AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

# REVIEWING THE RULES AND REGULATIONS IMPLEMENTING FEDERAL WAGE AND HOUR STANDARDS

## HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, JUNE 10, 2015

**Serial No. 114–18**

Printed for the use of the Committee on Education and the Workforce

Available via the World Wide Web: *www.gpo.gov/fdsys/browse/committee.action?chamber=house&committee=education*
or
Committee address: *http://edworkforce.house.gov*

U.S. GOVERNMENT PUBLISHING OFFICE

94–823 WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

## COMMITTEE ON EDUCATION AND THE WORKFORCE

JOHN KLINE, Minnesota, *Chairman*

Joe Wilson, South Carolina
Virginia Foxx, North Carolina
Duncan Hunter, California
David P. Roe, Tennessee
Glenn Thompson, Pennsylvania
Tim Walberg, Michigan
Matt Salmon, Arizona
Brett Guthrie, Kentucky
Todd Rokita, Indiana
Lou Barletta, Pennsylvania
Joseph J. Heck, Nevada
Luke Messer, Indiana
Bradley Byrne, Alabama
David Brat, Virginia
Buddy Carter, Georgia
Michael D. Bishop, Michigan
Glenn Grothman, Wisconsin
Steve Russell, Oklahoma
Carlos Curbelo, Florida
Elise Stefanik, New York
Rick Allen, Georgia

Robert C. "Bobby" Scott, Virginia
*Ranking Member*
Rubén Hinojosa, Texas
Susan A. Davis, California
Raúl M. Grijalva, Arizona
Joe Courtney, Connecticut
Marcia L. Fudge, Ohio
Jared Polis, Colorado
Gregorio Kilili Camacho Sablan, Northern Mariana Islands
Frederica S. Wilson, Florida
Suzanne Bonamici, Oregon
Mark Pocan, Wisconsin
Mark Takano, California
Hakeem S. Jeffries, New York
Katherine M. Clark, Massachusetts
Alma S. Adams, North Carolina
Mark DeSaulnier, California

Juliane Sullivan, *Staff Director*
Denise Forte, *Minority Staff Director*

---

## SUBCOMMITTEE ON WORKFORCE PROTECTIONS

TIM WALBERG, Michigan, *Chairman*

Duncan Hunter, California
Glenn Thompson, Pennsylvania
Todd Rokita, Indiana
Dave Brat, Virginia
Michael D. Bishop, Michigan
Steve Russell, Oklahoma
Elise Stefanik, New York

Frederica S. Wilson, Florida,
*Ranking Member*
Mark Pocan, Wisconsin
Katherine M. Clark, Massachusetts
Alma S. Adams, North Carolina
Mark DeSaulnier, California
Marcia L. Fudge, Ohio

# CONTENTS


| | Page |
|---|---|
| Hearing held on June 10, 2015 | 1 |
| Statement of Members: | |
| Walberg, Hon. Tim, Chairman, Subcommittee on Workforce Protections | 1 |
| Prepared statement of | 4 |
| Wilson, Hon. Frederica S., Ranking Member, Subcommittee on Workforce Protections | 6 |
| Prepared statement of | 8 |
| Statement of Witnesses: | |
| Berberich, Ms. Nicole, Human Resources Director, Cincinnati Animal Referral and Emergency Center (CARE), Cincinnati, OH | 12 |
| Prepared statement of | 14 |
| Court, Mr. Leonard, Senior Partner, Crowe and Dunlevy, Oklahoma City, OK | 22 |
| Prepared statement of | 24 |
| Harris, Hon. Seth D., Former Acting U.S. Secretary of Labor and Deputy U.S. Secretary of Labor, Distinguished Scholar, Cornell University School of Industrial and Labor Relations, Ithaca, NY | 34 |
| Prepared statement of | 36 |
| Richardson, Mr. Jamie, Vice President of Government and Shareholder Relations, White Castle System, Inc., Columbus, OH | 50 |
| Prepared statement of | 53 |
| Additional Submissions: | |
| Takano, Hon. Mark, a Representative in Congress from the State of California: | |
| Report from the National Employment Law Project | 73 |
| Walberg, Hon. Tim, Chairman, Subcommittee on Workforce Protections: | |
| Statement submitted on behalf of the National Restaurant Association | 85 |
| Letter dated June 9, 2015, from the National Association of Home Builders | 93 |
| Report from the U.S. Government Accountability Office dated December 2013, Fair Labor Standards Act, The Department of Labor should Adopt a More Systematic Approach to Developing Its Guidance | 95 |
| Ms. Wilson: | |
| Letter dated April 9, 2015, from National Women's Law Center | 132 |

# REVIEWING THE RULES AND REGULATIONS IMPLEMENTING FEDERAL WAGE AND HOUR STANDARDS

---

**Wednesday, June 10, 2015**
**U.S. House of Representatives**
**Subcommittee on Workforce Protections**
**Committee on Education and the Workforce**
**Washington, D.C.**

---

The subcommittee met, pursuant to call, at 10:02 a.m., in Room 2175, Rayburn House Office Building, Hon. Tim Walberg [Chairman of the subcommittee] presiding.

Present: Representatives Walberg, Thompson, Rokita, Brat, Stefanik, Wilson, Clark, DeSaulnier, and Fudge.

Also present: Representatives Kline, Scott, and Takano.

Staff present: Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Callie Harman, Staff Assistant; Tyler Hernandez, Press Secretary; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Alexa Turner, Legislative Assistant; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Austin Barbera, Minority Staff Assistant; Denise Forte, Minority Staff Director; Christine Godinez, Minority Staff Assistant; Carolyn Hughes, Minority Senior Labor Policy Advisor; Eunice Ikene, Minority Labor Policy Associate; Brian Kennedy, Minority General Counsel; Kevin McDermott, Minority Senior Labor Policy Advisor; Amy Peake, Minority Labor Policy Advisor; Kiara Pesante, Minority Communications Director; Dillon Taylor, Minority Labor Policy Fellow.

Chairman WALBERG. A quorum being present, the subcommittee will come to order.

Good morning, and welcome, to all of our guests.

I would like to thank our witnesses for joining us today to examine the rules and regulations guiding implementation of federal wage and hour standards.

For more than 75 years—that is older than the Chairman, I am happy to say, and the Chairman of the full Committee, too——

Mr. KLINE. I am happy, too.

[Laughter.]

Chairman WALBERG [continuing]. I think all of us here at the table.

The *Fair Labor Standards Act* has been the foundation of our nation's wage and hour protections. It establishes important rights for American workers and continues to guide employers in protecting those rights.

However, the workplace looks very different today than it did in 1938 when the law was enacted, and the rules and regulations defining the law are failing to meet the needs of a twenty-first century workplace. Regulations that made sense long before the advent of smartphones and telecommuting simply don't work in the modern economy.

Failing to keep up with the changing workplace, the law's regulatory structure has become more complex and burdensome. Both employees and employers have difficulty understanding their rights and their responsibilities and must constantly contend with conflicting legal interpretations of the law.

Despite sincere efforts to act in the best interest of workers, many well-intentioned employers face costly legal battles because of a flawed regulatory structure, and we have evidence to back that up.

A report from the nonpartisan Government Accountability Office revealed a surge in FLSA lawsuits during the past 20 years, with the number of lawsuits increasing by 514 percent since 1991. Let me repeat that. There has been a 514 percent increase in FLSA-related litigation over the last 25 years. That is a troubling increase and strong indication that something isn't working.

To help address this significant problem, GAO urged the Department of Labor to—and I quote—"develop a systematic approach for identifying areas of confusion about the FLSA that contribute to possible violations and improving the guidance it provides to employers and workers in those areas."

Simply stated, we need a system that holds bad actors accountable when they break the law, but that also helps law-abiding employers uphold their obligations. I hope some of our witnesses will shed light on whether the department is implementing GAO's recommendation and what impact it may be having on our nation's workplaces.

However, even the best administrative guidance cannot make up for other shortcomings that exist and are harming those working hardest to jump-start the economy. This isn't the first time these concerns have been raised. In fact, this subcommittee has held a number of hearings in recent years looking at the very same issue.

It has been a focus of our continued oversight for a simple reason: we want to ensure that regulations that underpin the *Fair Labor Standards Act* serve the best interests of both American workers and employers.

As Chairman Kline and I noted a year ago, we are ready and willing to be a partner in a responsible effort to modernize current regulations, but I would stress that it must be a responsible effort. The American people deserve a system that is simple, clear, and can meet the demands of the modern workforce. The last thing policymakers should do, including those in the administration, is to make a bad regulatory system worse.

In the coming days the department is expected to release a proposal intended to update federal wage and hour regulations. Rumors are running rampant, and we know concerns are being raised about what the proposal may entail.

Thanks to an administration notorious for overreaching and governing through executive fiat, I share many of those same concerns. I expect we will continue to hear about the consequences for workers and job creators if the administration goes too far in the regulatory proposal it is expected to release.

However, hope springs eternal, and it is my hope the department will heed these concerns and ultimately put forward a proposal that encourages rather than stifles productivity, personal opportunity, and economic growth. Any proposal that would inflict harm on the nation's workplaces and move the country in the wrong direction will be opposed by this Committee and, no doubt, the American people.

With that, I now recognize the senior Democratic member of the subcommittee and Ranking Member, Representative Frederica Wilson, for her opening remarks.

[The statement of Chairman Walberg follows:]

**AS PREPARED FOR DELIVERY**
**June 10, 2015**

**CONTACT: Press Office**
**(202) 226-9440**

**Opening Statement of Rep. Tim Walberg (R-MI)**
**Chairman, Subcommittee on Workforce Protections**
**Hearing on "Reviewing the Rules and Regulations Implementing Federal Wage and Hour Standards"**

For more than 75 years, the *Fair Labor Standards Act* has been the foundation of our nation's wage and hour protections. It establishes important rights for American workers and continues to guide employers in protecting those rights. However, the workplace looks very different today than it did in 1938 when the law was enacted, and the rules and regulations defining the law are failing to meet the needs of a 21st century workforce. Regulations that made sense long before the advent of smartphones and telecommuting simply don't work in the modern economy.

Failing to keep up with the changing workplace, the law's regulatory structure has become more complex and burdensome. Both employees and employers have difficulty understanding their rights and responsibilities and must constantly contend with conflicting legal interpretations of the law. Despite sincere efforts to act in the best interest of workers, many well-intentioned employers face costly legal battles because of a flawed regulatory system, and we have evidence to back that up.

A report from the nonpartisan Government Accountability Office revealed a surge in FLSA lawsuits during the past 20 years, with the number of lawsuits increasing by 514 percent since 1991. Let me repeat that – there has been a 514 percent increase in FLSA-related litigation over the last 25 years. That is a troubling increase and strong indication that something is not working.

To help address this significant problem, GAO urged the Department of Labor to "develop a systematic approach for identifying areas of confusion about the FLSA that contribute to possible violations and improving the guidance it provides to employers and workers in those areas."

Simply stated, we need a system that holds bad actors accountable when they break the

*(More)*

law, but that also helps law-abiding employers uphold their obligations. I hope some of our witnesses will shed light on whether the department is implementing GAO's recommendations and what impact it may be having on our nation's workplaces.

However, even the best administrative guidance cannot make up for other shortcomings that exist and are harming those working hardest to jumpstart the economy.

This isn't the first time these concerns have been raised. In fact, this subcommittee has held a number of hearings in recent years looking at this very same issue. It has been a focus of our continued oversight for a simple reason: We want to ensure the regulations that underpin the *Fair Labor Standards Act* serve the best interests of both American workers and employers.

As Chairman Kline and I noted a year ago, we are ready and willing to be a partner in a responsible effort to modernize current regulations, but I would stress that it must be a responsible effort. The American people deserve a system that is simple, clear, and can meet the demands of the modern workplace. The last thing policymakers should do – including those in the administration – is to make a bad regulatory system worse.

In the coming days, the department is expected to release a proposal intended to "update" federal wage and hour regulations. Rumors are running rampant, and we know concerns are being raised about what the proposal may entail. Thanks to an administration notorious for overreaching and governing through executive fiat, I share many of those same concerns. I expect we will continue to hear about the consequences for workers and job creators if the administration goes too far in the regulatory proposal it is expected to release.

However, hope springs eternal, and it is my hope the department will heed these concerns and ultimately put forward a proposal that encourages – rather than stifles – productivity, personal opportunity, and economic growth. Any proposal that would inflict harm on the nation's workplaces and move the country in the wrong direction will be opposed by this committee and, no doubt, the American people.

With that, I will now recognize the senior Democratic member of the subcommittee, Representative Frederica Wilson, for her opening remarks.

# # #

**U.S. House Committee on Education and the Workforce**

Ms. WILSON. Thank you, Chairman Walberg, and thank you for holding this hearing today and giving us an opportunity to talk about the *Fair Labor Standards Act.*

And thank you to our panelists for attending.

And thank you to the audience for having a keen interest in this issue.

Later this month marks 77 years, as it was stated, since this landmark law was passed. The *Fair Labor Standards Act* was passed in a time when workers simply were not valued. Women, children, immigrants, people of color all were exploited and made to work unreasonably long hours for starvation wages.

Since its passage, the FLSA has been a powerful tool in helping workers assert their rights to fair wages and reasonable hours. Since the FLSA was passed, Congress has made the necessary updates to ensure that the law continues to protect workers. Congress must continue with this legacy and update the FLSA to reflect current economic and employment realities.

The reality is that this country is facing a dire income inequality problem. In the last 40 years hourly pay for the average worker has increased 9 percent while worker productivity has increased almost 75 percent. At the same time, top earners have seen astronomical increases in pay.

The looming problem of income inequality threatens to gut our middle class, create a permanent under class, and dismantle the American dream of building economic wealth and financial stability.

This problem not only hurts the individual, but the American economy as a whole. When less and less money goes to low-and middle-income workers, less and less money is spent in our consumer-based economy. Less money spent on goods and services means fewer jobs. Fewer jobs mean fewer Americans working and contributing to our tax base.

It is a vicious cycle that ends in economic turmoil and despair for millions of Americans. We must address the issue of income inequality, and we must do it now.

We do that by strengthening the FLSA with much-needed updates. We must update the FLSA by passing the *Paycheck Fairness Act* to strengthen equal pay protections. We can no longer devalue the contributions our daughters, sisters, and wives make to our economy.

We must update the FLSA by passing the *Raise the Wage Act,* to raise the minimum wage. We can no longer insist that people pull themselves up by their bootstraps when they make the poverty wages that ensure they will never be able to stay afloat, let alone get ahead. How do you pull yourself up by the bootstraps when you have no boots?

We must update the FLSA by modernizing the salary thresholds for overtime workers. We can no longer pretend that workers who toil 60 or more hours a week and take home $23,660 a year are paid fair wages.

We must update the FLSA by expanding overtime and minimum wage protections to home health care workers. We can no longer justify depriving these workers of these basic protections while en-

trusting them to care for our aging parents and disabled family members. We are almost there ourselves.

Just as we must update the FLSA, we must, for the sake of income inequality, be wary of rolling back its protections. We cannot support efforts to strip workers of their overtime no matter what form it takes, no matter how good the intentions.

Eroding workers' rights to overtime pay will put us back to the days where the economically vulnerable workers faced the illusionary choice between working for far less than they are worth or not working at all.

Labor laws like the FLSA were passed for a reason. That reason was to protect workers. And we are the Workforce Protections Subcommittee.

I look forward to hearing from the witnesses and what we can do to strengthen the FLSA and to continue to protect workers.

Thank you, Mr. Chair.

[The statement of Ms. Wilson follows:]

**Opening Statement of Ranking Member Frederica S. Wilson**
**Workforce Protections Subcommittee Hearing**
***"Reviewing the Rules and Regulations Implementing Federal Wage and Hour Standards."***
**June 10, 2015**

Chairman Walberg, thank you for holding this hearing today and giving us an opportunity to talk about the Fair Labor Standards Act.

Later this month marks 77 years since this landmark law was passed. The Fair Labor Standards Act was passed in a time when workers simply were not valued. Women, children, immigrants, people of color—all were exploited and made to work unreasonably long hours for starvation wages.

Since its passage, FLSA has been a powerful tool in helping workers assert their rights to fair wages and reasonable hours. Since FLSA was passed, Congress has made the necessary updates to ensure that the law continues to protect workers. Congress must continue with this legacy and update FLSA to reflect current economic and employment realities.

Because the reality is that this country is facing a dire income inequality problem. In the last 40 years, hourly pay for the average worker has increased 9%, while worker productivity has increased almost 75%. At the same time, top earners have seen astronomical increases in pay. The looming problem of income inequality threatens to gut our middle class, create a permanent underclass, and dismantle the American dream of building economic wealth and financial stability.

This problem not only hurts the individual, but the American economy as a whole. When less and less money goes to low and

middle income workers, less and less money is spent in our consumer based economy. Less money spent on goods and services means fewer jobs. Fewer jobs mean fewer Americans working and contributing to our tax base. It is vicious cycle that ends in economic turmoil and despair for millions of Americans.

We must address the issue of income inequality and we must do it now. We do that by strengthening FLSA with much needed updates.

We must update FLSA by passing the *Paycheck Fairness Act* to strengthen equal pay protections. We can no longer devalue the contributions our daughters, sisters, and wives make to our economy.

We must update FLSA by passing *the Raise the Wage Act* to raise the minimum wage. We can no longer insist that people pull themselves up by their bootstraps when they make the poverty wages that ensure they will never be able to stay afloat, let alone get ahead.

We must update FLSA by modernizing the salary thresholds for overtime workers. We can no longer pretend that workers who toil 60 or more hours a week and take home $23,660 a year are paid fair wages.

We must update FLSA by expanding overtime and minimum wage protections to home health care workers. We can no longer justify depriving them of these basic protections while entrusting them to care for our aging parents and disabled family members.

Just as we must update the FLSA, we must, for the sake of income equality, be weary of rolling back its protections.

We cannot support efforts to strip workers of their overtime pay no matter what form it takes, no matter how good the intentions. Eroding workers' rights to overtime pay will put us back

to the days where the economically vulnerable workers faced the illusory choice between working for far less than their worth or not working at all.

Labor laws like FLSA were passed for a reason—to protect workers. I look forward to hearing from the witnesses and what we can do to strengthen FLSA and to continue to protect workers.

