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IMPROVING THE FEDERAL WAGE AND HOUR REGULATORY STRUCTURE

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

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IMPROVING THE FEDERAL WAGE AND HOUR REGULATORY STRUCTURE

Wednesday, July 23, 2014
House of Representatives,
Subcommittee on Workforce Protections,
Committee on Education and the Workforce,
Washington, D.C.

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, Rokita, Hudson, Courtney, Pocan, and Takano.

Staff present: Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Christie Herman, Professional Staff Member; Nancy Locke, Chief Clerk; James Martin, Professional Staff Member; Daniel Murner, Deputy Press Secretary; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Alexa Turner, Legislative Assistant; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Melissa Greenberg, Minority Labor Policy Associate; Eunice Ikene, Minority Labor Policy Associate; Brian Kennedy, Minority General Counsel; Leticia Mederos, Minority Director of Labor Policy; and Richard Miller, Minority Senior Labor Policy Advisor.

Chairman WALBERG. Good morning. A quorum being present, the Subcommittee on Workforce Protections will come to order.

Let me begin by welcoming our guests and thanking our witnesses for joining us today. At the very least, it is a way to get in out of the humidity outside. Coming from Michigan, I am not used to the humidity being inside along with air conditioning. But we adjust to it, and I am sure my colleagues at the dais here would recognize the same issue.

The issue today, we probably continue some heat to be generated; discussion of creative juices flowing. And that is a good thing to take place in this room. So thank you for joining us.

For more than 75 years, the *Fair Labor Standards Act* has provided America's workforce with crucial federal wage and hour protections. Every day, the vast majority of employers do their part—and I say that again—every day, the vast majority of employers do their part to ensure workers enjoy these vital protections. Unfortunately, that is becoming an increasingly difficult challenge.

The current rules and regulations surrounding the law are exceptionally complex and outdated. Too often, a maze of confusing regulatory requirements promotes the interests of trial lawyers rather than working families. A report issued by the nonpartisan Government Accountability Office reveals a broken regulatory structure that fosters unnecessary and costly litigation. According to the report, and I quote—"The number of FLSA lawsuits filed nationwide in federal district courts has increased substantially, with most of these increases occurring in the last decade."

The GAO report continues, "Since 1991, the number of FLSA lawsuits filed has increased by 514 percent, with a total of 8,148 FLSA lawsuits filed in fiscal year 2012." A more than 500 percent increase in litigation during the last two decades; clearly, something isn't right. You would think employers are engaged in some coordinated national conspiracy to deny workers their rights. The truth is, the vast majority of employers want to do the right thing and follow the law. But too often, they unknowingly step into a regulatory trap. Even the Department of Labor has run afoul of wage and hour regulations, and they are responsible for writing the rules and enforcing the law.

As litigation has increased, the number of guidance documents issued by the department has sharply declined. Between 2001 and 2009, the department released an average of 37 guidance documents each year, yet in the last three years the Obama administration has issued a total of seven; just seven during the last three years. As GAO notes, improving guidance could increase the efficiency and effectiveness of the department's efforts to help employers voluntarily comply with the law.

What is the harm in assisting employers in understanding their legal responsibilities? Why wouldn't we want to help employers understand their obligations so they can stop spending time inside a courtroom and, instead, invest their resources in growing a successful business and creating jobs?

We have heard a lot in recent months and years about executive authority. We are told this is supposed to be a so-called "year of action." Too often, these actions stretch the limits of the law and even our Constitution. Yet when it comes to using a pen and a phone to help employers understand a complex and confusing regulatory scheme, the Department of Labor can't be bothered.

Earlier this year, the President issued an executive memorandum directing the Secretary of Labor to revise federal wage and hour regulations. There is obviously some agreement the rules are outdated and need to be improved.

At that time, Chairman Kline and I said that if the President was beginning a sincere attempt to modernize current regulations, then the Committee would support such an effort. In fact, we hope we can be a partner in that effort, and today's hearing should certainly inform that work. We need responsible change that will bring these rules into the 21st century, while also safeguarding worker protections.

The Committee stands ready to assist, but more can be done to help employers comply with the law. The department has a job to do, and we hope this government accountability report will encour-

age the agency to get to work. Again, I want to thank our witnesses for joining us today.

With that, I will now yield to the senior Democrat of the Subcommittee, my friend and colleague, Representative Joe Courtney, for his opening remarks.

[The statement of Chairman Walberg follows:]

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

Good morning. Let me begin by welcoming our guests and thanking our witnesses for joining us.

For more than 75 years, the Fair Labor Standards Act has provided America's workforce with crucial federal wage and hour protections. Every day the vast majority of employers do their part to ensure workers enjoy these vital protections. Unfortunately, that is becoming an increasingly difficult challenge.

The current rules and regulations surrounding the law are exceptionally complex and outdated. Too often a maze of confusing regulatory requirements promotes the interests of trial lawyers, rather than working families. A report issued by the nonpartisan Government Accountability Office reveals a broken regulatory structure that fosters unnecessary and costly litigation.

According to the report, "The number of FLSA lawsuits filed nationwide in federal district courts has increased substantially, with most of this increase occurring in the last decade." The GAO report continues, "Since 1991, the number of FLSA lawsuits filed has increased by 514 percent, with a total of 8,148 FLSA lawsuits filed in fiscal year 2012." A more than 500 percent increase in litigation during the last two decades; clearly something isn't right.

You would think employers are engaged in some coordinated national conspiracy to deny workers their rights. The truth is the vast majority of employers want to do the right thing and follow the law, but too often they unknowingly step into a regulatory trap. Even the Department of Labor has run afoul of wage and hour regulations and they are responsible for writing the rules and enforcing the law.

As litigation has increased, the number of guidance documents issued by the department has sharply declined. Between 2001 and 2009, the department released an average of 37 guidance documents each year. Yet in the last three years, the Obama administration has issued a total of seven – just seven during the last three years.

As the GAO notes, improving guidance "could increase the efficiency and effectiveness of [the department's] efforts to help employers voluntarily comply with the law." What's the harm in assisting employers in understanding their legal responsibilities? Why wouldn't we want to help employers understand their obligations, so they can stop spending time inside a courtroom and instead invest their resources into growing a successful business and creating jobs?

We've heard a lot in recent months and years about executive authority. We are told this is supposed to be a so-called year of action. Too often these actions stretch the limits of the law and even our Constitution. Yet when it comes to using a pen and phone to help employers understand a complex and confusing regulatory scheme, the Department of Labor can't be bothered.

Earlier this year, the president issued an executive memorandum directing the secretary of labor to revise federal wage and hour regulations. There is obviously some agreement the rules are outdated and need to be improved. At that time, Chairman Kline and I said that if the president was beginning a sincere attempt to modernize current regulations, then the committee would support such an effort.

In fact, we hope we can be a partner in that effort and today's hearing should certainly inform that work. We need responsible change that will bring these rules into the 21st century, while also safeguarding worker protections. The committee stands ready to assist, but more can be done to help employers comply with the law. The department has a job to do and we hope this government accountability report will encourage the agency to get to work.

Again, I want to thank our witnesses for joining us. With that, I will now yield to the senior Democrat of the subcommittee, my colleague Representative Joe Courtney, for his opening remarks.

Mr. COURTNEY. Thank you, Chairman Walberg, and I want to thank you for calling today's hearing to examine the important

work of the Wage and Hour Division at the Department of Labor. I also want to thank the witnesses for their participation and testimony today, regarding the department's efforts to ensure workers are fairly compensated for their hard work.

The Wage and Hour Division at the Department of Labor plays a vital role in enforcing our nation's wage and hour laws. This division is responsible for enforcing the federal minimum wage, overtime pay, recordkeeping and child labor requirements of the *Fair Labor Standards Act* as well other important laws like the *Family and Medical Leave Act;* in essence, bedrock protections that have a direct impact on workers' quality of life and economic security.

Hardworking Americans who are cheated out of their wages need to be able to turn to the Department of Labor for help when their employers are refusing to give them their due. Wage theft is most common in low-wage industries and, as a result, disproportionately impacts the workers who are the least able to afford to take action on their own. For many of these low-wage workers, any diminishment of their take-home pay can make the difference between getting by and not being able to provide for their families. As a result, the department's actions on behalf of low-wage workers is critically important.

Since 2009, the department has recovered over $1 billion in wages to more than 1.2 million workers, including helping 108,000 low-wage workers recover nearly $83 million in back wages. This represents a 44 percent increase in the amount of back wages recovered, and a 40 percent increase in the number of low-wage workers being provided compensation. And just last month, the Department of Labor announced the result of a multiyear initiative resulting in the recovery of over $1 million in wages and damages for 1,518 restaurant workers in the Tampa area.

I understand that one focus of today's hearing will be a recent GAO report on the increase in the number of wage and hour lawsuits over the past 10 years. While there has been a dramatic increase over this period, the reasons for this increase are unclear. The department initiated suits comprise only a small fraction of the total FLSA lawsuits brought against employers, and the GAO study did not conclusively point to the cause for this increase. I also understand, though, that the GAO report focused on improving the department's approach to developing guidance through a more data-driven approach.

The department has agreed to this recommendation and is working on its implementation. And I want to emphasize this point at the outset. If you read the GAO report, like any other GAO report—whether it is on the House Armed Services Committee or any other committee—the department is asked to react to the GAO recommendations. And the reaction, which is in the report, says that the department agrees with the conclusions of the GAO report and is willing to work to address the issues that GAO has recognized.

I can say from personal experience in terms of GAO studies on the Navy, on the Air Force, that is not always the case. That there—in many instances, there is strong pushback by administrative agencies and departments by GAO reports.

But Secretary Perez in the Department of Labor has said, we agree. So, you know, I think it is important at the outset here to

make sure that we aren't drawing lines in the sand here between what GAO is recommending and the Department of Labor. And I would point out that this is not atypical. Since Secretary Perez has taken over, he agreed with this Committee's criticisms on the Office of Contract Compliance enforcement actions against hospitals; terminated the initiative that the department had been following for a number of years; withdrew an enforcement lawsuit in federal district court in Florida; and issued a five year moratorium, again based on the legitimate questions that this department—this Committee raised.

Secondly, in terms of the *Service Compliance Act*—which, again, was an issue that was raised in the Armed Services Committee—that DOL was forcing an unreasonable level of compensation for fringe benefits at contractor services at military bases around the country. The Navy appealed DOL's report, and they cut their recommendation to like a quarter of what was initially the case. This Secretary listens, and I really think it is important for people to understand.

And this Subcommittee has had direct experience. And frankly, I think the GAO report, which shows that DOL accepts the findings in the GAO report, and agrees to work with it, is just another indication of the Secretary's willingness to work with outside parties, members of Congress, you name it in terms of tying to show that this department is, in the give and take of an administrative agency, actually responsive.

Perhaps, I would suggest, a more fruitful use of today's hearing would be to examine proposals that would strengthen wages for hardworking Americans to assure that no one who is working full-time has to live in poverty. And that is the issue of the day out there for low-income Americans across the country. This administration has taken steps to raise the minimum wage for federal contract workers, supports the *Miller-Harkin Minimum Wage Act,* which has roughly 200 cosponsors in the House, expanded FLSA protections to home health care workers, taking them out of below minimum wage status to the protections of minimum wage, taken steps to ensure pay equity for women, and is in the process of updating their overtime regulations.

We should build on these efforts by passing H.R. 1010, the *Fair Minimum Wage Act.* Raising the minimum wage is not only good for millions of workers that would directly benefit, but also for our economy as a whole. And again, as a member of the House Agriculture Committee, we just went through this Farm Bill agony over the level of spending on food stamps in this country. You want to cut food stamps in this country? Raise the minimum wage. That will reduce the allotment that, again, low-income workers today have to use in food stamps to put food on the table for themselves and their kids. Again the CBO has verified this.

You want to cut the deficit in the agriculture account, in food stamps accounts, SNAP? Raise the minimum wage. You will reduce spending for SNAP overnight by doing that. And you won't do it by denying people access to critically needed nutrition. In fact, data from the Department of Labor shows that 13 states that have raised the minimum wage have higher job growth than those that do not. Including my own state of Connecticut, which recently

passed a minimum wage increase to $10.10. We just had our job numbers come out for the month of June. Again, thousands of new jobs added in the Connecticut economy after the minimum wage bill was passed by the state legislature under Governor Malloy's leadership.

The poster to my right shows the hundreds of thousands of constituents represented by members of this subcommittee who would benefit from this important legislation. In my district, a total of 42,000 workers would benefit, including 24,000 women. Again, luckily, Connecticut is ahead of the curve. So that is happening as we speak. Passing this law would make a real difference in the lives of many people who we represent. And as a result, it deserves to be debated and a hearing at least needs to be held on this subcommittee. And hopefully, at some point, voted on in this chamber before the end of the 113th Congress.

Thank you, Mr. Chairman, and thanks again to our witnesses for your participation.

[The statement of Mr. Courtney follows:]

Prepared Statement of Hon. Joe Courtney, Senior Democratic Member, Subcommittee on Workforce Protections

Good morning. I want to thank Chairman Walberg for calling today's hearing to examine the important work of the Wage and Hour Division at the Department of Labor.

I also want to thank the witnesses for their participation and testimony today regarding the Department's efforts to ensure workers are fairly compensated for their hard work.

The Wage and Hour Division at the Department of Labor plays a vital role in enforcing our nation's wage and hour laws. This division is responsible for enforcing the Federal minimum wage, overtime pay, recordkeeping, and child labor requirements of the Fair Labor Standards Act, as well as other important laws like the Family and Medical Leave Act – in essence, bedrock protections that have a direct impact on workers' quality of life and economic security.

Hard-working Americans who are cheated out of their wages need to be able to turn to the Department of Labor for help when their employers are refusing to give them their due.

Wage theft is most common in low-wage industries and as a result, disproportionately impacts the workers who are the least able to afford to take action on their own. For many of these low-wage workers, any diminishment of their take-home pay can make the difference between getting by and not being able to provide for their families. As a result, the Department's action on behalf of low-wage workers is particularly important.

Since 2009, the Department has recovered over $1 billion in wages to more than 1.2 million workers, including helping 108,000 low-wage workers recover nearly $83 million in back wages. This represents a 44 percent increase in the amount of back wages recovered and a 40 percent increase in the number of low-wage workers provided compensation. And just last month, the Department of Labor announced the results of a multi-year initiative resulting in the recovery of more than $1 million in wages and damages for 1,518 restaurant workers in the Tampa area.

I understand that one focus of today's hearing will be to a recent GAO report on the increase in the number of wage and hour lawsuits in the past ten years. While there has been a dramatic increase over this period, the reason for this increase is unclear. Department initiated suits comprise only a small fraction of total FLSA lawsuits brought against employers and the GAO study could not conclusively pinpoint the cause for this increase.

I also understand that the GAO report focused on improving the Department's approach to developing guidance through a more data driven approach. The Department has agreed with this recommendation and is working on its implementation.

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protections to home health care workers, taken steps to ensure pay equity for women and is in the process of updating their overtime regulations.

We should build on these efforts by passing H.R. 1010, the Fair Minimum Wage Act. Raising the minimum wage is not only good for the millions of workers that would directly benefit, but also for our economy as a whole.

In fact, data from the Department of Labor shows that the 13 states that have raised the minimum wage have higher job growth than those that do not, including my own state of Connecticut – which recently passed a minimum wage increase to $10.10.

The poster to my right shows the hundreds of thousands of constituents represented by members of this subcommittee who would benefit from this important legislation.

In my district, a total of 42,000 workers would benefit, including 24,000 women who disproportionately make up the low-wage workforce. 55% of minimum wage workers who would benefit from a $10.10 increase are women, and raising the minimum wage to $10.10 would also close roughly 5% of the gender pay gap.

Passing this law would make a real difference in the lives of many people who we represent, and as a result, it at least deserves to be debated and voted on by this chamber.

Thank you Mr. Chairman. And thanks again to our witnesses for your participation.

Chairman WALBERG. I thank the gentleman.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow such statements and other extraneous material referenced during the hearing to be submitted for official hearing record.

It is now my pleasure to introduce our panel of distinguished witnesses. First, with us today is Dr. Andrew Sherrill; he is the director of education, workforce and income security at the U.S. Government Accountability Office here in Washington, D.C. Dr. Sherrill's responsibilities with the agency include GAO's work on employment and training programs and worker protection issues. Welcome.

Ms. Nancy McKeague is senior vice president of employer and community strategies, and chief human resources officer with the Michigan Health and Hospital Association in Okemos, Michigan. Ms. McKeague will testify on behalf of the Society for Human Resource Management. It is a pleasure to have Nancy, you, in front of us. Long-time experience together watching you give leadership to a number of crucial organizations supplying jobs, opportunity in Michigan, both in the public and private sector.

Ms. Judith M. Conti, welcome. You are familiar with this subcommittee. Glad to have you back. She is the federal advocacy coordinator at the National Employment Law Project here in Washington, D.C., where she advocates on issues related to unemployment insurance, enforcement of workplace standards, and civil rights.

The Honorable Paul DeCamp is a shareholder with Jackson Lewis PC here in Washington, D.C., within the firm's wage and hour practice group. Prior to joining the firm in 2008, he served as administrator of the U.S. Department of Labor's Wage and Hour Division. Welcome.

Before I recognize each of you to provide your testimony, let me briefly explain our lighting system. It is simple. Think of your time at the wheel, coming to a stoplight, the same thing. Green, go, keep

proceeding, you have five minutes to give your testimony. We hope to keep as close to that as possible due to the number of witnesses here and the questions I am sure that will want to be asked. When you see the yellow, you have a minute remaining. When it turns red, wrap up as quickly as you can your thought, and then we will go on. And there will be plenty of opportunity for questions, I am sure. Members will be kept to that same policy as strictly as I can swing the gavel on that. But we want to give opportunity for good review of our discussion topics today.

And so having said that, let me recognize now, for five minutes of testimony, Dr. Sherrill.

STATEMENT OF DR. ANDREW SHERRILL, DIRECTOR OF EDUCATION, WORKFORCE, AND INCOME SECURITY, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, WASHINGTON, D.C.

Dr. SHERRILL. Chairman Walberg, Ranking Member Courtney, and members of the Subcommittee, I am pleased to be here today to discuss our work on the recent increase in the number of lawsuits filed by individuals or groups alleging violations of the *Fair Labor Standards Act.* GAO reviewed this increase and examined the factors that potentially affected the number of lawsuits filed. GAO also examined the Department of Labor's Wage and Hour Division's plan; how it plans its *Fair Labor Standards Act* enforcement and compliance assistance efforts.

Using data compiled by the Federal Judicial Center, the Research and Education Agency of the federal judicial system, we reported the number of lawsuits filed in district court over the past two decades that allege violations of the FLSA. To obtain more information about these lawsuits, we also reviewed a nationally representative sample of all FLSA-related lawsuits filed in fiscal year 2012. Over the past two decades, there has been a substantial increase in the number of lawsuits filed, with most of the increase occurring in the last 10 years.

In 1991, the total number of lawsuits filed was around 1,300. In 2012, that number had increased over 500 percent, to over 8,100. FLSA lawsuits can be filed by the Department of Labor on behalf of employees, by individuals, or by a group of individuals known as a "collective action." Lawsuits filed by a group of individuals, collective actions, must be certified by the court. And if a collective action is decertified, the members of the group may then file separate lawsuits as individuals. Fifty-eight percent of all FLSA lawsuits filed in fiscal year 2012 were filed by individuals and 40 percent were collective actions.

Large increases in FLSA were concentrated in three states: Florida, New York, and Alabama. In 2012, these three states accounted for 53 percent of all FLSA lawsuits. Since 2001, the number of lawsuits filed in both Florida and New York rose steadily. But in Alabama, the increases were concentrated in two years—2007 and 2012—and were generally thought to be related to the decertification of collective actions, which later resulted in many individual lawsuits being filed by individuals involved in those actions.

We also looked at the types of FLSA violations alleged in the lawsuits filed in 2012; 95 percent of them alleged violations of the overtime payment provision, and almost a third alleged violation of

the minimum wage provision. While it was not possible to determine the exact cause of the increase in the number of lawsuits, we interviewed a number of stakeholders to obtain their views, including federal judges, Wage and Hour Division officials, and plaintiff and defense attorneys who specialize in these cases. The most frequently cited factor for the increases was attorneys' increased willingness to take on such cases.

