints and primarily benefits the lawyers, delays any wages that might be owed to employees, and increases employers' costs. None of these results promote expanded employment opportunities or the implementation of efficient work opportunities that employers and employees desire.

DOL's New "Apps" Result in Increased Economic Pressures on Employers

The Wage and Hour Division has introduced two new applications ("apps") to be loaded onto smart devices (iPhones, iPads, etc.) to encourage employees and the general public to file complaints with DOL about alleged wage and hour violations. Again, these programs leave out the employers and fail to provide an employer with any notice or opportunity to respond if there are complaints and to effect prompt remedial actions, if appropriate.

The Eat Shop and Sleep App

The DOL announced last week that the "informAction app" challenge had resulted in a new app called Eat Shop Sleep, which is designed to "empower consumer choices about the hotel, motel, restaurant and retail industries."[5] The app combines enforcement data from the Wage and Hour Division and the Occupational Safety and Health Administration with consumer ratings websites, such as Yelp and other tools, such as Google Maps.

When one of our attorneys downloaded Eat Shop Sleep on her iPhone and then did a search in our local area, she got a map of Washington, DC that pinpointed various establishments. When she clicked on one of the points, she learned that, for example, according to DOL, BLT Steak is "in violation." When she clicked further, she was shown 161 reviews of the restaurant on Yelp (overall rating of 4 out of 5 stars), but was also told that according to the Wage and Hour Division of DOL, the restaurant has "27 Fair Labor violations" and that "26 employees are due $6647.41 in back wages." The entry also asks the question, "Not a Fair or Safe Business?" and invites users to submit information to the Labor Department. It also provides contact information for DOL and a notification of worker rights.[6]

It is important to note what is not provided in this newest app—there is neither notification to the employer nor an opportunity for the employer to respond and to address the claims. The app gives the appearance that the violations exist, that the violations have been investigated, and that the employer is actually guilty of these violations. The app does not indicate whether these alleged violations and alleged resulting back wages are the result of a final adjudication or are they simply the results of an initial investigation or, even worse, are they simply that an employee has filed a complaint against the employer? Again, the DOL's focus here is to encourage employee litigation and other complaints based on information that may not be accurate or complete.

The DOL-Timesheet App

In May 2011, DOL announced the launch of its first application for smartphones, a timesheet to help employees independently track the hours they work and determine the wages they are owed.[7] Available in English and Spanish, users can track regular work hours, break time and any overtime hours for one or more employers.

The free app initially was compatible with the iPhone and iPod Touch. The Labor Department stated that it was exploring updates that could enable similar versions for other smartphone platforms, such as Android and BlackBerry. It also announced that it was exploring updates that would include the ability to track other pay features not currently provided for, such as tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest.

According to DOL's announcement "[t]his new technology is significant because, instead of relying on their employers' records, workers now can keep their own

records. This information could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records." The app allows employees to submit the information directly to DOL for investigation, if the employee suspects violations.[8]

Again, what is missing from DOL's Timesheet app is any notice to the employer. Also, the app fails to recognize that, in the first instance, both employees and employers would be best served by having employees first raise their concerns directly with their employers, in an effort to resolve potential issues in a timely and effective fashion without costly litigation and the inevitable delay in remediation.

The Timesheet app, combined with the Eat Shop and Sleep app, will clearly result in additional referrals for private attorneys under the Bridge to Justice program. These new DOL programs are providing an integrated system that promotes a "gotcha" approach that fosters litigation, but that does not benefit employees or employers who are interested in prompt compliance.

Targeting Worker Misclassification—the Misuse of Independent Contractors

Recently, on September 19, 2011, the DOL announced a Memorandum of Understanding ("MOU") with the Internal Revenue Service ("IRS").[9] Under the MOU, DOL and the IRS will coordinate efforts to address the misclassification of workers as independent contractors. Also, seven state agencies have already signed onto the MOU:[10] The MOU will enable "the DOL to share information and coordinate law enforcement with the IRS and participating states in order to level the playing field for law-abiding employers and ensure that employees receive the protections to which they are entitled under federal and state law." Additionally, DOL agencies now will share information.[11]

Following the DOL-IRS MOU, the IRS announced its Voluntary Classification Settlement Program ("VCSP"), which is a new program that will allow employers to resolve prior misclassification issues by voluntarily reclassifying workers as employees for future tax periods and paying a reduced amount in employment taxes.[12] To be eligible to participate in the VCSP, the employer must: 1) consistently have classified the workers as independent contractors or non-employees; 2) have filed all required Form 1099s for the prior three years; and 3) not currently be under an audit by the DOL, IRS or a state agency concerning the classification of the workers at issue.

In exchange for agreeing to re-classify its workers, the employer will: 1) pay a reduced amount that effectively equals just over one percent of the wages paid to the workers for the most recent tax year (instead of the typical 10 percent tax due on wages); 2) not be liable for any interest and/or penalties on that amount; and 3) not be subject to an audit by the IRS as to the previous misclassification for the workers being reclassified under the VCSP. Employers are not required to reclassify all workers—they may choose those to reclassify under the program.

Employers who wish to participate in the program must submit a VCSP application at least 60 days before it reclassifies the workers.[13] The IRS will then review the application and determine whether to accept the employer into the VCSP.

The IRS offers guidance on the factors it applies to determine worker status.[14] Additionally, the IRS will provide either workers or employers with a determination for tax withholding purposes of whether a worker can be classified as in independent contractor.[15]

In stark contrast to the IRS procedures to review and to advise on whether an employment relationship properly is classified as an independent contractor, DOL does not provide any comparable services. Previously, the Wage and Hour Division issued Opinion Letters by the Administrator that provided guidance on compliance matters, but the current administration has refused to issue Opinion Letters.

In the context of determining whether the independent contractor requirements are met, employers face complex legal questions that often pose legal uncertainties. For tax purposes, the IRS applies a 20-factor test, whereas for determining whether the FLSA is applicable based on an employee relationship, DOL assesses the "economic realities."[16] DOL has recognized that "[t]he plethora of tests defining independent contractor status applied across federal and state laws makes it possible for a worker to be classified as an independent contractor under one law, but as an employee under another."[17] These differing worker classification criteria present a major compliance challenge for employers.

The MOU between DOL and the IRS does not address the differing criteri, nor afford employers clear guidance by DOL. As a result, if a worker is found by the IRS to be properly classified as an independent contractor for tax purposes, an employer still may face a challenge by DOL based on the economic realities test. Alternatively, if a worker is reclassified as an employee under the IRS program, there remains legal uncertainty as to whether DOL will agree with the amount of back

pay and whether DOL will claim that additional liquidated damages must be paid under the FLSA. Because of these uncertainties and the lack of transparency on the part of DOL's Wage and Hour Division as compared to the clear guidance and procedures offered by the IRS, voluntary compliance under the DOL-IRS MOU remains another example of the "gotcha" approach that DOL has adopted in addressing employer compliance concerns.

Enforcement Directed at Independent Contractor Compliance

In implementing its independent contractor enforcement strategies, DOL is focusing on specific industries, including home building, hospitality, janitorial services, agriculture, day care, health care and restaurants. Published reports describe the recent enforcement efforts targeting the five largest builders in the home building industry unfocused and overly broad, as the DOL seeks pay and employment records and the names of all contractors hired in the past year on a nationwide basis. The Wage and Hour Department does not allege any specific violations of laws. Instead, DOL has explained that, "We are actively looking at those industries that employ the most vulnerable workers and that engage in business practices—such as misclassifying employees as independent contractors—that result in violations of minimum wage and overtime laws." [18]

It appears that industry sweeps addressing worker classification issues are not calibrated or focused on employers that are most likely to have potential misclassification issues. Instead, Wage and Hour has launched a broadside attack against an entire industry, irrespective of the compliance efforts and success of specific employers. Builder advocates have responded that the probe represents another example of "regulatory intrusion" by the Labor Department, at a time when unwarranted investigation is particularly challenging, given the current economic climate and the economically hobbled residential construction industry. Typically, in my experience, when the Wage and Hour Division or other DOL enforcement agencies focus on an industry, such as agriculture or the garment industry for FLSA compliance, the agency will randomly select employers and then use enforcement data to further refine and sharpen the focused compliance. This type of focused approach has not been followed by Wage and Hour for the home building industry; instead, all of the largest employers have been targeted on a corporate-wide basis.