Thank you.

Chairman WALBERG. I thank the gentlelady.

Pursuant to Committee rule 7(c), all subcommittee 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 statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce today's witnesses.

First is Ms. Nicole Berberich, who is the human resources director for the Cincinnati Animal Referral and Emergency Center, CARE, in Cincinnati, Ohio. Ms. Berberich's specialties include HR policies and procedures, training and employee development, employee and labor relations, benefits administration, and workers' compensation.

Welcome.

Mr. Leonard Court is a senior partner with Crowe and Dunlevy of Oklahoma City, Oklahoma. Since 1997, Mr. Court has served as a member of the U.S. Chamber of Commerce Labor Relations Committee. In 1999, he was appointed chairman of the Wage, Hour, and Leave Subcommittee.

Welcome.

Mr. Seth Harris is a distinguished scholar with Cornell University School of Industrial and Labor Relations in Ithaca, New York. From May 2009 until January 2014, Mr. Harris served as Deputy Secretary of Labor at DOL, overseeing functions ranging from strategic planning and performance management to legislation and policy development and implementation. He briefly served as Acting Secretary of Labor following the resignation of Hilda Solis in January of 2013 until Secretary Perez's confirmation in July of 2013.

Welcome back.

Mr. Jamie Richardson is vice president of government and shareholder relations with White Castle System, Incorporated, of Columbus, Ohio. His primary responsibilities include government affairs, shareholder relations, public relations, and corporate philanthropy. He joined White Castle in 1998 and has previously served as director of marketing for the company.

Welcome, and crave on.

I will ask now the witnesses to stand and raise your right hand. We have the normal process of swearing in at this point.

[Witnesses sworn.]

Let the record reflect the witnesses answered in the affirmative.

And you may take your seats.

Before I recognize you to provide your testimony, let me briefly explain our lighting system. A number of you have gone through this multiple times, but just to remind, you have five minutes for your testimony. We expect that you will keep fairly close to that.

When the yellow light goes on it means one minute remaining. Wrap up your statements as close to the ending time when the red light goes on as is possible.

And as the Chairman of the full Committee has established, I will, as well, expect that our Committee members will keep to the five-minute time for questioning.

Having said that, I now recognize Ms. Berberich for your five minutes of testimony.

**STATEMENT OF MS. NICOLE BERBERICH, HUMAN RESOURCES DIRECTOR, CINCINNATI ANIMAL REFERRAL AND EMERGENCY CENTER (CARE), CINCINNATI, OHIO, TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT**

Ms. BERBERICH. Chairman Walberg, Ranking Member Wilson, and distinguished members of the subcommittee, my name is Nicole Berberich, and I am the human resources director at the Cincinnati Animal Referral and Emergency Center, or CARE Center, in Ohio. In my role I oversee all HR policies and procedures, including employee classifications under the *Fair Labor Standards Act*, the FLSA.

I appear before you today on behalf of the Society for Human Resource Management, or SHRM. Thank you for the opportunity to testify today on my experience with the FLSA and implementing regulations.

Mr. Chairman, the FLSA may have been appropriate in the 1930s, but it is out of step with our modern, technology-based economy, creating unnecessary regulatory burdens for our employers and hindering the ability of employers to be flexible and address contemporary employee needs. Furthermore, as the millennial generation becomes the majority of employees in the American workforce, the demand for greater use of technology and flexibility will only continue to grow.

Allow me to tell you a little about my organization. CARE Center is an emergency and multi-specialty veterinary practice located in Cincinnati and Dayton, Ohio. Our team of skilled emergency and specialty staff provide 24-hour care seven days a week to the patients and clients we serve.

Small businesses with a one-person HR department, like CARE Center, are likely to experience these regulatory burdens disproportionately, which will likely grow in complication with expected changes to FLSA overtime regulations later this month.

I would now like to highlight challenges my organization faces when it comes to implementing flexible arrangements under the FLSA. Most notably, the law prohibits private sector employers from offering nonexempt employees paid time off or comp time instead of overtime compensation, even though public sector employees have access to this type of flexibility.

At CARE Center, many hourly employees prefer the option of comp time, to have more time off to spend with their families, instead of overtime pay. The veterinary sciences sector attracts a workforce dedicated to animal health. Our employees aren't there for the money.

We have to monitor our labor expenses closely and try to identify other ways to attract and retain our workforce through competitive employee benefits. Allowing for comp time would provide my organization with an additional workplace flexibility option to attract top talent.

Another opportunity to provide flexibility to our workforce is through biweekly work weeks. Under the FLSA, employers are permitted to allow a nonexempt employee to work four 10-hour days Monday through Thursday for a total of 40 hours in a week and take every Friday off without the employer incurring any overtime

obligations. But if our organization wanted greater flexibility, we run into challenges.

For example, some of our veterinarians developed a schedule to meet the emergency care needs of our clients by working 50 hours in one week and 30 hours in the next. The CARE Center wants to structure the workplace so that our doctors work with the same technicians and assistants on cases. Working as a dedicated team builds rapport between the doctors and technical staff and cultivates a positive work environment that maximizes patient care.

In the end, I was unable to allow the hourly technicians and assistants to work alongside those same veterinarians under their proposed schedule because of the overtime payments that would be incurred.

Mr. Chairman, today's hearing is timely, given the fact that DOL is proposing changes to overtime regulations soon. I fully anticipate our practice will be impacted by these changes.

We have internal medicine and surgery supervisors who I recently reclassified as exempt employees due to their managerial and professional responsibilities within our organization. If the salary threshold is doubled, those employees would lose their exempt status and will return to hourly, nonexempt status, which they will view as a demotion.

Also, as a 24/7 organization, further changes to the primary duties test requiring additional tracking of exempt time or the elimination of the ability for managers to do both exempt and nonexempt work concurrently would greatly impact our workforce. As a small business, managers may pitch in to work at the front desk, answer phone calls, and care for patients.

Our emergency surgery and internal medicine technical supervisors work on the floor as well as manage their departments. Removing the ability to perform these concurrent activities would eliminate many opportunities to homegrow our technicians that have ambitions to become supervisors.

In closing, SHRM is concerned that upcoming changes to the FLSA overtime regulations will further exacerbate an already complicated set of regulations for employers and would have the unintended consequence of limiting workplace flexibility for employers and employees.

Mr. Chairman, thank you again for allowing me to share my experiences and SHRM's view on the rules and regulations governing the FLSA. I welcome your questions.

[The statement of Ms. Berberich follows:]

**STATEMENT OF NICOLE BERBERICH, SHRM-CP**

**HUMAN RESOURCES DIRECTOR**

**CINCINNATI ANIMAL REFERRAL AND EMERGENCY CENTER (CARE)**

**ON BEHALF OF THE**

**SOCIETY FOR HUMAN RESOURCE MANAGEMENT**

**SUBMITTED TO**

**U.S. HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

**HEARING ON**

***"Reviewing the Rules and Regulations Implementing Federal Wage and Hour Standards"***

**JUNE 10, 2015**

**Introduction**

Chairman Walberg, Ranking Member Wilson, and distinguished members of the Subcommittee, my name is Nicole Berberich, Human Resources Director of Cincinnati Animal Referral and Emergency (Care) Center in Ohio. I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I've been a member for seven years. On behalf of more than 275,000 SHRM members in over 160 countries, I thank you for this opportunity to appear before the Committee to discuss the rules and regulations implementing federal wage and hour standards. Today, I will focus my comments on the relevance of the Fair Labor Standards Act (FLSA) to the 21st century workplace.

SHRM is the world's largest association devoted to human resource management. The Society serves the needs of human resource (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.

As the Human Resources Director for the Care Center, I am charged with: implementing all HR policies and procedures; training employees; overseeing benefits and payroll administration, and ensuring compliance with all labor laws, including determining employee classifications under the FLSA. I have over 11 years of HR experience across multiple industries, including manufacturing and telecommunications.

The Care Center is an emergency and multispecialty practice in Cincinnati and Dayton, Ohio, serving the region since 2000. Emergency veterinary medicine closely parallels emergency medicine for humans and requires similar specialists. Our team of skilled emergency room doctors provide 24-hour care, seven days a week to the patients we serve. Our workforce is diverse and includes surgeons as well as specialists in cardiology and internal medicine, and the only two board-certified specialists in emergency care and critical care in our region, known as "Diplomates" of the American College of Veterinary Emergency and Critical Care.

The Care Center also employs client service coordinators, technician supervisors, internal medicine supervisors, critical care technicians, surgery technicians, and veterinary technicians, among other administration positions. Our facility offers in-house CT scans, radioactive iodine therapy, digital radiography, ultrasonography, echocardiography, minimally invasive surgery and interventional radiology for our patients. In total, the Care Center employs 105 individuals at our two locations, including 34 exempt employees and 71 nonexempt employees. And, I am quite proud to say that we are accredited by the American Animal Hospital Association, earning both traditional and referral accreditation at both locations – currently the only veterinary hospital in the region to hold such distinction of dual accreditation.

In my testimony, I will explain the key issues posed by the FLSA to our nation's employers and employees, demonstrate how the FLSA prohibits employers from providing the workplace flexibility that today's employees want, discuss the impact of upcoming changes to FLSA overtime regulations, and share SHRM's efforts to promote effective and flexible workplaces.

**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.

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]

Additionally, many states have their own laws pertaining to overtime pay, such as California. 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. Employers and HR professionals use discretion and independent judgment to determine whether employees should be classified as exempt or nonexempt and, thus, whether they qualify for the overtime pay provisions or the minimum wage provisions of the FLSA. Generally speaking, the classification of an employee as either exempt or nonexempt is determined by whether the employee is paid on a salary basis with a fixed rate of pay, and their duties and responsibilities.

Classification determinations must also be made by looking at each individual job position. Classification decisions for all positions are challenging as they are based on both objective criteria (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 when they should be nonexempt, or vice versa.

Despite the ambiguity of many employment situations, the stakes in improperly classifying employees are high. The U.S. Department of Labor (DOL) frequently audits employers and penalizes those that misclassify employees, awarding up to three years of back pay for overtime to those employees, plus attorney's 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.

The FLSA is second to only the Family and Medical Leave Act (FMLA) in terms of the number of inquiries received from SHRM members to our HR Knowledge Center help desk. In 2014, SHRM received 14,000 inquiries related to various facets of the FLSA. Approximately 52 percent of these inquiries were related to overtime, overtime exemption and FLSA legal compliance. Approximately 16 percent of the questions were submitted around compensable hours/minimum wage/youth employment minimum wage issues. Another 8-10 percent of inquiries were related to incentive/bonus/tax compliance associated with payroll and compensation. This indicates the challenges employers are already facing with complicated FLSA regulations.

While SHRM appreciates the administration's recent interest in modernizing the FLSA overtime regulations, it believes that enacting significant changes to the duties test could further exacerbate an already complicated set of regulations for employers, leading to a new wave of litigation. I will discuss the impact of changes to FLSA overtime regulations later in my testimony.

---

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

**FLSA – a 20th Century Statute**

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. Information technology and advances in communication have clearly transformed how businesses operate, communicate and make decisions. Cellphones, tablets, personal digital assistants (PDAs) and other technology allow many employees to perform job duties when and where they choose. Furthermore, as the Millennial generation becomes the majority in the American workforce, the demand for greater use of technology and flexibility will only continue to grow.

Certain policies may have been appropriate in the 1930s but are out of step with a technology-based economy, creating unnecessary regulatory burdens for employers and restricting employers' ability to be flexible and address contemporary employee needs. Small businesses with a one-person HR office, like the Care Center, are likely to experience these burdens disproportionately, which will continue to worsen with expected changes to FLSA overtime regulations later this month.

**Workplace Flexibility and the FLSA**

The increased diversity and complexity within the American workforce – combined with global competition in a 24/7 economy – suggests the need for more workplace flexibility. C-suite executives, for example, say the biggest threat to their organizations' success is attracting and retaining top talent.[2]

Human resource professionals believe the most effective way to attract and retain the best people is to provide workplace flexibility.[3] Moreover, a large majority of employees – 87 percent – report that the flexibility offered would be "extremely" or "very" important in deciding whether to take a new job.[4] As a Millennial, I can personally attest to the value placed on workplace flexibility by my generation when applying for jobs. As research shows, four in five employees say workplace flexibility is important when considering a new job, but less than one in four have access to high levels of flexibility.

In addition, recent research indicates that employers are voluntarily adopting workplace flexibility options. According to the 2014 National Study of Employers, a report released by the Families and Work Institute (FWI) and SHRM, from 2008 to 2014 workplace flexibility for full-time employees increased. For example, more employers are offering some employees the option to telecommute occasionally, with 67 percent providing this option in 2014 compared to 50 percent in 2008. Small employers like the Care Center tend to be the leaders in providing workplace flexibility, a key trend identified in the 2014 National Study of Employers.

Given the importance of this issue to our members, SHRM continues to lead a dialogue about workplace flexibility that responds to the diverse needs of employees and employers. SHRM released a set of principles in 2009 to help guide policymakers in the development of public policy that meets the needs of *both* employees and employers by incentivizing organizations to voluntarily offer workplace flexibility options. SHRM looks forward to working with this Committee on a 21st century workplace flexibility policy.

Specifically, the FLSA presents two challenges for organizations wanting to implement flexible work arrangements. Employers encounter challenges in terms of offering compensatory time to nonexempt employees and structuring biweekly workweeks. Employers also experience limitations with

---

[2] Company of the Future Survey (2010). Society for Human Resource Management and the Economist Intelligence Unit.
[3] Challenges Facing Organizations and HR in the Next 10 Years (2010). Society for Human Resource Management.
[4] National Study of the Changing Workforce (2008). Families and Work Institute.

employees seeking to conduct work remotely from mobile devices. I outline these challenges in more detail below.

**Compensatory Time**

The FLSA 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 public-sector employers are able to offer this type of flexibility, commonly referred to as "compensatory or comp time." At the Care Center, many nonexempt employees prefer the option of comp time because additional time for family obligations is valued more highly than overtime pay. Furthermore, as a small business we have to monitor our labor expenses closely and try to identify other ways to attract and retain our workforce through competitive employee benefits. Amending the FLSA would provide our organization with an additional workplace flexibility option to attract top talent, benefiting both employers and employees nationwide.

This comp time option would be made available to all employers and employees if H.R. 465, the Working Families Flexibility Act, was enacted. SHRM strongly supports H.R. 465 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.

Mr. Chairman, the time has come for Congress to approve legislation to grant private-sector nonexempt employees the opportunity to choose for themselves whether to receive cash wages or paid time off for working overtime. SHRM looks forward to working with Congress to advance this important legislation.

**Biweekly Workweeks**

SHRM is also concerned that the FLSA limits choices for employees interested in modifying the biweekly workweek. Under the FLSA, employers are permitted to allow a nonexempt employee to work four, 10-hour days Monday through Thursday, for a total of 40 hours in a week, and take every Friday off without the employer incurring any overtime obligations. However, if an employee wanted greater flexibility to work a nine-hour day Monday through Friday of the first week for a total of 45 hours, and then work three nine-hour days and one eight-hour day in the second week and take Friday off, the employer would have to pay overtime for the additional hours over 40 hours in the first week. In addition, several states have daily overtime requirements for more than an eight-hour day, further complicating employer efforts to provide this type of flexible work arrangement.

At the Care Center, I have faced challenges with the FLSA in terms of scheduling nonexempt employees' hours over two-week periods to match the team needs of the emergency and critical care veterinarians. The Care Center wants to structure the workplace so that our emergency veterinarians work with the same veterinarian technicians and assistants on cases. Working as a dedicated team builds rapport between the doctors and technical staff and cultivates a positive work environment that maximizes patient care.

In a 24/7 emergency care environment, the emergency and specialty veterinarians sometimes work 10-14 hour shifts. Recently, one of our critical care veterinarians developed a schedule to meet the emergency care needs of our clients by working 50 hours in one week and 30 hours in the next. However, due to the restrictions of the FLSA, I was unable to allow the nonexempt veterinarian technicians to work alongside the same veterinarians because of the overtime payments that would be incurred. As a small business with tight labor costs, I have to monitor our overtime payments even though this schedule would be the best for our organization and our patients.

**Technology Limitations**

I also face challenges under the FLSA when nonexempt employees want to access online work platforms remotely after work hours. Because nonexempt employees are only paid for the hours they work, all hours must be closely tracked in order to remain in compliance with the FLSA. The Care Center has decided to restrict nonexempt employees' access to patient care online platforms from their homes because of challenges associated with tracking those hours and the inability to pay overtime.

As noted, the FLSA was written before the proliferation of smartphones. Phones, watches and other "smart" devices are commonly enjoyed by the Millennial workforce and will continue to present challenges in regards to nonexempt employees. I recently experienced a challenge with technology that I want to share with the Committee.

In February, one of our patients, a boxer named Carmen, made national news for her role in trying to save her owner from smoke inhalation. The dog was found lying across her owner's face seemingly trying to shield him from the fumes during a tragic house fire. Carmen was found unconscious but was taken to our Care Center where she was treated and subsequently recovered. Some of our nonexempt employees wanted to log in from home and check the status of their patient and manage e-mail remotely, but because of the difficulty of tracking nonexempt hours, the Center had to restrict e-mail access because of the overtime hours that would be incurred.

**President's Call to Update Overtime Regulations**

Today's hearing on the FLSA is particularly timely given that DOL is expected to release proposed regulations to update the FLSA overtime regulations this month.

Currently, under the FLSA, individuals must satisfy two criteria to qualify as a salaried worker exempt from federal overtime pay requirements: first, they must be paid on a salary basis (that is, the salary cannot fluctuate) of more than $455/week ($23,660 annually); and second, their "primary duty" must be consistent with those common to executive, professional or administrative positions as detailed in section 541 of the FLSA overtime regulations or one of the other statutorily defined exemptions. Employees who meet these criteria are considered exempt from the overtime requirements of the FLSA.

On March 13, 2014, President Barack Obama directed DOL to "modernize and streamline" the FLSA overtime regulations. While proposed regulations haven't been published at this time, one potential change may call for a significant increase to the salary basis amount of $455 a week to $910 a week ($47,320 annually) or more. This means that a substantial number of employees, in a variety of different industries, currently classified as exempt from the overtime requirements would then be subject to the overtime requirements. Also, reports indicate that the DOL is considering changes to the "primary duty" test to require salaried employees to spend a specific percentage of their time performing certain duties.