Financial incentives, combined with the fairly straightforward nature of many FLSA cases, may make attorneys receptive to taking these cases. In Florida, for example, where nearly 30 percent of all the FLSA lawsuits were filed in 2012, several stakeholders told us that plaintiffs' attorneys advertise for wage and hour cases via billboards, radio, foreign language press, and other methods. Stakeholders cited several other potential factors for the increase in lawsuits. Evolving case law: stakeholders cited the 1989 Supreme Court decision in the Hoffman case, which made it easier for plaintiffs' attorneys to identify potential plaintiffs and reduce the work needed for them to form collective actions.

Recent economic conditions: stakeholders said these may have led to reduced payment of the minimum wage or overtime, as required, or to an increased likelihood that workers would file lawsuits.

State wage and hour laws: while the federal statute of limitations for filing these claims is two years, or three years if the violation is willful, New York State law provides a six-year statute of limitations for filing wage and hour lawsuits, which may increase potential damages in such cases.

Ambiguity in applying laws and regulations: ambiguity, particularly the exemption for executive administrative and professional workers, the white collar workers, was cited as a factor by a number of stakeholders.

Department of Labor updated its regulations in 2004 to provide more guidance on this topic. But a few stakeholders told us there is still significant confusion among employers about which workers should be classified as exempt.

Finally, we reviewed the Wage and Hour Division's annual process for determining how to target its enforcement and compliance assistance resources. Using its recent enforcement data, the agency targets industries for enforcement that have a higher likelihood of FLSA violations. However, in developing its guidance on the FLSA, Wage and Hour Division does not use a systematic approach that includes identifying data on the subjects or the number of requests for assistance it receives from employers and workers.

In addition, Wage and Hour Division does not have a routine database process for assessing the adequacy of its guidance. Because of these issues, we recommended that Wage and Hour Division develop a systematic approach for identifying areas of confusion about the requirements that contribute to possible violations, and improving the guidance it provides to employers and workers. Wage and Hour Division agreed with our recommendation, and stated that it is in the process of developing systems to further analyze trends in communications received from stakeholders, such as workers and employers.

That concludes my statement. I would be happy to answer any questions you may have.

[The statement of Dr. Sherrill follows:]

United States Government Accountability Office

Testimony

Before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives

For Release on Delivery
Expected at 10 a.m. ET
Wednesday July 23, 2014

FAIR LABOR STANDARDS ACT

Department of Labor Needs a More Systematic Approach to Developing Its Guidance

Statement of Andrew Sherrill, Director, Education, Workforce, and Income Security

GAO-14-629T

GAO Highlights

Highlights of GAO-14-629T, a testimony before the Subcommittee on Workforce Protections, Committee on Education and the Workforce, House of Representatives

July 2014

FAIR LABOR STANDARDS ACT

Department of Labor Needs a More Systematic Approach to Developing Its Guidance

Why GAO Did This Study

The FLSA sets federal minimum wage and overtime pay requirements applicable to millions of U.S. workers and allows workers to sue employers for violating these requirements. Questions have been raised about the effect of FLSA lawsuits on employers and workers and about WHD's enforcement and compliance assistance efforts as the number of lawsuits has increased.

This statement examines what is known about the number of FLSA lawsuits filed and how WHD plans its FLSA enforcement and compliance assistance efforts. It is based on the results of a previous GAO report issued in December 2013. In conducting the earlier work, GAO analyzed federal district court data from fiscal years 1991 to 2012 and reviewed selected documents from a representative sample of lawsuits filed in federal district court in fiscal year 2012. GAO also reviewed DOL's planning and performance documents, interviewed DOL officials, as well as stakeholders, including federal judges, plaintiff and defense attorneys who specialize in FLSA cases, officials from organizations representing workers and employers, and academics.

What GAO Recommends

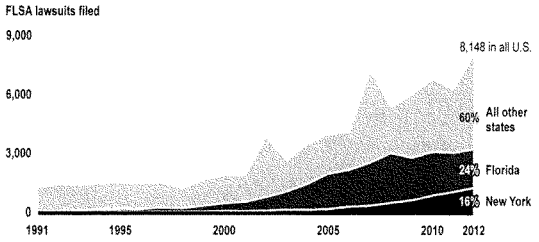
In its December 2013 report, GAO recommended that the Secretary of Labor direct the WHD Administrator to develop a systematic approach for identifying and considering areas of confusion that contribute to possible FLSA violations to help inform the development and assessment of its guidance. WHD agreed with the recommendation and described its plans to address it.

View GAO-14-629T. For more information, contact Andrew Sherrill at (202) 512-7215 or sherrilla@gao.gov.

What GAO Found

Substantial increases occurred over the last decade in the number of civil lawsuits filed in federal district court alleging violations of the Fair Labor Standards Act of 1938, as amended (FLSA). Federal courts in most states experienced increases in the number of FLSA lawsuits filed, but large increases were concentrated in a few states, including Florida and New York. Many factors may contribute to this general trend; however, the factor cited most often by stakeholders GAO interviewed—including attorneys and judges—was attorneys' increased willingness to take on such cases. In fiscal year 2012, an estimated 97 percent of FLSA lawsuits were filed against private sector employers, often from the accommodations and food services industry, and 95 percent of the lawsuits filed included allegations of overtime violations.

FLSA Lawsuits Filed in Federal District Court in Florida, New York, and Other States, Fiscal Years 1991-2012



Source: GAO analysis of Federal Judicial Center data.

The Department of Labor's Wage and Hour Division (WHD) has an annual process for planning how it will target its enforcement and compliance assistance resources to help prevent and identify potential FLSA violations. In planning its enforcement efforts, WHD targets industries that, according to its recent enforcement data, have a higher likelihood of FLSA violations. WHD, however, does not have a systematic approach that includes analyzing relevant data, such as the number of requests for assistance it receives from employers and workers, to develop its guidance, as recommended by best practices previously identified by GAO. In addition, WHD does not have a routine, data-based process for assessing the adequacy of its guidance. For example, WHD does not analyze trends in the types of FLSA-related questions it receives from employers or workers. According to plaintiff and defense attorneys GAO interviewed, more FLSA guidance from WHD would be helpful, such as guidance on how to determine whether certain types of workers are exempt from the overtime pay and other requirements of the FLSA.

Chairman Walberg, Ranking Member Courtney, and Members of the Subcommittee:

I am pleased to be here today to discuss our work on the recent increase in the number of lawsuits filed by individuals or groups alleging violations of the Fair Labor Standards Act (FLSA).[1] The FLSA sets minimum wage and overtime pay standards applicable to most U.S. workers. The Department of Labor's (DOL) Wage and Hour Division (WHD) is responsible for ensuring that employers comply with the FLSA, and workers may also file private lawsuits to recover wages they claim they are owed because of a violation of the act, such as an employer's failure to pay overtime compensation to workers who are entitled to it. In recent years, the number of FLSA lawsuits has increased and questions have been raised about the effect of FLSA litigation on employers and workers and about WHD's enforcement and compliance assistance efforts.

WHD enforces the FLSA by conducting investigations, assessing penalties, supervising payment of back wages, and bringing suit in court on behalf of employees. In addition to responding to complaints of alleged FLSA violations it receives from workers or their representatives, WHD also initiates enforcement actions in an effort to target employers likely to violate the FLSA and where workers may be particularly vulnerable. However, WHD cannot investigate all of the thousands of complaints it receives each year because of its limited capacity. Therefore, the agency informs workers whose complaints of FLSA violations are not investigated or otherwise resolved by WHD of their right to file a lawsuit. Workers filing an FLSA lawsuit may file in one of the 94 federal district courts, which are divided into 12 regional circuits across the country.[2]

WHD encourages compliance with the FLSA by providing training for employers and workers and creating online tools and fact sheets that explain the requirements of the law and related regulations, among other efforts. The agency refers to these efforts collectively as compliance assistance. One form of FLSA compliance assistance WHD provides is

[1] Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-19).

[2] Workers may also file FLSA lawsuits in state court. In addition, state laws may establish higher minimum wage, lower maximum hours, or higher child labor standards than those established by the FLSA. Lawsuits filed in federal court with FLSA claims may include related state law claims.

written interpretive guidance that attempts to clarify the agency's interpretation of a statutory or regulatory provision. WHD disseminates this guidance to those who request it—such as employers and workers—and posts it on the WHD website for public use. WHD's interpretive guidance includes opinion letters which apply to a specific situation. In 2010, WHD stopped issuing opinion letters and indicated that it would instead provide administrator interpretations, which are more broadly applicable.

My statement today examines what is known about the number of FLSA lawsuits filed and how WHD plans its enforcement and compliance assistance efforts.[3] The statement is based on a report we issued in December 2013.[4] To conduct our prior work, we analyzed federal district court data compiled by the Federal Judicial Center—the research and education agency of the federal judicial system— from fiscal years 1991 to 2012. To assess the reliability of the data we obtained from the Federal Judicial Center, we reviewed documentation related to the collection and processing of the data, interviewed officials at the Administrative Office of the U.S. Courts and the Federal Judicial Center, and performed electronic testing to identify any missing data, outliers, and obvious errors. We determined that the data included in our report were sufficiently reliable for our purposes. In addition, we reviewed selected documents from a nationally representative sample of 97 FLSA lawsuits filed in federal district court in fiscal year 2012.[5] All estimates from our sample had a 95 percent confidence interval of within plus or minus 10 percentage points. We also reviewed DOL's planning and performance documents and interviewed DOL officials, as well as stakeholders, including federal judges, plaintiff and defense attorneys who specialize in FLSA cases, officials from organizations representing workers and employers, and academics about FLSA litigation trends and WHD's enforcement and

[3] For the purposes of this testimony, unless otherwise specified, the term "FLSA lawsuits" refers to lawsuits filed in federal district court under the FLSA.

[4] GAO, *Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance*, GAO-14-69 (Washington, D.C.: Dec. 18, 2013).

[5] For this analysis, we reviewed only the initial complaint from the lawsuits in our sample. A "complaint" is the legal term for the document the plaintiff files with the court to initiate a civil lawsuit. Our review did not include any subsequent documents filed, and therefore the information we collected was limited to the information provided by the plaintiff at the time the lawsuit was filed.

compliance assistance efforts. Further details on our scope and methodology are available in the previously published report.

We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

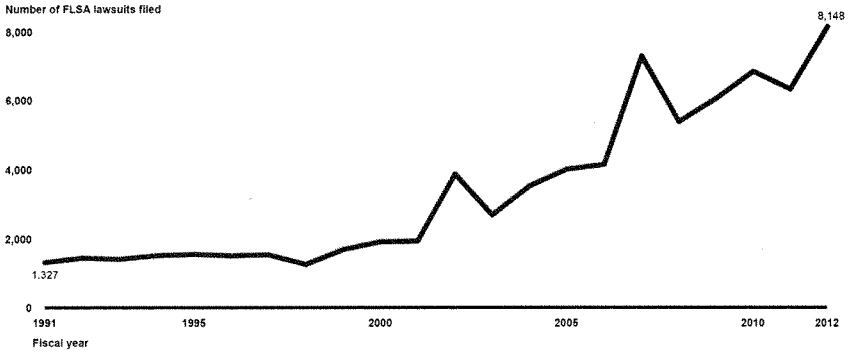
FLSA Lawsuits Have Increased Substantially over the Last Decade and Most FLSA Lawsuits Filed in Fiscal Year 2012 Alleged Overtime Pay Violations

FLSA Lawsuits Increased Substantially Over the Last Decade, and Most Were Filed in a Few States

Over the past two decades—from 1991 through 2012—there was a substantial increase in the number of FLSA lawsuits filed, with most of the increase occurring in the period from fiscal year 2001 through 2012.[6] As shown in figure 1, in 1991, 1,327 lawsuits were filed; in 2012, that number had increased over 500 percent to 8,148.

[6] The fact that a lawsuit was filed does not provide any information about how it was ultimately resolved. A case may be resolved in a variety of ways, such as settlement out of court, dismissal, or a judgment in favor of the plaintiff or defendant.

Figure 1: Number of FLSA Lawsuits Filed in Federal District Court, Fiscal Years 1991-2012



Source: GAO analysis of Federal Judicial Center data. | GAO-14-629T

Note: An FLSA lawsuit may be filed on behalf of an individual worker or multiple workers. Data on the number of workers involved in each lawsuit were not readily available.

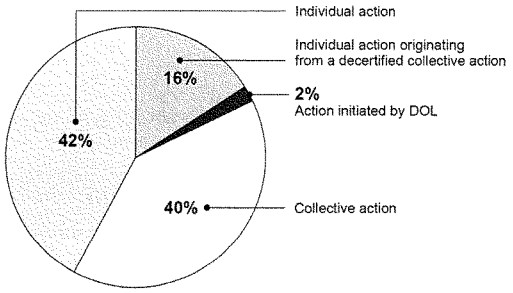
FLSA lawsuits can be filed by DOL on behalf of employees or by private individuals. Private FLSA lawsuits can either be filed by individuals or on behalf of a group of individuals in a type of lawsuit known as a "collective action".[7] The court will generally certify whether a lawsuit meets the requirements to proceed as a collective action. The court may deny certification to a proposed collective action or decertify an existing collective action if the court determines that the plaintiffs are not "similarly situated" with respect to the factual and legal issues to be decided. In

[7] The FLSA provides that an action may be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Collective actions under the FLSA and some other laws operate on an "opt-in" basis, meaning that workers must affirmatively consent in writing to participate as plaintiffs. In contrast, litigation under other laws may generally be brought as a class action. Class actions operate on an "opt-out" basis, whereby anyone who is part of a court-certified class is included as a plaintiff unless they actively choose not to be. Unlike the members of a class action, a potential plaintiff who does not "opt-in" to an FLSA collective action is not bound by the court's judgment in the case. In some cases, a federal court may hear both a collective action under the FLSA and a class action under state law.

such cases, the court may permit the members to individually file private FLSA lawsuits.

Collective actions can serve to reduce the burden on courts and protect plaintiffs by reducing costs for individuals and incentivizing attorneys to represent workers in pursuit of claims under the law.[8] They may also protect employers from facing the burden of many individual lawsuits; however, they can also be costly to employers because they may result in large amounts of damages. For fiscal year 2012, we found that an estimated 58 percent of the FLSA lawsuits filed in federal district court were filed individually, and 40 percent were filed as collective actions. An estimated 16 percent of the FLSA lawsuits filed in fiscal year 2012 (about a quarter of all individually-filed lawsuits), however, were originally part of a collective action that was decertified (see fig. 2).

Figure 2: FLSA Lawsuits Filed in Federal District Court in Fiscal Year 2012, by Type



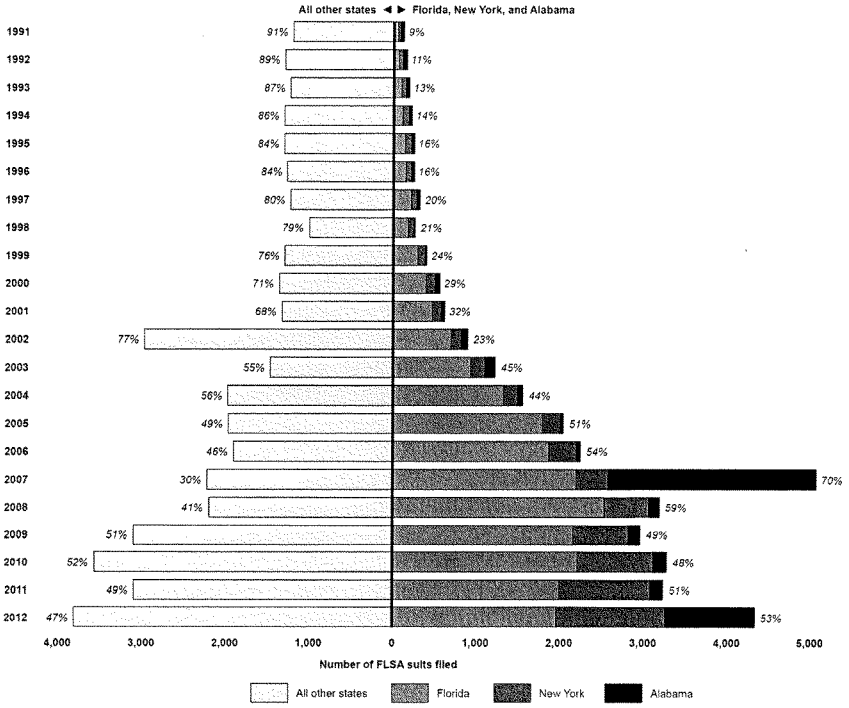
Source: GAO analysis of complaints from FLSA lawsuits obtained through the federal judiciary's Public Access to Court Electronic Records (PACER) system. | GAO-14-629T

[8] According to the Supreme Court in *Hoffmann-La Roche, Inc. v. Sperling*, a collective action allows plaintiffs "the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same ... activity." 493 U.S. 165, 170 (1989).

Federal courts in most states experienced increases in the number of FLSA lawsuits filed between 1991 and 2012, but large increases were concentrated in a few states, including Florida, New York, and Alabama. Of all FLSA lawsuits filed since 2001, more than half were filed in these three states, and in 2012, about 43 percent of all FLSA lawsuits were filed in Florida (33 percent) or New York (10 percent). In both Florida and New York, growth in the number of FLSA lawsuits filed was generally steady, while changes in Alabama involved sharp increases in fiscal years 2007 and 2012 with far fewer lawsuits filed in other years (see fig. 3). Each spike in Alabama coincided with the decertification of at least one large collective action, which likely resulted in multiple individual lawsuits. For example, in fiscal year 2007, 2,496 FLSA lawsuits (about one-third of all FLSA lawsuits) were filed in Alabama, up from 48 FLSA lawsuits filed in Alabama in fiscal year 2006. In August 2006, a federal district court in Alabama decertified a collective action filed by managers of Dollar General stores. In its motion to decertify, the defendant estimated the collective to contain approximately 2,470 plaintiffs.[9]

[9] Order on Motion to Decertify, Brown v. Dolgencorp, Inc., No. 02-673 (N.D. Ala. Aug. 7, 2006). Several stakeholders we interviewed cited decertifications of collective actions as a possible cause of spikes in the number of FLSA lawsuits filed.

Figure 3: Percentage of FLSA Lawsuits Filed in Federal District Court in Florida, New York, and Alabama Compared to FLSA Lawsuits Filed in All Other States, Fiscal Years 1991-2012



Source: GAO analysis of Federal Judicial Center data. | GAO-14-629T

Note: The large increase in FLSA lawsuits in all other states in fiscal year 2002 can be attributed to a spike in FLSA lawsuits filed in Mississippi in that year, coincident with an effort by a group of attorneys to bring FLSA lawsuits on behalf of certain school workers in Mississippi at that time.

FLSA Lawsuits Filed in 2012 Were Concentrated in a Few Industries and Most Alleged Overtime Violations

In fiscal year 2012, an estimated 97 percent of FLSA lawsuits were filed against private sector employers, and an estimated 57 percent of FLSA lawsuits were filed against employers in four industry areas: accommodations and food services; manufacturing; construction; and "other services", which includes services such as laundry services, domestic work, and nail salons.[10] Almost one-quarter of all FLSA lawsuits filed in fiscal year 2012 (an estimated 23 percent) were filed by workers in the accommodations and food service industry, which includes hotels, restaurants, and bars. At the same time, almost 20 percent of FLSA lawsuits filed in fiscal year 2012 were filed by workers in the manufacturing industry. In our sample, most of the lawsuits involving the manufacturing industry were filed by workers in the automobile manufacturing industry in Alabama, and most were individual lawsuits filed by workers who were originally part of one of two collective actions that had been decertified.[11]

FLSA lawsuits filed in fiscal year 2012 included a variety of different types of alleged FLSA violations and many included allegations of more than one type of violation. An estimated 95 percent of the FLSA lawsuits filed in fiscal year 2012 alleged violations of the FLSA's overtime provision, which requires certain types of workers to be paid at one and a half times their regular rate for any hours worked over 40 during a workweek.[12] Almost one-third of the lawsuits contained allegations that the worker or workers were not paid the federal minimum wage.[13] We also identified more specific allegations about how workers claimed their employers

[10] We used the North American Industry Classification System (NAICS) when determining the industry of workers filing lawsuits. For 14 percent of the FLSA lawsuits in our sample, we were unable to identify the industry in which the workers were employed because information about the industry was not included in the complaint we reviewed from the lawsuit.