In published reports,[19] the Labor Department said it was looking at industries in addition to home building, including hospitality, janitorial services, agriculture, day care, health care and restaurants. It remains to be seen whether the approach followed in the home building industry will be repeated.

Let me now turn to the Wage and Hour Division's significant regulatory changes, and the impact those changes are having:

Regulations

On April 5, 2011, the Department of Labor issued final regulations interpreting a number of provisions of the FLSA.[20] The proposed regulations were issued in the waning days of the Administration of President George W. Bush. The regulatory changes, as well as upcoming regulations, impose significant burdens on employers and inhibit job growth. In addition, they are significantly impeding the implementation of flexible work arrangements that are highly desired by both employers and employees.

Fluctuating Workweek Changes

In a fluctuating workweek, an employee works fluctuating hours from week-to-week and receives, pursuant to an understanding with the employer, a fixed salary as straight-time compensation for whatever hours the employee is called upon to work. The employee's regular rate of pay is determined by dividing the fixed salary by the number of hours worked in each workweek.

Thus, in those weeks in which the employee works many hours, his or her regular rate is lower than in those weeks in which the employee works fewer hours. In such cases, the employer satisfies the overtime pay requirements of the FLSA if it compensates the employee, in addition to the salary amount, by paying at least one-half of the regular rate of pay for the hours worked in excess of 40 hours in each workweek. The half-time method of calculating overtime recognizes the fact that the employee has already been compensated at the straight-time regular rate for all hours, including those over 40.

In the notice of proposed rulemaking issued on July 28, 2008, DOL stated, "The payment of additional bonus supplements and premium payments to employees compensated under the fluctuating workweek method has presented challenges to both employers and the courts in applying the current regulations." [21] The Department proposed to clarify the regulation at 29 C.F.R. § 778.114 to permit employers to pay bonuses and other incentives without jeopardizing the employer's ability to

use a half-time method of overtime calculation for employees working a fluctuating workweek. As the proposal recognized, "Paying employees bonus or premium payments for certain activities such as working undesirable hours is a common and beneficial practice for employees." Id. (emphasis added.) Under the proposal, such payments would be included in the calculation of the regular rate, unless they were explicitly excluded under the FLSA.

In a surprising development, DOL ultimately decided to reject its own proposed clarification. The Labor Department stated in the preamble to the final regulation that "the proposed regulation could have had the unintended effect of permitting employers to pay a greatly reduced fixed salary and shift a large portion of employees' compensation into bonus and premium payments, potentially resulting in wide disparities in employees' weekly pay depending on the particular hours worked. It is just this type of wide disparity in weekly pay that the fluctuating workweek method was intended to avoid by requiring the payment of a fixed amount as straight time pay for all hours in the workweek, whether few or many."[22]

In adopting the final regulation, DOL has undermined what the Department had earlier recognized as a "common and beneficial practice for employees." This is a clear about-face by DOL, and the final regulation discourages employers from either (1) offering flexible workweek arrangements for employees that receive bonuses and premium payments or (2) paying employees bonuses if they are on a flexible workweeks. Neither result is a positive outcome or justified by FLSA compliance.

Comp Time Changes

In the same rulemaking, DOL also announced an interpretation of the rules governing the use of compensatory time off ("comp time") in lieu of overtime pay for public-sector employees. These new regulations significantly reduce the flexibility for public sector employers to offer comp time in a cost-effective manner, and increase these costs at a time when public sector budgets are severely strained.

The FLSA permits states, local governments and interstate agencies to grant employees compensatory time off in lieu of cash overtime compensation pursuant to an agreement with the employees or their representatives, and the law provides a detailed scheme for the accrual and use of compensatory time off. The law provides that a public-sector employee must be permitted by the employer to use accrued compensatory time "within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency."

DOL had always taken the position that an employee's request to use compensatory time on a specific date must be granted unless doing so would unduly disrupt the agency's operations. The Courts of Appeals for the Fifth and Ninth Circuits, however, both declined to defer to DOL's regulations because they found the plain language of the statute to require only that an employee be allowed to use compensatory time off within a reasonable period of the date requested unless doing so would unduly disrupt the agency.

The proposed regulation would have stated that the law does not require a public agency to allow the use of compensatory time off on the day specifically requested, but instead only requires that the agency permit the use of the time within a reasonable period after the employee makes the request, unless the use would unduly disrupt the agency's operations. Many comments were received on both sides of the issue. After the publication of the proposal, the Court of Appeals for the Seventh Circuit disagreed with the Fifth and Ninth Circuit decisions, ruling that the FLSA was not clear on the issue, since "reasonable" and "undue" are very open-ended terms, and the Seventh Circuit held that DOL's interpretation was reasonable and entitled to deference.

In light of the split among the courts, DOL again decided to reject its own proposed revision to the regulation, and instead to maintain the more restrictive regulation that requires public sector employers to allow employees to use compensatory time off on the date requested absent undue disruption to the agency. DOL also stated that the fact that overtime may be required of one employee in order to permit another employee to use compensatory time off is not a sufficient reason for the employer to claim that the compensatory time off request is unduly disruptive.

Tip Credit Changes and Notification Requirements

The FLSA provides that an employer may utilize a limited amount of its employees' tips as a credit against the employer's minimum wage obligations. An employer can take a tip credit if the employee has been informed of the provisions of the law and if all tips received by the employee have been retained by the employee, although the employer is permitted to have a tip pooling arrangement among employees who customarily and regularly receive tips.

In 2008, DOL had proposed an interpretation of the FLSA that did not impose a maximum tip pool contribution percentage, but that stated that an employer must notify its tipped employees of any required tip pool contribution amount. In response to comments received on both sides of the issue, DOL's final regulation provides that the statutes do not impose a maximum contribution percentage on valid mandatory tip pools, which can only include those employees who customarily and regularly receive tips. However, under the new regulations an employer now must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

DOL reviewed comments regarding the ownership of employee tips, and concluded that tips are the property of the employee and that the only permitted uses of an employee's tips is through a tip credit or a valid tip pool among only those employees who customarily and regularly receive tips. DOL rejected a recent decision from the Court of appeals for the Ninth Circuit in Cumbie v. Woody Woo, Inc., 596 F.3d 577 (9th Cir. 2010). In that case, tipped employees were required to turn over the majority of their tips to a tip pool that included employees, such as cooks and dishwashers, who are not customarily and regularly tipped employees. The court held that the limitation on mandatory tip pools to those employees who customarily and regularly receive tips does not apply when the employer does not claim a tip credit toward the payment of the minimum wage.

DOL also addressed the issue of whether there was a limitation of the amount of tips that an employee could be required to contribute to a tip pool. In opinion letters and in litigation, DOL had stated that a tip pooling arrangement cannot require employees to contribute more than 15 percent of the employee's tips or two per cent of daily gross sales. Several courts have rejected the agency's maximum contribution percentages, however because neither the statute nor the regulations mentioned this requirement and because the opinion letters did not explain the statutory source for the limitation.

Right to Know—New Regulations

In the Labor Department's Spring 2011 regulatory agenda, the Department announced its intention to issue new regulations that will expand employer's record keeping obligations under 29 CFR §516, and significantly increase the costs for compliance and the risks of non-compliance. The pending "Right to Know" regulations are described in the regulatory agenda at DOL proposing to "to update the record-keeping regulations under the Fair Labor Standards Act in order to enhance the transparency and disclosure to workers of their status as the employer's employee or some other status, such as an independent contractor, and if an employee, how their pay is computed." The notice of proposed regulations was due to be published in October 2011, but has not yet issued.

The proposed regulation poses significant concerns for employers. Employers apparently will be required to identify and to provide the reasons why a worker is classified as an independent contractor which, as described above, often is a legally complex determination under the FLSA's economic realties. To comply, employers necessarily will have to incur the costs of retaining experienced employment counsel to advise on these determinations. Additionally, employers will be required to justify why an employee may be classified as exempt from overtime, which again often requires the assessment of how to properly apply the antiquated FLSA requirements to today's workplace. And what are the consequences if an employer's efforts are second guessed by DOL and deemed to be in error? The potential is that in addition to the record keeping violations, the DOL may cite the improper classification or notification of workers as evidence of a willful violation of the FLSA, which increases the back pay limitation period from two to three years, and correspondingly increases the resulting liquidated damages. Although styled as a "record keeping" change, this proposed rule will provide another "gotcha" requirement that DOL, in turn, can use to impose greater sanctions against employers. Based on the recent regulatory changes and positions adopted by DOL in the most recent rulemakings, the business community should be very concerned about how its interests may be adversely affected by the pending Right to Know regulations.