As a result, we expect many otherwise-exempt employees under the current regulations will lose their exempt status, curtailing their access to workplace flexibility offerings valued by employees and limiting their ability to decide where, when and how work is done.

At the Care Center, I fully anticipate our practice will be impacted by proposed changes to the FLSA overtime regulations. As mentioned previously, employees are attracted to veterinary sciences because of their dedication to animal health, not for high salaries. We have internal medicine and surgery supervisors whom I recently reclassified as exempt employees due to their managerial and

professional responsibilities within our organization. If the salary threshold is doubled, those employees may lose their exempt status and will return to nonexempt status. This segment of my workforce has already voiced concerns about potential reclassification. In their eyes, the exempt classification is seen as a promotion, providing a sense of "workplace status" and greater workplace flexibility to meet work/life needs. Our supervisors are emotionally attached to this professional status and will certainly view reclassification as a demotion to their career.

Furthermore, the Care Center is a 24/7 business. Further changes to the primary duty test, including a required quantification of exempt time or the elimination of managers' ability to do both exempt and nonexempt work concurrently would greatly impact our workforce. As a small business, managers often have to pitch in and work at the front desk, answer client phone calls and check in on patients. Our emergency, surgery and internal medicine technical supervisors work on the floor as well as manage their departments. If overtime regulations eliminate the ability of an employee to perform concurrent duties and maintain their exempt status, our hospital would have to hire additional employees. Currently, our employees are able to develop managerial skills while also utilizing their technical skills. Removing the ability to perform these concurrent activities would eliminate many opportunities to "home grow" our technicians that have ambitions to become supervisors.

While SHRM appreciates the administration's interest in modernizing the FLSA overtime regulations, it believes that enacting significant changes to the duties test would further exacerbate an already complicated set of regulations for employers, particularly small employers and employers in industries where managers often conduct exempt and nonexempt work concurrently.

As noted, a majority of employees have mentioned the importance of workplace flexibility when deciding whether or not to take a new job. The upcoming regulations are expected to be yet another example of how outdated FLSA regulations fail to meet the needs of the 21st century workforce. Changes to overtime regulations will likely require employers to reclassify millions of salaried employees to hourly employees. Hourly employees are only paid for the hours they work and are often forced to closely track their hours to ensure compliance with overtime requirements, which can lead to less flexibility.

In anticipation of these changes, SHRM chairs the Partnership to Protect Workplace Opportunity (PPWO), consisting of a diverse group of associations, businesses and other stakeholders representing employers with millions of employees across the country in almost every industry. The Partnership's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees and clarity for employers when classifying employees.

**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 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 non-advocacy 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 When Work Works Award.
- 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 the nature of 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.

**Conclusion**

The FLSA is a 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 for a different time, and should be evaluated to ensure it still encourages employers to hire, grow and better meet the needs of their employees.

In light of the fact that the Millennial generation will make up the majority of the American workforce in the near future, now is the time to seriously consider amending the FLSA to allow employers expanded workplace flexibility to attract and retain top talent.

As I've laid out today, SHRM remains concerned about the challenges presented by the FLSA in terms of workplace flexibility, namely comp time and the biweekly workweek. SHRM is also concerned that upcoming changes to FLSA overtime regulations will further exacerbate an already complicated set of regulations for employers, particularly small employers and employers in industries where managers often conduct exempt and nonexempt work concurrently. Substantial changes to the overtime regulations could also further limit workplace flexibility for employees.

Thank you. I welcome your questions.

# # #

Chairman WALBERG. I thank you.

Mr. Court, we recognize you for your five minutes of testimony.

**STATEMENT OF MR. LEONARD COURT, SENIOR PARTNER, CROWE & DUNLEVY, OKLAHOMA CITY, OKLAHOMA, TESTIFYING ON BEHALF OF THE U.S. CHAMBER OF COMMERCE**

Mr. COURT. Thank you, Mr. Chairman, Ranking Member, and members of the Committee.

On behalf of the U.S. Chamber of Commerce, I submitted a written presentation that covers two separate topics. The first is changes that are necessary to bring a statute passed in 1938 into the twenty-first century. In it are suggestions concerning, for instance, the updating of the computer expert exemption, the addition of an inside sales exemption.

And I will leave my written comments and the comments of my fellow panelists to cover those, because what I want to focus on is the second part.

What we are talking about today is, in part, the regulations as they will be in the paper or will be in the publications. What I want to talk to you about is how they are being enforced in the field, because we have great concern at the Chamber over the enforcement procedures that we are beginning to see over the last five to six years that we think are beyond the pale and in many respects simply abusive.

In that regard, I want to focus on three topics.

First, a deliberate pattern of now encouraging employers not to use legal counsel as part of an investigation. I have given you examples in my written paper, but the most recent one was too recent to even make it. This week one of my colleagues had a wage and hour investigator meet with her. The second question out of that investigator's mouth was, "What is the employer trying to hide since they have hired an attorney?"

When my colleague indicated that the employer was going to exercise their right to have the attorney sit in for interviews with management personnel, as they often do, again, as part of the enforcement policy of the current administration, the investigator said to her, "This investigation will be quicker, it will be easier if you do not participate." There seems to be a fear among wage and hour investigators of having experienced attorneys sitting in on the investigative process.

The second problem deals with what I would call compelled settlements with no time to consider them. I have given you three examples in my written presentation of situations where, after taking months for an investigation, the investigator comes to the closing conference, presents the settlement, and demands an immediate signature without any time for consideration, whether that be from the individual who is involved seeking legal counsel or, as in one of the examples, a multistate corporation where the human resources director needed to run the settlement by his boss and up the chain of command. But the threat was, "If you do not sign it today we will immediately refer it to litigation."

The third area is the dramatic increase in the use of civil money penalties and liquidated damages. As you know, liquidated damages are essentially double damages that are meant for willful vio-

lations. The statute specifically empowers the court, not the Department of Labor, to impose those damages. But as part of the new settlement process of this administration, we are finding more and more that a demand is being made not just to give back pay, but to pay double damages and civil money penalties.

Two of the examples in my paper, if you were talking about a retail establishment or a used car salesman, would be called bait and switch. Indications both from attorneys in Washington, D.C., and attorneys in Mississippi—all over the United States—where the investigators are coming in, settling claims, saying, "You don't have to worry about liquidated damages," and then after the amount of settlement has been agreed to by the employer, then coming in with a second person now demanding that liquidated damages be paid or that adverse publicity would occur in the newspaper.

In addition to these three areas of enforcement that I say are questionable at best, we have also seen a dramatic decrease in the amount of employer assistance in trying to comply with the wage and hour regulations. You will hear today and have heard before the fact that small employers in particular need assistance in understanding what these regulations mean.

And yet, this administration has announced and deliberately discontinued the practice of issuing opinion letters where I, as an employer, can give a specific factual situation to the Department of Labor and ask how this situation should be handled and how the law would be applied. The opinion letter gave the employer a safe harbor so that when it got direction from the Department of Labor it could rely upon that in going forward with its interpretation of the law.

This administration has discontinued the use of those opinion letters and in its place now has indicated that what they want to do is issue administrative interpretations. But there are two problems. First, we are getting virtually none being issued. Second, they do not appear to have that safe harbor protection for the employer so that relying upon them will give a defense.

So in closing, I would simply urge you to take a look not only at what the regulations say, but the tactics that are being used by the current administration in forwarding their investigations. We at the Chamber believe that is a significant problem.

[The statement of Mr. Court follows:]

# Statement of the U.S. Chamber of Commerce

**ON:** Reviewing the Rules and Regulations Implementing Federal Wage and Hour Standards

**TO:** U.S. House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections

**DATE:** June 10, 2015

**BY:** Leonard Court, Senior Partner, Crowe & Dunlevy

1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

**STATEMENT OF LEONARD COURT**
**SENIOR PARTNER, CROWE & DUNLEVY, A PROFESSIONAL CORPORATION**
**BEFORE THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS**
**HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE**

**REVIEWING THE RULES AND REGULATIONS IMPLEMENTING FEDERAL WAGE AND HOUR STANDARDS**

**June 10, 2015**

Mr. Chairman and Members of the Subcommittee:

I am honored to appear today on behalf of the United States Chamber of Commerce to address current enforcement approaches of the Wage and Hour Division of the U.S. Department of Labor and problems with the Fair Labor Standards Act. The United States Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector and region. My law firm Crowe & Dunlevy is one of the two largest firms in Oklahoma and is a member of the Chamber's Labor Relations Committee.

In speaking for the Chamber, I bring my personal experience of over forty years which involves advising and litigating employment matters including wage and hour issues on behalf of clients throughout the Midwest. Also, I have served as the Chairman of the Wage, Hour and Leave Subcommittee of the Chamber since 1999. Our subcommittee meets at least twice a year during which time members share their experiences with wage and hour enforcement techniques and issues and other concerns regarding the FLSA.

As you are probably aware, Fair Labor Standards Act suits are one of the fastest growing sources of litigation in our federal courts. Between April 2011 and May 2012, approximately 7,064 FLSA cases were filed nationally.[1] During the next 12 month period of April 2012 to March 2012, the number rose to approximately 7,764 FLSA cases.[2] From March 2013 through March 31, 2014, that number jumped to over 8,100 cases.[3]

Additionally, the Wage and Hour Division is changing its enforcement approach from a "complaint-driven approach" focusing on an individual's complaint toward what it calls "directed enforcement."[4] In fiscal year 2013, 45 percent of the agency's work stemmed from directed investigations which Wage and Hour Administrator David Weil characterizes as a "big change."[5]

---

[1] 145 BNA Daily Labor Report A-4, 7/27/12.
[2] 91 BNA Daily Labor Report A-5, 5/10/13.
[3] 97 BNA Daily Labor Report A-9, 5/21/14.
[4] 91 BNA Daily Labor Report A-7, 5/13/14.
[5] 28 BNA LRW 2496, 11/10/14.

Also, the Division has significantly increased its insistence on imposing liquidated or double damages and on assessing civil money penalties as part of settling wage and hour investigations prior to initiating litigation.[6] Additionally, the agency appears to be threatening to increase its use of its "hot goods" authority. Under sections 12(a) and 15(a)(1) of the Act, the Department can seek a court order to prevent shipment of goods produced in violation of the FLSA.

While the Chamber certainly supports appropriate enforcement of the FLSA, and realizes that there are employers who do not compensate their employees appropriately, unfortunately, what we have also seen is an increased use of questionable tactics by investigators trying to coerce settlements of wage and hour claims. This is the topic which I want to discuss with your Committee. While the examples that I use are anecdotal in nature, they have been confirmed by other members of the Chamber's Wage, Hour and Leave Subcommittee and other attorneys and human resource practitioners around the country.

**DISCOURAGING USE OF LEGAL COUNSEL**

Wage and Hour Division investigators are discouraging companies from using legal counsel during investigations. This is being done in a variety of ways. At the outset of an investigation, an investigator may say to the employer that this matter can be resolved quicker and cheaper if legal counsel is not involved. The implication is that seeking legal advice will cause the liability findings to increase significantly.

Quite frankly, if the investigator has done his or her job properly, then the investigator should have nothing to fear from the involvement of legal counsel for the company. The use of this tactic suggests that the investigator has something to hide.

Some investigators have also refused to allow legal counsel to attend interviews of management personnel in cases which do not involve the issue of misclassifying that specific employee as exempt. Management personnel have the ability to bind the company with their statements. Historically, the agency has allowed legal counsel to attend interviews of supervisors when the issue being investigated does not involve that particular supervisors pay or exempt status. For example, if the claim under investigation involves allegations of working non-exempt personnel off the clock, then legal counsel would be allowed to attend interviews of management personnel. The increasing number of instances of this tactic is troubling.

**IMMEDIATE SETTLEMENTS**

Agency investigators have a growing insistence that companies agree to settlement proposals without allowing adequate time for consultation with either higher management or legal counsel. Three examples illustrate the problem:

A multistate employer with facilities in Oklahoma underwent a wage and hour investigation without the assistance of counsel. At the closing conference, the investigator insisted that the human resources manager immediately agree to and sign the settlement

[6] 91 BNA Daily Labor Report A-7, 5/13/14.

agreement without allowing time for the manager to consult with the home office in another state. Fortunately, the manager had the presence of mind to call me immediately. I spoke by phone with the investigator and insisted she call her supervisor concerning this issue. After contacting her supervisor, the investigator relented and allowed the company approximately three weeks to consider and respond to the proposal.

In another investigation, I was the individual who attended the closing conference for the client. The investigator insisted that I agree to and sign the proposal immediately, without time to consult with the client, or else he would refer it to litigation. Obviously, that did not happen.

The last example is less than a month old. This one involves a case in which I am not counsel for the employer. In this matter, the investigator found six figure liabilities and gave the employer only three days to consider the proposal or else the matter would be forwarded for litigation.

This type of immediate settlement demand is troublesome for several reasons. First, it deprives the employer of adequate time to analyze the findings and conclusions of the investigator. If the investigators were careful and usually correct in their conclusions, then this would not be a problem. But the simple fact is that they are not. Second, this demand for an immediate response ignores the realities of dealing with most companies—particularly multistate employers. Any type of significant settlement normally requires the approval of multiple individuals within the company in addition to legal counsel. If the investigator's conclusions are sound, then the investigator should not fear having those conclusions appropriately analyzed by others.

**"HOT CARGO" THREATS**

The recent use of the "hot cargo" provision as a tool to coerce settlement has created both controversy and judicial criticism. The agency historically uses this provision when an industry has a supply chain structure, such as the garment industry.

In 2012, the agency used the threat of the hot cargo provision to "persuade" two California blueberry growers to agree to back wage settlements by threatening to delay shipments of their crops which would result in them rotting. Both growers "agreed" to settlement and paid back wages which were allegedly due. However, the growers then sued the agency over alleged losses caused by the tactic. A federal court vacated the resulting consent decrees, finding that the use of the "hot goods" provision amount to economic duress.[7]

When these types of investigative tactics are discussed at our Subcommittee, many other members from around the country confirm that they have suffered similar conduct from wage and hour investigators.

[7] *Pan-American Berry Growers LLC v. Perez*, D. Or., No. 6:13-01439 4/24/14.

## SYSTEMIC INVESTIGATIONS

Another example of this shift is a greater emphasis on expanded and expansive investigations. This is part of the emphasis on looking for systemic violations. Unfortunately, the expanded investigations also mean expanded costs for the employers that are being targeted. The investigations entail demands for hundreds, if not thousands, of pages of documents which the investigators insist must be produced in a very short period of time. Once this type of investigation begins, the agency will continue these demands, even when no violations are being unearthed. A colleague in a neighboring state had a client that had to deal with a relentless attempt by the Division to combine unrelated and independent businesses in order to satisfy the "enterprise coverage" test of the FLSA. Despite repeated submission of documentation showing the independence of these businesses, the investigation continued. The state's congressional delegation became involved in attempting to solve the problem. When this occurred, the investigation expanded to include subsidiaries of the entities. After the businesses were forced to spend near six figure sums on legal fees, the investigation concluded no liability existed.

## LIQUIDATED DAMAGES AND CIVIL MONEY PENALTIES

Another dramatic change in enforcement tactics is the increased use of liquidated damages and civil money penalties during negotiations prior to litigation. The agency has increasingly demanded these remedies over the last five years.[8] The question raised by this tactic is whether it actually accomplishes the goal of the investigation which is to get any unpaid wages to the affected employees as quickly as possible. Under previous administrations, the incentive for an employer to settle an investigation was the threat of liquidated or double damages and civil money penalties if a suit were to be filed. By insisting on imposition of these penalties during the investigative stage, the agency may actually encourage employers to engage in litigation. This results in delaying the employees from receiving the back wages allegedly due.

Furthermore, the Portal to Portal Act seems to reserve the discretion for assessing liquidated damages or civil money penalties to the court.[9] The Wage and Hour Division is frequently treating violations as warranting these penalties that Congress designated for the most severe cases where there is no suggestion that the employer acted in good faith[10]; the Division does not seem to want to acknowledge the possibility of a good faith disagreement. Indeed, Solicitor of Labor Patricia Smith has made clear that employers should expect more demands for liquidated damages from the Wage and Hour Division.[11]

These experiences highlight a dramatic shift by the Wage and Hour Division in dealing with the employer community. While enforcement has always been a hallmark of the Wage and

---

[8] 91 BNA Daily Labor Report A-7, 5/13/14.

[9] See 29 U.S.C. 260: "In any action commenced...to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938...if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title."

[10] *Id.*

[11] 36 BNA Daily Labor Report C-1, 2/23/2012.

Hour Division, and will always be necessary, the approach has shifted from one of cooperation and education to one of confrontation and coerced settlement.

In addition to my personal experiences, members of the Chamber's Wage, Hour and Leave Subcommittee have provided the following examples illustrating the change in enforcement tactics:

- From a lawyer in New Orleans: In my practice experience, WHD formerly had a policy to encourage employers who discovered violations to bring them to the agency for resolution. While that policy sounded counterintuitive to employers, WHD promised no liquidated damages, no attorney fees, and an effective release (the only other effective release is from a court). Now employers will go back to their old approach when discovering wage and hour violations – fix the problem quietly, in a low key way, such as at the beginning of a new fiscal/calendar year, and then "whistle past the graveyard" for the next three years until the limitations period has run.

- From a prominent Wage and Hour practicing attorney in Detroit: "The recent trend makes it appear that the DOL assumes the employers wish to violate the law," Robert Boonin told Bloomberg BNA January 7. In reality, Boonin said, most employers "try to comply with the law, but sometimes the law is just unclear."

  In particular, he said, the defense bar is concerned about "DOL's general position that certain penalties may be assessed without formal adjudication." He said the DOL "is taking the position with respect to many of its investigations lately that employers must pay liquidated damages in addition to unpaid overtime in order to resolve an adverse administrative finding," even though under the FLSA "liquidated damages may only be assessed by a court."

  "Settlements would be easier to work out if liquidated damages weren't on the table," Boonin said, adding that "many claims do not warrant liquidated damages since employers who find out that there may be overtime due were unaware of the overtime having been incurred."