[11] Our sample included individual lawsuits originating from one of two collective actions initially filed in Alabama against an automobile manufacturer in 2008. In fiscal year 2012, these collective actions were decertified and a number of individual lawsuits were subsequently filed. One of these collective actions also named two staffing agencies as co-defendants.

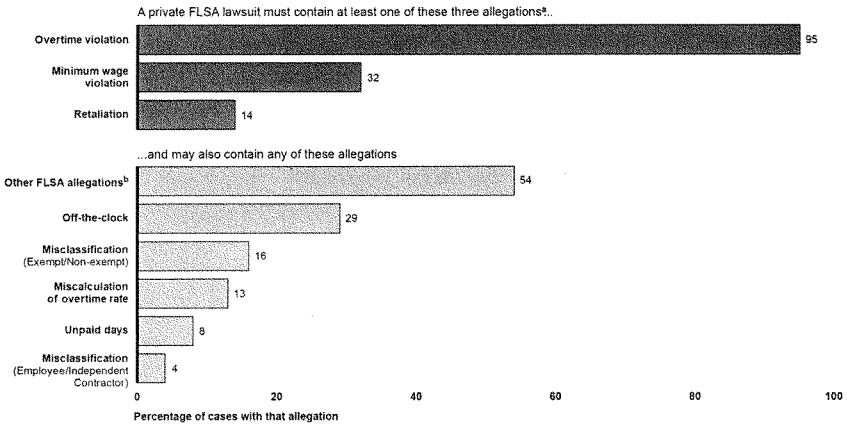
[12] See 29 U.S.C. § 207. The FLSA exempts certain types of workers from these requirements, including outside salespersons; workers in bona fide executive, administrative, or professional positions; and workers in certain computer-related occupations. 29 U.S.C. § 213(a)(1) and (17).

[13] See 29 U.S.C. § 206.

violated the FLSA. For example, nearly 30 percent of the lawsuits contained allegations that workers were required to work "off-the-clock" so that they would not need to be paid for that time.[14] In addition, the majority of lawsuits contained other FLSA allegations, such as that the employer failed to keep proper records of hours worked by the employees, failed to post or provide information about the FLSA, as required, or violated requirements pertaining to tipped workers such as restaurant wait staff (see fig. 4).

[14] For the purposes of our review, we defined an "off-the-clock" allegation as a claim that an employer did not pay workers for all of the hours they worked within a day. Examples include claims that workers were not credited or paid for time worked outside their scheduled work hours, such as the hours when they were donning protective gear or booting up their computers before starting work. Requiring an employee to work off-the-clock can result in both overtime and minimum wage violations. An overtime violation could occur if the hours worked off-the-clock result in more than 40 hours worked during the workweek. A minimum wage violation could occur if a worker's wage is at or close to the minimum wage, and the extra hours worked without pay result in his or her average hourly wage falling below the minimum wage.

Figure 4: Estimated Percentage of FLSA Lawsuits Filed in Federal District Court in Fiscal Year 2012, by Type of Allegation



Source: GAO analysis of complaints from FLSA lawsuits obtained through the federal judiciary's Public Access to Court Electronic Records (PACER) system. | GAO-14-629T

Note: Percentages do not add to 100 because FLSA lawsuits may contain multiple allegations. Any allegations not specifically mentioned in the lawsuit complaint were not counted. All estimates have a 95 percent confidence interval of within plus or minus 10 percentage points.

[a] This figure also includes lawsuits filed by DOL. An FLSA lawsuit filed by DOL may include certain other allegations, such as those related to child labor violations; however, the DOL-initiated lawsuits in our sample did not include such additional allegations.

[b] Other FLSA allegations include recordkeeping violations, failure to post FLSA-related information as required, and violations related to tipped workers, among others.

Stakeholders Cited Several Reasons for the Rise in FLSA Litigation

While it was not possible to determine the exact cause of the increase in the number of FLSA lawsuits filed in recent years, stakeholders we interviewed cited several potential contributing factors:

- **Increased awareness and activity by plaintiffs' attorneys.** Stakeholders we interviewed—including federal judges, officials with WHD, and attorneys—most frequently cited increased awareness about FLSA cases and activity on the part of plaintiffs' attorneys as a significant contributing factor. Many stakeholders, including two plaintiffs' attorneys, told us that financial incentives, combined with the

fairly straightforward nature of many FLSA cases, made attorneys receptive to taking these cases.[15] In Florida, for example, where nearly 30 percent of all FLSA lawsuits were filed from 1991 to 2012, several stakeholders told us that plaintiffs' attorneys advertise for wage and hour cases via billboards, radio, foreign language press, and other methods.

- **Evolving case law**. Several stakeholders we interviewed told us that evolving case law may have contributed to the increased awareness and activity on the part of plaintiffs' attorneys. For example, they said the 1989 Supreme Court decision Hoffmann–La Roche, Inc. v. Sperling made it easier for plaintiffs' attorneys to identify potential plaintiffs and reduced the work necessary to form collectives. Historically, according to several stakeholders, the requirement that plaintiffs must "opt in" to a collective action had created some challenges to forming collectives because the plaintiffs' attorneys had to identify potential plaintiffs and contact them to get them to join the collective. In this case, the Supreme Court held that federal courts have discretion to facilitate notice to potential plaintiffs of ongoing collective actions.[16]
- **Economic conditions.** According to some stakeholders we interviewed, economic conditions, such as the recent recession, may have played a role in the increase in FLSA litigation. Workers who have been laid off face less risk when filing FLSA lawsuits against former employers than workers who are still employed and may fear retaliation as a result of filing lawsuits.[17] In addition, some stakeholders said that, during difficult economic times, employers may be more likely to violate FLSA requirements in an effort to reduce costs, possibly resulting in more FLSA litigation.
- **State wage and hour laws**. Many stakeholders also told us that the prevalence of FLSA litigation by state is influenced by the variety of state wage and hour laws. For example, while the federal statute of

[15] The FLSA requires the court to award a reasonable attorney's fee to a prevailing plaintiff, to be paid by the defendant. 29 U.S.C. § 216(b). Several stakeholders said plaintiffs' attorneys in FLSA cases typically work on a contingent basis, meaning that, if the case settles, they receive a percentage of the settlement as a fee. However, if the plaintiff does not receive a settlement or win the case, the attorney is not paid for his or her services.

[16] Hoffmann–La Roche, Inc. v. Sperling, 493 U.S. 165 (1989).

[17] An estimated 14 percent of FLSA lawsuits filed in federal district court in fiscal year 2012 included an allegation of retaliation.

limitations for filing an FLSA claim is 2 years (3 years if the violation is "willful"), New York state law provides a 6-year statute of limitations for filing state wage and hour lawsuits. A longer statute of limitations may increase potential financial damages in such cases because more pay periods are involved and because more workers may be involved. Adding a New York state wage and hour claim to an FLSA lawsuit in federal court could expand the potential damages, which, according to several stakeholders, may influence decisions about where and whether to file a lawsuit. In addition, according to multiple stakeholders we interviewed, because Florida lacks a state overtime law, those who wish to file a lawsuit seeking overtime compensation generally must do so under the FLSA.

- **Ambiguity in applying the law and regulations.** Ambiguity in applying the FLSA statute or regulations—particularly the exemption for executive, administrative, and professional workers—was cited as a factor by a number of stakeholders. In 2004, DOL issued a final rule updating and revising its regulations in an attempt to clarify this exemption and provided guidance about the changes, but a few stakeholders told us there is still significant confusion among employers about which workers should be classified as exempt under these categories.[18]
- **Industry trends**. As mentioned previously, about one-quarter of FLSA lawsuits filed in fiscal year 2012 were filed by workers in the accommodations and food service industry. Nationally, service jobs, including those in the leisure and hospitality industry, increased from 2000 to 2010, while most other industries lost jobs during that period.[19] Federal judges in New York and Florida attributed some of the concentration of such litigation in their districts to the large number of restaurants and other service industry jobs in which wage and hour violations are more common than in some other industries. An academic who focuses on labor and employment relations told us that changes in the management structure in the retail and restaurant industry may have contributed to the rise in FLSA lawsuits. For example, frontline managers who were once exempt have become nonexempt as their nonmanagerial duties have increased as a portion of their overall duties.

[18] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541).

[19] Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, volume 135, number 1 (Washington, D.C.: January 2012), p. 66.

WHD Uses a Data-based Approach to Target Its FLSA Enforcement Efforts but Does Not Analyze Data on Requests for Assistance to Improve Its Guidance

We also reviewed DOL's annual process for determining how to target its enforcement and compliance assistance resources. The agency targets industries for enforcement that, according to its recent enforcement data, have a higher likelihood of FLSA violations, along with other factors. In addition, according to WHD internal guidance, the agency's annual enforcement plans should contain strategies to engage related stakeholders in preventing such violations. For example, if a WHD office plans to investigate restaurants to identify potential violations of the FLSA, it should also develop strategies to engage restaurant trade associations about FLSA-related issues so that these stakeholders can help bring about compliance in the industry.

However, DOL does not compile and analyze relevant data, such as information on the subjects or the number of requests for assistance it receives from employers and workers, to help determine what additional or revised guidance employers may need to help them comply with the FLSA.[20] In developing its guidance on the FLSA, WHD does not use a systematic approach that includes analyzing this type of data. In addition, WHD does not have a routine, data-based process for assessing the adequacy of its guidance. For example, WHD does not analyze trends in the types of FLSA-related questions it receives. This type of information could be used to develop new guidance or improve the guidance WHD provides to employers and workers on the requirements of the FLSA.

Because of these issues, we recommended that WHD develop a systematic approach for identifying areas of confusion about the requirements of the FLSA that contribute to possible violations and improving the guidance it provides to employers and workers in those areas. This approach could include compiling and analyzing data on requests for guidance on issues related to the FLSA, and gathering and using input from FLSA stakeholders or other users of existing guidance through an advisory panel or other means.

[20] According to federal standards for internal control, program managers need operational data to determine whether they are meeting their agencies' strategic and annual performance plans as well as their goals for effective and efficient use of resources. See GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999). In documenting best practices about planning and performance management, we have suggested that agencies involve regulated entities in the prevention aspect of performance. See GAO, *Managing for Results: Strengthening Regulatory Agencies' Performance Management Practices*, GAO/GGD-00-10 (Washington, D.C.: Oct. 28, 1999).

While improved DOL guidance on the FLSA might not affect the number of lawsuits filed, it could increase the efficiency and effectiveness of its efforts to help employers voluntarily comply with the FLSA. A clearer picture of the needs of employers and workers would allow WHD to more efficiently design and target its compliance assistance efforts, which may, in turn, result in fewer FLSA violations.

WHD agreed with our recommendation that the agency develop a systematic approach for identifying and considering areas of confusion that contribute to possible FLSA violations to help inform the development and assessment of its guidance. WHD stated that it is in the process of developing systems to further analyze trends in communications received from stakeholders such as workers and employers and will include findings from this analysis as part of its process for developing new or revised guidance.

In closing, while there has been a significant increase in FLSA lawsuits over the last decade, it is difficult to determine the reasons for the increase. It could suggest that FLSA violations have become more prevalent, that FLSA violations have been reported and pursued more frequently than before, or a combination of the two. It is also difficult to determine the effect that the increase in FLSA lawsuits has had on employers and their ability to hire workers. However, the ability of workers to bring such suits is an integral part of FLSA enforcement because of the limits on DOL's capacity to ensure that all employers are in compliance with the FLSA.

Chairman Walberg, Ranking Member Courtney, and members of the Committee, this completes my prepared statement. I would be happy to respond to any questions you may have.

GAO Contact and Staff Acknowledgments

For further information regarding this statement, please contact Andrew Sherrill at (202) 512-7215 or sherrilla@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony include Betty Ward-Zukerman (Assistant Director), Catherine Roark (Analyst in Charge), David Barish, James Bennett, Sarah Cornetto, Joel Green, Kathy Leslie, Ying Long, Sheila McCoy, Jean McSween, and Amber Yancey-Carroll.

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Chairman WALBERG. Thank you.

I recognize Ms. McKeague now for your five minutes.

STATEMENT OF MS. NANCY MCKEAGUE, SENIOR VICE PRESIDENT OF EMPLOYER AND COMMUNITY STRATEGIES, AND CHIEF HUMAN RESOURCES OFFICER, MICHIGAN HEALTH AND HOSPITAL ASSOCIATION, EAST LANSING, MICHIGAN, TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Ms. MCKEAGUE. Thank you, Chairman Walberg, Ranking Member Courtney and distinguished members of the Subcommittee. My name is Nancy McKeague, and I am the senior vice president of employer and community strategies and the chief human resources officer for the Michigan Health and Hospital Association, also known as the MHA. And I am appearing before you today on behalf of the Society for Human Resource Management.

Thank you for the opportunity to testify today on how to improve the federal wage and hour regulatory structure. Mr. Chairman, as you stated, employers of all sizes diligently work to classify employees correctly and remain in compliance with the *Fair Labor Standards Act.* However, classification decisions for positions are particularly challenging, as they are based on both objective and subjective criteria. Therefore, on occasion an employer acting in good faith could mistakenly classify employees as exempt who, in reality, should be non-exempt or vice versa.

Allow me to tell you a little bit about the MHA. We are a non-profit association advocating for hospitals and the patients they serve. We are an employer of choice, having received several workplace awards, referenced in my written statement. Yet even some of the best employers face practical challenges with the FLSA.

First, let me suggest that additional guidance will certainly be helpful for H.R. professionals, given the practical challenges most employers face with FLSA compliance.

Complying with the statute can create high legal costs for employers, which is particularly difficult for an organization like the MHA on a tight budget. Unfortunately, increased litigation related to alleged FLSA violations leads to less funding for a non-profit's core mission; whether that is providing patient treatment, caring for children, or conducting research. Non-profits like MHA must make challenging employee classification determinations because employees are often performing a mix of duties which includes both exempt and non-exempt functions.

For example, we sometimes find one of our employees will fit all of the executive employee exemptions under the FLSA, with the exception of supervising two or more employees. Take the instance of the MHA Foundation. Our executive director there supervises only one employee, but she otherwise fits all of the tests. So determining her classification was challenging. In the end, we determined that she should be classified as exempt because of her autonomy, her experience, and our confidence in her personal judgment.

Given this ambiguity, the stakes in improperly classifying employees are high. Planning for an increase in litigation can be particularly difficult for the non-profit sector and small employers. When the 2004 changes to the FLSA overtime regulations were en-

acted, the MHA had to allocate additional funding to retain counsel in order to assure our practices were compliant. In the end, a non-profit hospital's decision to direct limited funds to defending against lawsuits means less money for patient care and treatment. As an employer in the health care sector, our member hospitals are working 24 hours a day, seven days a week providing critical treatment and care to patients.

Because of the nature of our work, we must have the ability to respond as quickly as possible and utilize flexible hours, especially for our clinicians. The FLSA makes this difficult for certain employees. While non-exempt employees can receive time and a half pay, they cannot be afforded the same workplace flexibility benefits as an exempt employee.

The FLSA further impedes workplace flexibility by prohibiting private sector employers from offering non-exempt employees the option of paid time off rather than overtime pay for hours worked over 40 hours per week, even though all public sector employees are offered this type of flexibility, commonly referred to as "comp time."

Mr. Chairman, today's examination of the FLSA is particularly timely, given President Obama's recent directive to modernize the overtime regulations. While SHRM appreciates the President's interest in clarifying the regulations—and, parenthetically, we have been pleased by Secretary Perez's responsiveness—we remain concerned that revisions could significantly impact employers and employees. Employers and employees are just now finally understanding the full impact of the 2004 overtime changes, so any changes to the regulations should be carefully constructed to prevent a new wave of litigation and additional confusion. The current regulations may not be perfect, but they are the regulations we are accustomed to as a profession.

In closing, SHRM and its members are committed to working with this Subcommittee and other members of Congress to address the FLSA in a manner that balances the needs of both employees and employers, and does not produce requirements that could limit workplace flexibility.

Mr. Chairman, thank you again for allowing me to share SHRM's views on the FLSA, and I welcome your questions.

[The statement of Ms. McKeague follows:]

STATEMENT OF NANCY MCKEAGUE, SPHR

SENIOR VICE PRESIDENT, EMPLOYER AND COMMUNITY STRATEGIES
& CHIEF HUMAN RESOURCES OFFICER, MICHIGAN HEALTH &
HOSPITAL ASSOCIATION

ON BEHALF OF THE
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SUBMITTED TO
U.S. HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING ON
"IMPROVING THE FEDERAL WAGE AND HOUR REGULATORY
STRUCTURE"

JULY 23, 2014

Introduction

Chairman Walberg, Ranking Member Courtney and distinguished members of the Subcommittee, my name is Nancy McKeague, and I am Senior Vice President, Employer and Community Strategies and Chief Human Resources Officer for the Michigan Health & Hospital Association, based near Lansing, Michigan. I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I am a member. On behalf of our approximately 275,000 members in over 160 countries, I thank you for this opportunity to appear before the Committee to discuss improving the federal wage and hour law and regulatory structure in the 21st century workplace.

SHRM is the world's largest association devoted to human resource (HR) management. Representing more than 275,000 members in over 160 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

The Michigan Health & Hospital Association (MHA), founded in 1919 as a nonprofit association, advocates for hospitals and the patients they serve. This includes all community hospitals in the state, which are available to assist each of Michigan's nearly 10 million residents, 24 hours a day, seven days a week. Michigan hospitals consist of various types of health care facilities, including public hospitals—owned by city, county, state or federal government, and nonpublic hospitals—individually incorporated or owned and operated by a larger health system. In total, the MHA has 151 employees, including 73 exempt employees and 78 nonexempt employees. The MHA has employees in a variety of occupations including lawyers, physicians, allied health professionals, and computer and information technology (IT) professionals.

The MHA is a top employer in Michigan, earning the Alfred P. Sloan Award for Excellence in Workplace Effectiveness and Flexibility in both 2009 and 2010. The Sloan Awards, given annually by SHRM and the Families and Work Institute, honor organizations that are using workplace flexibility as a strategy to make work "work" better—for the employer and the employees. In addition, the MHA received Modern Healthcare magazine's "Best Places to Work in Healthcare" 2010 award based on a judging system that is weighted 25 percent on an organization's nomination and 75 percent on its employees' survey results—making the award significantly representative of staff sentiment.

In my testimony, I will explain the key issues posed by the Fair Labor Standards Act (FLSA) to our nation's employers and employees; demonstrate some of the practical challenges faced by employers when complying with the FLSA, with a focus on nonprofit organizations; explain how the FLSA hinders an employer's ability to provide workplace flexibility; share SHRM's efforts to promote these benefits to employees; explain SHRM's principles for a 21st Century Workplace Flexibility Policy; and lastly, provide a quick overview of President Obama's recent actions to update overtime regulations.

The Fair Labor Standards Act

The FLSA has been a cornerstone of employment and labor law since 1938. The FLSA establishes minimum wage, overtime pay, record-keeping and youth employment standards affecting full-time and part-time workers in the private sector and in federal, state and local governments. The FLSA was enacted to ensure an adequate standard of living for all Americans by guaranteeing the payment of a minimum wage and overtime for hours worked in excess of 40 in a workweek.

The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) administers and enforces the FLSA with respect to private employers and state and local government employers.

Virtually all organizations are subject to the FLSA. A covered enterprise under the FLSA is any organization that "has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and has $500,000 in annual gross volume of sales; or engaged in the operation of a hospital, a preschool, an elementary or secondary school, or an institution of higher education."[1]

Employees of firms that are not covered enterprises under the FLSA still may be subject to its minimum wage, overtime pay, record-keeping or child labor provisions if they are individually engaged in interstate commerce or in the production of goods for interstate commerce.

Additionally, many states have their own laws pertaining to overtime pay. If a state's law is more inclusive or more generous to the employee than federal law, the state law will apply. If, however, the state law is less inclusive, then employers are required to follow federal law. The myriad of federal and state laws add additional complexity when employers are working diligently to remain compliant.