Chairman Walberg, Ranking Member Woolsey, I thank you again for inviting me to testify. I am happy to answer any questions you may have.

ENDNOTES

[1] See the statements for the July 14, 2011, Subcommittee hearing submitted by (1) J. Randall MacDonald, Senior Vice President, Human Resources, IBM Corporation and Chairman, HR Policy Association; (2) Nobumichi Hara, Senior Vice President of Human Capital for Goodwill Industries of Central Arizona on behalf of the Society for Human Resource Management (SHRM);

and (3) Richard L. Alfred, Esq., Seyfarth Shaw LLP. The statements and information from the July 14, 2011 hearing are available on the Subcommittee's website at *http://edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=250290* (as of November 1, 2011).

[2] The HR Policy Association has just released a detailed survey showing that the industrial era wage and hour laws inhibit workplace flexibility policies. Information is available at www.hrpolicy.org.

[3] Quoted in New York Times article, U.S. Outlines Plan to Curb Violations of Labor Law (April 29, 2010) available at *http://www.nytimes.com/2010/04/30/business/30comply.html.*

[4] See DOL's announcement and Frequently Asked Questions describing the Bridge to Justice program posted on DOL's website at *http://www.dol.gov/whd/resources/ABAReferralPolicy.htm.*

[5] See DOL's press release issued October 27, 2011, posted on DOL's website at *http://www.dol.gov/opa/media/press/opa/OPA20111568.htm.*

[6] For a report on the experience using the Eat Shop Sleep app, see the Workplace FYI blog, at *http://www.workplacefyi.com/dol/new-dol-app-dishes-information-about-violations-by-restaurants-hotels-and-motels/.*

[7] The DOL's announcement of the smartphone Time Sheet app issued May 9, 2011 is available at *http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20110509—1.xml.*

[8] More information about the time sheet app is available at the Workplace FYI blog, at *http://www.workplacefyi.com/dol/wage-hour-compliance/.*

[9] DOL's press announcement is available at *http://www.dol.gov/opa/media/press/whd/WHD20111373.htm.*

[10] The seven states which, as of the date of the MOU announcement have agreements with DOL, are Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah and Washington. The Wage and Hour Division also announced it will enter into memorandums of understanding with the state labor agencies of Hawaii, Illinois and Montana, as well as with New York's attorney general.

[11] DOL's Wage and Hour Division and, in some cases, its Employee Benefits Security Administration, Occupational Safety and Health Administration, Office of Federal Contract Compliance Programs and Office of the Solicitor may share information with states that have agreements in place.

[12] The IRS description of the VCSP is available at *http://www.irs.gov/pub/irs-drop/a-11-64.pdf.*

[13] The VCSP application known as IRS Form 8952 (rev. September 2011) is available at *http://www.irs.gov/pub/irs-pdf/f8952.pdf.*

[14] The IRS guidance is available at *http://www.irs.gov/businesses/small/article/0,,id=99921,00.html.*

[15] Employers or employees can submit Form SS-8 (rev. August 2011) for the determination of worker status for purposes of federal employment taxes and income tax withholding. Form SS-8 is available on the IRS website at *http://www.irs.gov/pub/irs-pdf/fss8.pdf.*

[16] The economic realities test focuses on five factors to assess whether the worker's relationship with the employer is that of an independent contractor or employee, including degree of control, opportunity for profit or loss, investment in facilities, permanency of the relationship, and required skill. See generally Goldberg v. Whitaker House Cooperative, 366 U.S. 28 (1966); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947), United States v. Silk, 331 U.S. 704 (1947) and their progeny.

[17] DOL's report on Flexible Staffing Arrangements (August 1999) available on DOL's website at *http://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/staffing/9.1—contractors.htm* noting "Whether or not a worker is covered by a particular employment, labor, or tax law hinges on the definition of an employee. Yet, statutes usually fail to clearly define the term 'employee', and no single standard to distinguish between employee and independent contractor has emerged."

[18] As quoted in the article in the Wall Street Journal, States, IRS to Join Probe of Home-Builder Pay Practices, Business Section (September 17, 2011), available on line at *http://online.wsj.com/article/SB10001424053111903927204576574892314453196.html.*

[19] See, Wall Street Journal article, cited in preceding footnote.

[20] See, 76 F.R. 18832-18860 (April 5, 2011).

[21] 73 F.R. 43654, 43662 (July 28, 2008).

[22] 76 F.R. 18850 (April 5, 2011).

Chairman WALBERG. Thank you, Mr. Fortney, for your testimony.

I now recognize myself for 5 minutes of questioning.

And, Ms. McCutchen, let me go back to that whole idea of opinion letters that you alleged that Wage and Hour has stopped issuing. You have discussed the importance of Wage and Hour opinion letters to giving clarity to employers who are volunteering their desire to comply for the expressing uncertainty. How has the current policy on this—these opinion letters changed from when you were running Wage and Hour Division—and not simply that you were doing them, but the outcomes?

Ms. MCCUTCHEN. The outcome is—and when the division decided to stop issuing opinion letters what they stated was they did not feel that providing answers to employers' fact-specific questions was an efficient use of resources. And they did state they gave 900 presentations last year. I will point out that that is less than one presentation per year per investigator, by the way. But you can give a presentation and explain an administrative exempt employee must exercise discretion and independent judgment, but how does the—without a fact-specific answer from the agency, how is an employer supposed to know whether a particular employee actually exercises discretion and independent judgment?

So their compliance assistance today is all just basically repeating what the statute says, repeating what the regulations say, repeating what is in their fact sheets. But without fact-specific information an employer cannot determine whether or not they are complying with the law when they are giving an employee a bonus and whether it has be included regular rate or classifying an employee. So fact-specific answers from the Department of Labor is absolutely necessary to a good faith employer who wants to comply, and they are not getting that today.

Chairman WALBERG. So in many ways, thinking through it myself, dealing with the issue that Ms. Bobo brought up of 1,000 cops on the job to do this amazing—this huge job—whether or not you put more or not, a voluntary opinion or opinion letter to a company seeking clarification on what they are supposed to do would at least go a ways toward supplying what 1,000 more cops could do in getting information out.

Ms. MCCUTCHEN. Absolutely, because you help those—to use other people's term—ethical, legitimate employers who just want to know what they are supposed to do——

Chairman WALBERG. Why wouldn't they offer opinion letters, then? What is the hold up? What is the hindrance? What is the concern about offering opinion letters?

Is it concern that they are not certain themselves about the law, or——

Ms. MCCUTCHEN. Well, frankly, I think it is because they are no longer interested in helping employers like that. Now, they are issuing administrator's interpretations, which are supposed to be more general discussion of a law, but this administration has issued only two administrator's interpretations on FLSA and both of those were simply reversals of positions taken in the Bush administration just a few years earlier. So they are not helping with the confusion.

They say it is an inefficient use of resources. I think having a staff of five to 10 people responding to opinion letters would go a long way towards increasing employer compliance, which is their most important mission.

Chairman WALBERG. Thank you.

Mr. Fortney, we have recently heard the IRS and the Department of Labor announce the two agencies will be collaborating on misclassification issues to allow employers who may have misclassified workers to pay reduced rates resulting from those misclassifications. In theory it sounds like a good idea—a good partnership. What pitfalls might you see in that decision, that relationship?

Mr. FORTNEY. There are several issues that fall into that. First of all, the legal tests for under the two statutes are different. That is how the law exists.

There are 20 factors that the IRS supplies or follows to determine whether a worker is a contractor or an employee. The results of that do not necessarily dictate whether a worker should be treated as an employee under the FLSA. It seems bizarre, but that is the current law. So it can provide a, if you will, a false positive or a false negative if you go to the IRS alone.

Second, when you go to the—as I mentioned, the IRS does have a much more robust compliance process, whereby people don't have to wonder or wait until an enforcer shows up. They can go get—they fill out a form. It is a very simple—it is sort of like a streamlined opinion letter process. You fill out a form; you get the information back from the IRS where they give you a written opinion whether those—fact-specifically, whether those workers are or are not contractors.

That is of huge assistance. The Labor Department can and should adopt a similar approach to answer the FLSA questions. It has not.