  He lamented that "the WHD—particularly in light of the background of the likely new Administrator—appears primed to short-circuit the adjudication process and impose penalties normally reserved for after there's been a full adjudication of the matter."[12]

- From a Wage and Hour practicing attorney: In or around October/November 2011, a multi-generational family-owned nursery in Mississippi was investigated by DOL regarding pay practices. The investigator represented to the employer that it would need to pay back wages, but not to worry about liquidated damages. Later, supervisors of the investigator came to the employer and demanded payment of liquidated damages, threatening that if the employer did not agree to pay such damages, DOL would sue and "humiliate" the employer in the local press.

[12] 18 BNA Daily Labor Reporter S-19, 1/28/2014.

An effort was made to negotiate with the District Director in Birmingham, AL, but that was ultimately rejected. When a question was raised about DOL's ability to seek liquidated damages in this setting, the District Director reportedly said that he was authorized to do so.

- From a Washington, DC, based attorney: Wage-Hour has done something else that's even worse: Settled, and then after the settlement is entered come for liquidated damages. So, the employer thinks the matter is closed but DOL comes back for more—and uses the settlement as an admission, and uses past settlements to show the employer is a repeat offender. I've seen them do this to two clients who settled without representation by outside counsel.

**REDUCED COMPLIANCE ASSISTANCE**

The increased enforcement activity seems to be accompanied by a reduction to employers in compliance assistance. Thus the administration has eliminated opinion letters in which the agency answered specific questions from employers. According to David Fortney, former acting Solicitor of Labor, the letters provided certainty.[13] The current administration has abandoned opinion letters in favor of broader "administrator's interpretations" on specific issues. Unfortunately, few of these have been issued to date and they are not driven by employers' fact-specific inquiries, but by the Administrator's desires of what he wants to say.

One key question about Administrator's Interpretations, as opposed to Opinion Letters, is the degree to which an employer can use reliance on one as a defense to enforcement. Employers need to know what level of protection, or "safe harbor," they can expect from following an AI. The Portal to Portal Act makes clear that following administration guidance is one of the ways an employer can demonstrate good faith compliance[14]; if an employer's facts fit within an AI, there should be some form of a good faith defense/safe harbor. The Wage and Hour Division needs to specify how AIs fit within the Portal to Portal Act's good faith defense/safe harbor provisions.

**AREAS OF NEEDED CHANGE TO THE FLSA**

In addition to the problems I have outlined above with the enforcement tactics of the Wage and Hour Division, the law itself is badly in need of updating. The Fair Labor Standards Act was passed in 1938 during the industrial era when workers went to one location and punched a time clock to start their day. Today, workers may not even go to an employer's workplace, and their day may start by checking their portable electronic device to get their instructions for the day. The Fair Labor Standards Act is so out of sync with the contemporary workplace it is like trying to compare traveling by zeppelin with today's modern air travel.

---

[13] 227 BNA Daily Labor Report C-1, 11/25/14.

[14] See 29 U.S.C. 258: "...no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act...if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or *interpretation*, of any agency of the United States or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged...." (emphasis added)

The FLSA needs a comprehensive review. The following is not intended as a comprehensive list, but discussed below are some areas that clearly stand out as needing attention. These changes are intended to provide employers with more clarity, employees with more flexibility, and help avoid expensive and resource draining litigation. The changes will positively impact multiple sectors of the economy, including IT, health IT, defense, pharmaceuticals, financial services, retail, insurance, distribution, telecommunications, and others that are drivers of job creation and economic growth.

There is no reason these changes cannot attract bipartisan support. In fact, the bill for updating the computer employee exemption was supported by Congressmen Jared Polis and Rob Andrews back in the 112th Congress.

**Update and Modernize the Computer Employee Exemption**

Codified nearly 25 years ago, the current definition of an exempt computer employee is outdated and too narrow to be very relevant today. Modern computer professionals require higher level of thought and skill to perform their duties, and many individuals have advanced degrees, yet they are non-exempt employees. For example, a database administrator maintaining a complex and large system who collaborates with technical teams from multiple areas (e.g., host and operating systems, storage, and other application support teams) to coordinate upgrades or repair problems is most likely considered non-exempt if they do not spend the majority of time designing, modifying, creating or making changes directly related to the program code or operating systems.

The solution is to expand the exemption to include a 21st century list of duties (e.g., securing, configuration, integration, maintenance, debugging or modification of computer or information technology). Congress clearly recognized that there are professionals in the computer and high tech industry whose duties warrant them being exempt from the overtime requirements—it is now time to update this exemption to reflect the modern computer and high tech workplace.

**Create Exemption for Inside Sales Employees**

Inside sales employees are non-exempt because they have a 'fixed office location,' unlike their outside sales counterparts, who are exempt. This distinction is artificial and outdated. Inside sales persons 'virtually' call on clients and are not 'order takers,' using the same technology as outside sales employees and selling the same products. Inside sales reps are doing the same work for clients as outside sales colleagues with the same technology, yet their workplace flexibility, hours and commissions are limited due to strict time-keeping requirements, salary caps and employers' needs to predict compensation costs.

The solution would be to include inside sales positions as exempt (like outside sales) by removing the 'fixed office location' requirement. Alternatively, the Commissioned Employees exemption could be expanded by removing the 'retail/service establishment' requirement. This would make this exemption available to a wide array of businesses, but only if they pay more than 50 percent of compensation in commissions.

**Clarify the Definition of "Hours Worked"**

The modern workplace gives rise to minor IT-related activities outside of the work day (e.g., checking email/calendar before leaving for work), which currently may be compensable depending on interpretation, and there is a lack of consistency in current interpretation. Activities resulting from either the use of technology or flexible work arrangements could turn the regular commute to and from work into compensable time under current interpretations of the FLSA. Indeed, the Department of Labor has noticed a Request for Information due out in August to explore how much work is done outside the traditional workplace and work hours in this way.

The "*de minimis*" exception, in terms of time and IT-related activities, is not defined. Again, this is a contemporary issue that was never anticipated by the original FLSA, nor even by the amendments to the Act as recently as 1990. Employers and employees need Congress to update the *de minimis* exemption to include current uses of technology and work habits.

Possible solutions would be to define specific *de minimis* activities and exclude said *de minimis* activity from "paid time." (e.g., checking scheduled assignments, work locations, emails, voice mail, electronic or other forms of calendars, and other similar activities). Also, the Act should specify that normal commute time is not compensable, even if work is performed before or after the commute.

**CONCLUSION**

The Fair Labor Standards Act is one of the key laws shaping the workplace. It embodies essential protections for employees and provides key directions to employers. Unfortunately, there is ample opportunity for differing interpretations and misunderstandings of the law's requirements in the contemporary setting. Into these areas of uncertainty has, in some measure, stepped the Wage an Hour and Division with aggressive enforcement tactics built around the presumption that all violations are intentional and worthy of the most severe penalties. This attitude is then combined with coercion intended to force employers into agreements that may not be appropriate. It is my hope that by highlighting these issues to your Committee, we can return to investigations and settlement that stand on their merits rather than attempt to simply coerce results, irrespective of their propriety.

Beyond the Department of Labor's approach to enforcement, the law itself is badly in need of being updated as applying a law passed in 1938 is exceedingly challenging in today's technology-driven, internationally competitive, and rapidly evolving workplaces. Too many of the key terms of this law no longer work for either employees or employers. Congress needs to make updating the Fair Labor Standards Act a high priority so that the jobs and workplaces of the 21st Century are not held back by a law from the early 20th Century.

Chairman WALBERG. Thank you, Mr. Court.

Now I recognize Mr. Harris for your testimony.

**STATEMENT OF HON. SETH D. HARRIS, FORMER ACTING U.S. SECRETARY OF LABOR AND DEPUTY U.S. SECRETARY OF LABOR, DISTINGUISHED SCHOLAR, CORNELL UNIVERSITY SCHOOL OF INDUSTRIAL AND LABOR RELATIONS, ITHACA, NEW YORK**

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

Mr. Chairman, Ranking Member Wilson, Chairman Kline, Ranking Member Scott, it is good to be with both of you again, and thank you for the opportunity to testify today. Let me note that I am speaking only for myself, not the various organizations with which I am affiliated or in the past have been affiliated.

America's working families are suffering through a decades-long wages crisis, but neither stagnant wages nor growing income inequality is a foregone conclusion. Public policy matters. Congress and the Obama administration must do more.

Most American workers have struggled with stagnant real wages for decades. While there are several alternative measures of wages and earnings, they all tell essentially the same story. The average American worker has not received a meaningful raise since before Ronald Reagan was elected president.

Real wages have begun to rise again under President Obama, yet the pace of wage growth is slow and the amount is too small to help American families recover from the decline in household incomes caused by the Great Recession. Real median household incomes in the United States remain well below their pre-recession levels.

The story is different for the wealthiest Americans. Their incomes and wages have continued to grow substantially faster and more than those of the average family.

Since 1979, productivity has almost doubled. Our economy has more than doubled in size. But working families are not receiving their fair share of this growth.

Households in the top 10 percent of incomes used to take in one-third of our national income. Now they take in half. The ratio of the average top 1 percent household's wealth to the median American family's wealth in 2015 is more than twice the ratio in 1983.

The rich are getting richer, and the richest of the rich are doing best of all.

The wages crisis has hurt working families and our economy. Seventy percent of the U.S. economy is consumption—that is working-class and middle-class families, among others, buying goods and services.

If working families' wages, incomes, and wealth do not rise, then the American economy will remain locked in a cycle of slow growth. We are pressing the accelerator, but we also have our foot on the brake.

A few policy proposals within this subcommittee's jurisdiction would help ameliorate the wages crisis and contribute to narrowing income inequality.

First, Congress must raise the minimum wage, including for tipped employees. The *Raise the Wage Act* would increase the fed-

eral minimum wage to $12 per hour by 2020. An increase in the minimum wage also would be extended to so-called tipped employees whose federal minimum wage rate has been stuck at $2.13 for 20 years. This Committee should approve the *Raise the Wage Act* immediately.

Second, we must expand minimum wage and overtime coverage to low-wage workers, like home health aides. In 1975, the Labor Department effectively excluded home health aides and other similar workers from minimum wage and overtime protections. The home health care industry has changed dramatically, and the regulations must change along with it.

The Labor Department's new regulations were blocked by a poorly reasoned district court decision I expect will be reversed by the U.S. Court of Appeals, and rightly so. When it is, the Labor Department should immediately implement the new regulations while ensuring that higher wages for home health aides do not result in reduced assistance to those they serve.

Third, the Labor Department should expand eligibility for overtime, and Congress should not narrow eligibility. OMB is reviewing draft-proposed regulations that would update the rules defining the exemption of executive, administrative, and professional employees from FLSA coverage. I hope the Labor Department will update the salary threshold which must be reached before a worker is exempt.

Also, to address employer frustration with ambiguity in the existing rules, the proposed regulation should clarify the meaning of the primary duty test by establishing a bright line—perhaps a preponderance standard.

Congress must not narrow overtime eligibility. Various legislative proposals would allow employers to substitute cash overtime for comp time. While superficially appealing, these proposals are deeply flawed for several reasons that I detail in my written testimony, and the Committee should reject those proposals.

Fourth, Congress should ensure all workers have access to paid leave for family and medical purposes.

And finally, Congress should provide the Labor Department's Wage and Hour Division with the enforcement resources it needs to ensure fair competition among employers and protect workers from wage theft.

Thank you again, Mr. Chairman, and I look forward to the subcommittee's questions. I appreciate the opportunity to be with you today.

[The statement of Mr. Harris follows:]

**TESTIMONY OF SETH D. HARRIS**

**DISTINGUISHED SCHOLAR,**
**CORNELL UNIVERSITY'S SCHOOL OF INDUSTRIAL & LABOR RELATIONS, AND**
**FORMER ACTING U.S. SECRETARY OF LABOR AND**
**DEPUTY U.S. SECRETARY OF LABOR**

**BEFORE THE HOUSE EDUCATION AND THE WORKFORCE COMMITTEE,**
**SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

**"REVIEWING THE RULES AND REGULATIONS IMPLEMENTING**
**FEDERAL WAGE AND HOUR STANDARDS"**

**JUNE 10, 2015**

Mr. Chairman, Ranking Member Wilson, and distinguished members of the subcommittee. Thank you for the opportunity to testify on this important topic. I am speaking today in my individual capacity and as a Distinguished Scholar at Cornell University's School of Industrial & Labor Relations, and not on behalf of any of the other organizations with which I am or have been affiliated.

Mr. Chairman, America's working families are suffering through a decades-long wages crisis. While government did not cause this crisis, neither stagnant wages nor growing income inequality is a foregone conclusion. Public policy matters immensely. The United States government, particularly the U.S. Congress and the U.S. Department of Labor, must do more to establish a firm and fair floor for wages, ensure workers receive appropriate compensation when they work overtime, and provide for fair competition among employers by effectively, consistently, and vigorously enforcing wage and hour laws.

*America's Wages and Inequality Crisis*

Most American workers have struggled with stagnant real (i.e., inflation-adjusted) wages for decades. Many labor economists peg the beginning of the wages crisis to the end of the 1970s. The real average hourly wage for the large majority of workers, although it has moved slightly higher and lower at times over the decades, has been essentially flat since 1979. While there are several alternative measures of wages and earnings, they all tell essentially the same story: the average American worker has not received a meaningful raise since before Ronald Reagan was elected president.

The story becomes more stark and troubling when we assess the effects of this wages crisis on workers by wage level. Men earning wages below the median wage --- that is, the lowest 50% of wages --- have seen their real wages decline since 1979. Men earning the lowest 20% of wages have seen the largest decline in real wages. Meanwhile, men earning the top 10% of wages have seen meaningful real wage gains, and those earning the top 1% of wages have received the largest real wage increases. As a group, women have done somewhat better than men, but women earning in the bottom 20% of wages have received almost no real wages

increase since 1979. Only women earning the top 20% of wages have received sizable wage increases during that time.

The one period that offered a respite from this four-decades-long wages crisis was President Bill Clinton's second term. From 1996 to 2001, real average hourly earnings of private production and nonsupervisory employees (another reasonable measure of wages) increased about 7.5%. Equally important, real wage gains were spread across the wages spectrum --- that is, low-wage as well as high-wage workers received real increases. Because it is an oasis in a wages desert, this period is instructive for policy makers.

One very important reason real wages rose during President Clinton's second term is that labor markets were extremely tight. The unemployment rate during this period fell below and stayed below 5% for several years, and even dipped below 4% during several months. Part-time employees who would rather work full-time were far less prevalent in the late 1990s than they are today: 4.2 million in January 1996 and 3.3 million in January 2001 compared with 6.7 million in May 2015. Labor force participation, which measures the percentage of working-age people who have jobs or are actively looking for jobs, hovered around 67% from 1996 through 2001, actually increasing slightly during this time. In May 2015, the labor force participation rate was 62.9% meaning there are many more workers who have stopped looking for work. In sum, President Clinton's second term was characterized by a large number of employers bidding up wages in order to compete for a small pool of available workers.

But a second reason that wages rose during the second Clinton term was that the U.S. government raised the wages floor. In 1996, Congress raised the federal minimum wage from $4.25 to $5.15 --- a 21% increase in two annual increments. Almost ten million workers benefitted: 71% adults and 58% women. Households in the bottom 20% of the income distribution typical receive only 5% of total family income, but they received 35% of the benefits from the 1996-97 minimum wage increase. Numerous empirical studies failed to find any significant job loss associated with the 1996-97 increases. In fact, working families' increased incomes may have allowed them to spend more in their communities and, in the process, create jobs. During the same period, some workers benefitted from the availability of unpaid leave under the federal Family and Medical Leave Act which, after President Clinton signed it in 1993, protected some employees from losing their jobs because they took time off from work to care for themselves or a family member after a serious illness struck or to care for a newly born or adopted child. In sum, a higher wage floor and new labor standards protections for workers were important contributors to the one period of across-the-board wages growth during America's four-decades-long wages crisis. It is also worth noting that President Clinton's second term was a period of rapid economic and jobs growth unmatched until President Obama's second term.

By contrast, the waning months of President Bush's administration brought devastating job losses, including 700,000 jobs lost during the month of President Obama's first inauguration. Supported by aggressive monetary policy from the Federal Reserve, President Obama led a successful effort to help the American economy recover from the Great Recession. The American Recovery and Reinvestment Act and other Obama Administration policies facilitated turning catastrophic job losses into a record-setting 63 consecutive months of private-sector jobs growth that produced 12.6 million jobs for American workers. Our economy has added 3.1

million jobs over the past 12 months and an average of 217,000 jobs per month in 2015. The unemployment rate has fallen from its peak of 10% to 5.5% in May 2015, according to the Bureau of Labor Statistics. As a result of this job creation, American labor markets have begun to tighten and real wages are rising again. Average hourly earnings for all workers increased by 2.3% over the last year while average hourly earnings of production and nonsupervisory employees increased by around 2.0%. Although these are small increases, America's very low inflation rate --- at or near 0% in the most recent Bureau of Labor Statistics report --- ensures that workers will receive some real wage increase this year, as they did last year. Yet, the pace of wage growth is slow and the amount is too small to help American families recover from the devastating decline in household incomes caused by the Great Recession. Real median household incomes in the United States remain well below their pre-recession levels.

The story is quite different for the wealthiest Americans. Their incomes and wages have continued to grow dramatically --- substantially faster and more than those of the average family. While it is fair to say that they have reaped the largest share of our nation's recent economic recovery, the outsized share of national income flowing to the wealthiest Americans since the Great Recession is merely the continuation of a long-lasting trend that has made the rich richer. Since 1979, productivity in the United States has almost doubled, and our economy has more than doubled in size, but working families are not receiving their fair share of this growth. Since the late 1970s, the 60% of households with the lowest incomes have seen no real increase in their household incomes while the top 5% have increased their household incomes by several multiples. The households in the top 10% of incomes, which used to take in one-third of our national income, now take half. As noted above, the same story can be told about wages. When it comes to wealth, the ratio of the average top 1% household's wealth to the median American family's wealth in 2015 is more than twice the ratio in 1983. The rich are getting richer in absolute terms and in comparative terms, and the richest of the rich are doing best of all.