Employee Classification Determinations under the FLSA

The FLSA provides exemptions from both the overtime pay and minimum wage provisions of the Act. Taking into consideration the regulations under 29 CFR Part 541, employers and HR professionals should use discretion and independent judgment to determine whether employees should be classified as exempt or nonexempt and, thus, whether they qualify for the overtime and the minimum wage provisions of the FLSA. Generally speaking, classification of employees as either exempt or nonexempt is made on whether the employee is paid on a salary basis, at a defined salary level, and an individual's specific duties and responsibilities. It is assumed under the FLSA that all employees are covered under the FLSA as nonexempt employees, and each element of the three-part FLSA test must be met in order to consider an employee exempt under the statute.

These classification determinations must also be made looking at each individual job position. Classification decisions for all positions are particularly challenging as they are based on both objective (salary basis level, salary basis test) and subjective criteria (duties test). As a result, an employer acting in good faith can easily mistakenly misclassify employees as exempt who, in reality, should be nonexempt, or vice versa.

Given the challenges HR professionals encounter, a significant portion of SHRM's programs and educational resources focus on compliance with the FLSA. SHRM's HR Knowledge Center responds to thousands of FLSA inquires each year from our members as employers diligently work to stay in compliance with the law. In fact, the volume of questions SHRM receives regarding the FLSA is second only to one other federal statute—the Family and Medical Leave Act (FMLA).

[1] 29 U.S.C. 203(s)(1)(A)

FLSA–Practical Challenges for Employers

The FLSA was enacted toward the end of the Great Depression and reflects the realities of the industrial workplace of the 1930s, not the workplace of the 21st century. The Act itself has remained relatively unchanged in the more than 70 years since its enactment, despite the dramatic changes that have occurred in where, when and how work is done.

Therefore, today's examination of how to improve the FLSA regulatory structure is an important discussion. HR professionals and employers can benefit from the findings of the December 2013 Government Accountability Office (GAO) report on how the DOL should adopt a more systematic approach to developing guidance for employers. In fact, should the DOL implement this approach, SHRM and HR professionals would welcome increased dialogue with employers, including nonprofit organizations and small employers.

Additional guidance would certainly be helpful given the practical challenges most employers face when complying with the FLSA. Complying with the statute can create high legal costs for employers, which is difficult for an organization like the MHA with a tight budget. Simply stated, increased litigation related to alleged FLSA violations leads to less funding for a nonprofit's core mission, whether that is providing patient treatment, caring for children or conducting research. That is why improved guidance from the Department in order to prevent baseless lawsuits is critical. The following areas represent practical challenges for many employers:

Employee Classification Determinations: The organizational structure of and duties performed by employees in the nonprofit sector can lead to difficult employee classification determinations. The MHA, like many nonprofits, has a fairly flat organizational structure that is not as rigid as those commonly found in for-profit enterprises. For example, exempt employees in nonprofit organizations that are similar to the MHA often engage in work activities along with nonexempt employees in order to meet members' expectations. Thus, employee classifications do not always fit nicely into the FLSA's two separate bucket approach of "exempt" or "nonexempt" employees.

For a small organization, the "primary duties" test presents unique challenges because it is difficult to distribute work evenly across a limited capacity organization. As a result, managers may frequently assist with the work of their nonexempt colleagues and perform exempt and nonexempt work concurrently. I will elaborate later in my testimony on the flexibility restraints associated with the FLSA.

For example, we sometimes find an employee will fit all of the executive employee exemptions under the FLSA with the exception of the supervision of two or more employees. Take the instance of the MHA Foundation, which was established to support hospitals and their community partners to improve the health of individuals and communities throughout Michigan. Because the executive director for this Foundation supervises only one employee, determining her classification was challenging. In the end, we decided to make her exempt because of her autonomy, experience and our confidence in her judgment.

Defending Against Litigation: Despite the ambiguity of many employment situations, the stakes in "improperly" classifying employees are high. The DOL frequently audits employers and penalizes those that misclassify employees, awarding up to three years of back pay for overtime to those employees, plus attorneys' fees, if applicable. Predictably, audit judgments can be subjective, since two reasonable people can disagree on a position's proper classification. Employers also face the threat of class-action lawsuits challenging their classification decisions.

Nonprofit employers like the MHA work hard to ensure employee classification decisions are in compliance with the FLSA. With a limited budget and tight margins, we must do everything in our power to limit expensive lawsuits. When the 2004 changes to the FLSA overtime regulations were enacted, the MHA had to allocate additional funding to retain counsel in order to assure our practices were compliant. We have two HR staff members, and I estimate that about 35 percent of their time is dedicated to compliance matters. This restricts the time and resources we have available for organizational development and building support services for our member hospitals in Michigan.

With employers and employees now finally understanding the full impact of the 2004 overtime changes, any sweeping changes to the FLSA regulations should be carefully constructed to prevent a new wave of litigation and additional confusion. Planning for an increase in litigation can be particularly difficult for the nonprofit sector and small employers. In the end, a nonprofit hospital's decision to direct limited funds to defending against lawsuits means less money for patient care and treatment.

Technology Challenges: Information technology and advances in communication have clearly transformed how businesses operate, communicate and make decisions. Smartphones, tablets, the use of social media and other technology allow many employees to perform job duties when and where they choose.

As an employer in the health care sector, our member hospitals are working 24 hours a day, seven days a week, providing critical treatment and care to patients. With the outdated nature of the FLSA, many of our members feel limited with how nonexempt staff can use their time when working from home. Currently, our database manager and our help desk manager are nonexempt employees, but they both would greatly benefit, and so would our organization at large, from the flexibility that comes with a work-provided smartphone. These employees want to be responsive to our members' needs. However, because of the difficulties associated with tracking these after work hours, we've had to restrict when and how these employees assist users with technology-related questions. Added flexibility to provide this technology would be quite beneficial because these employees are supporting and assisting other smartphone users within our organization.

Diminished Workplace Flexibility: The 21st century workforce and workplace are increasingly demanding workplace flexibility, defined as giving employees some level of control over how, when and where work gets done. Altering how, when and where work gets done in today's modern workplace, however, also raises compliance concerns with the FLSA.

In the health care sector we have many jobs that didn't even exist ten years ago—some technology-related and some due to medical and scientific advances. Because of the nature of our work, we must have the ability to respond as quickly as possible and utilize flexible hours, especially for clinicians. For instance, when several states, including Michigan, experienced medical emergencies due to contaminated compounded injections, we had nurse managers working alongside the teams they manage to provide patient care for an extended period during the crisis.

The FLSA makes it difficult, if not impossible in many instances, for employers to provide workplace flexibility to millions of nonexempt employees. While nonexempt employees can receive time-and-a-half pay, they cannot be afforded the same workplace flexibility benefits as exempt employees. At the MHA, we restrict telecommuting options because of FLSA compliance concerns. While we do offer flexible schedules, we require that all work be performed between 7:00 a.m. and

6:00 p.m. on weekdays. Another consequence of this outdated statute is seen in the MHA's decision to limit internships and fellowship opportunities because of flexibility restrictions.

Furthermore, the statute also prohibits private-sector employers from offering nonexempt employees the option of paid time off rather than overtime pay for hours worked over 40 hours per week, even though all public-sector employees are offered this type of flexibility, commonly referred to as "compensatory or comp time." This comp time option would be made available to all employers and employees if H.R. 1406, the Working Families Flexibility Act, was enacted. SHRM strongly supports H.R. 1406 because it meets our core workplace flexibility principle—that in order for flexibility to be effective, it must work for both employers and employees. Specifically, the bill would modernize the application of the FLSA to the private sector by permitting employers to offer employees the voluntary choice of taking overtime in cash payments, as they do today, or in the form of paid time off from work. Currently, federal, state and local government employees are offered a similar benefit.

While the ability to offer nonexempt, private-sector employees comp time is one way public policy can encourage greater access to workplace flexibility, SHRM believes more can be done to incentivize employers to implement effective and flexible workplaces. It is our strong belief that public policy must not hinder an employer's ability to provide flexible work options. Rather, public policy should incentivize and enhance the voluntary employer adoption of workplace flexibility programs.

Because SHRM and its members believe the United States must have a 21st century workplace flexibility policy that reflects the nature of today's workforce, and that meets the needs of both employees and employers, the Society has developed a set of five principles to help guide the creation of a new workplace flexibility public policy. I have included a copy of these principles at the end of my written statement (Appendix A).

Workplace Flexibility Educational Efforts

As SHRM continues to advocate for public policy proposals that encourage or incentivize employers to create effective and flexible workplaces, the Society has also formed a multiyear partnership with the Families and Work Institute (FWI) to educate HR professionals about the business benefits of workplace flexibility. The primary goal of the SHRM/FWI partnership is to transform the way employers view and adopt workplace flexibility by combining the influence and reach of the world's largest association devoted to human resource management with the research and expertise of a widely respected organization specializing in workplace effectiveness.

Although the FWI is an independent nonadvocacy organization that does not take positions on these matters, and the position of SHRM should not be considered reflective of any position or opinion of the FWI, I'd like to mention one of the key elements of the SHRM/FWI partnership: "When Work Works," a national initiative to bring research on workplace effectiveness and flexibility into community and business practice. "When Work Works" partners with communities and states around the country to:

- Share rigorous research and employer best practices on workplace effectiveness and flexibility.
- Recognize exemplary employers through the Sloan Award for Excellence in Workplace Effectiveness and Flexibility.

- Inspire positive change so that increasing numbers of employers understand how effective and flexible workplaces benefit both employers and employees, and use this information to make work "work" better.

Change is constant in business. We know that in order for organizations to remain competitive, they must employ strategies to respond to changes in the economy, the workforce and work itself. By highlighting strategies that enable people to do their best work, "When Work Works" promotes practical, research-based knowledge that helps employers create effective and flexible workplaces that fit the 21st century workforce and ensures a new competitive advantage for organizations.

President's Call to Update Overtime Regulations

In closing, I would note that today's hearing on the FLSA is particularly timely given President Obama's recent memorandum to DOL Secretary Perez requesting that the Department modernize the FLSA regulations related to overtime. In short, while we appreciate the president's interest in clarifying and simplifying the regulations, we remain concerned that these revisions could lead to more complications for employers and employees, especially for smaller employers and nonprofit organizations that might not have a full HR office or legal team.

Since the DOL's latest Semiannual Regulatory Agenda suggested a Notice of Proposed Rulemaking (NPRM) on the overtime regulations later this fall, it is unclear what changes will be proposed. However, any changes to the FLSA overtime regulations will likely touch almost every employer and employee in the country. The proposal could include an increase to the salary basis level amount from $455 a week by a significant amount. This means that a substantial number of employees currently classified as exempt from the overtime requirements would be eligible for overtime pay. In addition, the proposal might adjust the primary duty test.

In preparation for a regulatory proposal, over the past few months the DOL has been holding listening sessions to directly hear from various stakeholders about how the rules governing overtime and overtime exemptions are currently operating in the workplace. I was pleased to have joined in one of the three listening sessions the DOL conducted with SHRM members recently.

In these sessions, SHRM members highlighted the impact potential changes to the overtime rules could have on employee morale and workplace flexibility. For example, changing overtime regulations could take an entire level of management and convert them to hourly employees, curtailing their access to workplace flexibility offerings valued by employees and limiting their ability to decide where, when and how work is done. Also, many employees prefer the exempt classification because it is associated with "professional status" in an organization.

SHRM members also discussed the need for employer education if the rules are changed, and advocated for a "safe harbor" allowing employers to adjust their employee classifications, if necessary, without fear of repercussions or litigation. HR professionals working in California, who have their own, more stringent rules for overtime exemptions, have expressed concerns with moving to a duties test that could curtail the ability of exempt employees to concurrently perform exempt and nonexempt duties.

In anticipation of these changes, SHRM chairs the Partnership to Protect Workplace Opportunity (PPWO), a group of various industry employer associations concerned about potential changes to the FLSA regulations. As the employer community voice on the FLSA regulations, the PPWO looks

forward to analyzing a NPRM on this issue and commenting on behalf of employers across industries and across the country.

Conclusion

The FLSA is a valuable and fundamental cornerstone among America's workplace statutes. SHRM educates its membership and their organizations about all wage and hour issues under the FLSA. But the FLSA was crafted in a bygone era, and it should be re-evaluated to ensure it still encourages employers to hire, grow and better meet the needs of their employees. As such, SHRM encourages the Department to improve its approach to developing guidance for employers, as suggested by the GAO report.

Working to comply with the FLSA can create high legal costs for employers, which is particularly difficult for the nonprofit sector with tighter budgets. Simply stated, more confusion from Washington and increased litigation related to alleged FLSA violations leads to less funding for a nonprofit's core mission, whether that is providing patient treatment, caring for children or conducting research.

SHRM and its members, who are located in every congressional district in the nation, are committed to working with this Subcommittee and other members of Congress to modernize the outmoded FLSA in a manner that balances the needs of both employees and employers and does not produce requirements that could limit workplace flexibility.

As we anticipate the DOL's proposed changes to the FLSA regulations later this fall, SHRM appreciates the Administration's interest in modernization. However, we caution that enacting sweeping changes could make compliance even more complicated for employers, in particular small employers and nonprofit organizations.

Thank you. I welcome your questions.

Appendix A.

SHRM's Recommendations for a 21st Century Workplace Flexibility Policy

Shared Needs: SHRM envisions a "safe-harbor" standard where employers voluntarily provide a specified number of paid leave days for employees to use for any purpose, consistent with the employer's policies or collective bargaining agreements. A federal policy should:

- Provide certainty, predictability and accountability for employees and employers.
- Encourage employers to offer paid leave under a uniform and coordinated set of rules that would replace and simplify the confusing—and often conflicting—existing patchwork of regulations.
- Create administrative and compliance incentives for employers that offer paid leave by offering them a safe-harbor standard that would facilitate compliance and save on administrative costs.
- Allow for different work environments, union representation, industries and organizational size.
- Permit employers that voluntarily meet safe-harbor leave standards to satisfy federal, state and local leave requirements.

Employee Leave: Employers should be encouraged to voluntarily provide paid leave to help employees meet work and personal life obligations through the safe-harbor leave standard. A federal policy should:

- Encourage employers to offer employees some level of paid leave that meets minimum eligibility requirements as allowed under the employer's safe-harbor plan.
- Allow the employee to use the leave for illness, vacation, personal and family needs.
- Require employers to create a plan document, made available to all eligible employees, that fulfills the requirements of the safe harbor.
- Require employers to attest to the U.S. Department of Labor that their plan meets the safe-harbor requirements.

Flexibility: A federal workplace leave policy should encourage maximum flexibility for both employees and employers. A federal policy should:

- Permit the leave requirement to be satisfied by following the policies and parameters of an employer plan or collective bargaining agreement, where applicable, consistent with the safe-harbor provisions.
- Provide employers with predictability and stability in workforce operations.
- Provide employees with the predictability and stability necessary to meet personal needs.

Scalability: A federal workplace leave policy must avoid a mandated one-size-fits-all approach and instead recognize that paid leave offerings should accommodate the increasing diversity in workforce needs and environments. A federal policy should:

- Allow leave benefits to be scaled to the number of employees at an organization; the organization's type of operations; talent and staffing availability, market and competitive forces, and collective bargaining arrangements.
- Provide prorated leave benefits to full- and part-time employees as applicable under the employer plan, which is tailored to the specific workforce needs and consistent with the safe harbor.

Flexible Work Options: Employees and employers can benefit from a public policy that meets the diverse needs of the workplace in supporting and encouraging flexible work options such as telecommuting, flexible work arrangements, job sharing, and compressed or reduced schedules. Federal statutes that impede these offerings should be updated to provide employers and employees with maximum flexibility to navigate work and personal needs. A federal policy should:

- Amend federal law to allow employees to manage work and family needs through flexible work options such as telecommuting, comp time, flextime, a part-time schedule, job sharing, and compressed or reduced schedules.
- Permit employees to choose either earning compensatory time off for work hours beyond the established workweek, or overtime wages.
- Clarify federal law to strengthen existing leave statutes to ensure they work for both employees and employers.

Chairman WALBERG. Thank you.

I now recognize Ms. Conti for your five minutes of testimony.

STATEMENT OF MS. JUDITH CONTI, FEDERAL ADVOCACY COORDINATOR, NATIONAL EMPLOYMENT LAW PROJECT, WASHINGTON, D.C., MINORITY WITNESS.

Ms. CONTI. Thank you, sir. And thanks to you and the committee for inviting the National Employment Law Project to share this testimony today.

NELP is a non-profit organization that advocates for low-wage and unemployed workers, and few things matter to us as much as the FLSA's promise of a fair day's wage for a full day's work. My written testimony goes into extensive detail about the nature and extent of wage theft in this country, especially as it applies to low-wage workers. Without a strong Wage and Hour Division as the most prominent opponent of wage theft, it does, and will, run rampant in certain industries. Not only to the detriment of workers, but to the detriment of many good and honest businesses that don't cut corners and don't cheat their workers.

Of course, there are principal differences in opinion as how to best run and staff the Wage and Hour Division. As was its prerogative, the Bush administration placed heavy emphasis on compliance assistance. That is, giving employers the tools they need to follow the mandates of the FLSA. Indeed, this has always been a central component of the Wage and Hour Division's work, and must always remain so. But in 2008 and 2009, the GAO issued a series of three reports that were extremely critical of the Wage and Hour Division's investigative and enforcement functions.

They detailed systemic problems of calls that were never returned, cases that were never investigated, and the workers who lost their opportunities to even pursue their claims in court because the investigations took so long that the statute of limitations had run. Clearly, the balance had shifted too far in one direction.

As of May of this year, for the first time in a decade, we have a confirmed administrator of the Wage and Hour Division. And in Dr. David Weil, we have the rare occasion of someone who has spent the majority of his career thinking about and working on this very topic of the hearing today; how to best use the limited resources of the Wage and Hour Division to enforce the FLSA to the maximum extent possible.

You can accurately say about Dr. David Weil that he has literally written the book. His recently published book, the Fissured Workplace, and his 2010 report to the Department of Labor on how it can better conduct strategic enforcement of the FLSA, is mandatory reading in my field, certainly, and for anyone interested in wanting to know how to best operate the Wage and Hour Division. The recommendations in his report and book are too numerous to cite but, in short, he is someone who appreciates the role of data and analysis in driving an effective enforcement strategy.

At NELP, we are quite certain he will lead the Wage and Hour Division in a rigorous examination of all the relevant data to figure out how to best prioritize and balance all of its work whether it be investigation, enforcement, education for workers or compliance assistance for employers.

And just briefly, I would like to address the compliance assistance that the Wage and Hour Division does provide. It is true it stopped the practice of issuing opinion letters, which often turned on a very narrow specific set of facts relevant to one employer only.

But one only needs to look at the Wage and Hour Division's Web site to see the extensive amount of compliance assistance it produces, including numerous fact sheets that are in English and nine other languages; regular conference calls with stakeholders about compliance with numerous laws and regulations; webinars on new and current rules and regulations; interactive e-tools that help employers calculate what wages they owe workers; field bulletins; administrative interpretations; and PowerPoint presentations in eight different languages that the department produces to ensure that employers have extensive resources to comply with the FLSA.

In addition, the Wage and Hour Division employees routinely take phone calls from employers and/or their attorneys, and provide individualized guidance over the phone, as well. Looking ahead, NELP anticipates a strong Wage and Hour Division, which will soon be enforcing the President's executive order that all federal contract workers begin receiving a minimum wage of $10.10 with all new contracts starting on or after January 1, 2015; a department that will be updating and further classifying the rules surrounding the payment of overtime; and most of all, we hope that they will be soon be overseeing implementation of a nationwide minimum wage increase.

Thank you again for the opportunity to testify at today's hearing, and I am happy to answer any questions about my written or oral testimony. Thank you.

[The statement of Ms. Conti follows:]

NELP National Employment Law Project

Testimony of
Judith M. Conti
National Employment Law Project

Hearing Before the
United States Congress

Workforce Protections Subcommittee
House of Representatives Education and Workforce Committee

Improving the Federal Wage and Hour Regulatory Structure

July 23, 2014

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Good morning Chairman Walberg, Congressman Courtney, and members of the subcommittee on Workforce Protections. My name is Judith M. Conti, and I'm the Federal Advocacy Coordinator for the National Employment Law Project (NELP). NELP is grateful for the opportunity to address the Subcommittee today and share our views of how vitally important the Fair Labor Standards Act (FLSA) and its vigorous enforcement is to today's workforce, particularly for low-wage workers.