Finally, at this point, when you go to the Labor Department, if you would approach them to pay back pay, not only will they not supervise or verify the amount that is being paid, but more often than not, in our experience, the Labor Department will also say in addition, liquidated damages, which is a doubling—a double amount—must also be paid. That, historically, for many decades and many different administrations, was not the rule that the department followed, and it provides a disincentive for employers to come forward and take advantage of—otherwise the good offices of the department to supervise those resolutions.

Chairman WALBERG. Thank you. My time is expired.

I now recognize the gentlelady from California, Ranking Member Woolsey.

Ms. WOOLSEY. So, Mr. Fortney, wouldn't you be very critical of the department if they weren't working with the IRS with this memorandum of understanding to work out the differences between the two agencies? That is what they are doing right now. This is, I believe, a huge step forward, I mean, so that next year, or once we are through with this, you won't be worried about having two sets of standards for who is and who is not a contract employee.

Mr. FORTNEY. Yes. I would indicate, the coordination—the initiation of coordinated efforts between the service and the Labor Department is a very positive step. As they say, the devil is in the detail, and I think there is still—the department——

Ms. WOOLSEY. Well, we are working out the detail. That is the point, and that what——

Mr. FORTNEY. That would be welcome.

Ms. WOOLSEY [continuing]. The chairman of the full committee said, you know, why aren't we going forward with activities that will make this better and more efficient? So hopefully that is the intent.

Ms. Bobo, Mr. Fortney stated in his testimony that the Bridge to Justice program is turning compliance upside down. He argues that the referral by DOL to private attorneys would resort in actu-

ally a program where it is rewards to lawyers. Would you tell me what you think—I mean, isn't it true that we already allow the complaintant—the individual to go to a private attorney if they choose?

Ms. BOBO. Absolutely. And clearly, the system is set up right now where part of enforcement is really done by the bar, by the legal community. And that is just, you know, one of the reasons there are so few staff at the Wage and Hour Division is because you have the private bar allowed to participate in help enforcing the law. So that is kind of a given.

What is new in this program is it is really telling low-wage—primarily low-wage workers that they have this opportunity and it is simply a referral program. This is, like, not a big deal. It is not different from what is already out there, and it is a small referral program to tell low-wage workers that you have the right to do this, and it is going through established procedures, right, the ABA. So this seems like a no-brainer. This is a simple program that is not controversial.

Ms. WOOLSEY. So, Ms. McCutchen's statement in her testimony is—and actually, she argued that there is no path for a good faith employer to voluntarily correct violations under the Wage and Hour Division, or actually to seek compliance assistance from the division.

Do you see it that way? Do you agree with her statement? Do you know, in your experience, how the Wage and Hour Division has ever—has failed to provide compliance assistance to employers?

Ms. BOBO. Well, in my experience—again, I don't deal a lot with high road employers. I deal with a lot of employers in the low-wage sectors that are really rife with wage theft. And in my experience, when a restaurant worker or—there was a car repair employer in Chicago who some of his workers came into our worker center in Chicago and he wasn't paying them overtime, and we called the employer, and he was, frankly, surprised to learn that that is what the law was.

We put him in touch with the Department of Labor; the Department of Labor helped. And now he is turning in his competition around the community for not paying overtime because again, if he is going to do it right he wants everybody to do it right.

So in my experience, with particularly these low-wage employers, the department has been very willing to help, and I suspect they are willing to help with the larger employers, as well.

Ms. WOOLSEY. So, do you think there should be an incentive, a discount for that failing employer once they are caught to pay——

Ms. BOBO. You know, I said in my written testimony that I turned in I once messed up my employer payroll taxes, and I got hit with—not only did I have to pay the taxes but I got hit with a huge fine that I, frankly, thought was a little unfair because it was an honest mistake. On the other hand, I have never paid one again because it really taught me a lesson that, you know, it is—you have got to be super careful on this stuff, and especially when we are talking about workers' wages, right? We need to create an environment where not only will workers get their back money, but employers, frankly, feel a little terrified and a little worried that

they are doing it right so that they are super careful because it matters to families.

Ms. WOOLSEY. And I would suggest that it has cost the federal government some money in order to——

Ms. BOBO. Absolutely. You know, and I do want to say this, on this employer misclassification, calling people independent contractors when they are really employees, now, I recognize that there are probably some cases that are complicated and confusing, but a lot of this stuff is really straightforward. We see, in our worker centers around the country—we run 26 worker centers—we routinely see cooks and dishwashers from restaurants that are paid as independent contractors and paid salaries of $300 a week, no payroll taxes taken out of it. I mean, there is no question this is wrong and they are stealing from workers and stealing from the public coffers.

So I think most of this stuff is really not all that confusing.

Ms. WOOLSEY. Thank you.

Chairman WALBERG. I thank the gentlelady, and her time expired.

I will turn to the gentleman from Indiana, Dr. Bucshon?

Mr. BUCSHON. Thank you, Mr. Chairman.

Again, I want to comment on the fact that we are having this hearing today to make sure that everything that this agency is doing is consistent with the law. No one would deny that we want to make sure that federal law is enforced properly. But I also want to make sure that we have an efficient and effective government, and programs in the government.

And with that, Ms. McCutchen, when you came to the Wage and Hour Division in 2001 what were your goals for the department?

Ms. MCCUTCHEN. Two things, and I think this should still be the goal: Punish those bad employers. Do not let them get away with anything, as Ms. Bobo describes. But for good faith employers, make sure that there are all possible available resources to help them understand what the law allows because it is confusing. You know how many wage and hour lawyers there are in this country making a good living because these laws are not clear? You know, thousands and thousands. So it is not clear.

So you need to punish the bad actors and you need to provide incentives to those good faith employers who want to comply but have made an honest mistake without punishing them for them when they voluntarily come forward rather than waiting to be investigated or sued. So it is that combination. The goal, the mission of the agency is to increase compliance by employers overall, and you cannot do that through enforcement only.

Mr. BUCSHON. And in your opinion, currently the Wage and Hour Division, where do you see that the goals that you had when you came to the division are misdirected, so to speak?

Ms. MCCUTCHEN. I stand by my statement in my testimony that the door is closed to employers. I cannot even get an answer when I ask a question.

And I know the wage and hour law pretty well, and sometimes I don't know what the answer is. I personally, for example, asked the deputy administrator a particularly difficult question a year and a half ago and have not gotten an answer. So it is really impossible for an employer to call up the DOL and find an answer.

Mr. BUCSHON. So again, one of the—what—can you just reiterate again for me personally what the most important steps you think they could take right now to get back in line with what the goals of—in your view, of the division should be?

Ms. MCCUTCHEN. Number one, start issuing opinion letters again which do respond to fact-specific inquiries from employers who are trying to understand what the requirements are. Number two, start, again, to issue on a regular basis the WH-58 waiver form; that is a form an employee who receives back wages signs that waives their FLSA rights. Unlike other implement law statutes, there are only two ways to waive you claims under the FLSA—through litigation or through the Department of Labor. If you allow employers to get these waiver forms after they agree to pay 100 percent of back wages then it gives—provides a really strong incentives for voluntary compliance.

And the third is to start, again, a voluntary compliance program that allows employers without fear of being punished with civil money penalties and liquidated damages to come forward voluntarily to the department, say, "I have made a mistake; I want to pay back wages. Can you help me calculate and pay those back wages and in exchange get that wavier of claims," so that they know that their issue has been completed and employees who receive back wages can't turn around the next day and start a major class action litigation for more.

Mr. BUCSHON. Okay.

Mr. Fortney, with all of what Ms. McCutchen just said, in your opinion, what could possibly be the motivation of the Wage and Hour Division's changes in their—in—recently in all of these areas? I mean, what possible—I mean, I guess that is more, maybe, of a political question. But, I mean, what could be the motivating factor behind the way that it seems to be managed now compared to what appeared to be an effective way it was being managed before?

Ms. MCCUTCHEN. I was just thinking about this last night. I do not know.

In her written testimony Deputy Administrator, for example, referred to a case in 2007 where an employer voluntarily came to the Department of Labor to get help and paid a total of $32 million in back wages. Today, that employer would be turned away from the door.

And I just don't understand why the agency would not want to collect $33 million more in back wages when an employer wants to do that voluntarily.

Mr. BUCSHON. Mr. Fortney?

Mr. FORTNEY. The department has made a fundamental shift—and they have announced this—indicating that the philosophy is a—they believe the employer community operates on a "catch me if you can" approach. I think Ms. Bobo's comments reflect, my comments would reflect, Ms. McCutchen's, that that is not the general trend, that there are many, many employers out there that do not.