The wages crisis has been devastating for America's families as they have struggled to maintain their standard of living and middle-class status. Yet, the wages crisis has also hurt our economy. Seventy percent of the U.S. economy is consumption --- that is, working class and middle class families, among others, buying goods and services. These families spend a much higher percentage of their incomes on consumer goods and services than higher income families spend. In other words, if a minimum wage worker earns an additional dollar, she will spend that entire dollar to buy groceries or pay rent to support her family. That dollar goes directly back into the economy. If a millionaire or billionaire earns an additional dollar, he is much more likely to save that dollar than spend or invest it. Thus, our economy grows more when working class and middle class families increase their incomes than when wealthy people increase their incomes. The shift in wealth, incomes, and wages away from the working class and the middle class to the wealthiest Americans over the past four decades has reduced overall consumption from the level it might have achieved if wealth, incomes, and wages had been more fairly distributed. This "reverse Robin Hood" economic shift has contributed to what former Treasury Secretary Lawrence Summers called "secular stagnation" --- that is, slow growth in the American economy caused by inadequate demand. Simply, the U.S. economy is growing more slowly because of the wages crisis. While we are pressing the accelerator, we also have our foot on the brake.

*The Wages Crisis' Causes*

Once again, although government has made it worse rather than better, government did not directly cause this wages and inequality crisis. The principal culprits are technology and globalization. Over the course of the last four decades, uncounted technological innovations have resulted in middle-wage, middle-skill workers being replaced with machines: for example, ATMs in place of bank tellers, robots in place of manufacturing workers, digital technologies in place of telephone operators, and EZ passes in place of toll collectors. When I was the Acting Secretary of Labor, I had the privilege of visiting the ArcellorMittal steel plant in Cleveland, Ohio, one of the largest and most productive integrated steel manufacturing facilities in our country. The plant had been through bankruptcies and other challenges arising out of global competition in the dozen years before I visited. I was shocked when I walked onto the plant floor and did not see any workers. The plant was entirely mechanized. A small number of employees could be found in a series of pods that housed sophisticated computers and television screens that these modern-day steelworkers used to monitor production, quality, and other issues and run the robots and other machines that made the steel 24 hours each day, 365 days each year. A steel plant that once employed more than 8,000 workers currently employs only 1,800. This is the effect of technology on middle-skill jobs in workplaces across our country.

Where technology did not replace workers, it facilitated offshoring middle-skill jobs to other countries. A visit to the maquiladoras in Mexico, garment factories in Vietnam or Bangladesh, iPhone manufacturing sites in China, electronics fabrication plants in Malaysia, or a call center in India would confirm this widely acknowledged fact. In some cases, technology has created jobs in the United States. The Internet-based industries and occupations that call Silicon Valley home are all examples. However, job creation in these industries has not kept pace with job destruction in other industries where displacement or offshoring has occurred. As a result, the United States has suffered a measurable loss of middle-wage job opportunities, particularly those affecting those jobs traditionally filled by workers who did not attend college and earn a bachelor's degree.

Without these opportunities, middle-skill workers must scramble to secure more education and training to qualify for high-skill jobs, or slip into the lower wage, low-skill labor market where competition is intense. Adding millions more workers --- both U.S. workers and foreign workers who can compete from overseas using technology --- to low-wage labor markets has put a powerful downward pressure on already low wages in those markets. Similarly, increased competition from displaced middle-skill workers for the smaller number of middle-wage jobs that remain in the U.S. also puts significant downward pressure on wages in those labor markets. Some higher skilled workers, who have benefitted from an increase in the return to their education, skills, and knowledge, have seen their wages rise and the unemployment levels remain very low, but they have been the exception during the wages crisis.

Intensified, often global, competition among businesses has also put meaningful downward pressure on wages. Companies locked in competition for market share or capital sometimes seek to reduce costs and squeeze out profits wherever and however possible. These competitive strategies can have negative consequences for workers as their wages are cut, employment relationships fissure, and benefits and protections evaporate. In the absence of very

tight labor markets that give workers individual bargaining power in their dealings with employers, or powerful and effective labor unions that give workers collective bargaining power, employers' ability to choose competitive strategies regardless of their effects on workers' wages and well-being can go unchecked. Slack in labor markets, and the longlasting decline in union density to 6.6% of America's private-sector workforce, have made choosing these strategies far easier. For these reasons, government must step in.

*Public Policy Can Ameliorate the Wages Crisis*

The list of prescriptions for ending the wages crisis and narrowing income inequality is long. Some of it extends beyond this committee's jurisdiction. For example, Congress could further tighten labor markets by creating millions of jobs --- particularly middle-wage, middle-skill jobs --- with smart investments in transportation and communications infrastructure, alternative energy development, and advanced manufacturing, along with other sectors. Assisting states and local governments with returning their workforces to the levels reached during President George W. Bush's administration would create jobs and tighten labor markets while improving public education, strengthening public safety, and helping local transportation systems, and also restoring a traditional pathway into the middle class for millions of Americans.

Beyond sound fiscal policy, tax policy, job training, and labor policy matter a great deal to wages and the breadth of the income inequality gap. Germany and some other European countries suffer from a lesser degree of income inequality and a lesser challenge with respect to stagnant wages because their tax policies are more progressive, they have extensive government-provided social insurance, and they offer workers multi-channeled job training and education systems, among other reasons. Especially important, our European trading partners also make it far easier for workers to join unions. Their systems also permit collective bargaining agreements that cover millions of workers who are not union members. In some cases, including in Germany, they have statutorily mandated "works councils" that involve workers' representatives in "co-determination" of virtually all workplace policies.

While America's workers may not expect to live in a country that mimics European public policies, they expect that their government will protect them from bearing the full burden of the consequences of increasingly intense competition in capital markets, local and national product and labor markets, and the global economy's product and labor markets. Americans expect that labor markets and workplace practices will be governed by fair "rules of the road." These rules must predictably lead to fair competition among employers and fair treatment of workers, especially workers who do not have sufficient individual bargaining power to protect themselves. Workers' must never be exploited or their wages stolen to feed employers' profits.

*Strategies for Congress and the Labor Department to Ameliorate the Wage Crisis*

The United States has adopted a set of policies that relate to the wages crisis, like a national minimum wage and overtime protections, protections against exploitative child labor, and family and medical leave, among others. Too many of those policies have fallen into disrepair or have been rendered ineffective because they have not kept up with changing times. This section addresses some of those policies that are within the scope of this hearing. Each of

the following policy proposals would help ameliorate the wages crisis, contribute to narrowing income inequality, help America's working families, and strengthen the U.S. economy:

Raise the minimum wage, including for tipped employees.

When I was the Acting Secretary, I traveled the country meeting with small groups of minimum-wage and low-wage workers to learn about their lives and how an increase in the federal minimum wage would help them. I heard powerful and poignant stories of people scraping to get by, or not getting by, on a minimum wage of $7.25 per hour. One mother in Florida told me of her painful choice to sacrifice work hours and wages in order to attend a meeting with school administrators to discuss her daughter's disability and education plan. As she and her daughter drove home from the meeting, her daughter was hungry, so they stopped for dinner. Short of money, the mother could only buy one hamburger and one order of french fries and ask for two cups of water. The daughter ate the meat and the fries. The mother ate the bun.

This kind of excruciating choice is common among minimum wage and low-wage workers: pay for groceries or pay the rent; fix the car or fix the heater in your home; buy prescription medications or buy clothes for your children to wear to school. During my travels, I heard story after story of people who fell behind and could never get ahead --- living with family, sleeping on a friend's couch, walking miles because of a lack of bus fare, cutting pills in half to save money on refills.

Congress should follow the example set by 17 states and the District of Columbia over the last two years and raise the minimum wage. The proposal pending before Congress is the Raise the Wage Act, which would increase the federal minimum wage to $12 per hour by 2020. This committee should consider and approve this bill immediately. Some estimates suggest that as many as 38 million workers would benefit from this minimum wage increase. The value of the current federal minimum wage --- totaling only $15,080 for a full-time worker over a full year --- has eroded to a historically low level. The value of today's minimum wage, adjusted for inflation, is well below the minimum wage in 1968, for example. Congress should also index the minimum wage to median wages as a means of preventing further erosion in its value, as the Raise the Wage Act proposes.

An increase in the minimum wage also must be extended to so-called "tipped employees" whose federal minimum wage rate has been stuck at $2.13 per hour for 20 years. The difference between this paltry wage and the usual minimum wage of $7.25 is paid by restaurant-goers who leave tips for these hard-working men and women. I suspect that patrons leaving tips intend this money to go to their servers, not the restaurants. The Raise the Wage Act proposes to phase out this practice and ensure that tipped employees get the same cash wage from their employers as other employees.

Expand minimum wage and overtime coverage to low-wage workers, like home health aides, who have been excluded by an outdated and obsolete exemption.

In 1974, Congress expanded the Fair Labor Standards Act to cover "domestic service" workers so that employees performing household services in a private home would be paid at

least the minimum wage and overtime. These amendments exempted from minimum wage and overtime protection casual babysitters and other workers employed to provide "companionship services" to elderly persons or persons with illnesses, injuries, or disabilities. In 1975, the Labor Department's Wage & Hour Division promulgated regulations that had the effect of categorizing home health aides and other similar workers as fitting within this "companionship exemption" and, therefore, excluding them from minimum wage and overtime legal protections.

The home health care industry has changed dramatically since 1975. The number of home health aides had grown markedly over the past decade and faster growth is expected in the coming years. This growth is, in part, a product of accelerating changes to health care delivery designed to reduce costs. Simply, more Americans will be discharged from, or never admitted to, hospitals and institutions so that they may live and receive care at home and remain a part of their communities. For rapid jobs growth to occur without sacrificing the quality of care, we must induce a rising number of workers to become home health aides. Higher wages and overtime pay are a necessary part of that process.

Perhaps more fundamentally, our society must recognize these workers' critical importance. They care for our parents, children, grandparents, siblings, and us when we need them most. They make it possible for people with disabilities to live in the community rather being warehoused in an institution. They are not babysitters. They are professional caregivers -- one of our society's most noble professions. They deserve our respect and thanks, and nothing less than the federal minimum wage and overtime pay when they work more than 40 hours in a week.

Reflecting changes in the industry and the importance of these workers, the Labor Department proposed new regulations that should have taken effect on January 1, 2015 to narrow the companionship exemption and provided minimum wage and overtime protections to home health aides and similar workers. Unfortunately, in a poorly reasoned decision, U.S. District Court Judge Richard Leon blocked the regulations. His decision is currently on appeal to the U.S. Court of Appeals for the District of Columbia. The court heard oral argument on May 7, 2015. I expect that the Court of Appeals will reverse Judge Leon's decision and allow the updated regulations to take effect. This will be the right decision. When the Court of Appeals frees it to act, the Labor Department should immediately implement the new regulations working closely with state Medicaid directors, the Centers for Medicare and Medicaid Services, unions representing home health aides, and advocates for people with disabilities and senior citizens to ensure that higher wages for home health aides do not result in reduced assistance to those they serve.

Expand eligibility for overtime pay.

When Congress exempted executive, administrative, and professional employees from the FLSA's minimum wage and overtime protections, it implicitly concluded that these workers ordinarily would have sufficient power in the labor market to bargain with their employers for fair salaries and reasonable work hours. Highly paid workers who lead organizations or their constituent units, or who work closely with those leaders, or who are uniquely talented and credentialed professionals should be able to negotiate with sufficient strength to protect

themselves. However, when Congress delegated the task of defining "executive," "administrative," and "professional" to the Labor Department's Wage & Hour Division, some of this central purpose of the exemptions was lost over the years. As a result, workers who should be protected by the FLSA are treated as exempt. For example, no ordinary citizen would think that a fast-food restaurant's assistant manager earning $27,000 per year who supervises a couple of co-workers and makes recommendations about hiring, but spends a large portion of her time salting fries, flipping burgers, and serving customers, is an "executive." Yet, these low-wage workers and others legally can be required to work 50, 60, or even 70 hours per week without receiving overtime pay.

Right now, the Office of Management & Budget is reviewing draft proposed Wage & Hour Division regulations that would update the overtime rules. I expect these regulations will be published for public comment in the coming weeks. While I do not know the content of these regulations, I hope the Labor Department will update the "salary threshold" which must be reached before a worker is an exempt executive, administrative, or professional employee. The current threshold is $455 per week, or less than $11.50 per hour for 40 hours of work in a week. According to the Bureau of Labor Statistics, the average hourly wage in 2014 was almost twice that amount. Wages are one reasonable proxy for individual bargaining power --- that is, powerful workers can bargain for higher wages or salaries. A low wage, by contrast, suggests little bargaining power and a real need for the FLSA's protection. The existing outdated threshold suggests that large numbers of workers who do not have much bargaining power have been unfairly and inappropriately, but legally, exempted from the FLSA's protections.

Some employers are justifiably frustrated by the uncertainty that comes with trying to apply the existing overtime regulations. The existing rules are too complex. Where possible, regulations should be written to make absolutely clear to the regulated community how it should comply. Unnecessary ambiguity and uncertainty should be eliminated in favor of transparent standards to which employers can conform their conduct prior to any intervention by government. For this reason, the Wage & Hour Division should clarify the meaning of the "primary duty" test for these exemptions. Under existing rules, executive, administrative, or professional duties must be the employee's primary duties before that employee can be exempted from FLSA coverage. But there is no clear standard in the existing regulations for "primary." One court, after reviewing the facts of a particular case, held that exempt duties requiring as little as 1% of an employee's time were nevertheless "primary." The Wage & Hour Division should propose a bright line test that resolves this ambiguity, perhaps by employing a preponderance standard (i.e., more than 50%).

Congress should not narrow eligibility for overtime.

While the Labor Department seeks to expand overtime protections to better reflect congressional intent, Congress must not permit workers to be deprived of overtime pay that they badly need to make ends meet and save for their children and their future. For example, various legislative proposals would allow employers to substitute cash overtime pay for "comp time" --- time off from work. While superficially appealing, these proposals are deeply flawed for several reasons. I will focus my testimony on only three of these reasons.

First, the proposals seem to be premised on the myth that the FLSA inflexibly prohibits compensatory time off as a reward for hard-working employees. The FLSA permits employers to grant paid time off awards to employees who work more than 40 hours in one week, or 30 hours, or 50 hours, or to employees who perform exceedingly well at work regardless of their work hours. The only difference between the system authorized by the comp time proposals and existing law is that employees would receive lower pay under the comp time bills. They would be required to sacrifice their overtime pay in return for time off. More generally, the FLSA permits flexible scheduling of employees' work hours within the broad confines of a 40-hour work week. For example, an employee can work twelve hours one day and six hours the next day without running afoul of the FLSA or triggering overtime liability. As long as the employee receives overtime compensation for hours worked in excess of 40 hours, the employer can set a work schedule that best fits its needs. Congress should not legislate based on a perception of inflexibility that does not exist.

Second, workers need time *and* money, not time *or* money. The essence of the wages crisis is that workers' real wages have been stagnant for decades. The idea that workers should have to buy time off from work from their employers by sacrificing overtime pay, in addition to being morally dubious, will not solve the signal economic challenge of our time. It certainly will not help hard-pressed working class and middle class families to pay their bills. At the same time, according to the Organization for Economic Cooperation and Development, U.S. employees already work more hours than workers in most other developed countries. Simply, U.S. workers' wages are too low *and* they are working very hard. Employers should be encouraged to find an economically efficient way to give their employees greater flexibility to care for themselves and their families without being permitted to ask workers to reduce their pay in return.

Third, based on the comp time proposals I have reviewed, the deal that they seem to offer to workers ---trade overtime pay for time off --- is not the real deal. Simply, the pending comp time proposals do not guarantee that employees control the time they have earned like they would cash overtime wages. Of course, when an employee receives premium pay for working overtime, she can spend those extra wages on anything she would like. Under the law, the employer has no say in the employees' spending. Comp time is very different. The employer keeps control over the comp time in two ways: (a) the employer can unilaterally "cash out" an employee's comp time with 30 days' notice (in the House's version of the bill, the employer may cash out only comp time in excess of 80 hours); and (b) an employee can be prohibited from using her comp time if the employer concludes that the employee's absence would "unduly disrupt" the employer's business operations.

Imagine an employee who has worked overtime during January, February, and March in order to accumulate comp time that she intends to use to take four weeks off from work (with pay, because of the comp time) to care for her 80-year-old grandmother who will undergo a serious medical procedure in August. In mid-June, the employee gives her supervisor advance notice of the dates she intends to use her comp time. Before the end of June, the supervisor notifies the employee of either of two things: (1) the employer has decided to buy back the employee's comp time by paying her the overtime wages the employee would have been paid in January, February, and March; or (2) the employee cannot use her comp time in August because

it would unduly disrupt operations in August given that so many other employees will be taking vacation at the same time. What is the result under the comp time proposals? The employee does not get to use her comp time (or, under the House's version, all of her comp time), despite her careful planning and long hours of work. She will not be available to care for her grandmother through her procedure and four weeks of convalescence. Because grandmothers are not covered family members under the federal Family and Medical Leave Act, the employee cannot take job-protected time off and use her overtime pay to cover her lost wages. The employer, on the other hand, gets an interest free loan from the employee of the total value of the employee's overtime pay from January, February, and March through the end of June and perhaps longer. This is just one of many scenarios in which the promised tradeoff --- overtime pay for time off --- will not be realized by workers because employers retain control over the use of comp time.

The true purpose of comp time legislation was revealed by Justice Clarence Thomas in a Supreme Court decision entitled *Christensen v. Harris County*. *Christensen* involved a challenge to the provisions of the FLSA that allow public-sector employers to provide comp time in lieu of premium pay to their employees who work overtime. Employees of the Harris County sheriff's office sued their employer because it had established a comp time system that looked very much like the kinds of systems authorized by the private-sector comp time proposals currently pending in Congress. Justice Thomas reviewed the history of the FLSA's coverage of public employers and public employees, in particular Congress' amendments to the FLSA extending coverage to the public sector in 1966 and 1974. After Congress expanded coverage to state and local governments, the Supreme Court initially held in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the FLSA could not be constitutionally extended to cover state and local government employees. The Court overruled that decision in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985). Thus, after 1985, the FLSA applied to public-sector employers and employees. Enter comp time. As Justice Thomas recounted, "[i]n the months following *Garcia*, Congress acted to mitigate the effects of applying the FLSA to States and their political subdivisions, passing the Fair Labor Standards Amendments of 1985, Pub. L. 99—150, 99 Stat. 787." In other words, the 1985 amendments added comp time to the law *in order to save public-sector employers money* because the FLSA had just been applied to them for the first time. The goal was not added flexibility for employees; rather, comp time allowed public-sector employers to avoid the added costs of paying overtime to their employees. The private-sector comp time proposals now under consideration seem to be directed toward the very same purpose.