NELP is a non-profit organization that for over 45 years has fought for the rights and needs of low-income and unemployed workers. We seek to ensure that work is an anchor of economic security and a ladder of economic opportunity for all working families. In partnership with state, local and allies, we promote policies and programs that create good jobs, strengthen upward mobility, enforce hard-won worker rights, and help unemployed workers regain their economic footing.

One of NELP's priority issues is enforcement of the protections of the FLSA. As a nation that strives to create fair and moral conditions in workplaces, under which both workers and employers can mutually thrive and succeed, there is no more basic underpinning to the social contract of employment than "a fair day's pay for a full day's work." If we cannot enact and enforce basic wage and hour protections, we can never hope to remedy the other abuses such as discrimination and unsafe working conditions that go on in far too many workplaces. So, in our view, the heart and center of worker protections is the FLSA and its promises of minimum wages, proper hourly payment, overtime premiums, and prohibitions against child labor. And as anyone who has ever represented low-wage workers can tell you, when employers don't respect the basic mandates of the FLSA, other violations of labor and employment laws are virtually guaranteed to follow.

My experience with the FLSA is deep and varied. I analyzed it as a law clerk to a judge in the United States Court of Appeals for the Seventh Circuit. While in private practice, I counseled large and small employers on how to comply with its mandates as well as litigated on behalf of many workers who were denied their rights under the FLSA. I also spent seven years as an employer and was tasked with applying and enforcing the FLSA with regard to my organization's workforce. During that same period of time, I supervised hundreds of staff and volunteer attorneys who prosecuted FLSA violations. Most recently, as a policy advocate with NELP, I have worked with our allies throughout the country to ensure the vigorous enforcement and defense of the FLSA.

At the start, I wish to make clear that I am not here to suggest that a majority or even a substantial minority of employers do not follow the FLSA. Indeed, given the clarity of the law, by and large, most employers quite willingly comply, and where there are judgment calls to be made, they do their best to make the right judgment. There is a thriving management-side bar

that ably advises employers and human resources professionals across the country as to compliance with the FLSA and by and large they do a very good job.

But we cannot ignore the fact that there are low-road employers, both large and small, who to varying degrees push the boundaries of the FLSA beyond reason, who misclassify workers as independent contractors in order to avoid their legal responsibilities under the FLSA, who wrongfully classify workers as exempt from coverage of the FLSA, and who flat-out do not pay their workers minimum wage and/or overtime. It is these employers, and their employees, for whom the vigorous enforcement of the FLSA is most important, for not only do they cheat workers out of their wages, but they gain an unfair competitive edge over honest employers. Neither outcome should be tolerated.

In order to eradicate their behavior, our task must be to look for ways to increase vigorous enforcement of the wage and hour laws that are already on the books, and to craft better solutions to the common schemes of wage theft that are so rampant in this country. If we do those things, we not only make conditions better for workers in this country, but we simultaneously level the playing field for high-road employers who strive to do the right thing by their workforces.

Enactment and Purpose of the FLSA

At its core, the FLSA was aimed at eliminating subpar jobs, sweatshops and the subcontracting (including independent contractor abuses) that were going on in the US economy in the early 1900's. And sadly, many of those structures and persistent low-wage jobs are still in existence today, making the statute as relevant and important now as it was when enacted in 1938.

As a society, we agree that there should be a wage floor, below which employers cannot go,[1] and overtime premiums for those who work more than 40 hours per week.[2] These baseline laws ensure not just that we prevent people from being unfairly overworked, but that we spread out employment among workers. Indeed, as Justice Reed noted in 1941, job creation was at the core of the enactment of the overtime premium, a goal as important and laudable in the Great Depression as it is now in the Great Recession and its aftermath:

> By this requirement although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a

[1] 29 U.S.C. §206.
[2] Id. at §207.

> workweek beyond the hours of the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of extra work.[3]

Finally, the FLSA included essential child labor prohibitions to eliminate the particular evil of child labor in the days when young children lost their youth to long hours and horrific conditions in the garment and other industries.[4]

The FLSA is a statute that is intended to protect workers and to dissuade unfair competition by unscrupulous employers who flout its rules to the disadvantage of those employers who do play by the rules.[5] As the Supreme Court stated:

> This Act seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation. The purpose is to raise living standards. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based upon substandard labor conditions. Otherwise the Act will be ineffective, and will penalize those who practice fair labor standards as against those who do not.[6]

Thus, as with all remedial statutes, the FLSA should be read broadly, and doubts about coverage should be construed in favor of coverage, not exemption.

Current Conditions for Hourly Workers

For the last few decades, anecdotal evidence indicates that with changing workforce demographics and sectoral shifts within the economy, there had been a persistent rise in the incidence of wage theft, particularly among low-wage workers, though they are by no means the exclusive victims of this practice.[7] While the Department of Labor and its state

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[3] Overnight Motor Transport. V. Missel, 316 U.S. 527, 577-78 (1941).

[4] 29 U.S.C. §212.

[5] Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 36 (1987); see also Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 299 (1985) ("[P]ayment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of 'unfair method of competition' that the Act was intended to prevent." (citation omitted)); Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1332, 1334 (9th Cir.1991) (Nelson, J., dissenting) (discussing the FLSA's effort to protect law-abiding employers against unfair competition from businesses paying substandard wages).

[6] Roland Elec. Co. v. Walling, 326 U.S. 657, 669-70 (1946).

[7] "Wage theft" refers to a range of practices that reflect employers' failure to pay workers the wages they have earned. These include the failure or refusal to pay some or all of wages promised, requiring workers to put in unpaid time off the clock, denial of minimum wage and overtime pay, and misclassification of employees as independent contractors.

counterparts were supposed to have kept records of complaints and investigations, and lawsuits alleging wage theft are matters of public record, the record-keeping was actually often quite shoddy and there was no rigorous, methodical study documenting just how wide-spread this practice was.

That changed in 2008 when researchers specializing in the low-wage workforce joined together to conduct the first-ever comprehensive survey of low paid hourly workers to get a precise measure of the nature and incidence of the problem. Together with researchers from the Center for Urban Economic Development at the University of Illinois at Chicago and the UCLA Institute for Research on Labor and Employment, NELP surveyed more than 4000 hourly workers in low-wage industries in Chicago, Los Angeles and New York City. Using findings generated by a detailed and structured questionnaire that was carefully administered and analyzed by surveyors, the survey produced the first valid snapshot into the nature of exploitation by unscrupulous employers, and just how widespread abuses are. The results of the survey, published in the 2009 report *Broken Laws: Unprotected* Workers, included the following key findings:

- An astounding 68% of those surveyed experienced at least one pay-related violation in the work week preceding the survey.
- More than one-fourth (26%) of workers were paid less than the legally required minimum wage in the previous work week, and 60% of these workers were underpaid by more than $1 per hour.
- Among those working overtime (more than 40 hours in the previous work week), a whopping 76% were **not** paid the legally required overtime rate by their employers.
- Nearly a quarter of workers came in early or stayed late on the job, and 70% of these workers received no compensation for this "off the clock" work.
- Three-in-ten tipped workers surveyed were not paid the tipped worker minimum wage, and 12% of tipped workers experienced tip stealing by their employer or supervisor.
- The majority of workers never complained about any of these violations for fear that they would experience retaliation, and indeed, of those who did complain, 43% did experience illegal employer retaliation.
- The cost of wage theft is enormous: The typical worker experiencing wage theft lost $51 per week out of average weekly earnings of $339. On a full-time year-

round basis, this translates into lost annual earnings of $2,634 (15% of total earnings of $17,616).[8]

Extrapolating from these findings, the research team estimated that *in these three cities alone*, low-wage workers lose more than $56.4 million *per week* as a result of employment and labor law violations. At a moment when our economy continues to suffer from lack of demand (consumer purchasing), these findings suggest that one important key to economic recovery is more vigorous enforcement of wage and hour protections—so workers are paid what they earn, and can pump money back into their local economics. It goes without saying that wage theft of this magnitude also contributes to the phenomenon of working poverty.

The 2008 survey was broad, encompassing twelve different industries: apparel and textile manufacturing; personal and repair services; private households; retail and drug stores; grocery stores; security, building and grounds services; food and furniture manufacturing, transportation and warehousing; restaurants and hotels; residential construction; home health care; social assistance and education; and other industries such as finance and other health care. Workers from employers of all sizes were part of the survey, and while employers with less than 100 employees had markedly higher rates of violations of basic wage and hour laws, employers with more than 100 employees still had shockingly high rates of violations.[9]

A few other important findings are worth noting:

- Women are more likely to be victims of wage theft than men are.[10]
- Minimum wage violations are most common in three industries: apparel and textile manufacturing; personal and repair services; and private households.[11]
- In each of the following occupations, *more than 50%* of the workers surveyed experienced overtime violations:[12]
    - Child care workers (90.2%)
    - Stock/office clerks & cashiers (86%)
    - Home health care workers (82.7%)

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[8] Annette Bernhardt, et al. Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (2009), http://www.nelp.org/page/-/Justice/BrokenLawsPresentation2010.pdf?nocdn=1.
[9] For those workers who were employed by a company with more than 100 employees, 15.2% experienced minimum wage violations, 52.8% were victims of overtime violations, 64.9% were made to work off the clock, and 63.8% had a meal break violation. Those who worked for smaller companies experienced minimum wage violations at a rate of 28.5%, overtime violations at a rate of 82.4%, off the clock work at 73.6%, and meal break violations at a rate of 73.5%. Id. at 30.
[10] Id. at 42.
[11] Id. at 31.
[12] Id. at 34.

- Beauty/dry cleaning & general repair workers (81.9%)
- Car wash workers/ parking attendants & drivers (77.9%)
- Waiters/cafeteria workers/ bartenders (77.9%)
- Retail salespersons and tellers (76.2%)
- Building services & grounds workers (71.2%)
- Sewing & garment workers (69.9%)
- Cooks, dishwashers & food preparers (67.8%)
- General construction (66.1%)
- Cashiers (58.8%)

As this brief overview makes clear, the most basic and bright-line rules of the FLSA are being routinely ignored with impunity. These violations are not occurring because of complex determinations of whether or not someone is an exempt professional or a legitimate independent contractor. Rather, they are flagrant abuses of very straight-forward and relevant provisions of our basic federal and state wage and hour laws.

These findings highlight just how important the FLSA still is and how we need to dramatically increase our enforcement of wage and hour laws throughout the country, across every industry and occupation. [13]

The Role of the Wage and Hour Division

The U.S. Department of Labor's Wage and Hour Division (WHD) is and can be a powerful ally in efforts to enforce and improve just pay laws. Though it is well documented how under-staffed and under-resourced the WHD is relative to the number of employers and workers subject to its jurisdiction, especially before the relatively recent addition of investigators thanks to appropriations in the American Recovery and Reinvestment Act[14] it is nonetheless a powerful

[13] For an excellent summary of the abuses rampant in agricultural labor, please see "Weeding Out Abuses: Recommendations by Farmworker Justice and Oxfam America.: http://www.farmworkerjustice.org/files/immigration-labor/weeding-out-abuses.pdf.

[14] Between FY 1975 to FY 2004, the number of WHD investigators declined from 921 to 788 in spite of the fact that the Division was given responsibility for the FMLA during the same time, the covered US workforce grew by 55% and the number of covered employers grew by 112%. These 788 investigators were responsible for protecting the rights of over 135 million workers in over 7.3 million establishments, a staggering average of 245,000 workers for each investigator. Brennan Center for Justice, Economic Policy Brief, No. 3, September 2005, available on-line at www.brennancenter.org/dynamic/subpages/download_file_8423.pdf. The 788 investigators in FY 2004 were only part of Wage-Hour's total staff, which numbered 1,442 employees; the other staff included supervisors, analysts, technicians, and administrative employees. (*Department of Labor FY 2009 Performance Budget*, www.dol.gov/dol/budget/2009/PDF/CBJ-2009-V2-03.pdf, pp. ESA-35 and ESA-36.) Statistics from the Solicitor's Office from FY 1992 to FY 2008 paint a similar picture. During that time, the total staff of the Solicitor's Off ice (attorneys, paralegals, secretaries, etc.) declined by 25% from 786 to 590. U.S. Department of Labor Budget Submission to Congress for Fiscal Year 1993; "Legal Services" in volume 3 of the U.S. Department of Labor's *FY 2008 Detailed Budget Documentation,* pp. DM-26 to DM-28, available at www.dol.gov/dol/budget/2008/PDF/CRJ-

ally in the fight to enforce the Fair Labor Standards Act's (FLSA) guarantees of minimum wage, overtime pay, and other important wage and hour protections.

While the tools available to remedy wage and hour violations are many and varied, nothing can take the place of a strong WHD that simultaneously investigates and remedies complaints, provides employers with the tools they need to comply with the laws, and observes and investigates relevant trends so that it can target enforcement at the workers who most need its assistance and are least likely to find attorneys or other advocates to vindicate their rights. Efforts of private advocates, while important and often significant, are necessarily piecemeal and cannot alone provide the pressure needed to tackle the deeply-entrenched wage violations across too many industries.

Unfortunately, the WHD has been without a confirmed Administrator since Tammy McCutcheon left the job in 2004 until very recently when Dr. David Weil was confirmed by the Senate and sworn in on May 5, 2014. While there were a number of able and learned people who have served as Acting Administrators during the decade in which the position was open, the fact is that an Acting Administrator, someone who is often holding the place for a pending nominee, does not have the same ability to shape and direct the work of the Division, no matter how exceptional they are, and no matter how hard they work.

Thankfully, we now have not only a confirmed Administrator, but one who has spent the majority of his career thinking about and working on the very topic of this hearing today – how to best use the limited resources of the WHD to enforce the FLSA to the maximum extent possible. Dr. Weil's academic and professional writings on this topic are many and varied, but perhaps most relevant is his May 2010 report to the WHD entitled "Improving Workplace Conditions Through Strategic Enforcement."[15] It is an extensive and well researched report and I hope that it will be made part of the official record today, along with Dr. Weil's recently published book, The Fissured Workplace: Why Work Became So Bad for So Many and What Can

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V3-02.pdf. Although the Solicitor's office had 590 employees in January 2007, it had funding to pay for only 551 employees. *Id.* at DM-28. During this same period of declining staff, the Solicitor's Office gained responsibility for litigation under both the FMLA, and under substantial amendments to the Mine Safety and Health Act (known as the Mine Improvement and New Emergency Response Act, or MINER Act) in 2006. As recently as FY 1987, the Solicitor's Office filed 705 FLSA lawsuits, representing 48% of all FLSA lawsuits filed. Administrative Office of the United States Courts, *Judicial Business of the United States Courts,* 1987 Annual Report, Table C-2 (Washington, D.C., 1987). In FY 2007, the Solicitor's office filed only 151 FLSA lawsuits, representing only 2% of all FLSA lawsuits filed. Administrative Office of the United States Courts, *Judicial Business of the United States Courts,* 2007 Annual Report, Table C-2 (Washington, D.C., 2007), available at http://www.uscourts.gov/judbus2007/appendices/c2.pdf.

[15] http://www.dol.gov/whd/resources/strategicEnforcement.pdf.

Be Done to Improve It, an even more detailed treatise on his views on the causes of wage theft and workplace violations, and what we can do to remedy these problems.[16]

The key findings of Dr. Weil's May 2010 report to DOL are the following:

- The WHD should prioritize enforcement in industries in which:
  - There is a high concentration of low-wage workers;
  - The workforce is particularly unlikely to step up and lodge complaints about violations of the FLSA; and
  - The WHD is likely to be able to change the behavior of employers in a sustained and systemic manner.

- These four principals should guide WHD's strategic enforcement:
  - Focus on the companies that are at the top of the industry structures, the ones that influence how other employers in the market will operate;
  - Increase deterrence effects at the geographic and industry levels through better investigation, more effective penalties, and coordination with the Solicitor of Labor
  - Better balance targeted enforcement with complaint driven enforcement;
  - Better monitor compliance with settlements and other enforcement initiatives.

- Change the way the WHD does its work:
  - Enhance investigation capacity;
  - Coordinate better with the Office of the Solicitor;
  - Enhance information systems;
  - Build stronger links to other DOL agencies where it would enhance sector enforcement strategies; and
  - Better evaluate strategic initiatives to improve future work.

The recent DOL Strategic Plan also reflects its ongoing work to better evaluate and target the work of the WHD. For the WHD, the performance goals include the following: "Provide that vulnerable workers are employed in compliance and secure sustained and verifiable employer compliance, particularly among persistent violators."[17] As part of this goal, the Strategic Plan discusses better balancing complaint driven and targeted enforcement, leveraging outside resources to better enforce the FLSA, continuing to focus on misclassification of employees as independent contractors as one of the driving forces in the erosion of compliance with labor and employment laws, and putting greater emphasis on prevailing wage laws to help increase wages for middle class families.

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[16] http://www.hup.harvard.edu/catalog.php?isbn=9780674725447.

[17] http://www.dol.gov/_sec/stratplan/FY2014-2018StrategicPlan.pdf, page 52.

So while the GAO report that is the subject of discussion at this hearing looked at WHD practices in the past four years, a time in which the WHD was working to respond to the myriad of very serious criticisms the GAO had also issued about its practices in the previous four years, we now have a confirmed Administrator whose very expertise is strategic enforcement of our wage and hour laws, who is ably assisted by a Deputy Administrator in Laura Fortman who has extensive expertise in running a highly successful state Department of Labor during her tenure as Secretary of Labor for Maine. This should give all of us tremendous cause for optimism about the WHD being on a continued upward trajectory.

I would also like to address what seems to be implicit in the request for the GAO report – the inference that the rise in lawsuits under the FLSA is somehow because the WHD is not strategically using its resources, or because it isn't doing sufficient compliance assistance for employers. I think that drawing any such conclusion would be patently wrong on a number of fronts, many of which were already explained in the GAO report itself.

It is true that the Obama administration WHD focusses more heavily on enforcement, targeted and directed, than the Bush administration did. The previous administration had more of a focus on compliance assistance, and as with any choices about how to best use resources to achieve the goals of the WHD, there are pros and cons to however the Division is run. While good-actor employers feel they had more assistance from the WHD during the Bush administration, at the conclusion of those eight years, the GAO issued a series of three reports containing fairly extensive criticism of the practices of the Division, and the myriad of problems with the complaint investigation and resolution process.[18] These reports were the subject of a Congressional hearing where the people running the WHD beginning in 2009 were explicitly directed to rebuild the investigation and complaint process, which they did with great success thanks, in part, to appropriations made in the American Recovery and Reinvestment Act that allowed the WHD to dramatically increase its staff to combat wage theft. Indeed, the statistics about the dramatically increased enforcement and recovery during the first four years of the

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[18] *Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, GAO-08-962T: Published: Jul 15, 2008. Publicly Released: Jul 15, 2008 ; http://gao.gov/products/GAO-08-962T; *Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable To Wage Theft*, GAO-09-458T: Published: Mar 25, 2009. Publicly Released: Mar 25, 2009; http://gao.gov/products/GAO-09-458T; *Wage and Hour Division Needs Improved Investigative Processes and Ability to Suspend Statute of Limitations to Better Protect Workers Against* Wage Theft; GAO-09-629: Published: Jun 23, 2009. Publicly Released: Jul 23, 2009; http://gao.gov/products/GAO-09-629.

Obama Administration demonstrate that the WHD has done exemplary work responding to the GAO reports from 2008 and 2009.[19]

The GAO amply and accurately describes all the reasons why the number of lawsuits has increased over the past few decades. And while the GAO report did not look into the resolution of the cases, it spoke widely to stakeholders in both the management and worker communities, and uncovered nothing to suggest that there was any widespread filing of or uptick in frivolous lawsuits. Surely if there was any such evidence, those interviewed from the management community would have presented it to the investigators.