The ethical business leaders that Ms. Bobo referenced, that certainly is what we see and what people want is the certainty. On the other hand, if you are looking to sort of tote up numbers and so forth—I mean, it is very frustrating. We have had a number of instances where significant employers have wanted to, over the last

2 years, come forward and have all the benefits of the department's supervised release and have been told repeatedly by the department, "No. Go figure it out on your own. Do it on your own."

Mr. BUCSHON. I think my time is expired, so with that I will yield back.

Chairman WALBERG. I thank the gentleman.

I now recognize the gentleman from New Jersey, Mr. Payne?

Mr. PAYNE. Thank you very much. I understand that the blueberry investigation in our state has already been discussed in the previous panel, so I won't go into that. Of course, many of you may or may not know that New Jersey, believe it or not, called the Garden State, really had most of the egregious labor problems in the country, especially in the agricultural industry.

I don't know if any of you remember Senator Harrison Williams, who was on the Senate Labor Committee and had to conduct very extensive investigations in New Jersey and the treatment of migrant workers in the southern part of our state. So although New Jersey may not be a state that comes to mind as it relates to some abuses in labor, of course in agriculture in particular, we have really been, in the past, in the forefront. Many remedies have, of course, occurred since his tenure 30 years ago, but we are certainly aware of it.

I just wonder, the—maybe, actually, Ms. Bobo or—anyone can chime in—I see that there is a tremendous amount of so-called misclassification. According to the record in 2005, found that 10.3 million workers, 7.4 percent of the workforce, had been classified, rightly or wrongly, as independent contractors. Of course, we know that independent contractors lose all rights linked to employee status, such as workers' compensation, minimum wage, overtime protection, family medical leave, right to organize, collective bargaining.

Now, I have always had a very high opinion of employers. They are people who are bright, and have a lot of initiative, and, you know, really—American spirit. How do we find so many of them making simple mistakes like not classifying people properly? Could you kind of—and is this rightly or wrongly done rightly or wrongly by choice? It just seems to me that these are basic things that a person would know whether someone is a so-called contractor. You know, when I think of a contractor it is the guy that comes out and builds a house, you know?

Can you kind of clarify that to me or make some comment on it?

Ms. BOBO. I think we have a number of sectors in the society where it has become standard practice to break the law. And one of the main ways that people do that is by payroll fraud—lying about actually having employees.

And so you see it in restaurants, in the back of the house, where people are called independent contractors. Of course they are not independent contractors. You see it with janitors all the time.

Residential construction is notorious. One time a couple years ago in Phoenix we did a number of just dropping in on work sites of one of the nation's largest home builders. So this is not a small mom and pop that didn't understand the law.

We dropped in on work sites. Every single worker we talked to was paid as an independent contractor and they were clearly con-

trolled—the work was controlled by the contractor there. But everybody was paid as an independent contractor and most of them were getting less than minimum wage.

So again, we have got these huge sectors where it is common practice to pay people poorly, which is why I think this whole issue—I mean, clearly what we have done for the last decade—you know, how you do it, and what are the incentives and disincentives, you know, I think we can argue about that, but clearly what we have been doing is not working. There is a crisis of workers not getting paid.

When the largest survey of low-wage workers—these are workers making $10 an hour and less—shows that one out of four workers isn't paid the minimum wage and three-fourths aren't—who work overtime aren't paid it. We have a crisis and what we are doing is not working.

And, sir, I think the administration—again, the folks I know at the Department of Labor would never say that everything they are doing is the best, right? But they are really trying to figure out what is the mix, and how do we strengthen enforcement, how do we make it clear that breaking the law is wrong and that there is going to be some consequences for that—meaningful consequences?

So again, I think the big picture here is that we have got a crisis of wage theft and it is not yet being addressed. My sense is that, you know, I am glad there are 1,000 investigators, but frankly, it is still not enough, given the crisis that we see every day. Eighty-eight percent of the workers that came into our worker centers came in with wage theft problems. Huge problem.

Mr. BUSCHON. Thank you.

Chairman WALBERG. The gentleman's time is expired.

We appreciate the panel, your attention to details and getting information to us that will certainly be helpful.

I now turn to the gentlelady from California for any closing comments she might have.

Ms. WOOLSEY. Well, thank you, Mr. Chairman.

And thank you to the panel. This has been very interesting.

I hope that what comes out of this committee—our subcommittee—will be action that actually strengthens this important FLSA law and protects workers by setting very clear rules for employers and making it possible for the employee to challenge their employer and at the same time providing the employer with the help and support that they, as taxpayers, are counting on.

I would like to work with you to crack down on misclassification because we know it hurts employees, it drains the government of much-needed revenue while putting employers who are in compliance at a severe disadvantage. So I would love it if you could have a hearing on my bill and add it to the committee agenda this year. I think that would be a good full committee hearing for us.

I want to be clear that enforcing the law does not hurt the economy. There is a lot of talk about excessive government regulation and how it costs jobs, but it is also very clear that it could be a convenient excuse to do away with the hard-fought protections of the FLSA.

But even more important than that, in a time of a bad economy, like we are in right now, we have to remember that FLSA and

similar laws were passed at the height of the Great Depression when people needed this help the most, and that is exactly where we are today. We know we need jobs in this country but we don't want to put jobs out there that don't pay a fair wage, that break the law, that put our workers at a disadvantage, because nobody is going to benefit from that.

So let's do everything possible to ensure that the working Americans get a fair shake. And thanks for this committee for all their opinions in that regard.

And thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentlelady and appreciate the lobbying for your bill to be taken up, especially on your birthday today. That is a good choice to bring it up at this time. And we are certainly interested in looking further into this.

That is why we have had this hearing today and we have had a prior hearing on FLSA. We continue to build our understanding, frankly, even if it is only for the chairman's purposes, understanding in a full-blown capacity of what we are dealing with here. This is a 1938 law. I think it ought to be very clear from both sides of the aisle that this is not an attack on FLSA—it is not meant to be an attack on FLSA—and that we don't believe that enforcing this law or any law is necessarily in itself an effort to hurt the economy. Not at all.

But we certainly want to understand that since 1938 things have changed, and creativity has taken place. And Henry Ford may have been able to work under this law very adequately, but today Henry Ford, if he were around, might have some challenges in dealing with this law, as others have. And so we are looking for mechanisms by which we may—we can make this law work to encourage employees, employers, and the taxpayer in the process.

We do not want wage theft. It is an ugly term and it is an ugly outcome if that takes place and we neglect it. But on the other side of the ledger, we want to make sure that the people's government that they expect, that comes from these halls as well as at the local and state levels, are service-motivated—service-motivated to make sure that people are cared for, to get no more than what they need as far as compliance activities, but they also get compliance assistance.

And I appreciate the panelists in, I believe, coming down unified on that fact that if there are ways that we can motivate voluntary compliance and encourage that, and not stand in the way of it or give disincentive for it, even if it is only perceived, that is a good path to take. To even entertain the fact that there may be no perceived path to voluntary compliance today for good actors—not talking about the bad actors; we are going to have to continue looking for them—but if there is no perceive path to voluntary compliance under this bill or under this law, but under present application of this law, then I think we have a problem we have to address.

If there is an incentive to litigation—if there is an incentive to that—and I am not saying that there is, but hearing testimony, whether it is Bridge to Justice or whatever reason—if there is an incentive to litigation that goes beyond what is really the problem and adds unnecessary and burdensome costs and, in the outcome,

impacts the number of jobs that are available for employees who want to function well on the job site, and want to have those jobs, and want to be paired up with employers who will treat them right, we want to address that concern.

And then, moving from those aspects in what I have heard today, as well, there is an efficiencies, there is an economic issue that must be our concern as well. We want the taxpayer, the employee, the employer to be well served and efficiently served.

When we hear today figures, frankly, we will check into further that it costs 23 cents—23 percent more to collect the same back wages as a few years ago. When we see figures that indicate that in 2010 the Department of Labor collected $130 million in back wages for almost 219,000 workers and realize at least if the figures are accurate that this is a decrease compared to the 2005 to 2009 average collection of $141 million for nearly 254,000 workers, yet Wage and Hour Division has increased its workforce by more than—its effort by $30 million and nearly 300 positions. That is a question in my mind about the efficiency that is there as well, not simply just the outcome.