Ensure all workers have access to paid leave for family and medical purposes.

As noted earlier, the federal Family and Medical Leave Act provides some U.S. workers of some U.S. employers with 12 weeks of job-protected leave if they must take time off from work to care for themselves or a family member after a serious health condition strikes or to care for newly born or adopted child. The FMLA was an important achievement. Millions of employees have taken needed leave over the past 20 years. Employers found it easy to comply. But the FMLA is limited. Employees of small businesses are not covered, many part-time workers are not covered, and many family members (like grandmothers) are not covered. A U.S. Department of Labor survey issued in 2013 for the FMLA's 20th anniversary found that only one

in six work sites reported being covered by the FMLA (another 30% were unsure) and only 59% of employees reported being covered. Equally important, under the FMLA, family and medical leave is only available to those employees who can afford to take *unpaid leave*. In the Labor Department's survey, low-wage workers were more than twice as likely as higher wage workers to report that they had an unmet need for leave. Forty percent of workers reported cutting short their FMLA leave because of financial concerns.

The discussion of paid leave is a necessary part of the wages crisis. Workers are forced to cut their own pay when they must take time off from work without compensation. In the worst circumstances, workers may lose their jobs because they must care for a sick child or attend to their own illness or disability. Workers do not merely work --- they have families and other responsibilities that are both entirely predictable and a fundamental part of the human condition. Yet, the United States lags far behind the rest of the developed world in policies that respect these facts of life. According to the International Labor Organization, the United States and Papua New Guinea are the only two out of 185 countries that do not provide paid maternity leave. Of course, the United States does not have a federal law that guarantees paid paternity leave, family leave, or sick leave.

Congress should provide funding to support states that are experimenting with paid leave systems. Paid leave makes it possible for all workers to take paid time off to care for themselves and their families or the arrival or a newborn or newly adopted child. Several states have already enacted laws that provide paid leave and they work successfully. Congress can help others to do the same. Further, forty-three million American workers do not have access to any paid sick leave. This is a disturbing statistic, not merely for people who care about working families, but also for those who are concerned about public health. We do not want families' inability to absorb a loss of a day's or week's pay to force sick waiters, waitresses, health care workers, retail workers, or others who have extensive contact with the public to go to work. "Presenteeism" --- that is, people going to work while sick --- is a threat to all of us. Congress should enact the Healthy Families Act to ensure that workers are entitled to at least seven days of paid sick leave.

<u>Provide the Labor Department's Wage & Hour Division with the enforcement resources it needs to ensure fair competition among employers and protect workers from wage theft.</u>

The U.S. Department of Labor's Wage & Hour Division has been charged by Congress with enforcing the minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act; prevailing wage requirements and wage determination provisions of the Davis-Bacon and Related Acts and the McNamara-O'Hara Service Contract Act (SCA); wages and working conditions under the Migrant and Seasonal Agricultural Worker Protection Act; the job protections of the Family and Medical Leave Act; and the Employee Polygraph Protection Act. The Wage & Hour Division's compliance responsibilities extend to 135 million workers in more than 7.3 million workplaces throughout the United States and its territories. What is the total number of staff funded by Congress to accomplish these monumental tasks? In FY 2014, total Wage & Hour Division FTE was 1,803. Yet, many of these employees are not investigators in the field. Some help employers by providing compliance assistance through direct consultations or online and printed materials. Others engage in worker education efforts.

In early 2009, the Government Accountability Office issued a scathing report essentially finding that the Wage & Hour Division was performing poorly in responding to workers' complaints of FLSA violations. Operating undercover, GAO filed ten typical worker complaints with Wage & Hour's local offices across the country. Wage & Hour staff deterred these "workers" from filing complaints by encouraging them to resolve the issue themselves, directing most calls to voice mail, not returning phone calls to both employees and employers, and providing conflicting or misleading information about how to file a complaint. Wage & Hour policies required investigators to enter all reasonable complaints into Wage & Hour's database. Half of GAO's fictitious complaints were not so recorded. Looking beyond its undercover cases, GAO identified real-life cases affecting at least 1,160 employees whose complaints were inadequately investigated by Wage & Hour. Five of the cases were closed based on false information provided by the employer that could have been verified by a search of public records to which Wage & Hour staff did not have access. GAO also found that Wage & Hour's investigations were often delayed by months or years, partly because backlogs in some offices prevented investigators from initiating cases within six months. In sum, whether due to a lack of resources, poor management, inappropriate performance measures, ineffective systems, or underqualified or uninterested employees, Wage & Hour had failed to collect and act upon information and complaints from vulnerable workers who believed their rights had been violated.

With new leadership in the department and the Wage & Hour Division beginning in 2009, the organization dramatically turned around its performance. Among other accomplishments, the Wage & Hour Division responded more quickly and effectively to complaints, in part because of a new prioritization policy. Over the first five years of the Obama Administration, the Labor Department returned more than $1.1 billion dollars in wages lost through wage theft to the workers who earned them. The department also did the best job, ever, of targeting Wage & Hour investigations to the workplaces that had violations whether the Wage & Hour Division initiated the investigation on its own (a "directed investigation") or responded to a complaint (a "complaint investigation"). The Wage & Hour Division's strategic enforcement efforts have been more tightly focused on low-wage industries where fissured employment relationships can lead to exploitation and wage theft. The addition of 300 investigators in the FY 2010 appropriations bill contributed to this performance improvement, but the improvement can also be credited to an aggressive, evidence-based, data-driven performance measurement and management system implemented across the Labor Department beginning in 2010. The Wage & Hour Division staff work very hard, target their efforts using thoughtful and data-driven strategies, and dramatically improved their performance and efficiency from 2009 through 2015. They are doing everything they can with the resources Congress has provided. More resources would allow them to produce even better results.

Congress can help to ensure that wage and hour laws are fairly and effectively enforced in at least two ways. First, Congress should increase the resources provided to the Wage & Hour Division. President Obama's FY 2016 budget proposed an increase of 317 FTE for the Wage & Hour Division. This is a small down payment on the increases the Wage & Hour Division actually needs, and the minimum commitment that Congress should make to America's working families. Second, Congress can enact legislation that helps employers to come into compliance with the laws enforced by the Wage & Hour Division without any intervention by the Wage &

Hour Division. I believe firmly that the overwhelming majority of U.S. employers want to comply with the law, and actually comply with the law. But responsible employers can be significantly disadvantaged when forced to compete with law-breaking employers that are never held to account or face penalties that do not punish or have deterrent effects.

President Obama's Fair Pay and Safe Workplaces executive order offers two illustrations of the kind of preventive compliance legislation Congress might consider. The executive order requires federal contractors and their subcontractors to provide every employee with a pay stub that discloses the employee's regular rate of pay, number of hours worked, gross pay, and any deductions from gross pay for taxes, benefits, or other payments. This transparency will help employees to check, on their own and without any government involvement, whether they are receiving the pay to which they are entitled. Employers will be better able to check their own compliance with the FLSA and state and local wage laws. Further, this requirement would help employers by bringing them into compliance with the FLSA's recordkeeping requirements.

The executive order also requires federal contractors and their subcontractors to provide every worker classified as an "independent contractor" with written notice to that effect. This notice will eliminate any surprises between workers and employers, and reduce the amount of misclassification that occurs in the economy. As the members of this sub-committee know, millions of workers are improperly misclassified as "independent contractors," rather than "employees." Only employees are covered by most employment laws. So, misclassification deprives these workers of minimum wage and overtime protections, but also workers compensation, unemployment insurance, and the protection of other employment laws. To the tune of several billion dollars, misclassification also cheats state and federal governments out of payroll taxes for Social Security, Medicare, and unemployment insurance, as well as income taxes. Requiring employers to disclose a worker's status as an "employee" or an "independent contractor" will nudge them to avoid misclassifications. Among other reasons, these written statements to their employees could become evidence against employers in any investigation by the Wage & Hour Division or a private action brought by employees.

Beginning during my time at the Labor Department, the Wage & Hour Division entered into 21 memorandums of understanding with state governments to cooperate with respect to misclassification. Every level of government has an interest in addressing misclassification of employees. Congress can also help to reduce the incidence of misclassification by including it as a substantive violation of the FLSA. In addition, Congress could adopt the proposal included in President Obama's FY 2016 budget to increase civil money penalties so that irresponsible employers will be deterred from seeking to gain a competitive advantage over responsible, law-abiding employers by misclassifying employees or otherwise violating the FLSA. If they are not deterred, employers must pay a meaningful price when they do not play by the rules. Congress can and should enact legislation that make these changes to the Fair Labor Standards Act.

*Conclusion*

Thank you again for the invitation to testify before the subcommittee. I believe firmly that it is time for Congress and the Obama Administration to use every reasonable tool at their disposal to end the wages crisis and narrow income inequality. Some of those tools are within

the jurisdiction of this subcommittee. I urge the subcommittee and committee to act immediately.

I appreciate the opportunity to share my views on how you might deploy those tools to benefit working families and our economy.

Chairman WALBERG. Thank you, Mr. Harris, and thank you for your timeliness. You have done this before.

Now I recognize Mr. Richardson for your five minutes of testimony.

**STATEMENT OF MR. JAMIE RICHARDSON, VICE PRESIDENT, WHITE CASTLE SYSTEMS, INC., COLUMBUS, OHIO, TESTIFYING ON BEHALF OF THE NATIONAL COUNCIL OF CHAIN RESTAURANTS**

Mr. RICHARDSON. Chairman Walberg, Ranking Member Wilson, Chairman Kline, and Ranking Member Scott, and members of the subcommittee, thanks for the chance to be with you today to discuss the *Fair Labor Standards Act*.

I am Jamie Richardson, and I serve as vice president at White Castle. I am pleased to be testifying on behalf of the National Council of Chain Restaurants, NCCR, and NCCR members around the country, including the country's most respected restaurants, representing millions of hardworking Americans dedicated to good business and great taste. NCCR is a division of the National Retail Federation, the world's largest retail trade group.

White Castle is a family-owned business, and we were founded in 1921. From humble beginnings, we have had the opportunity to grow thoughtfully over the past 94 years, and today we have 390 restaurants in 12 states with 10,000 team members who are dedicated to feeding the souls of craver generations everywhere and making memorable moments every day.

Our founder, Billy Ingram, had two key governing principles in growing the business: number one, happy employees make happy customers; and number two, we have no right to expect loyalty except from those to whom we are loyal.

More than one in four of our 10,000 team members have been with White Castle 10 years or more. The average time one of our general managers has been at White Castle is 21 years, and turnover for this key group last year was less than 6 percent. We are recognized as an industry leader for our commitment to diversity, with 33 percent of our restaurant general managers who are African-American and 77 percent of our restaurant general managers who are female.

Today, we are here to share thoughts on wage and hour protections and the *Fair Labor Standards Act*. White Castle was 17 years old when FLSA was enacted in 1938, and even then White Castle was pioneering a notion of enlightened management before it was popular.

For example, we began offering a health insurance benefit in 1924. Our profit sharing and retirement benefits were pioneered in the late 1920s, as well as a holiday bonus initiated for all team members to make us an acknowledged employer of choice in the 1930s. And those are programs that still continue to this day.

Our nation's economy and the labor force have changed significantly since the 1930s, so it comes as no surprise that a statute from 1938 and its accompanying regulations do not effectively mirror the needs of today's business and workforce. There has been a major shift in the industries that drive employment opportunities. Technology has transformed the workplace and job duties, and em-

ployees increasingly place a premium on workplace flexibility and work-life balance.

In fact, nearly 80 percent of our White Castle general managers tell us the number one reason they love the Castle is the flexibility they enjoy.

The FLSA's current statutory and regulatory structure is ill-equipped to cope with these realities. The result is an outdated and complex framework in which employers and employees must operate, and the need to modernize a 1930s, Depression-era law for the twenty-first century economy has never been more important.

One specific example about the relevancy of today's FLSA is especially concerning to restaurants and retailers. The administration is soon expected to propose major changes to the FLSA overtime regulations, which were last updated in 2004. Rather than providing more opportunities for individuals to earn overtime pay, it appears the new regulations will only result in a more complicated law requiring outside legal advice for small businesses and more litigation.

In anticipation of these regulatory changes, NCCR's parent organization, the National Retail Federation, commissioned an Oxford Economics study to analyze the impacts of an increase in the salary threshold on the retail and restaurant industries. The report demonstrates just how disruptive significant increases in the salary threshold would be on an American business model that creates jobs in every community across the country.

Looking at the report's mid-range option found an increase in the overtime salary threshold to $808 per week, or $42,016 per year, would affect 1.7 million retail and restaurant workers and would cost business owners $5.2 billion per year, assuming employers do not make changes to offset the increased costs. At White Castle the estimated added cost with no changes in our business model would be $8 million to $12 million a year.

In addition to the expected increase of the salary threshold, we also anticipate the U.S. Labor Department regulations will make unnecessary modifications to the duties test for restaurant managers, which would impose immense costs on chain restaurants and would stifle opportunities for career advancement for hourly associates who wish to manage our restaurants.

In reality, restaurant managers' days are spent performing management tasks, and they also multitask, stepping in to help serve diners during busy times, leading and training team members by working side by side with them, motivating and teaching as they go. Enacting a duties test would curb a manager's critical ability to multitask and lead in a busy restaurant setting, undermine customer service, limit training opportunities for team members, diminish morale, and force complicated assessments of time spent managing in a restaurant setting.

Mr. Chairman, the FLSA of the twenty-first century should be consistent with the purpose and values from the time in which it was enacted almost 80 years ago, but the law should be modernized to reflect the twenty-first century demographics of our workforce and the unlimited opportunities provided by our modern and dynamic economy.

On behalf of White Castle and the National Council of Chain Restaurants, thanks again for the opportunity to share our views, and we would be happy to answer any questions.

[The statement of Mr. Richardson follows:]

**Testimony of Jamie Richardson**
**Vice President, Government and Shareholder Relations and Assistant Secretary**
**White Castle System, Inc.**
**On behalf of the**
**National Council of Chain Restaurants**
**Before the Subcommittee on Workforce Protections**
**Education and the Workforce Committee**
**U.S. House of Representatives**
**June 10, 2015**

Chairman Walberg, Ranking Member Wilson and members of the Subcommittee, thank you for the opportunity to be with you today to discuss the Fair Labor Standards Act (FLSA). I'm Jamie Richardson and I serve as Vice President, Government and Shareholder Relations at White Castle. I am pleased to be testifying on behalf of the National Council of Chain Restaurants (NCCR). NCCR is the leading trade association exclusively representing chain restaurant companies. For more than 40 years, NCCR has worked to advance sound public policy that best serves the interests of restaurant businesses and the millions of people they employ. NCCR members include the country's most-respected quick-service and table-service chains. NCCR is a division of the National Retail Federation, the world's largest retail trade group.

White Castle is a family owned business founded in 1921. From humble beginnings, we have had the opportunity to grow thoughtfully over the past 94 years, and today have 390 restaurants in 12 states, with 10,000 team members dedicated to "feeding the souls of craver generations everywhere" and "making memorable moments every day."

Our founder Billy Ingram had two key governing principles in growing the business: 1) happy employees make happy customers, and 2) we have no right to expect loyalty except from those to whom we are loyal.

These are principles that shape all we do to this day and why a strong notion of loyalty continues even now as the world changes around us. More than one in four of our 10,000 team members has been with us 10 years or more. The average tenure of our Restaurant General Managers is 21 years – and turnover for this key group last year was less than 6%. We were recently honored by industry research firm TDNK as the 2014 recipient of its coveted "Diamond Catalyst Award" in large part for our continued commitment to Billy's founding principle of putting people first. The award also acknowledged White Castle's commitment to diversity, noting that 33% of our restaurant General Managers are African American, and 77% of our restaurant General Managers are female. Our Castles truly have become a home for empowerment and opportunity for generations of individuals living in the neighborhoods where we do business.

NATIONAL RETAIL FEDERATION
1101 New York Avenue, NW, Suite 1200
Washington, DC 20005
www.nrf.com/nccr

Today, we are gathered to share thoughts on wage and hour protections and the Fair Labor Standards Act (FLSA). Interestingly, right about the time the FLSA was created, our founder Billy Ingram was working on a packaging innovation for our business. We had started "selling 'em by the sack" and found a slight problem in that the bottom of our sacks needed extra support. Billy created a small cardboard insert to provide more structure, and on these cards, he printed an image of a goose with a small story about making sure to do the right things in the right order - and not to punish those who were doing their part to create jobs and help our neighborhoods. Over the years, the specific message would change – always with the ending – "Don't kill the goose that lays the golden egg."

In many ways, that's the message we would like to share today. Let's never forget that the jobs we crave for our economy come from employers who benefit and survive over the long haul based on their commitment to do the right thing for their employees.

White Castle was 17 years old when the FLSA was enacted in 1938. Even then, White Castle was pioneering a notion of "enlightened management" before it was popular. For example, we began offering a health insurance benefit in 1924, our profit sharing and retirement benefits were pioneered in the late 1920's, and a holiday bonus initiated for all team members that has been paid every year since with the exception of the economic depression years of 1934 and 1935. In the 1930's, White Castle was already an "employer of choice" as an upstart innovator with our "wild experiment in the hamburger business." White Castle's company archives document our support for basic workforce protections – and alignment with the early spirit of the FLSA.

Our nation's economy and the labor force have changed significantly since the 1930's, so it comes as no surprise that a statute from 1938 and its accompanying regulations do not effectively mirror the needs of today's businesses and workforce. While few significant modifications have been made to the FLSA in recent years, there has been a major shift in the industries that drive employment opportunities, technology has transformed the workplace and job duties, and employees increasingly place a premium on workplace flexibility and work-life balance. The FLSA's current statutory and regulatory structure is ill-equipped to cope with these realities. The result is an outdated and complex framework in which employers and employees must operate, and the need to modernize a 1930's depression-era law for the 21st century economy has never been more important.