Indeed, the FLSA was designed with just this result in mind. Attorney's fees are authorized so that the "private attorneys general" all over the country can aid WHD in the very important task of making sure that people are paid the wages to which they are legally entitled. Though the WHD is fully empowered to investigate all claims of FLSA violations, no realistic appropriations could ever provide the Division with all the resources it needs to remedy all claims, and those who can find attorneys on the private market should be fully encouraged to do so. That way, the WHD can focus its resources that much more on those workers who are the least likely to be able to find a private attorney to take their cases, or to even wage a complaint in the first place because of their extreme vulnerability to retaliation.

Moreover, while the GAO identifies the WHD's decision to stop doing Opinion Letters as a decline in compliance assistance, they do not detail all the other methods of compliance assistance that the WHD uses:

- numerous fact sheets that are in English and nine other languages,
- conference calls with stakeholders about compliance with numerous laws and regulations,
- webinars,
- various Interactive"E-tools" that help employers calculate what wages they owe their workers,
- Q&A sheets,
- field bulletins,
- administrative interpretations, and
- power point presentations in eight different languages that the Department produces to ensure that employers have every resource they need to comply with the FLSA. [20]

And WHD employees routinely take phone calls from employers and/or their attorneys and provide individualized guidance over the phone as well. Though it is true that under President

[19] Wage and Hour Enforcement Statistics from FY 2001 through FY 2013. U.S. DOL WHD and Printing Industries of America, http://www.printing.org/page/10114.
[20] http://www.dol.gov/whd/flsa/index.htm.

Obama, the WHD and DOL as a whole has focused more on its enforcement responsibilities relative to compliance assistance than the previous Administration's DOL did, the return to enforcement, especially at a time when the Recession was driving more and more employers to the low-road, was a welcome and necessary change in the way of doing business. And the massive increase in recoveries and settlements, both from WHD and the private bar, is proof that the added enforcement actions are necessary.

That doesn't mean there isn't room for improvement in the way that the WHD does business, and indeed, in its response to the GAO report, the WHD's Principle Deputy Administrator confirms that the Agency is currently examining ways to better target its enforcement activities, in ways consistent with but also beyond those listed in the GAO report.[21]

In the coming years, we look forward to seeing what Dr. Weil and his team will be able to do with the WHD. In addition to enforcing the laws and regulations already on the books, they will soon be enforcing the President's Executive Order that all federal contract workers begin receiving a minimum wage of $10.10 will all new contracts starting on or after January 1, 2015, they will be announcing new regulations aimed at updating and further clarifying the rules surrounding payment of overtime, and we hope that they will soon be overseeing implementation of a nation-wide minimum wage increase.

There is an exceptional management team in place at the WHD, with a fully confirmed Administrator for the first time in over a decade. The best thing Congress could do to ensure meaningful enforcement of our nations wage and hour laws, and employer compliance with those laws is to appropriate adequate funds for the WHD, so it can keep pace with the ever increasing growth in the number of employers and FLSA-covered workers in this country.

Thank you again for the opportunity to testify at today's hearing. NELP stands ready to assist the WHD and this Congress in enforcing the FLSA's guarantees of a fair day's pay for a full day's work.

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[21] http://www.gao.gov/assets/660/659772.pdf, at 35.

Chairman WALBERG. Thank you.

And now we turn to Paul DeCamp for your five minutes.

STATEMENT OF HON. PAUL DECAMP, SHAREHOLDER, JACKSON LEWIS P.C., WASHINGTON, D.C.

Mr. DECAMP. Good morning, Chairman Walberg, Ranking Member Courtney and distinguished members of the Subcommittee.

The *Fair Labor Standards Act* seems straightforward. Just pay workers at least $7.25 an hour plus time-and-a-half for hours beyond 40 in a work week, unless an exemption applies that would change or eliminate one or both of those requirements. But the devil is in the details, as set forth at some length in my written testimony, which I ask to be made a part of the hearing record. There is a reason why violation rates under the FLSA are so high, with Wage and Hour consistently reporting violations by 70 percent or more of the employers it contacts. The statute itself does not provide useful definitions of such key terms as "employee" or "work."

And the agency's regulations attempting to shed light on these issues and many more take up roughly 1,000 pages in the Code of Federal Regulations. In my time at Wage and Hour, as well as in my experience in private law practice, I have seen employers repeatedly struggle with identifying which workers are their employees under the law; which activities constitute compensible work; what types of compensation factor into the regular rate for purposes of calculating overtime; and which employees are exempt from the law's overtime requirements. There are certainly many instances where the answers to these types of questions are straightforward. And it is reasonable to expect employers to understand and to follow those clear legal standards.

But in the surprisingly broad array of circumstances, the legal requirements are vague and confusing. These are serious, real-world problems for employers dealing with tight operating margins, especially in today's economy. These companies are often competing with businesses that take more aggressive positions on these same issues, such that simply defaulting to the most conservative approach where there is ambiguity can have crippling consequences by virtue of imposing a competitive disadvantage. A rule of "when in doubt just pay the workers more," is not a recipe for remaining in business. So employers must make choices about how to manage the gray zone between clear compliance and clear noncompliance while, at the same time, often facing strong economic pressures weighing in favor of a more aggressive approach.

By and large, over the past five and a half years, Wage and Hour has been all but completely uninterested in providing employers with guidance to assist them in complying with the FLSA. The agency has closed its doors to employers, abandoning the process it followed for more than half a century of issuing opinion letters in response to requests from the public for guidance regarding specific questions under the law. Instead, the agency has turned to highly punitive enforcement, focusing on civil money penalties, liquidated damages, litigation, and publicly shaming employers in lieu of helping employers comply with the law and thereby avoid violations in the first place.

As things now stand, many employers have nowhere to turn for guidance regarding FLSA compliance. Wage and Hour is providing little, if any, information. So the main alternative is to hire lawyers. Large companies can usually afford to pay at least some amount of money on attorneys. But many smaller and medium-size businesses simply do not have either the resources to expend on compliance or even the awareness that serious liabilities lurk beneath the surface of a seemingly simple and innocuous statute. Wage and Hour can do better.

There will always be employers who want to comply with their legal obligations, just as there will always be willful violators who intentionally skirt the law. The manner in which Wage and Hour carries out its charge to secure compliance with the FLSA depends largely on how the agency and, more specifically, its leadership and the leadership in the department more generally views the relative proportions of these two types of employers in the economy. If one believes that the vast majority of employers act in good faith and try to comply with the law—though perhaps through no evil intent they do not always get it right—then one must think that there is real value in providing clarity via education and interpretive guidance to give employers a fighting chance to pay their workers correctly.

If, instead, one believes that most employers are out to cheat their workers and to violate the FLSA if they think that they can do so without getting caught, then one will see such guidance as having little value; with heavy-handed enforcement appearing to be the most effective way to obtain compliance. What does the current leadership in Wage and Hour believe? The agency should return to its historical practice of treating employers as stakeholders and partners in compliance, rather than as lawbreakers. This starts with recognizing the need to issue many more guidance documents than the agency now produces.

Moreover, Wage and Hour has the ability to gather and to examine information regarding the types of issues that give rise to frequent violations, as well as questions that employers commonly ask when seeing informal guidance. The agency should use that information to drive its choices in topics for guidance. If Wage and Hour pursues this path the result will be more compliance, more workers receiving proper pay under the law, and fewer violations. All of the relevant stakeholders win.

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

[The statement of Mr. DeCamp follows:]

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STATEMENT OF

PAUL DECAMP
JACKSON LEWIS P.C.

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING

"IMPROVING THE FEDERAL WAGE AND HOUR
REGULATORY STRUCTURE"

JULY 23, 2014

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"IMPROVING THE FEDERAL WAGE AND HOUR REGULATORY STRUCTURE"

JULY 23, 2014

Good morning, Chairman Walberg, Ranking Member Courtney, and distinguished members of the Subcommittee. My name is Paul DeCamp, and I am pleased to provide this testimony to address the need for the U.S. Department of Labor's Wage and Hour Division ("WHD") to issue more, and better, guidance to the public clarifying ambiguities in the Fair Labor Standards Act (the "FLSA")[1] and its implementing regulations. I am a shareholder with Jackson Lewis P.C., a national law firm with more than 770 attorneys in 55 offices across the country practicing exclusively in the area of workplace law. I am testifying today in my individual capacity; the opinions I express are my own and do not necessarily reflect the views of my firm, its attorneys, or its clients.

EXECUTIVE SUMMARY

Enacted in 1938 and amended numerous times since, the FLSA continues to present serious compliance challenges for employers. From a distance, the FLSA looks simple enough: minimum wage, time-and-a-half after 40 hours for most employees, restrictions on work by minors, and recordkeeping obligations. Yet the statute and its regulations contain many vague and ill-defined terms, leading to substantial confusion among employers and employees, high violation rates, and a rapidly growing wave of costly litigation. Even now, nearly eight decades into the law's existence, the courts continue to grapple with such seemingly basic and foundational questions as who is an employee, what is work, which elements of compensation go into the regular rate when calculating overtime, and which employees are exempt from overtime.

By and large, over the past 5-1/2 years WHD has been all but completely uninterested in providing employers with guidance to assist them in complying with the FLSA. The agency has closed its doors to employers, abandoning the process it followed for more than half a century of issuing opinion letters in response to requests from the public for guidance regarding specific questions under the FLSA. Instead, the agency has turned to highly punitive enforcement, focusing on civil money penalties, liquidated damages, litigation, and publicly shaming

[1] 29 U.S.C. §§ 201-219.

employers in lieu of helping employers comply with the law and thereby avoid violations in the first place.

As things now stand, many employers have nowhere to turn for guidance regarding FLSA compliance. WHD is providing little, if any, information, so the main alternative is to hire lawyers. Large companies can usually afford to spend at least some amount of money on attorneys, but many smaller and medium-sized businesses simply do not have either the resources to expend on compliance or even the awareness that serious liabilities lurk beneath the surface of a seemingly simple and innocuous statute.

WHD can do better. There will always be employers who want to comply with their legal obligations, just as there will always be willful violators who intentionally skirt the FLSA's requirements. The manner in which WHD carries out its charge to secure compliance with the FLSA depends largely on how the agency, and more specifically its leadership and the leadership in the Department more generally, views the relative proportions of these two types of employers in our society.

If one believes that the vast majority of employers act in good faith and try to comply with the law, though perhaps through no evil intent they do not always get it right, then one must think that there is real value in providing clarity through education and interpretive guidance to give employers a fighting chance to pay their workers correctly. If instead one believes that most employers are out to cheat their workers and to violate the FLSA if they think that they can do so without getting caught, then one will see such guidance as having little value, with heavy-handed enforcement appearing to be the most effective way to obtain compliance. What does the current leadership in WHD believe?

WHD should return to its historical practice of treating employers as stakeholders and partners in compliance, rather than as law-breakers. This starts with recognizing the need to issue many more guidance documents than the agency now produces. Moreover, WHD has the ability to gather and to examine information regarding the types of issues that give rise to frequent violations, as well as questions that employers commonly ask when seeking informal guidance. The agency should use that information to drive its choices in topics for guidance. If WHD pursues this path, the result will be more compliance, more workers receiving proper pay under the law, and fewer violations. All of the relevant stakeholders win.

BACKGROUND AND EXPERIENCE

I have been an attorney for 19 years. From 2006 to 2007, I served as the Administrator of WHD. Appointed by the President, I was the chief federal officer responsible for interpreting and enforcing the Nation's wage and hour laws, most significantly the FLSA.

For the past 6-1/2 years, I have been the national leader of Jackson Lewis's Wage and Hour Practice Group. I oversee a team of approximately 130 attorneys who devote a substantial portion of their practice to representing employers in wage and hour litigation, including class and collective action cases as well as individual litigation matters; defending employers in federal and state agency proceedings; conducting preventive compliance reviews; and providing day-to-day advice and counsel.

Since mid-2005, my own work has focused exclusively on wage and hour matters. In addition to my time at WHD, I have represented large national clients, mid-sized regional companies, and small local businesses in all aspects of litigation, agency practice, and counseling. I have been lead counsel or co-counsel in dozens of wage and hour class cases across the country. I have successfully sued DOL to invalidate regulations that the court deemed inconsistent with the FLSA. I am a frequent speaker at conferences across the country, and I have published numerous articles and book chapters on wage and hour issues. In short, I live these issues each and every day.

CHALLENGES EMPLOYERS FACE IN COMPLYING WITH THE FLSA

The FLSA seems straightforward. Just pay workers at least $7.25 an hour, plus time-and-a-half for hours beyond 40 in a workweek, unless one or more exemptions or exceptions apply that would change or eliminate one or both of those requirements. But the devil is in the details. There is a reason why violation rates under the FLSA are so high, with DOL consistently reporting violations by 70% or more of the employers it contacts.

The statute itself does not provide useful definitions of such key terms as "employee" and "work", and WHD's regulations attempting to shed light on these issues and many more take up roughly 1,000 pages in the Code of Federal Regulations. In my time at WHD, as well as in my experience in private law practice, I have seen employers repeatedly struggle with identifying which workers are their employees under the FLSA, which activities constitute compensable work, what types of compensation factor into the regular rate for purposes of calculating overtime, and which employees are exempt from the law's overtime requirements. There are certainly many instances where the answers are for all intents and purposes clear under the law, and it is reasonable to expect employers to understand and to follow these clear legal standards. But in a surprisingly broad array of circumstances, the legal requirements are vague and confusing.

These are real-world problems for employers dealing with tight operating margins, especially in today's economy. These companies are often competing with businesses that take more aggressive positions on these same issues, such that simply defaulting to the most conservative approach where there is ambiguity can have crippling consequences by virtue of imposing a competitive disadvantage. "When in doubt, just pay the workers more" is not a recipe for remaining in business. So employers must make decisions about how to manage the gray zone between clear compliance and clear non-compliance, while at the same time often facing strong economic pressures weighing in favor of a more aggressive approach.

I. WHO IS AN EMPLOYEE?

The FLSA's protections apply only to individuals who are "employees" under the law. The statute, however, provides the following circular definition for this critical term: "the term

'employee' means any individual employed by an employer".[2] And the definition of "employ"? "'Employ' includes to suffer or permit to work."[3] The FLSA does not define "work".

Although in many circumstances it is perfectly clear who is an employee, there has been extensive litigation and agency enforcement action in a number of the significant gray zones. For example, one of WHD's major enforcement initiatives over the past several years has been to clamp down on what the agency perceives as misclassification of employees as independent contractors, with the focus being on addressing relationships that businesses have directly with workers such that the workers are nobody's employee. Industries heavily affected by this ambiguity include cable installation, parcel delivery, and information technology services.

Drawing the line between employees and bona fide independent contractors has proven incredibly difficult. It is not the type of inquiry that has lent itself to bright lines and determinate results. Indeed, I testified before this Subcommittee seven years ago tomorrow on the topic of independent contractor misclassification, and Congress is no closer today than it was then to solving this challenge.

Another point of emphasis among workers' advocates in recent years has been to push for a much broader notion of joint employment than has traditionally been the case. In short, a claim of joint employment involves asserting that one entity is actually responsible as an employer for securing the FLSA's protections with respect to workers employed by another business. We have seen WHD and the plaintiffs' bar active in this area with respect to traditional contracting and subcontracting relationships, with the claim being that an entity higher up in the contracting chain is a joint employer of workers employed by subcontractors. This issue has become significant in the residential construction industry, among others.

This type of joint employment issue has also arisen in the context of the relationship between franchisors and franchisees. We have seen substantial interest in the claim that the employees of a franchisee are also the employees of the franchisor entity. This issue has arisen primarily in restaurant and retail operations.

We have also seen class action litigation addressing whether unpaid interns are actually employees under the FLSA. A number of media companies, among others, have found themselves on the receiving end of lawsuits challenging the interns' unpaid status and seeking compensation. The same issue also exists with respect to individuals receiving pre-employment training, which has affected among other industries businesses that prepare tax returns for members of the public.

Unfortunately, WHD's guidance on these issues has been sparse. There is a very general fact sheet on the employment relationship, plus some older opinion letters that set forth a six-factor test that most courts have rejected. But we have seen very little in terms of efforts by the agency to clarify this persistent and difficult ambiguity in the law.

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[2] 29 U.S.C. § 203(e)(1).

[3] *Id.* § 203(g).

II. WHAT IS WORK?

In order for the protections of the FLSA to apply, an employee must engage in compensable work. Although there is a broad range of activity that clearly qualifies as work—i.e., when an employee is performing core job duties at the worksite during a scheduled shift—issues continue to arise at the margins. These issues have major economic significance insofar as a retroactive determination that activity treated as noncompensable actually counts as work can have a devastating effect on a company, especially in light of the reality that an employer who knows in advance to treat the activity as compensable would set the wage rates accordingly so as to arrive at the same overall level of compensation.

The types of activity that tend to generate WHD investigations and litigation include, among others, donning and doffing (primarily in meat and poultry processing, mining, and high-technology fabrication), security screening (in a variety of industries including warehouses, information technology, power generation, and airports), and using mobile devices and remote network access. Indeed, the Supreme Court is currently considering whether security screening at a warehouse is compensable work.[4] WHD and the courts have yet to develop standards that provide clear, determinate answers for whether these kinds of activities constitute work.

Even when activity may be work, employers face the question of whether the work is so brief as to fall within the long-recognized *de minimis* exception that allows employers to disregard a few seconds or minutes of work that does not involve core job duties and would be administratively difficult to measure. WHD has taken an aggressive position with respect to the *de minimis* rule, though many courts continue to apply the rule.

As the types of job-related activity that people perform increase, and as the opportunities to engage in that activity away from the workplace expand due to technology, it becomes even more important to adapt the FLSA to the times. This includes providing guidance to explain to employers how to handle these situations that are often far removed from the 1930s brick-and-mortar factory paradigm that gave rise to the FLSA.

III. WHICH TYPES OF COMPENSATION GO INTO THE REGULAR RATE?

Another recurring issue that employers face is which elements of compensation factor into an employee's regular rate for purposes of calculating overtime. The general rule is that all compensation an employee receives for work becomes part of the equation for determining the employee's regular rate, meaning the effective average hourly rate for the workweek, that serves as the basis for calculating the half-time overtime premium.[5] This rule, however, contains numerous exclusions, including discretionary bonuses and contributions to certain benefits plans.[6]

Nearly all employers understand that base hourly pay goes into the regular rate, and most employers that pay shift premiums know to include that money as well. But hardly a week goes

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[4] *Integrity Staffing Solutions, Inc. v. Busk* (U.S.) (No. 13-433).

[5] *See* 29 U.S.C. § 207(e).

[6] *See id.* § 207(e)(1)-(8).

by that I do not have at least one employer asking whether a certain type of bonus payment qualifies as discretionary, and thus excludable from the regular rate. WHD's enforcement position has been much more aggressive in practice than the agency's guidance on this issue would suggest. Although the regulations appear to treat a bonus as discretionary so long as the employer does not commit in advance to paying any particular amount of bonus money, or to paying any bonus at all,[7] in reality WHD will challenge almost any bonus as non-discretionary, and thus includable in the regular rate. Employers need to know how to treat these bonuses, both because the overtime calculations can be cumbersome and because excessive risk in this area discourages employers from paying bonuses in the first place.

Similar concerns arise with respect to contests and prizes, as well as corporate wellness programs. Employers are constantly looking for creative and flexible ways to reward their employees. But ambiguities in the law force employers to choose between (1) treating the compensation as part of the regular rate, thereby incurring higher costs and a greater administrative burden; (2) paying money to consult an attorney; (3) excluding the compensation from the regular rate, thereby running the risk of litigation or agency enforcement action; or (4) deciding that it is just not worth the hassle and foregoing the additional compensation entirely.

IV. WHICH EMPLOYEES ARE EXEMPT FROM OVERTIME?

Exempt status is a major concern for employers and employees alike. Being "salaried" denotes a level of status and accomplishment that in most workplaces represents important responsibilities, higher overall compensation, and greater upward mobility. It also means not worrying so much about week-to-week fluctuations in the workload causing unanticipated drops in pay. Hourly-based compensation tends to encourage slower work and a feeling of being on the clock and a cog in a machine, whereas salary-based compensation drives efficiency and innovation, as well a greater feeling of autonomy and alignment with the employer.