So those are issues we will look at, and I commit to my ranking member that we will do this with due diligence, that this is not the first of the hearings, but we want to move forward so that in this time of economic challenge, whether it is in my state, in my district, or any of ours, that the law well serves the people who come under it. And ultimately, our economy grows, but probably more importantly, our people grow in this process, as well.

So I appreciate the hearing today. I appreciate all who have taken part in it. And seeing that there are no other action or issues to be taken care of at this time, the committee stands adjourned.

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

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December 22, 2011

Nancy J. Leppink
Deputy Administrator
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Deputy Administrator Leppink:

Thank you for testifying at the Subcommittee on Workforce Protection's hearing on "Examining Regulatory and Enforcement Actions Under the Fair Labor Standards Act" held on Thursday, November 3, 2011.

Enclosed are additional questions submitted by Committee members following the hearing. Please provide written responses no later than Monday, January 9, 2012 for inclusion in the official hearing record. Responses should be sent to Ryan Kearney of the Committee staff who may be contacted at (202) 225-7101.

Thank you again for your contribution to the work of the Committee.

Sincerely,

Tim Walberg

Tim Walberg
Chairman
Subcommittee on Workforce Protections

Deputy Administrator Leppink
December 22, 2011
Page 2
Questions from Representative Walberg:

1. We received testimony during the hearing's second panel noting that the Wage and Hour Division (WHD) has withdrawn a number of so-called "Opinion Letters," which provide fact-specific guidance on wage and hour issues. Not only have the Opinion Letters been withdrawn, but we understand they have not been replaced and WHD has ceased issuing Opinion Letters altogether. WHD is now issuing more general "Administrators Interpretations," and it has only issued two since early last year. First, why has WHD stopped issuing fact-specific Opinion Letters? And second, why would WHD withdraw such important direction and guidance, changing the rules for job creators during this time of economic uncertainty?

2. In fiscal years (FY) 2008, 2009, 2010, and 2011, what percentage of WHD's investigations were internally directed, as opposed to complaint-driven?

3. What are WHD's bases for determining if a directed investigation is warranted for a specific industry or corporation? How does WHD initiate such directed investigations? Are directed investigations initiated and ordered primarily from the national office?

4. WHD has stated its intention to devote resources toward deterring "persistent violators." How does WHD administratively define "persistent violator," and how does WHD determine if a company is a "persistent violator? " Does this enforcement strategy assume a company without violations is a "persistent violator" if it participates in an industry with a higher propensity for violations? If WHD cites a company more than once in an operating year, does WHD consider the company a "persistent violator?"

5. Your testimony cited WHD's FY 2011 enforcement numbers. Previous administrations posted DOL's enforcement information for all agencies and fiscal years online. However, enforcement data has not been updated since Secretary Solis took office. Please submit WHD's enforcement figures for FYs 2009, 2010, and 2011, using the same statistics and tables reported on the FY 2008 and prior years' annual enforcement fact sheets, as posted on WHD's website.

6. For FY 2012, WHD has promised to "pursue corporate-wide compliance strategies designed to ensure that employers take responsibility for their compliance behavior." How is WHD pursuing, or how does WHD intend to pursue, these strategies?

7. WHD, IRS, and a number of states recently announced agreements to engage in concerted industry-wide investigations and audits. Please submit for the record any economic burden or regulatory burden analyses undertaken by WHD concerning this new audit program and its potential economic impact? If WHD did not conduct any such analyses, please explain why not.

Deputy Administrator Leppink
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Page 3

Questions from Representative Woolsey:

1. How does the Wage and Hour Division make decisions about its directed enforcement actions?

2. Is the Fair Labor Standards Act flexible enough to meet the needs of the modern workforce?

3. Can you tell us more about the types of individuals who are performing companionship services?

4. Do you have policies on when live-in domestic workers have to be paid for overnight work?

5. It has been asserted that since the Wage and Hour Division no longer issues opinion letters that the Department is no longer providing compliance assistance to employers. Can you tell us more about your compliance assistance efforts? Additionally, can you provide information on what happens when an employer comes to the Wage and Hour Division for compliance assistance?

6. Unlike the practice under the previous administration, it is my understanding that the Wage and Hour Division no longer includes the results of employer initiated compliance reviews in the agency's annual enforcement numbers. Can you explain why not?

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Questions Submitted for the Record by Ms. Woolsey

QUESTIONS FOR NANCY J. LEPPINK

1. How does the Wage and Hour Division make decisions about its directed enforcement actions?
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6. Unlike the practice under the previous administration, it is my understanding that the Wage and Hour Division no longer includes the results of employer initiated compliance reviews in the agency's annual enforcement numbers. Can you explain why not?

LYNN WOOLSEY, *Ranking Member,*
Subcommittee on Workforce Protections.

Ms. Lippink's Response to Questions Submitted for the Record

1. We received testimony during the hearing's second panel noting that the Wage and Hour Division (WHD) has withdrawn a number of so-called "Opinion Letters," which provide fact-specific guidance on wage and hour issues. Not only have the Opinion Letters been withdrawn, but we understand they have not been replaced and WHD has ceased issuing Opinion Letters altogether. WHD is now issuing more general "Administrator Interpretations," and it has only issued two since early last year. First, why has WHD stopped issuing fact-specific Opinion Letters? And second, why would WHD withdraw such important direction and guidance, changing the rules for job creators during this time of economic uncertainty?

WHD Response: The Wage and Hour Division (WHD) has not stopped responding to requests for guidance on the laws that it enforces. The agency responds to incoming requests for opinion letters by providing references to statutes, regulations, interpretations and cases that are relevant to the specific request but without a detailed analysis of the specific facts presented as was the agency's practice in the past. Such a detailed analysis is a very labor intensive task and the resulting opinion letter frequently was bound by its very particular facts and applicable only to the circumstances presented by the requester. In addition, requests for opinion letters will be retained for purposes of the Administrator's ongoing assessment of what issues might need further interpretive guidance. Individuals with questions about the application of wage and hour laws to their particular situation may also talk to a Wage and Hour Division representative by contacting the office nearest them listed at *http://www.dol.gov/whd/america2.htm* or by calling the Division's toll-free help line at 1-866-4USWAGE (1-866-487-9243) Monday-Friday 8 a.m. to 8 p.m. Eastern Time or by accessing the wealth of materials on the agency's website at *www.wagehour.dol.gov.*

In order to provide meaningful and comprehensive guidance and compliance assistance to the broadest number of employers and employees, the Wage and Hour Administrator issues Administrator Interpretations when it is determined, in the Administrator's discretion, that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate. Administrator Interpretations set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue. Guidance in this form is useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees. WHD believes that this is a much more efficient and productive use of resources than attempting to provide definitive opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the assumed facts may result in a different outcome.

WHD has a number of other tools through which it provides guidance to the regulated community and to the public. For example, the agency disseminates compliance guides, fact sheets, compliance checklists, educational pamphlets, new and small business guides, self-audit packages, posters, bookmarks, videos both in hard copy and electronically through the agency's Web site. WHD's Internet site also hosts several program specific electronic interactive programs, i.e., elaws, that enable employers and employees to get customized responses to their questions.

WHD has also engaged in rulemakings in which it allows the public, the regulated community, employers, and employees to weigh in with their views on the proposed change during the comment period.

2. In fiscal years (FY) 2008, 2009, 2010, and 2011, what percentage of WHD's investigations were internally directed as opposed to complaint-driven?

WHD Response: The following chart provides the requested percentages. Please note that percentages are based on "all investigations" as opposed to "all cases." Cases include both investigations as well as conciliations. Conciliations are those

non-investigative customer service activities that the agency takes primarily on behalf of one employee to address one issue, typically the failure to pay a last paycheck.

Fiscal year	Directed investigations as a percent of all investigations	Complaint investigations as a percent of all investigations
2008	36.51%	63.49%
2009	35.21%	64.79%
2010	26.72%	73.28%
2011	29.21%	70.79%

3. What are WHD's bases for determining if a directed investigation is warranted for a specific industry or corporation? How does WHD initiate such directed investigations? Are directed investigations initiated and ordered primarily from the national office?

WHD Response: The WHD conducts investigations for a number of reasons, all dealing with enforcement of the laws and ensuring an employer's compliance. WHD does not disclose the reason for an investigation. Most are initiated by complaints.

WHD uses a data-driven approach in developing both its national and local directed enforcement initiatives. WHD concentrates its directed investigations in industries with a high likelihood of minimum wage and overtime violations, in industries with a history of violations, and where vulnerable workers are typically employed. Occasionally, a number of businesses in a specific geographic area will be examined.