Today at White Castle we're looking forward to celebrating our 100th birthday in 2021 – and we have concerns about the relevancy of FLSA – especially in light of a regulatory regime that is increasingly proscriptive – and a regulatory regime that seems increasingly disconnected from the needs and desires of the modern worker and contemporary business owners.

Inherent in the original provisions of the law is acknowledgment of the dignity of the worker – and especially as the nation continued to work its way through the great depression – the uniquely enabling empowerment that a job provides. Today, with many of our urban centers continuing to suffer record high levels of unemployment – especially with at risk youth and for those who would benefit most from employment – regulatory actions go beyond providing protection for those employed and make it harder for employers everywhere to create more jobs.

In cities and neighborhoods where White Castle has a presence, youth unemployment is creating a "lost generation" of citizens who are missing the chance to land that first job – missing the chance to get their foot on that first rung of the ladder that leads to a more prosperous and fulfilling life. For example, according to the Bureau of Labor Statistics' 2013 annual average, the unemployment rate for youths ages 16-19 in the city of Chicago was 51%, in the city of Detroit, 38.5%, and in New York City, the rate was 26.9%.

One specific example about the relevancy of today's FLSA is especially concerning to restaurants and retailers. The Administration is soon expected to propose major changes to the FLSA overtime regulations which were last updated in 2004. Rather than providing more opportunities for individuals to earn overtime pay, it appears that the new regulations will only result in a more complicated law, requiring outside legal advice for small businesses, and more litigation.

In anticipation of these regulatory changes, NCCR's parent organization, the National Retail Federation, commissioned an Oxford Economics study to analyze the impacts of an increase in the salary threshold on the retail and restaurant industries. The "Rethinking Overtime" report demonstrates just how disruptive significant increases in the salary threshold would be on an American business model that creates jobs in every community across the country.

The report analyzed three different scenarios anticipating an increase in the overtime salary threshold. The report's mid-range option found that an increase in the overtime salary threshold to $808 per week, or $42,016 per year, would affect 1.7 million retail and restaurant workers and would cost business owners $5.2 billion per year assuming employers do not make changes to offset the increased costs. However, chain restaurants operate in a uniquely competitive environment with slim profit margins, and would presumably take measures to mitigate the increased labor costs associated with overtime pay when salaried managerial employees who are currently classified as exempt are reclassified to "hourly" status. Notably, the "food services and drinking places" sector employs 10.3 million workers, roughly 815,000 of whom are currently exempt from federal overtime rules. However, if the salary threshold is raised to $42,016, approximately 59%, or 483,000, of these exempt workers will be affected by the changes.

In addition to the expected increase to the salary threshold, we also anticipate that the U.S. Labor Department regulations will make unnecessary modifications to the "duties test" for restaurant managers which would impose immense costs on chain restaurants and would stifle opportunities for career advancement for hourly associates who wish to manage our restaurants.

While the bulk of our restaurant managers' days are spent performing management tasks, they also multitask, stepping in to help serve diners during busy times, and leading and training team members by working side-by-side with them, when necessary. If the Labor Department proceeds with a regulatory change from the current rules adopted in 2004 in which the overtime exemption is tied to a manager's specific tasks, and moves to a percentage based analysis of the time spent performing duties, such an alteration would mark a dramatic step back to a time when such a percentage based scheme was used 50 years ago. Such a modification would curb a manager's critical ability to multitask in a busy restaurant setting, undermine customer service, limit training

opportunities for team members, diminish morale and force complicated assessments of time spent "managing" in a restaurant setting.

The success of our Castles is dependent on excellent customer service, team member satisfaction, and flexibility to meet the demands of a fast-paced consumer-focused environment. In our business, we imagine a future where our team member engagement "top box" score grows from its most recently noted level of 86% to 100%. The way we will get there at White Castle is asking our team members good questions, listening intently to what they tell us, and then acting in a way consistent with what we learn.

What if our policy-makers and thought leaders did the same? What if the "Fair" in the "Fair Labor Standards Act" renewed its focus on a definition of "Fair" that truly focused on freeing enterprising individuals from impoverishment through the unique dignity a job can provide? What if we no longer cast the discussion as a zero-sum game where employers and employees are adversaries – and for one to win, the other has to lose? What if we went beyond bumper sticker politics to truly problem solving policy making?

At White Castle, we are 94 years into a "wild experiment in the hamburger business" that illustrates first hand that more jobs and more opportunity for more people is not only desirable, it is achievable. It is less achievable when lawmakers and regulators, perhaps with the best intentions, feel the need to be overly proscriptive in ways that ignore the real world realities of our businesses and our communities....and in ways that ignore the real world challenges faced by the families and friends who call our Castles home.

The FLSA of the 21st Century should be consistent with the purpose and values from the time in which it was enacted almost 80 years ago, but the law should be modernized to reflect the 21st century demographics of our workforce and the unlimited opportunities provided by our modern and dynamic economy.

Mr. Chairman, on behalf of White Castle and the National Council of Chain Restaurants, thank you again for this opportunity to present my views this morning. I would be happy to answer any questions.

Chairman WALBERG. Thank you, Mr. Richardson.

Appreciate your time, and all of the testimonies that were given and the timeliness that you did them in.

I now recognize for the first five minutes of questioning the Chairman of the full Committee, Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman, for the courtesy. Thanks for the hearing.

Thanks, to the witnesses, for your testimony. And I will just add to Chairman Walberg's comments that almost everybody stayed pretty doggone close to five minutes.

So well done, Mr. Chairman. You must have really gotten after them.

It is good to see you again, Secretary Harris, and all the witnesses. It was interesting sitting here listening to Secretary Harris' testimony, and I was thinking that once again, you know, I—that is very fine testimony and I disagree with almost everything you said. So some things don't change.

I do agree that after some six years the incredibly anemic economy for the last six years or so has worked out fairly well for the very, very wealthy, but for the rest of America, not so well.

Mr. Court, I was interested to hear your focus on implementation procedures and tactics that you were talking about under the administration. One of the things that you talked about was this immediate settlement without consultation.

I want to give you some more time here to elaborate on that, how that works, and what is the problem that results——

Mr. COURT. Thank——

Mr. KLINE [continuing]. Because of that action?

Mr. COURT. Certainly. If you are unfamiliar with the process, essentially, after the investigation is concluded the wage and hour investigator will then come in with his or her findings. The bottom-line figure is what we are talking about. They may say you owe $30,000 or $130,000, whatever that figure is.

What is occurring is that the wage and hour investigator is making the individual who is sitting in the closing conference make an immediate decision—we will or we will not accept this proposal—otherwise the threat is it will go to immediate litigation on behalf——

Mr. KLINE. If I may, who is in the room when this happens?

Mr. COURT. More often than not it is a human resources director of the local facility. For instance, one of the examples that is in my paper is a multistate employer with a facility that was in Lawton, Oklahoma. They were not represented by counsel up through the closing conference. This tactic occurred.

They happened to pick up the cell phone and call me. I indicated to the investigator, no, they are entitled to have time so that their legal counsel can look at it and, as importantly, so that their home office in Phoenix, Arizona can see if the analysis is proper or something that they want to contest.

And it appears what the Department of Labor is attempting to do is cut out the ability of the employer to either respond or analyze the job that has been done by the local investigator. If the investigators were always right that wouldn't be a problem, but they aren't. I have had numerous occasions where the initial figure

would be a six-figure settlement requirement, and after analysis and discussion the figure may drop as low as $10,000.

So it is cutting out the analytical ability of the company and cutting out the ability to deal with higher-ups in the company, in terms of this immediate settlement approach that now seems to be——

Mr. KLINE. But in this immediate settlement approach, if further analysis shows that it should have been, to—$35,000 instead of $100,000, it is too bad. You are still stuck with $100,000—

Mr. COURT. That is correct. By then you have signed the settlement.

Mr. KLINE. Yes. Thank you.

Mr. Richardson, it is nice to see you again. Glad that you are here.

I am interested in—because we have had conversations—in fact, you and I have had conversations, and conversations with how your manager, your store manager, your restaurant manager who is sort of the captain of the ship—he has got his crew there and he is trying to move through and he is stepping up to—or she is stepping up to serve customers during peak times, doing training, leading lower-level employees, and doing those things that were in your testimony. If this narrow interpretation of the overtime revisions were to hit, you said this is going to have a bad impact.

So one of the things that I have always been interested in is the sort of upward mobility here through the stores. And if this were to hit, can you talk about what that would do to the—not just to the customers and to the function of the store, but what that does to the individual?

Mr. RICHARDSON. Thank you, Mr. Chairman.

For our team at White Castle we are proud to say that of our 450 top restaurant operations team members—the general managers, the district supervisors, and the regional directors—445 of those individuals started behind the counter at an hourly rate. So our promote-from-within culture is critical to that.

Those general managers are the captains of the ship, as you indicate. Their hope is to be able to become a multi-unit manager, and their effort and their energy is so entrepreneurial about coaching, guiding, being involved in community. Oftentimes they want to go to the Boys and Girls Club and be part of that. They are the face of White Castle and ambassadors of good will, and they take great pride in the fact that they have achieved this status as a salaried team member and helping lead the charge for that restaurant.

Mr. KLINE. Thank you.

I see my time is expired, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

And now I recognize the Ranking Member, gentlelady from Florida, Ms. Wilson.

Ms. WILSON. Thank you, Mr. Chair.

My question is for Mr. Harris. Please tell me and tell this body why the *Fair Labor Standards Act* is so important to millions of American workers, what has been its role in the past, and what it will mean for workers going forward. Can you speak to its role in income inequality?

And while you are doing that, in your written testimony you spoke of a woman from Florida and how she struggled to make ends meet on low wages. Tell us about her and other instances you might have to make this real, so we will know we are talking about real people.

Thank you.

Mr. HARRIS. Well, let me start with that story. Thank you very much for the question.

While I was Acting Secretary I had the privilege of traveling around the country and meeting with small groups of minimum-wage and low-wage workers to give them an opportunity to tell me about their experience of living at $7.25, $8 an hour in the American economy. And I met this wonderful woman in central Florida who had a daughter with a disability, and she had to make the really excruciating choice of giving up hours worked and wages, which she would never get back, in order to attend a meeting with school administrators about her daughter's individual education plan.

So she went to the meeting. She and her daughter were driving home. Her daughter was hungry, so they stopped for dinner but she had almost no money. So she bought one hamburger, one order of French fries, and got two cups of water. And her daughter ate the meat and the French fries and the mother ate the hamburger bun and drank the water.

And that was just one of dozens of poignant stories I heard all around the country, people in low wages making excruciating choices. Am I going to buy food or am I going to buy clothes for my kids? Am I going to fix the car or am I going to fix the heater? Am I going to have to split my prescriptions in half because I can't afford a refill? I heard dozens and dozens of these stories.

The *Fair Labor Standards Act* is supposed to help fix that. It is supposed to establish a fair floor on wages so that workers can't be exploited and have their wages driven down if they don't have the bargaining power to protect themselves in dealings with employers. It is supposed to avoid exploitative long hours not by putting a hard ceiling on hours, but by requiring that employers pay a little bit more. And of course, it protects against exploitative child labor, very important, which I don't expect we will be talking about a lot today.

It is critical, how the *Fair Labor Standards Act* is structured and how the regulations under it are written, is critical to the question of wage stagnation and income inequality. The minimum wage has been stuck for some seven years now. It is well below its historical value.

Overtime regulations, the current salary threshold that we are all talking about here for exempt employees is at half of the average hourly wage for nonproduction employees in the American economy—half. So I agree with those who say that some of these regulations are outdated. They should be updated so that we are pushing wages up, particularly for the lowest workers in our economy.

Ms. WILSON. In your testimony you outline some of the reasons why comp time for private employees is problematic. Can you walk

us through an example of how workers might be worse off if their employers were allowed to offer comp time in lieu of overtime pay?

Mr. HARRIS. Certainly. Let me give you the example of an employee who works overtime in January, February, and March of a year in order to accumulate enough time so that in August she will be able to take time off because her grandmother is going to have some kind of a medical procedure and she wants to be able to take four weeks off in order to be able to care for her grandmother during August, okay? Let's say her grandmother is 80 years old, just to pick a date.

Under the comp time proposals that I have read there are two ways in which the employer controls the comp time, not the employee. So one possibility is that the employer could say, "I am going to cash out your comp time."

Under the Senate bill, the employer can cash out all of the comp time, meaning give them money, give the employee money in return for the comp time and the employee no longer has time off. Under the House bill they can take, in this example, half of it—two weeks of it—and leave 80 hours.

Also, the employer could say, "Well, no, I am sorry, you can't take any time off in August because that will unduly disrupt my operations." And the employer unilaterally decides that.

So comp time is not like cash wages. If you pay somebody cash overtime they control how it is spent—the worker controls how it is spent. But with comp time the employer gets to decide, in a lot of circumstances, whether or not the employee gets the time off.

So this tradeoff of cash for time is really an illusion in an unfortunate number of cases.

Ms. WILSON. Oh, boy.

Chairman WALBERG. The gentlelady's time is expired. Appreciate the exchange there.

I now recognize myself for my five minutes of questioning.

Ms. Berberich, in your testimony you also highlight the ability of employees to rise through the ranks, like we have heard in other testimony, in part to their ability to perform concurrent duties. For example, you note that your emergency surgery and internal medicine technical supervisors work on the floor as well as manage their individual departments.

You argue that concurrent duties allow employees to develop a variety of skill set opportunities for advancement. Can you talk a little bit more about how important that structure is to the overall functioning of a business?

Ms. BERBERICH. Absolutely.

The employees originally go to school for this technical position, and so they are originally hired to be a registered veterinary technician. At a point in time in their career they express an interest in moving into a more supervisory, managerial role. However, they don't want to let go of those technical duties, as well.

So we offer that flexibility where you can still keep up your technical skill set, and yet also get that management development and that training and be able to have more of a place in the management meetings and be able to be a part of the policies and the procedures that go on in the hospital.

We like to offer our employees the flexibility of them determining the where and the when that they can get their job done. If they have to be completely on the floor and they don't have any flexibility outside of the CARE Center then they don't have that ability to work on performance reviews, phone interviews, things like that, that further strengthen their bench strength of workforce on the floor.

Chairman WALBERG. And this is their choice? It is all voluntary?

Ms. BERBERICH. Yes. This is their choice.

Chairman WALBERG. This is what they want to do.

Ms. BERBERICH. Yes.

Chairman WALBERG. For their own personal reasons.

Ms. BERBERICH. Yes.

Chairman WALBERG. Okay.

Mr. Richardson, you mentioned the fact of some statistics that the tenure of your general managers, I believe you said, was 21 years on average?

Mr. RICHARDSON. Yes, that is correct.

Chairman WALBERG. Talk to us a little bit about what the potential overtime rules—the changes that would go on there—talk about what that would do to employees' advancement and job security.

Mr. RICHARDSON. Thank you, Mr. Chairman.

There are two primary effects. The first that we are worried about is the salary threshold. The second is the duties test.

That duties test element is so important because the general manager—he or she invests their time in helping build that restaurant, and they are engaged and leading the charge every day. What we know is without any changes, that would increase our investment in that area $12 million to $18 million a year.

That is the same money we are currently using to provide a great health care benefit. That is the same money we are using now for our really robust retirement program, and holiday bonuses, and profit-sharing.

So when we look at it, unfortunately, as a family-owned business we can't budget like Washington, D.C., does, so we don't have the same ability——

Chairman WALBERG. Don't get personal, please.

[Laughter.]

Mr. RICHARDSON. So we don't have that opportunity to be able to find those dollars. We are already investing as much as we can in our people because that is our number one priority.

Food and people are our two biggest investments, and at the top of the list are our people. So for us, we think that would limit their ability to continue to grow and take on more responsibility—

Chairman WALBERG. Is an assistant manager position a significant position?

Mr. RICHARDSON. An assistant manager position is a good position. That is an hourly position for us, and an opportunity to learn on the job and grow. And then there is a management and training program that allows those individuals to grow into a general manager position.

But you are king or queen of the castle once you become a general manager——

Chairman WALBERG. General manager.

Mr. RICHARDSON [continuing]. It is a fun position.

Chairman WALBERG. And committed to it. Okay.

Mr. Court, you discussed in your testimony how wage and hour investigators discourage use of legal counsel. Why? What have you determined?

Mr. COURT. I am concerned that they want—that the focus has shifted from doing the investigation right to seeing how much money they can collect. You all are very used to having agencies come to you and tell you as part of their search for appropriations that we have collected X number of dollars for, in this case, wage and hour violations. And I am concerned that the emphasis has been placed more, in terms of even their evaluations, not on whether the investigation is done correctly, but how much money they can collect.

Chairman WALBERG. So this is intimidation for——

Mr. COURT. I—it—

Chairman WALBERG [continuing]. Fundraising purposes?

Mr. COURT. I think that is part of exactly what is going on. The question I always have is—the question was asked of my colleague, you know, "What is the employer afraid of? Why are they hiring legal counsel?"

And my response is, "What is the investigator afraid of when legal counsel is there simply to exercise the rights of the employer?"

Chairman WALBERG. Thank you.

My time is expired.

I now recognize Mr. Scott, Ranking Member of the full Committee, for his five minutes of questioning.

Mr. SCOTT. Thank you, Mr. Chairman.

Secretary Harris, you recognize the policy that we have that 40 hours is the work week and over that you should get time-and-a-half unless you are exempt. Now, the rulemaking is going to suggest a higher number than the $23,000. Now, the exact amount of that will be subject to rulemaking with interested parties given an opportunity to comment, but if we just increased for inflation since 1975, the wage threshold, do you know what it would be today?

Mr. HARRIS. I do. Currently we have a little bit north of 21 million people who are exempt under the existing threshold, and raising the threshold to around $51,000, which would be an inflation adjustment since 1975, would newly cover 6.1 million workers.

Mr. SCOTT. But the number would be about $51,000 just with inflation. And the old rate covered about 65 percent of the workers as being exempt; now about 11 or 12 percent are covered.

If we were to cover 90—excuse me—65 percent of the workers like they were back in 1975, what would that threshold be?

Mr. HARRIS. That would cut the number of exempt in half, so it would newly cover about 10.4 million workers.

Mr. SCOTT. And how much—where would the threshold be—dollar amount?