It is also important to remember that the FLSA's overtime requirement is not primarily designed to put more money into the pockets of workers who work long hours. Instead, the goal is the opposite: to create a strong economic incentive for employers to spread work around among more employees so as to avoid the overtime penalty. In short, the purpose of the overtime requirement is to alleviate unemployment, which makes eminent sense in light of the roughly 20% unemployment the country faced in 1938 when Congress enacted the FLSA. In my experience, employees converted from exempt to non-exempt normally see their hours reduced to 40 or less per week, and their pay declines accordingly.

Based on my dealings with employers and employees in both counseling and litigation, current employees want to be exempt, and former employees want to be non-exempt. When we see litigation over exemption status, it tends to involve former employees, at least at the outset of the case. When WHD investigates, the agency often takes aggressive and unanticipated positions with respect to roles long thought to be exempt.

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[7] *See* 29 C.F.R. § 778.211.

Classifying an employee as exempt or non-exempt is a very important step in deciding an employee's compensation, and employers need to get it right. The consequences of choosing wrong are substantial, given that most employers do not track the hours of employees classified as exempt, and courts calculate damages based not on what the hourly rate would have been if the employer had treated the employee as non-exempt from the start, but instead based on the pay that the employee actually received. The result is that the employee receives overall compensation, once back wages come into play, far in excess of the actual market value of the job. On the other hand, classifying as non-exempt an employee who could qualify for an overtime exemption imposes significant operational costs on the employer and limits the overall utility of the employee, in addition to limiting opportunities for promotion and higher compensation.

For most workers today, exempt status is not an issue. The general rule is that employees get overtime for working beyond 40 hours in a week unless an exemption applies, and courts have traditionally construed exemptions narrowly. As a result, most workers in the economy today are clearly non-exempt.

Nevertheless, there are a large and growing number of salaried office workers earning in the range of $30,000 to $90,000 per year who are in the gray zone between clearly exempt and clearly non-exempt status. These are not manual laborers, and many of these workers have a college degree. Employers need to know how to classify these employees, without having to resort to calling the lawyers each time or just taking the most conservative approach.

For example, there has been growing interest in litigation over the executive exemption[8], the exemption that generally applies to supervisors and managers. We have seen this most frequently in the retail setting, but it affects other industries as well. The challenge for employers is that the regulations and other WHD guidance leave room for employees (and especially former employees) to contend that their "primary duty" was not actually management, or that they did not have sufficient supervisory authority over other employees. This ambiguity in the standards encourages more litigation.

Another area that has long confused employers is the administrative exemption, which applies to employees engaged in "work directly related to the management or general business operations of the employer or the employer's customers" who exercise "discretion and independent judgment with respect to matters of significance"[9]. This is the category for office workers who are not supervisors or managers, and who do not qualify for exemption as a learned or computer professional. The standards are especially amorphous, and much of the guidance available from the courts and WHD is inconsistent and contradictory.

Even WHD has had trouble applying the administrative exemption. For the first several decades of the agency's existence, WHD classified its wage and hour investigators as exempt pursuant to this exemption. In the 1970s, the Office of Personnel Management ("OPM"), which has enforcement authority under the FLSA with respect to most federal employees, conducted an audit and determined that WHD had misclassified hundreds of these investigators. These are the

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[8] *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.100-.106.

[9] *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.200-.204.

very individuals whose job it is to go around the country telling employers whether they have or have not correctly applied the FLSA. But OPM concluded that the investigators are production employees rather than administrative, and thus that the administrative exemption does not apply. As a result, WHD's investigators have been non-exempt since that OPM review.

There is also much confusion regarding the learned professional[10] and the computer professional[11] exemptions. The available WHD guidance suggests that not every learned professional must have a college degree so long as the norm for entry into the field is obtaining the degree, yet there is little to no guidance explaining to employers how to apply this standard. In addition, there is very little case law or WHD information applying the computer professional employee exemption to specific fact situations. The standards for the computer employee exemption date back to the early 1990s, and today's information technology world looks almost nothing like the pre-internet, pre-mobile device era that gave rise to the exemption and its regulations.

* * *

One of the most difficult aspects of the vague standards is the potential for class and collective action litigation. The way that the case law has developed over the past twenty-five years, when a plaintiff comes into court alleging that a business violated his or her FLSA rights and that there are other similarly situated workers affected by the same practice, most courts do not hesitate to authorize notice at the early stages of the case to a broad class of employees. Thereafter, even if it turns out that the employees are not similar to the original plaintiff, the plaintiff's lawyer has names and contact information for many additional clients. In effect, the collective action device under the FLSA has become a powerful client recruitment and solicitation tool for the plaintiffs' bar to stir up further litigation. Employees who did not think that they had a problem find themselves encouraged to press often dubious claims against their employer.

It is one thing to expect employers to comply with clear legal standards; we should demand this of every employer. But it is something else entirely for companies to have to face massive litigation over gray areas in the law. Legal ambiguities encourage litigation, and often the transaction costs of litigating a dispute are more than the amount of damages claimed. Clear standards lead to compliance, and they make it easier for employers and workers alike to know whether pay practices comply with the FLSA.

WHD'S RESPONSE TO THESE CONCERNS

In early 2009, WHD withdrew 20 opinion letters, 18 of which were Administrator letters and two of which were non-Administrator letters, subject to "further consideration". In the more than five years since, WHD has not reissued those letters, or even stated one way or the other whether the agency believes that the guidance provided in those letters is correct.

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[10] *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.300-.304.

[11] *See* 29 U.S.C. § 213(a)(17); 29 C.F.R. §§ 541.400-.402.

Then in 2010, WHD announced that it was abandoning entirely its decades-old practice of issuing opinion letters. No longer would employers or workers have an opportunity to submit questions to the agency for a formal ruling. Instead, the agency would select issues on its own, and then make broad policy pronouncements. Since that time, WHD has issued five so-called Administrator Interpretations concerning the FLSA, including one that focuses on agriculture and the handling of pine straw, as well as two Administrator Interpretations concerning the Family and Medical Leave Act. The first two of WHD's Administrator Interpretations simply reversed positions taken under the FLSA during the previous administration. The Supreme Court is currently considering whether WHD complied with the Administrative Procedure Act in issuing one of those interpretations.[12]

These various quick reversals of agency enforcement positions have created substantial confusion for employers. The fact that the courts in many instances refuse to defer to agency guidance where an agency changes views from one administration to the next makes it even more difficult for employers to know and to understand what exactly their compliance obligations really are.

In lieu of issuing guidance and providing robust compliance assistance, WHD has instead focused its efforts on conducting broad investigations, seeking liquidated damages in a broad range of investigations, imposing civil money penalties on the basis of an employer's status as a "repeat" violator even where the prior violation was years ago and involved a completely different issue, and shaming employers through the use of press releases and other techniques to publicize what WHD believes to be an employer's non-compliance.

WHD has also been very reluctant to supervise settlements. In light of long-standing Supreme Court precedent[13], courts have generally held that the only way to effect a binding release of FLSA liability is through a judgment in court (or arbitration), or a court-approved (or arbitrator-approved) settlement, or a settlement supervised by WHD. In the past, if an employer discovered a violation, the employer had the option of going to WHD to have the agency supervise the payment of back wages, thereby bringing closure to the situation. In the past several years, WHD has been unwilling to consider request to supervise settlements, effectively leaving employers with no option to address their back wage exposure without the risk of follow-on litigation.

Making matters even more challenging for employers, WHD is now looking at significantly revising the white-collar overtime exemption regulations in response to the President's memorandum to Secretary of Labor Thomas Perez declaring that "millions of Americans lack the protections of overtime" as a result of problems with the regulations.[14] Employers who have relied on WHD regulations, court rulings, and what little WHD guidance exists now must face the prospect of substantially revamping their compensation policies. At the

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[12] *Perez v. Mortgage Bankers Ass'n* (U.S.) (No. 13-1041).

[13] *Brooklyn Sav. Bank v. ONeil*, 324 U.S. 697 (1945).

[14] *Presidential Memorandum—Updating and Modernizing Overtime Regulations* (Mar. 13, 2014), available at www.whitehouse.gov/the-press-office/2014/02/13/presidential-memorandum-updating-and-modernizing-overtime-regulations.

same time, a new wave of litigation is all but inevitable as employees frustrated by the changes forced by the new regulations will seek to hold their employers responsible, regardless of whether the employer paid the workers correctly.

WHD CAN, AND MUST, DO BETTER

WHD needs to recognize that employers are not the enemy. The undeniable reality is that most employers want to comply with the law. With regard to the FLSA, most employers have no idea how complicated and difficult it can be to pay workers correctly. And with a law that is so seemingly simple—minimum wage plus time-and-a-half—employers are not for the most part on notice of the need to master 1,000 pages of regulations, 70-plus years of agency guidance, and numerous court rulings. Given WHD's own track record of misclassifying half or more of its own employees as exempt, the agency should be more understanding of how and why violations occur. While there will always be a need for strong coercive enforcement measure for willful violators, good and effective government requires calibrating enforcement to address the needs and the nature of the regulated community. This means acknowledging that most employers will comply with the law if someone simply tells them what the law requires.

As discussed above, the many ambiguities in the FLSA and its regulations cry out for more agency guidance. Even though compliance assistance does not necessarily show up in an agency's enforcement numbers, insofar as it is all but impossible to quantify the effect of guidance documents in preventing violations, making information available to the public is the right thing to do. Employers need help complying with the FLSA, and the law should not be so complex that the only option is to seek legal counsel.

Based on my time in WHD, as well as my years of working with employers, the best way to increase compliance is to provide standards that are as clear as possible. This means issuing guidance documents that actually help employers to understand the key issues that they face on a daily basis. Given WHD's long history of enforcing the FLSA, as well as its experience fielding calls from the pubic seeking information about compliance, the agency and the public would surely benefit from an approach that identifies points of recurring violations and frequently asked questions and then focuses on issuing guidance tailored to that need. If WHD focuses more resources on issuing guidance documents, and on the topics that are of greatest importance to the public, then we will see substantial benefits in the form of better compliance and fewer violations.

CONCLUSION

Employers and employees alike benefit when WHD provides clear guidance on relevant FLSA topics. WHD should embrace the value of preparing and issuing such guidance documents, and it should allocate more resources to identifying areas of particular concern to large numbers of employers and employees, and then crafting appropriate guidance documents. If the agency commits to such an approach, the result will benefit everyone, including most importantly the workers the FLSA exists to protect.

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

Chairman WALBERG. Well, thank you. I thank each of the panel members for your efficiency in keeping within the time limits and giving us information we need. And I would call attention to myself and my colleagues on that example, as well.

Having said that, let me recognize Representative Rokita, my good friend from Indiana, for your five minutes of questioning.

Mr. ROKITA. Thank you, Chair. I appreciate that, appreciate you holding this hearing, and I thank the witnesses for their testimony this morning. I am going to concentrate, at least initially, on Mr. DeCamp. I thank you for your service to this country, by the way. Your written testimony, if I understand it right, highlights an issue that employers face when determining an employee's regular rate for the purposes of calculating overtime pay. And having been an employee in some of these places, and then knowing other employers, I know that a lot of employers try to do the right thing by, you know, offering their workers—allowing them to share in the success of a company through a bonus structure or some kind of equity or non-equity provision, mostly non-equity.

Yet even this well-intentioned action can result in an employer running afoul of the FLSA, or it can be a deterrent to employers who want to provide bonuses. Can you elaborate for about 30 seconds to a minute on that?

Mr. DECAMP. Well, sure. What we are talking about, really, is one of the regular rate exclusions under the statute. And under the FLSA, a discretionary bonus does not have to go into the regular rate. So the employer does not have to pay overtime on top of that bonus. A non-discretionary bonus however does go into the regular rate. If an employer guesses wrong as to whether a bonus is discretionary or non-discretionary it can find itself after the fact, after it has paid bonuses, subject to an enforcement action. There is a great example of that. There is an oil and gas company in the Southwest that awarded bonuses that it regarded as discretionary under the standards and the regulations to about 5,000 of its non-exempt employees.

The Department of Labor came in afterwards and said no, we think that was a non-discretionary bonus and, in fact, you have to pay overtime on that. This resulted in the Department of Labor filing a lawsuit in federal court accusing the company of violating the law with respect to over 5,000 workers.

Mr. ROKITA. Yet these people got bonuses.

Mr. DECAMP. They got bonuses. This is sort of the no good deed goes unpunished theory of employment.

Mr. ROKITA. Right.

Mr. DECAMP. And this led to litigation and, ultimately, a large award.

Mr. ROKITA. Well, surely the company explained and showed that, you know, consideration was given. And I don't know if it was less or more, but assume it was about the same. Or you tell me if it is different. And what was the department's response? A lawsuit? And then what was their legal argument? Strict noncompliance?

Mr. DECAMP. The Department's argument was, well, look, you gave this benefit to just about all of your people, you have given this bonus before. Therefore, even though you retained, under the

terms of the bonus plan, the discretion not to award a bonus we are gonna treat it as non-discretionary. We are gonna say that you really were promising to give this money, even though you said you didn't have to give it. And so the department said it goes into the regular rate, and they sued.

Mr. ROKITA. What adjective would you use for something like this, an action like this?

Mr. DECAMP. I am sorry. Say again?

Mr. ROKITA. What adjective would you use for an action like that?

Mr. DECAMP. I can't say it in this room.

[Laughter.]

Mr. ROKITA. Well, church it up. Go ahead.

Mr. DECAMP. Well, it is heavy-handed and punitive. And—

Mr. ROKITA. I was going to say punitive. Absurd might be another one. Going on with something else, I assume you might be aware of an amendment that was recently filed here in the House of Representatives during a floor debate on several appropriations measures. I was surprised by it, actually. But the amendment would prevent contractors found to have violated the FLSA from continuing to receive federal contracts. So can your explain how this amendment could impact companies that you have experience with where, through no, you know, intentional action they would, again, punitively be prohibited from getting employed by the federal government.

Mr. DECAMP. Well, the great example is that same oil and gas company I was talking about. They happen to be a federal contractor. So under the standards of the amendment, that company would arguably be barred from federal contracting. It would be blacklisted under the Appropriations amendment. Because there was an award that was in excess of—whether it is $5,000 or $100,000, depending on which provision of the statute we are talking about—it was a six-figure award ultimately. That company that their only violation was paying their non-exempt employees too much, giving them bonuses could result in them being kicked out of the federal contracting program.

Mr. ROKITA. Okay. Is it also true, in your experience both as a practitioner now, but in your public experience, that union contracts are tied to minimum wage rates?

Mr. DECAMP. They can be. They are not always it depends on the contract.

Mr. ROKITA. Do you have a one out of 10 how many it would be. Can you—any kind of—

Mr. DECAMP. I wouldn't be able to estimate, frankly. Most union jobs that I have seen are well above minimum wage, and so tend not to—

Mr. ROKITA. Anywhere, right?

Mr. DECAMP. Right.

Mr. ROKITA. All right, fair enough.

Mr. Chairman, thanks for the time again. I yield back.

Chairman WALBERG. I thank the gentleman.

Now I recognize the ranking member, Mr. Courtney, for your five minutes.

Mr. COURTNEY. Thank you, Mr. Chairman. Again, as was stated in the opening remarks and also in Dr. Sherrill's testimony, the department's reaction or response to the GAO study was that they agreed with its findings and pledged to, again, come up with an action plan to follow up in terms of changes to comply with the recommendations that GAO found.

I would also ask, Mr. Chairman, we received a letter last night from Dr. Weil, that Ms. Conti referred to, that again was a follow up, again, to the initial reaction that was included in the report. I would ask that this letter be added to the record.

And it clearly states that contrary to, you know, comments here about closing its doors to the employer community that the Wage and Hours Division is currently engaged in a national outreach effort to provide guidance, information and training prior to the new home care regulations.

In addition, in the area of agriculture they are, again, issuing compliance information and even pocket cards for people in terms of giving them handy ways to, again, respond to some of the issues that people deal with every single day in the workplace.

So, again, as Ms. Conti's testimony indicates, and I think, you know, under the new leadership of Secretary Perez we have a department that is actively following up with employers to try and give them the help that they need. So again, I would ask that this be made part of the record.

[The information follows:]

U.S. Department of Labor Wage and Hour Division
Washington, D.C. 20210

Cathy Roark
Senior Analyst
U.S. Government Accountability Office
Washington, D.C. 20548

Dear Ms. Roark:

Thank you for your follow-up inquiry asking how the Department of Labor's Wage and Hour Division (WHD) has addressed the recommendation in GAO's Report entitled *"Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Improving Its Guidance"* (GAO-14-69, Dec. 18, 2013).

In response to GAO's recommendation in its draft report:

> *[t]hat the Secretary of Labor direct the Wage and Hour Administrator to develop a systematic approach for identifying and considering areas of confusion that contribute to possible FLSA violations to help inform the development and assessment of its guidance[,]*

WHD stated that it agreed that it could "institute additional processes for identifying and considering areas of the FLSA that could benefit from development of guidance or revisions to existing guidance." *See* Letter from WHD Principal Deputy Administrator Laura Fortman to GAO dated November 27, 2013. Please be advised that WHD is continuing to consider additional processes for identifying areas of the FLSA that could benefit from development of guidance or revisions to existing guidance, including systems to further analyze trends in correspondence and communications received from stakeholders, such as workers and employers.

WHD continues to issue guidance in response to inquiries from the regulated community. For example, WHD is currently engaged in a national outreach effort to provide guidance, information, and training prior to the January 1, 2015 effective date of the new home care regulations. As part of that effort and in response to questions from public agencies and other stakeholders, WHD has released two Administrator's Interpretations this year providing guidance on the application of the home care regulations. WHD expects this effort will provide valuable insights on how to effectively reach and educate a diverse set of stakeholders impacted by the new regulations. Similarly, in response to requests from representatives of employers and workers for additional guidance in advance of the growing season, WHD recently released a new video and a new booklet for employers that provide simple and comprehensive information on the laws and requirements governing agricultural employment, covering topics such as wages, housing, transportation and field sanitation. The agency at the same time released a revised pocket card for agricultural workers that informs them of their rights and provides information on how to file a complaint with the Wage and Hour Division if they believe these rights have been violated.

See http://www.dol.gov/whd/FLSAEmployeeCard/AgGuideEnglish.pdf and http://www.dol.gov/whd/FLSAEmployeeCard/FarmWorkerEnglish.pdf.

Please do not hesitate to contact Jennifer Brand, Associate Solicitor for Fair Labor Standards, with questions or with requests for additional updates.

Sincerely,

Dr. David Weil
Administrator
Wage and Hour Division

Chairman WALBERG. Without objection, and hearing none, it will be added.

Mr. COURTNEY. And, Ms. Conti, I thank you for bringing up the 2008–2009 GAO report. I guess I have been around here long enough that I remember that hearing. And again, the report, frankly, was not, in my opinion a, you know, great report card for the Wage and Hour Division as it was presently operating right then. I mean, again, just looking at it and refreshing my recollection, some of the headings: undercover tests reveal inadequate investigations and poor complaint intake process; case studies show that Wage and Hours Division inadequately investigated complaints; Wage and Hours Division complaint intake process, conciliations and other investigative tools do not provide assurance of a timely and thorough response to wage theft complaints.

So clearly we were not living in wage and hour paradise prior to the new leadership that is at the department right now. Frankly, that is not trying to take a cheap shot at people that—our predecessors. I mean, frankly, you know, that is the—we are all human beings and we all have to deal with challenges.

But the fact of the matter is, the notion that—you know, that there was some bright line that took place on January of 2009 in terms of the way the Department of Labor treats this critical area for low-income Americans has sort of cast us into this dark period. I mean, the fact is the report goes back 10 years that we have here today, and frankly doesn't identify any sort of change of—sea change that has occurred with the department in terms of explaining the spike and the number of lawsuits.

In fact, I mean, that report back in 2008–2009 showed a lot of workers were forced almost to go to private remedies because of the fact that the department was not picking up the ball. And that is a part of the record. I mean, that is not a partisan talking point.

You deal with low-income workers in that population day in and day out. It has been 2007—the last time Congress passed a minimum wage increase. Can you talk about what is happening to the people that you see, that your agency represents?

Ms. CONTI. Absolutely. Tomorrow will actually mark the fifth anniversary of the last time the minimum wage has increased. During that period, we of course have gone through a recession and a recovery, which is not as robust as anybody would like. But the fact of the matter is, the price of housing has increased over the past 5 years. The price of our utility bills has increased. The price of food, clothing, consumer goods, gasoline has all increased over the last 5 years. Yet the lowest-wage workers in this country have not received a raise in 5 years. And when we look at the rates of wage growth, while it is certainly true that the federal government only mandates the floor, doesn't apply a ceiling, there is absolutely stagnant wage growth among the lowest-wage workers in this country.