The vast majority of directed investigations are initiated by WHD field offices based on the particular compliance issues that may exist within their geographic area. The agency's directed enforcement, however, includes both national and local/regional initiatives. The planning process is shaped by a hybrid approach of top-down and bottom-up planning. Investigations that result from a national initiative are typically conducted to establish national baselines of compliance. Targeted establishments are most often randomly selected.

The objective of targeted or directed investigations is to improve compliance with the laws in those businesses, industries, or localities. Regardless of the particular reason that prompted the investigation, all investigations are conducted in accordance with established policies and procedures.

4. WHD has stated its intention to devote resources toward deterring "persistent violators." How does WHD administratively define "persistent violator," and how does WHD determine if a company is a "persistent violator?" Does this enforcement strategy assume a company without violations is a "persistent violator" if it participates in an industry with a higher propensity for violations? If WHD cites a company more than once in an operating year, does WHD consider the company a "persistent violator?"

WHD Response: Whether a company persistently violates wage and hour laws is a fact-based determination rather than a numerical formula, WHD analyzes whether a company—either at the corporate level or the establishment level—has a history of repeated and systemic wage and hour violations. WHD does not characterize companies as persistent violators solely based on the company's industry.

5. Your testimony cited WHD's FY 2011 enforcement numbers. Previous administrations posted DOL's enforcement information for all agencies and fiscal years online. However, enforcement data has not been updated since Secretary Solis took office. Please submit WHD's enforcement figures for FYs 2009, 2010, and 2011, using the same statistics and tables reported on the FY 2008 and prior years' annual enforcement fact sheets, as posted on WHD's website.

WHD Response: See attached chart.

6. For FY 2012, WHD has promised to "pursue corporate-wide compliance strategies designed to ensure that employers take responsibility for their compliance behavior." How is WHD pursuing, or how does WHD intend to pursue, these strategies?

WHD Response: WHD has a long history of working with large or multi-establishment corporations to ensure that corporate policies are consistent with wage and hour laws and that corporations monitor compliance across business units or establishments. In the past, WHD has entered into various corporate-wide settlement agreements that contain elements of monitoring, training, outreach, and self-auditing that increase the likelihood that individual entities within the corporations will be compliant with the law. WHD has also pursued corporate-wide injunctions, where

appropriate. These are not new strategies, and it remains the responsibility of all covered employers at every level to comply with the applicable laws of this country.

7. WHD, IRS, and a number of states recently announced agreements to engage in concerted industry-wide investigations and audits. Please submit for the record any economic burden or regulatory burden analyses undertaken by WHD concerning this new audit program and its potential economic impact? If WHD did not conduct any such analyses, please explain why not.

WHD Response: The Memorandums of Understanding (MOUs) with the state agencies provide for the possibility of coordinated enforcement between the state agencies and the Wage and Hour Division. They do not, however, contemplate or discuss any coordinated enforcement actions against any specific industry or employer. Moreover, neither the IRS MOU nor the state MOUs contemplate or provide for audits, and thus no economic or regulatory burden was required.

There are significant economic benefits to be gained by addressing the problem of employee misclassification, including through coordinated enforcement. When employees are misclassified as independent contractors or something else, it often leads to those employees being denied important rights and benefits, law-abiding employers being unable to compete against those who do not play by the rules, and states facing critical revenue shortfalls. Worker misclassification also generates substantial losses to the Treasury and the Social Security, Medicare and Unemployment Insurance Trust Funds. In its last comprehensive estimate of the scope of the misclassification problem for tax year 1984, the Internal Revenue Service estimated that 15 percent of all employers misclassified a total of 3.4 million employees as independent contractors, resulting in an estimated annual revenue loss of $1.6 billion (in 1984 dollars). A 1994 Coopers & Lybrand study estimated that misclassification would cost the Federal government $34.7 billion between 1996 and 2004.[1] In a 2009 report, the GAO highlighted these problems and recommended that the Department do a better job of working with both the IRS and state governments to solve them. This is why, as part of the Administration-wide Misclassification Initiative that was launched under the auspices of the Vice President's Middle Class Task Force, the Department of Labor and the Internal Revenue Service recently took the important step of signing an MOU to allow for increased information-sharing on misclassification.

Specifically, the Department has agreed to share information with the IRS about the misclassification it finds in its enforcement actions, helping to ensure compliance with tax laws. The IRS has agreed to share aggregate information, consistent with disclosure laws, about the misclassification it finds, which will help the Department better target its efforts to combat misclassification. Similarly, the Wage and Hour Division has entered into similar MOUs with 10 state government agencies. Under these MOUs, the Wage and Hour Division has agreed to share information about its misclassification enforcement with its state agency partners, thus increasing their ability to ensure compliance with state workers' compensation, unemployment insurance, and other state laws.

The MOUs with the state agencies also provide for the possibility of coordinated enforcement between the state agencies and the Wage and Hour Division. They do not, however, contemplate or discuss any coordinated enforcement actions (or "audits") against any specific industry or employer.

8. [FROM THE HEARING] *"[i]f I could ask, Ms. Leppink, if you could supply us with any changes that Wage and Hour Division implemented to address the GAO concerns,".*

WHD Response: The Wage and Hour Division has implemented all of the recommendations from the March 2009 GAO report in which GAO made a series of recommendations for improving Wage and Hour's investigative and complaint intake processes.

Recommendation 1: The Administrator should reassess current policies and processes and revise them as appropriate to better ensure that relevant case information is recorded in WHD's database, including all complaints alleging applicable labor law violations, regardless of whether the complaint was substantiated, and all investigative work performed on conciliations, regardless of whether the conciliation was successful.

In response to this recommendation, WHD reassessed its policies and procedures. As WHD committed in its response to GAO, the Field Operations Handbook (FOH) was revised to strengthen WHD's complaint handling procedures. All WHD staff were then trained in customer service.

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[1] Projection of the Loss in Federal Tax Revenues Due to Misclassification of Workers, Coopers & Lybrand (June 1994).

Recommendation 2: To provide assurance that WHD personnel interacting with complainants and employers appropriately capture and investigate allegations of labor law violations, and provide appropriate customer service, the Administrator should conduct an assessment of WHD's complaint intake and resolutions processes and revise them as appropriate.

As noted above, WHD completed an internal evaluation of its complaint intake and customer service policies and procedures. This review resulted in many of the proposed changes set forth in the revised FOH chapters. WHD has also reintroduced customer service goals and measures in its annual operating plan.

Recommendation 3: To improve the efficiency and effectiveness of WHD personnel handling wage theft complaints, the Administrator should explore providing more automated research tools to WHD personnel that would allow them to identify key information used in investigating complaints such as bankruptcy filings, annual sales estimates for businesses, and information on additional names and locations of businesses and individuals under investigation.

WHD has provided every district office with access to PACER (Public Access to Court Electronic Record) as suggested by GAO. In addition, WHD regional offices have access to LexisNexis to assist in research on behalf of district office staff. WHD also strengthened the FOH chapter on bankruptcy procedures to ensure that investigators and managers are diligent about obtaining information on bankruptcies through these traditional means.

Recommendation 4: To assist in the verification of information provided by employers under investigation, the Administrator should explore gaining access to information maintained by IRS and other agencies as needed through voluntary consent from business being investigated.

With the implementation of an MOU with the IRS, the agency is exploring a number of opportunities for sharing information consistent with privacy and confidentiality concerns.

Recommendation 5: To provide assurance that WHD has adequate human capital and resources available to investigate wage theft complaints, the Administrator should monitor the extent to which new investigators and existing staff are able to handle the volume of wage theft complaints, and if not, what additional resources may be needed.

WHD has hired over 300 new investigators to ensure timely responses to complainants. Throughout FY 2010, WHD field offices worked to reduce complaint backlogs as the new staff began to contribute to the agency's investigation outputs.

QUESTIONS FROM REPRESENTATIVE WOOLSEY

1. How does the Wage and Hour Division make decisions about its directed enforcement actions?

WHD Response: WHD uses a data-driven approach in developing both its national and local directed enforcement initiatives. Decisions on which industries to target are based on empirical data and research. WHD concentrates its directed investigations in industries with a high likelihood of minimum wage and overtime violations, in industries The vast majority of directed investigations are initiated by WHD field offices based on the particular compliance issues that may exist within their geographic area. The agency's directed enforcement, however, includes both national and local/regional initiatives. The planning process is shaped by a hybrid approach of top-down and bottom-up planning. Investigations that result from a national initiative are typically conducted to establish national baselines of compliance. Targeted establishments are most often randomly selected.