Quite frankly, among many middle class workers, as well, but particularly among the low-wage force. Because there is no upward pressure being put on wages from Congress, among other things. So those folks have not only stood still, but while the cost of living has gotten greater and their wages have stayed relatively the same, or, to the extent they have gone up, they certainly haven't gone up anything commensurate with the cost of living, they are

falling further and further behind. And as you noted, that only increases their reliance on public benefits programs like SNAP as just one example.

So it has been very dark times for them. And as they have seen companies recover, as they have seen shareholders recover, as they have seen the stock market boom and executive compensation boom and they have stayed the same, it has been very hard times for workers.

Mr. COURTNEY. Thank you.

Yield back.

Chairman WALBERG. I thank the gentleman.

Now I have the pleasure of—I guess we go to—from a beautiful part of Wisconsin, my colleague, Mr. Pocan.

Mr. POCAN. Thank you, Mr. Chairman. I appreciate it.

Let me just offer a little, I guess, perspective as I look at this. I am a new member of Congress, but I have been a small business owner for over half my life. I opened a small business when I had hair 27 years ago, just to give you a little idea. And when I look at, you know, my expenses as a business, outside of my cost of sale of goods the single largest expense I have is—my operating cost—is labor cost. So what that means is, I am gonna try to follow the law really well because I don't want to spend a lot of money having other problems. So I would look at my insurance bill, I would look at my legal costs with the same thing—how do I find cost savings, make sure I am doing it efficiently.

But when it comes to labor law, you know, it is pretty straightforward. And if I am going in an area where it is not straightforward—for example, one of the things I considered was should I hire an independent contractor to go out and do some sales on the outside. Then I have to make sure I am doing the right definition of independent contractor. I will take the time to look into it. So I think somewhat—this isn't in the category of rocket science, it is in the category of what is best for my business, for my pocketbook and complying with the law. And I also have a firm that does my payroll that also keeps me in contact.

I am a small employer, five employees. So it is something that I think that some of the complaints maybe should fall in a different realm of maybe some compliments to the agency right now on what is getting done. I look at the scale of the agency: 1,100 employees, and in 2012 it is estimated there is $280 million in wage theft. If you look at robberies for the same year, it is estimated that is around $139 million. Yet we have about 780,000 law enforcement offices in this country. I am not saying it is the only thing they do, but when you have 700 times the people for compliance for half the money maybe we are getting a pretty good result for the dollars that we put into this area.

And I think when I look at the GAO study, you had one recommendation, if I am correct, Dr. Sherrill. And it is being complied with and followed. It seems to be that we are in a pretty good place here. And when you look at some of the past problems agencies had to where it is at today perhaps the question—if I could, I guess Dr. Sherrill just to really clarify this a little more—while there is a significant increase in these lawsuits the reason for the increase is

difficult to determine was, I think the words that you used in the report. Is that correct?

Mr. SHERRILL. That is correct.

Mr. POCAN. So it is not that the agency necessarily is doing something different. And as far as you know, not having the opinion letters, when I look at the vast number of other resources I can go to get the information about what the law is, including calling directly—I think there are still 26 people in the compliance division that I can reach out to ask these questions—I still have plenty of resources to be able to do that.

So I guess, Mr. Chairman, as much as I appreciate, you know, the conversation we are having today, I wish the conversation probably were around things like raising the minimum wage. Because the vast majority of low—low-income workers, who many of these people are affected not getting overtime, not getting their minimum wage, which is where these lawsuits come, could really benefit from a wage increase.

But at least the department right now is helping them get some of their resources. And I know Mr. Rokita brought up the example of the oil company with the bonuses, and there is confusion around that. I mean, if I am an oil company, I am gonna give out bonuses that is gonna put me in a different part of the law I am gonna probably make sure I am in the correct part of the law. Because let's face it, Wal-Mart and McDonald's aren't offering bonuses to workers.

We got issues around overtime and minimum wage whether or not they are getting that. So, Mr. DeCamp, if I can just ask you a quick question. I know you were in the department. But specifically, I mean, I am an employer. I know the vast majority of employers are following the law. But don't we need something in place for those who aren't, especially when it is—you know, we are talking $280 million just in the year 2012.

Mr. DECAMP. Well, sure. Absolutely. I mean, there has to be enforcement. There will be some employers out there, a relatively small proportion of employers, who no matter what guidance you provide are going to, on purpose, cheat their workers. That is going to happen. We need enforcement to deal with that. The challenge that has raised is, right now what we have seen of the department over the last five and a half years is the same enforcement approach taken to those employers, the willful bad actors, and to the non-willful employers, the vast majority of employers who are good employers. To every—

Mr. POCAN. Now, you are referring specific to these letters, policy letters?

Mr. DECAMP. Well, I am talking about we need vigorous enforcement, but we need calibrated enforcement. I mean, to a hammer everything looks like a nail. And that's—

Mr. POCAN. Sure, but I think there is—you will agree there are certain industries and certain areas—three states where we saw most of these—that seem to have more problems. And I want the department to be doing what they are doing. And they are not bringing up most of the lawsuits. These are coming from individuals, correct?

Mr. DECAMP. Well, from individuals and class actions. That is where most of the litigation is coming from. There is a great value in more guidance documents. We—it doesn't who up in terms of—it is very difficult to prove that a violation was prevented because the department issued an opinion letter.

Mr. POCAN. Just because I see the yellow light, let me just ask this. As an employer, though, isn't it my job—the law, I think, is fairly straightforward unless you deviate into some interesting areas of how you pay your employee. If I am gonna go into one of those areas, shouldn't I do my due diligence before I put my toe into that water?

Mr. DECAMP. With all due respect, your assumption is incorrect. The law is not that straightforward. There are lots and lots of gray areas. There are clear areas, too, for sure. But there is a very broad array of issues that are gray like these bonus issues, like who is an employee, like what counts as work. We have a case going to the Supreme Court right now on that. Really basic issues that employers are continuing to struggle with. Employers that are doing their best to comply with the law. I am not just talking about willful violators or employers that don't think about the law. I am talking about employers that are trying. Even they find it difficult to get it right.

Mr. POCAN. Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

And I recognize the gentleman from California, Mr. Takano.

Mr. TAKANO. Thank you, Mr. Chairman. And thank you to our witnesses for their time today. You know, the Wage and Hour Division is the Department of Labor's most important tool to ensure that workers are receiving the pay and protections they are entitled to under the *Fair Labor Standards Act.*

Since 2008, the Wage and Hour Division has helped recover $1 billion in wages for more than 1.2 million workers. That is $1 billion these workers can use to pay for necessities such as food, housing, health care and transportation; $1 billion that workers can put back into their local communities.

Now, people who are head of corporations, with their vast network of relationships and interlocking boards, have no problem in getting their salaries incremented, even if there is questionable results that they do for their shareholders. I think it is common sense that Americans believe in a vigorous enforcement, especially of our low-wage workers. And that is why even with the Republican majority controlling the House of Representatives, we have passed four appropriations bills in the House with amendments that call for preventing the contracting with businesses that have a history of wage theft.

And I don't think the Congress intended for those amendments to go to these gray areas that were mentioned by Mr. DeCamp, but by people who do cheat our low-wage workers. I mean, I think that is the relationship. Let's not kind of confuse this issue about what these amendments were about.

Ms. Conti, could you comment on just what it means to have a fully confirmed director? We haven't had a fully confirmed director for eight years and how that might bring balance to this department.

Ms. CONTI. You know, it is something we are really excited about. And this is with no disrespect to Mr. DeCamp and the many other learned people who have filled the job in the interim between confirmed administrators. But they were often holding a seat for somebody else who was officially nominated for that job. You know, it stands to reason when you are an acting administrator it is not that time stands still, it is not that you don't look to continue to do better work, whatever your philosophy of enforcement and managing the division is.

But the fact of the matter is that someone with Senate confirmation and the full reins of power over the Wage and Hour Division has authority vested in him or her to really move the agenda forward. And as I stated in my testimony, you know, Dr. Weil has spent his entire career thinking about these very issues; data-driven enforcement compliance, and what to do to get the best bang for the buck.

As Mr. DeCamp could tell you better than I ever could, under the best of circumstances the Wage and Hour Division will always have limited resources, it will always have to do way too much with way too little because that is just the nature of the beast.

So we need to look for the ways to get the biggest bang for the buck. To use enforcement not just to remedy abuses, but to create the greatest deterrent effect. And to structure compliance assistance and education for workers in ways that will reach the greatest number of people. And a fully-confirmed administrator will have the full authority to really go about that very aggressively. So we are looking forward to seeing what the next few years are going to look like for the Wage and Hour department.

Mr. TAKANO. Thank you. Dr. Sherrill, the GAO recommended that the department be more strategic in its use of resources. And specifically the department is trying to comply by offering more general advice. And can you comment more about that?

Dr. SHERRILL. Yes. Our recommendation saw the need for improvements in the Wage and Hour Division's provision of compliance assistance in two key areas. One, first, they didn't have a sufficiently routine and systematic approach to getting information on where are the areas in which employers and others are requesting more guidance. So they need to—so our thought was, they need better information and a more systematic way to analyze where the inquiries for more clarification of the guidance is one aspect of that.

And second, the Wage and Hour Division doesn't really have a data-driven approach to determining how adequate is the guidance that it actually issues. For example, it doesn't look at trends over time. Is it getting after an issues guidance, is it getting less requests for assistance in certain areas? So it agreed with both of those recommendations that we think are two key areas that could help it really better target the interpretive guidance that it provides.

Mr. TAKANO. Yes. So devoting all of its resources into these very specific compliance—narrow, these narrow opinions—is not necessarily the best use of their time.

Dr. SHERRILL. Well, the interpretive guidance is a key part of their compliance assistance. So it is not like we are necessarily arguing that they need to do more or less or different types. But our

argument is basically you need to have a more systematic approach for how they do their interpretive guidance based on what information. So that helps target it, and to have information to assess what effect is it having.

Mr. TAKANO. Okay, thank you.

My time is up, thank you.

Chairman WALBERG. I thank the gentleman. I recognize myself for my five minutes of questioning. Ms. McKeague, would you like to comment further on DOL's decision to forego providing opinion letters containing fact-specific guidance to employees and its impact?

Ms. MCKEAGUE. Yes, Mr. Chairman. The opinion letters are very helpful to those of us who are doing what Mr. Pocan just discussed, trying to work our way through the issues and make sure we do the right thing. And the use of examples, specific examples that a lot of us see in the workplace, helps us facilitate that process. For instance, calculating travel time and what payment we make for travel time is not easy, even if you do the work all the time like most of us do. And so the use of examples in those letters is very helpful.

So I would welcome any sort of guidance we got in that manner.

Chairman WALBERG. The fact sheets aren't adequate for that?

Ms. MCKEAGUE. The fact sheets help also, but sometimes an opinion letter gets attention from higher up in the department and pays more attention to current issues which may be problematic.

Chairman WALBERG. You mentioned in your testimony employee morale, workplace flexibility and several other things relative to your concerns about the employees that you are attempting to service well, as well as use well in their areas. Why do many employees prefer to be exempt?

Ms. MCKEAGUE. You have hit on the key point and, for me, the biggest concern. They prefer to be exempt because they have more control over their work schedule. And it makes it easy for them to fulfill both their work and family obligations without feeling that they are letting either down. And as a non-profit or a small business, usually your org chart is pretty flat. And so people have widespread responsibilities. It is not uncommon to have only one person hold a specific job. So it is not like an administrative assistant, where you might have eight of them.

But I might have, you know, a clinical specialist who is the only one. That is one of the things that makes MHA the good place to work that it is, the ability that we give our employees to determine how to do the work, when to do the work. And in our case, since we are servicing hospitals and across time zones, it makes sense to let people make those decisions.

Chairman WALBERG. Does it supply any prestige to employees to be in that particular classification?

Ms. MCKEAGUE. Absolutely. You know, one of the things is..

Chairman WALBERG. And that is important to them beyond remuneration or it is just another component?

Ms. MCKEAGUE. If a person is already fairly compensated, I would say it is important to them beyond remuneration. One of the toughest discussions I have with an employee is going back to review their job description and how they spent their usual day at

work to determine whether they still met the test to be either exempt or non-exempt. And if I have to tell an employee who has been exempt that we are moving them to non-exempt status, they still hear the old language.

Chairman WALBERG. It is a step backwards.

Ms. MCKEAGUE. From professional to non-professional staff, that is how they view it.

Chairman WALBERG. Dr. Sherrill, could you elaborate—relatively briefly, but could you elaborate on the information GAO reviewed in order to draw conclusions about the reasons for increased FLSA litigation?

Dr. SHERRILL. Yes. We basically relied on obtaining perspectives from experts in the area; judges, plaintiffs and employers' attorneys who defend these kinds of *Fair Labor Standards* Act lawsuits, academics, et cetera. And we basically asked these stakeholders who are very familiar with the area, in their view what are the key factors that have contributed to this substantial rise in lawsuits over the years, especially in the last decade. So we weren't able to definitively quantify or sort of make an exact determination here. But what we found is that the most frequently cited factor was increased awareness of these lawsuits. And increased, attorneys' increased willingness to take on these lawsuits, over time, was the most frequently cited factor across the stakeholders we talked to.

In addition, we found a range of other factors that I mentioned; evolving case law, recent economic conditions, state wage and hour laws, and ambiguity in applying some of the laws and regulations, especially with the white collar exemptions. So it was a range of factors that people cited.

Chairman WALBERG. Okay. Quickly, Mr. DeCamp, could you just point out a few activities used more frequently by this administration and its impact upon the stakeholders?

Mr. DECAMP. Well, sure. They have been very aggressive with using civil money penalties for what they regard as repeated violations. In other words, an employer could have a small violation three, 5 years ago affecting a handful of employees or even one employee. And then in the current year, they have a totally different type of violation, but also under *Fair Labor Standards Act.* It could be at a different facility, a different state. The employer now will face civil money penalties as a repeat violator of up to $1,100 per affected employee now. And that can be hundreds of thousands of dollars or more of penalties for a non-willful violation.

Chairman WALBERG. Confused and uncertain and stepped over the line.

Mr. DECAMP. Yes. And you can also see a very aggressive use of liquidated damages, which is double the back pay. The department has been increasingly insisting on liquidated damages as a condition of settling a case administratively, even when there is no willful misconduct. It has made it very challenging for employers to settle cases.

They have also been very aggressive with bringing litigation and with public press releases to shame employers that the department feels violated the FLSA. It is a very adversarial relationship that is not calibrating between drawing the distinction between willful bad actors and employers who made a good faith mistake.

Chairman WALBERG. Hammer and nail.

Mr. DECAMP. Yes.

Chairman WALBERG. Well, thank you. My time has expired. And I certainly appreciate the testimony given, as well as the answers and the questions from the committee. So now let me recognize the ranking member for any closing comments that you might have.

Mr. COURTNEY. Thank you, Mr. Chairman. I want to thank all the witnesses for your testimony today, and particularly Dr. Sherrill who, again, GAO is no stranger to this part of the law or department. Again, you have looked at Wage and Hour over the years. Again, the last time this committee did it, in 2008 and 2009, I would characterize the GAO report as stinging in terms of its conclusions and its recommendations.

And again, just to read a very short portion of, again, the GAO report back in 2009, this is what it said: "This investigation clearly shows that the Department of Labor has left thousands of actual victims of wage theft who sought federal government assistance with nowhere to turn. Our work has shown that when Wage and Hours Division adequately investigates and follows through on cases they are often successful. However, far too often many of America's most vulnerable workers find themselves dealing with an agency concerned about resource limitations with ineffective processes and without certain tools necessary to perform timely and effective investigations of wage theft complaints. Unfortunately, far too often the result is unscrupulous employers taking advantage of our country's low-wage workers."

Again, that was in 2009. We had a change of administration. Secretary Solis did beef up the department, brought on more staff. Because that was, frankly, the department's sort of response back in—when GAO did the last report. And they did beef up protections for workers, which GAO was telling Congress in pretty strong language was leaving some of the most vulnerable workers in America's economy basically without any remedy to deal with what was clearly violations.

Again, move, fast-forwarding to today's GAO report, you know, there is no question there probably needs to be some rebalancing here in terms of giving employer guidance. But the good news is, the department is not contesting that. Again, they are not here to speak for themselves. You know, I frankly don't understand that myself personally. But nonetheless, the record is clear. They agreed with the findings, they are moving forward in terms of trying to respond to those findings. We even had an updated report here this morning that is entered to the record that confirms that fact.

But again, in the meantime we are dealing at a time in America's economy where income disparity is growing, where the cost of living for people who are out there every day, particularly single parents with kids are struggling to keep up with putting food on the table. Where public budgets are being, I think, unnecessarily expended because of trying to make up for the gap in that.

And this Congress needs to move on H.R. 1010. Yesterday, we had a wonderful bill signing at the White House that had almost no press coverage. *The Workforce Investment Act.* But it was a beautiful sight to see a bipartisan array of legislators who some-

times debate very passionately, behind the President signing an update to *The Workforce Investment Act.*

Hadn't happened since 1998. So the fact is, it is—

Chairman WALBERG. Not noteworthy, not noteworthy. Bipartisan.

Mr. COURTNEY. And it is possible, you know, for people to come together. And as these numbers show over here, I mean, the fact is, is that there are thousands of Americans that frankly need help. And that they are begging this Congress to move forward on. So again, the good news is today I think we actually have positive movement, based on what GAO came forward with. Let's build on that. Let's pass H.R. 1010.

And with that, I yield back the balance of my time.

Chairman WALBERG. I thank the gentleman.

And it is challenging to come up with a understanding of why something as bipartisan as that yesterday with the President, joining with members of both parties, both houses, working together to do something of significance that pushes forward the opportunity for job growth, for the growth of, as we said in the Declaration of Independence, "the pursuit of happiness" in this country, of individuals having that training and opportunity—that that isn't noteworthy. But there are questions in my life I will never have answered, and that will just be one of them maybe.

I would also echo some of the statements that my Democrat colleagues have about Secretary Perez and his openness to take our phone calls, to respond to some of our concerns. Not sometimes as completely as we would like, but nonetheless there is response. And I certainly want to add my kudos to his efforts.

And yet, we want to continue pushing forward. And this hearing today is for that purpose; to add our support, our encouragement to continue working in an area that is causing challenges. And, in some ways I will remember the use of—to a hammer, everything is seen as a nail—and probably use that more.

Because that is an approach that is of a concern in an economy that I don't think we can say has turned around. That continues to struggle, that the economic indicators that we saw as recently as last week that are building again, if they continue as history says they will continue is indicating we are going into another recession. We are not coming out of this appropriately. And so to not be careful how we deal with both the employee and the employer, you know, I appreciate the chart that has been put up here. But that chart doesn't talk about what CBO, what GAO I believe as well in the report said that to increase it to this level will cost 500,000 jobs.

I am concerned about that in my district. When I see the numbers here, I also don't see the numbers of jobs that will be lost as a result of doing this. Do we want people to expand in their income capabilities? Absolutely yes. We want living income that goes on. And so I am concerned about my middle class, as well. People that are in these type of jobs, exempt and non-exempt, having the opportunity, an employer base that generally, across the board, is attempting to work together. Not violate the system, not be punitive to individuals, not hold people back. But to expand. That we make sure that we do not have the adversarial relationship, based upon

a law that is outdated, outmoded, doesn't identify with the present situation that we have in place.

We want to grow the middle class, we want to grow the economy, we want to give opportunity for flexibility in the workplace, we want to give opportunity for advancement as well. And that comes with identifying issues as partners in the process, and not adversarial relationship of regulation by shaming. So we will keep working on this. I think it is an important question. There are plenty of other questions we can deal with, but this is one we want to deal with today.

And I want to say to our panel I appreciate all of you sharing your point of view, your background, your experience with us today. It will be important data put into our record, giving us direction on where we go from here. Having said that, with no further action coming before this Subcommittee, we will call it adjourned.

[Whereupon, at 11:17 a.m., the Subcommittee was adjourned.]

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