The objective of targeted or directed investigations is to improve compliance with the laws in those businesses, industries, or localities. Regardless of the particular reason that prompted the investigation, all investigations are conducted in accordance with established policies and procedures.

2. Is the Fair Labor Standards Act flexible enough to meet the needs of the modern workforce?

WHD Response: The FLSA has needed relatively few changes over the years because its language is general enough, and its principles broad enough, to apply to the new occupations and job duties that result from rapidly changing industries and technologies. This is why, for instance, WHD has emphasized job duties over job titles, and provided illustrative, rather than exclusive, lists of what types of job duties may or may not qualify for the administrative, executive and professional exemption. For example, WHD's regulation defining and delimiting the exemption for computer professionals specifically rejects the notion that job titles are dispositive—despite the specific mention of several job titles in the statute—because of the fact that "job titles vary widely and change quickly in the computer industry." Further,

the current computer professional exemption provides a primary duties test that, although narrowly tailored to exempt only those employees who are truly computer professionals and not employees whose jobs simply involve the use or application of computers or computer programs, is broad enough to adapt to the changes in a computer professional's duties as technology advances.

Although some of the Act's or related statutory or regulatory provisions may use language or examples involving traditional notions of manual labor, their concepts apply equally to modern service- or technology-related industries. For example, the fundamental premise of the FLSA is that an employee must be paid for all hours the employer suffers or permits her to work, which includes all the time during which she is required or allowed to perform work for an employer, regardless of where the work is done. If an employee is engaged to wait, as long as the time waiting is primarily for the benefit of the employer, the waiting counts as hours worked. This is true regardless of whether it is a firefighter waiting at the station for the alarm to signal a fire or a call center representative waiting at a computer for a call to come through.

Furthermore, the fact is that the FLSA as it exists today allows for a significant amount of flexibility for both employees and employers, yet this existing flexibility is not currently extended by employers to, or used by, the vast majority of workers. For example, nothing in the FLSA prevents an employee from telecommuting on a regular or ad hoc basis, or from having employees that only work remotely in a virtual office. Likewise shift flexibility, whether it involves a compressed workweek or a split shift, is compliant with the Act and allows employees the ability to spend more time with their families or take their children to doctors' appointments.

3. Can you tell us more about the types of individuals who are performing companionship services?

WHD Response: Of the 1.79 million home care workers, 1.59 million are employed by staffing agencies of which over 92% are women, nearly 30% are African American, 12% are Hispanic and close to 40% rely on public benefits such as Medicaid and food stamps.

4. Do you have policies on when live-in domestic workers have to be paid for overnight work?

WHD Response: Yes. Domestic service employees who reside in the household (live-in) where they are employed are entitled to minimum wage pay. However, section 13(b)(21) of the Fair Labor Standards Act provides an overtime pay exemption for live-in domestic service employees. In determining the number of hours worked by a live-in worker, the employee and the employer may exclude, by agreement, the amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits. If the sleeping time, meal periods, or other periods of free time are interrupted by a call to duty the interruption must be counted as hours worked. The regulations allow an employer and employee who have such an agreement to establish the employee's hours of work in lieu of maintaining precise records of the hours actually worked. The employer is to maintain a copy of the agreement and indicate that the employee's work time generally coincides with the agreement. If there is a significant deviation from the agreement, a separate record should be kept or a new agreement should be reached. See 29 CFR 552.102.

However, given the Department's concerns that such agreements may not reflect all hours worked by live-in domestic workers, the Department recently proposed to revise the regulations to no longer allow the employer of a live-in domestic employee to use the agreement as the basis to establish the actual hours of work in lieu of maintaining an actual record of such hours. Instead, under the proposal, the employer will be required to keep a record of the actual hours worked.

5. It has been asserted that since the Wage and Hour Division no longer issues opinion letters that the Department is no longer providing compliance assistance Additionally, can you provide information on what happens when an employer comes to the Wage and Hour Division for compliance assistance?

WHD Response: The Department of Labor is committed to providing the public—America's employers, workers, job seekers and retirees—with clear and easy-to-access information on how to comply with federal employment laws. WHD provides a wide variety of educational materials, such as formal interpretive bulletins, compliance guides, fact sheets, checklists, pamphlets, new and small business guides, self-audit packages, posters, bookmarks, videos, and an electronic interactive program through the WHD website.

Compliance assistance to employers is provided daily through a myriad of methods. Our offices are open to the public and employers and employees alike routinely

visit for assistance. We encourage employers to call WHD at our toll free number (1-8664USWAGE (1-866-487-9243)) for assistance with their WHD issues. In these individual calls, WHD staff respond to questions ranging from what is the minimum wage to more complex inquiries about how to pay overtime for a particular situation or industry. These calls are confidential and separate from investigations. Assistance is also provided to employers on how to obtain Wage Determination information or how to use the optional forms for the Family Medical Leave Act. Staff members not only mail publications to employers for future guidance but will guide them on how to access the information on the WHD website. Employers may also email the WHD directly (from our website) with their questions and receive a prompt response.

In order to provide meaningful and comprehensive guidance and compliance assistance to the broadest number of employers and employees, the Wage and Hour Administrator issues Administrator Interpretations when it is determined, in the Administrator's discretion, that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate. Administrator Interpretations set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision at issue. Guidance in this form is useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees. WHD believes that this is a much more efficient and productive use of resources than attempting to provide definitive opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the assumed facts may result in a different outcome.

Compliance assistance is a mandatory requirement in every investigation. Educating an employer on how to obtain, maintain, and sustain compliance is an essential part of our work with employers. Investigators will review sections of the law that are applicable to the employer's circumstances and provide them with the appropriate publications and other available resources prior to the conclusion of the investigation.

Lastly, in the past year, WHD conducted nearly 900 outreach seminars, conferences, speeches, symposiums, panel discussions, and presentations where the target audience is geared to employers, employer representatives, human resource professionals, and/or employer associations. These events allow WHD staff to educate employers and employees about the laws enforced by WHD and give attendees the opportunity to ask questions directly to WHD staff.

6. Unlike the practice under the previous administration, it is my understanding that the Wage and Hour Division no longer includes the results of employer initiated compliance reviews in the agency's annual enforcement numbers. Can you explain why not?

WHD Response: In fiscal years prior to 2010, the WHD's enforcement statistics were comprised of several types of investigative data, including data from employer initiated self-audits. Employer initiated self-audits were circumstances in which employers, who had determined on their own that their payroll practices were not in compliance with the law and that they owed back wages to their employees, would contact the WHD requesting that the WHD supervise the payment of the back wages they owed their employees so that upon the employees' acceptance of the back wages the employees would waive their private right to sue for liquidated damages in addition to the back wages. In these cases, the WHD generally would not conduct an independent investigation and would engage in a limited review of employers' back wage calculations. While WHD provides technical assistance to any employer that wishes to ensure that it is in compliance with WHD laws, WHD no longer supervises the payment of back wages solely based on an employer's self-identified violations and, as a result, no longer provides a de facto waiver of an employee's private right to sue his or her employer absent independent investigative activity by an agency official. Rather than committing investigator resources for an activity already undertaken by the employer, WHD expects the employer to compensate its employees for any wage shortages that it has identified.

The "total back wages collected" reported in fiscal years 2003 and 2007 included several large employer self-audit cases. In FY 2003, the "total back wages collected" included self-audits by Wachovia with $22 million in back wages, a self-audit by First Union with $8.5 million, and a self-audit by IBM at $7 million. These employer self-audits comprised $37.5 million of the FY 2003 total of $212,537,554.

The FY 2007 total for back wages collected included the Department's settlement with Wal-Mart in which more than 86,800 employees received more than $33 million in back wages. This case was also an employer self-audit case in which the employer approached the Department and asked for assistance in correcting several errors it had identified in an internal review of its method for calculating employees'

"regular rates" of pay, on which time and one half rates must be paid for overtime. Consequently, this employer self-audit comprised $33 million of the $220,613,703 million collected in FY 2007.

As of FY 2010 and, in particular, the FY 2011 total of $224,844,870 million in back wages collected, the largest amount collected in the WHD's history, the "total back wages collected" does not include back wages collected as a result of employer self-audits.

[Whereupon, at 11:43 a.m., the subcommittee was adjourned.]