Mr. HARRIS. To get to that level it would have to be $69,000—a little north of $69,000 a year.

Mr. SCOTT. Okay. But we don't know what the number is going to be, but that gives you an idea of if we just adjusted for inflation

and what the situation was in 1975, kind of what the numbers might look like.

Now, you mentioned wage inequality. The Chairman mentioned that the wealthy have been doing well, everybody else not so hot. What federal policy has contributed to that?

Mr. HARRIS. There is no federal policy under President Obama that has contributed to that. I am sorry the Chairman left because I wanted to have an opportunity to respond.

This is not a phenomenon of the last six years; it is the phenomenon of the last four decades. We have seen rising wage inequality and income inequality in the United States really since the 1970s, and there are a number of factors and federal policies that contribute to that. Failure to raise the minimum wage is very important. Failure to raise the overtime threshold is another part of it. Failure to provide paid leave.

We are one of the—we are one of two countries out of 185 surveyed by the OECD that don't provide paid maternity leave as a matter of law. We obviously have the *Family and Medical Leave Act,* but that is unpaid leave for workers.

Obviously, the declining union density has a very important effect. Our failure over the last 10 years to invest sufficiently in creating middle-wage, middle-skill jobs in infrastructure and other industries. So there are a number of policies that we can change.

But most important, there are policies within the jurisdiction of this subcommittee that I think we can act on. Raising the minimum wage would be the first on my list.

Mr. SCOTT. Now, what effect would the *Paycheck Fairness Act* have on addressing discrimination?

Mr. HARRIS. Yes. I think the *Paycheck Fairness Act* would have to be included on that list because of the terrible wage gap between the average working woman and the average working man, yes.

Mr. SCOTT. And can you say a word about what increasing the minimum wage—what effect that would have on the economy?

Mr. HARRIS. I think it would help our economy to grow. As I said, 70 percent of the American economy is built on consumption. Working people spend the money that they get, and they spend it almost right away. So it ricochets throughout the economy, and so it increases GDP.

You give more money to a billionaire, they put it in savings. They don't spend it, and so it is less effective at helping to grow GDP.

So you put more money in the pockets of 30 million, 35 million, 38 million Americans by raising the minimum wage, we are going to see that ricochet, particularly in the communities that need that growth the most, the communities that are suffering the most.

Mr. SCOTT. Now, one proposal that you have commented on, the so-called comp time legislation—how much choice does the employee have in terms of—I mean, does the employer or the employee—does the employer get to choose whether or not the employee can get comp time or take overtime?

Mr. HARRIS. Well, the way the bills are written, the employee is not supposed to be subjected to coercion or intimidation in the decision whether or not to use—to select comp time.

But, you know, we are talking about the Wage and Hour Division. I know it is appealing to treat it as though it is this monolithic law enforcement juggernaut.

They have 1,800 employees protecting 135 million workers in 7.3 million workplaces, and these bills would add yet another responsibility, which is protecting workers from exploitation with respect to comp time. Where are the extra resources going to come from to do that? I don't think that Congress is going to provide them, unfortunately, when they pass this bill. And I have read the bills. I don't see any authorization for additional resources in those bills.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

Now I recognize the gentleman from Pennsylvania, Mr. Thompson.

Mr. THOMPSON. Chairman, thank you so much.

Thank you to the panelists who are here.

My first question actually is for Ms. Berberich. As a governing body we consistently encourage use of modern technology in our schools, our research facilities, and government agencies. It is concerning to hear that by failing to update the FLSA we are essentially doing the opposite for businesses in the twenty-first century.

And by the way, I hope your patient, Carmen, is doing well—the boxer. That is just a great story.

Can you elaborate on how technology is escalating the risk of FLSA noncompliance and how employers are coping?

Ms. BERBERICH. Absolutely. And thank you for the question.

Our workforce needs the flexibility to be able to work when and where they can get the job done. If we have nonexempt employees that have to have all of their time tracked it becomes cost-prohibitive to use electronic devices that are not on the premises to conduct work and to have that time tracked and then calculated in for payroll purposes.

Mr. THOMPSON. Very good. Well, as someone who is really—has championed, and successfully, telemedicine language—and I know veterinarian services it obviously applies, but, I mean, we are just—this really poses a real barrier to what is truly accessible health care if we don't do that.

Mr. Richardson, I really support that, you know, we all want greater opportunity for everyone. I want greater wages.

I see a different pathway than the former secretary does. I see that that is achievable through training. I am proud to co-chair the Career and Technical Education Caucus, very strong bipartisan caucus here in Congress. I think that we achieve that through career ladder advancement, specific training, career and technical education training.

In your testimony you mentioned—and you talked about this briefly in a different concept or perspective—that modifications to the duties test would stifle opportunities for career advancement for hourly associates. Now, I assume that is, you know, that is really going to prevent them from getting access to the type of on-the-job training that would set them up for that advancement. Can you elaborate?

Mr. RICHARDSON. Yes. Thank you, Congressman.

One of the things we encounter is with our team members they want to grow and they want to learn. They love the flexibility that is part of the workplace. For our general managers specifically, we understand that this is, for some of them, where they want to be for the rest of their career; for others, they want to advance and take on more.

We have what we call a White Castle University. Good example. We bring our general managers in from all over the country. They congregate in Ohio, in Columbus, at our home office, and they spend time together. For them it is a very unifying experience. They feel energized.

We have general manager conferences.

Those are the types of things that under a new regulatory regime we would have to make tough decisions about because we simply can't print our own Castle dollars and have the dollars affordable to be able to invest in that.

Mr. THOMPSON. Very good.

Mr. Court, as—I am also—I serve on the Agriculture Committee, one of the subcommittee chairs there, so part of your testimony caught my eye in terms of commodities. During this recession time we have been blessed that the agriculture industry has really remained pretty resilient. It has really saved us—that and our domestic energy production.

But there are some issues related to export, and we have great opportunities in export. So my question kind of centers back on part of your testimony and questions about there have been concerns with the Wage and Hour Division's use of the hot cargo provisions of FLSA to clear settlements.

As you point out in your testimony, growers shipping products will—that will quickly spoil have been coerced into signing a consent judgment to get their products moving even though the growers strongly disagreed with the division's allegations. How should the division use the hot cargo provision, and are there alternatives to stopping shipments of goods that are perishable?

Mr. COURT. First, I would say that the hot cargo provision should be used sparingly. It is probably better suited for nonperishable goods—the garment industry, for instance.

The specific case that I reference in my written testimony was the circumstance in which the threat—not actually threat, but actual use of the hot cargo provision caused growers in California to literally lose in excess of $200,000 worth of product. It forced them to sign a consent decree, which they did.

Ultimately, they went to court to undo the consent decree and a federal judge found coercion by the Department of Labor, which is the very thing that I am complaining about, in terms of the investigative tactics.

As an alternative—quite frankly, I have not thought through what an alternative to the use of the hot cargo would be in the perishable good industry, other than typical enforcement procedures that are used in every other industry, which is to do the investigation, do it right, and see if we can get compliance by way of agreement, and then if not, through litigation.

Mr. THOMPSON. Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

Now I recognize the gentlelady from Ohio, where I enjoyed my weekend just south of your district very much. And for a Michigander to say that about Ohio, that is pretty special.

Ms. FUDGE. I thank you very much, Mr. Chairman. Come any time.

Thank you. I thank you all for your testimony today.

Clearly there is one thing we agree on, and that is that the *Fair Labor Standards Act* is outdated and is in need of updating. I also agree that we need to look at what the purpose of the bill is, and that is to be sure that we don't leave behind the very people the law was intended to protect, which are the American worker.

Now, Mr. Court, I just want to be clear on something that you said. You indicated that oftentimes when the investigation is completed they come and give you kind of a "take it or leave it right now." Now, if, in fact, that is the case, I am with you. I don't agree that that is appropriate.

But I do want to be clear on this: The investigator does not determine whether an employer has legal counsel or not, do they?

Mr. COURT. The investigator does not determine in the strictest sense. What they are doing is encouraging—

Ms. FUDGE. Well, no, no. That is not my question.

Mr. COURT. Okay.

Ms. FUDGE. The question is, they don't determine it, the employer determines whether they have legal counsel or not.

Mr. COURT. That is correct. The employer determines whether they have legal counsel.

Ms. FUDGE. Okay. Thank you.

Mr. Richardson, I will have to admit that I have eaten many too many of those when I was in college at Ohio State—

Mr. RICHARDSON. We appreciate your patronage. Thank you.

Ms. FUDGE. I spent a lot of time in Ohio. Let me say that first.

But let me ask this question: What is the average salary of your managers and how many hours do they work, on average?

Mr. RICHARDSON. For our general managers they work on average about 40 hours. We think it is important to have work-life balance—

Ms. FUDGE. Not general manager, the level below that one.

Mr. RICHARDSON. Oh, the level below that?

Ms. FUDGE. Yes.

Mr. RICHARDSON. For those team members who have been with us a bit longer they are working somewhere between 35 and 40 hours, for the most part. We have, with new hires they start out as part-time, so that is below 30 hours now. And so with those who are below 30 their hope is to be able to be available and be able to get the——

Ms. FUDGE. What is the salary? My question is, what is the salary, and on average, how many hours do they work?

Mr. RICHARDSON. Oh, sure. Okay. So you are talking about not our general managers but our hourly team members?

Ms. FUDGE. Correct.

Mr. RICHARDSON. The average hourly team member at White Castle makes close to $10 per hour.

Ms. FUDGE. Is that "close to" like $8, or is it——

Mr. RICHARDSON. No, no, no, no; $9.78, somewhere in there.

Ms. FUDGE. Okay.

Mr. RICHARDSON. It is about 38 percent ahead of the federal minimum wage.

Ms. FUDGE. Okay. Now, tell me at what level do you not think it appropriate that they should receive overtime.

Mr. RICHARDSON. When you are talking about the general managers or——

Ms. FUDGE. Anybody. Just pick anybody.

Mr. RICHARDSON. Well, for our team members it is about work-life balance, so our focus, as a people-focused business and happy employees making happy customers, is to really meet them where they are. The biggest——

Ms. FUDGE. I am happy too, but I need the answer.

Mr. RICHARDSON. Sure. Let me just share one part that shapes it, because each person's choices are different and we offer a lot of flexibility, that can shape that pretty dramatically.

Ms. FUDGE. Thank you so much.

Mr. Harris, let's go back to the comp time proposal. I am a former mayor so I worked in the public sector. I understand comp time very, very well.

Please explain again for me why you think it is not appropriate for the change that the House is talking about to be in law. Please explain that for me again.

Mr. HARRIS. I will do it really quickly, because there is a long discussion, I think. The first is the myth that the FLSA is perfectly inflexible is just that. It is a myth. There is a great deal of flexibility.

The difference between the comp time proposals and the FLSA is that with the flexibility workers get paid less under the comp time proposals and more under the FLSA. So if you are concerned about wage stagnation, if you are concerned about income inequality, the comp time proposals are the wrong way to go.

The second is workers don't need time or money, they need time and money. And I think that the premise of the bill that they should have to buy overtime from—buy time off from their employers by sacrificing their overtime pay, in addition to being morally dubious, is really problematic as an economic matter and as a matter of where we are in our country.

And then finally, I would say I—as I said before in response to the Ranking Member's question, I don't think the workers get the deal that they are being promised because employers still control the comp time in large part.

Ms. FUDGE. Thank you very much.

Just let me say lastly, I understand that there are some issues with the investigation. I am going to look into that to see what is happening with that. But I do know this one thing: you wouldn't have an investigation if you didn't break the law.

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

Chairman WALBERG. I thank the gentlelady, and I do disagree that you have had too many White Castles. That is impossible, in my position.

I now recognize the ranking millennial on this Committee, the gentlelady from New York, Ms. Stefanik.

Ms. STEFANIK. Thank you, Mr. Chairman. And that is very fitting because my question was related to millennials in the workplace, and my question is for Ms. Berberich.

As a fellow millennial I just wanted to lay down the context. Last month millennials surpassed Generation Xers as the largest generation in the U.S. labor force. More than one in three American workers today are millennials, and by 2020 nearly half of the U.S. workforce will be comprised of millennials.

So your point about how the FLSA and the fact that it has not modernized to keep pace with the technologically driven workplace is very meaningful. It will have significant impacts on our broader economic growth.

I know that I am an—typical millennial, an avid user of my smartphone, and I know that my constituents at home expect me to be in contact at all hours to make sure that I am serving them. And I believe that in small businesses and in the private sector it is also important to have that flexibility to promote greater productivity and to help grow our businesses.

So can you talk about specifically how employers have been advised to ensure compliance with current rules is stifling flexibility and productivity, from your experience?

Ms. BERBERICH. Thank you for your question.

I would say that employers are being stifled in their flexibility under the current regulations due to not having the resources for tracking this possible compensable time. In an organization such as CARE Center I am a one-person HR department. If we have to have additional tracking outside of our in-house systems, that would be additional expense, and I can say that for CARE Center and for many small businesses, we simply don't have the resources for it.

Ms. STEFANIK. And, Mr. Richardson, you spoke a lot about your company's commitment to flexibility in the workplace. Do you have any thoughts, as you are seeing millennials join your business, and do you have any reflections to share?

Mr. RICHARDSON. One of the things that is really interesting as we attract more millennials is to see that their priorities are different. And not surprisingly, our general managers who are 40 and over are a bit more focused on retirement benefit and what comes next in that degree.

With our younger workers it is absolutely about what can I learn, and a different notion of how long is a good time to stay somewhere. So to them it is about learning the skills, the portability, having that chance to get the first job in a workplace.

And I will tell you what is really tough, in a lot of our cities that youth unemployment rate is catastrophically high—over 50 percent in Chicago; over 38 percent in Detroit; near 27 percent in New York. And that is why we fear if there are other wage adjustments those are the first folks who don't get that chance to have that first step on the ladder to progress and opportunity.

So that is where we have real inequality. It is about inequality of opportunity that we are seeing in that landscape where we need to have more jobs.

Ms. STEFANIK. Mr. Court, do you have anything to add?

Mr. COURT. Let me just respond to the last, I guess, comment that if you weren't doing something wrong there wouldn't be an investigation. I couldn't disagree more.

An investigation can be started by a disgruntled employee. It can be started by a business competitor. The Department of Labor recognizes those investigations, and I have cited in my paper at least one example from my neighboring state of Arkansas of an investigation that went on for months, ran six-figure legal fees, and ultimately there was a finding that nothing was wrong.

Ms. STEFANIK. Thank you very much.

I think in order to encourage economic growth for Millennials we ought to be promoting policies that promote flexibility and productivity.

So thank you very much, and I yield back.

Chairman WALBERG. I thank the gentlelady.

And now I recognize the distinguished representative from California, Mr. DeSaulnier.

Mr. DESAULNIER. Thank you, Mr. Chairman.

Let me first say that as somebody who has owned and managed restaurants—independent restaurants—very different, Mr. Richardson, from your product—I feel some sympathy in the last comment by Mr. Court on regulations that don't seem to really be efficient, and it might be because of the resources we put into them, in terms of their stated goals.

Having said that, coming from Northern California, where we have a very high-cost area but the restaurant business does very well in spite of—and having managed—and I own restaurants in San Francisco, where you have got a very high minimum wage, you don't have a tipped minimum wage. It is sort of shocking to see that the federal tipped minimum wage is only $2.13, and my staff made a lot of money in tips.

So all of that said in the context that California regulations are much more difficult than the federal, which I look at as sort of a minimum.

When our managers scheduled they had to pay extra for split shifts. A lot of my employees didn't—they had to commute a long way. They didn't like doing a split shift. But on the other hand, I had to pay them time-and-a-half.

So I understand all that, but in the long run, the biggest problem, to Mr. Harris' comments—and I have—first question is your example of the steel mill was really wonderful, but in the service industry you say—the food service industry—trying to get that kind of technological improvement, particularly in fine dining, is fairly limited, and you still need a well-educated workforce.

Do you have any responses to productivity when it comes to nonmanufacturing fields, and how do we get more productive employees and still have particularly small businesses thrive? Now, that was actually Mr. Harris.

Mr. HARRIS. Oh. Well, thank you very much. That is a very big question.

So there are industries where technology is not going to be able to make dramatic change, but you see in restaurants—fast casual restaurants and other kinds—the use of technology for ordering, so the order is conveyed directly from the customer back to the kitch-

en. The servers are essentially just delivering the food, they are not taking the orders.

You are able to pay at your table. That is an innovation of one of the fast casual restaurants.

So that will be an example of—in those small—those businesses that use those kinds of technologies will see a decline in the number of employees, but I don't think we will see the kind of dramatic impact, for example, that we have seen in manufacturing. The example I gave in my testimony was a 75 percent cut in the number of workers.

Mr. DESAULNIER. The reason I asked, other than the fact I want to avail myself of your wisdom, is so in those fields in order to become—get a greater return on investment it seems like you almost have to get concessions on the wage side and benefit side. But that is a Henry Ford rule. If I didn't pay my employees enough to be able to come into my restaurant it really had a problem to the larger question that you posed about an economy that is 70 percent driven by consumer purchases, and that we have this huge disparity in capital and labor.

So your comment about tightening the labor markets by creating millions of jobs, particularly in middle-wage, middle-skill jobs with smart investments in transportation and communication infrastructure, alternative energy, these are all things we have done in California and it spurred the economy. So I wonder if you could comment on that.

I guess what I am getting at, for the individual business owner they are in a very retail environment. But we have got a larger, more complex issue that you are very well versed in that if we could get the wages up it would benefit—obviously benefit the economy and the small business owner.

Mr. HARRIS. I think that is precisely right, is that if we are able to raise wages across the board, particularly for low-wage and middle-skill workers, we are simply going to have more people spending more money. Those workers will spend every dollar that they get, sometimes more than every dollar that they get, and that spurs economic growth.

It helps White Castle. People are spending more money in their restaurants. It helps those restaurants you are talking about in California. People are spending more money there.

It allows them to hire more people. It allows them to expand. It allows them to open a new restaurant.

As demand goes up, good things happen with respect to supply and production.

We have a trend in our economy—it is a long-term trend, really since the 1970s—where technology has replaced workers in a lot of places. It has also allowed for off-shoring of jobs. So you have a lot of middle-wage, middle-skill workers who are dropping into low-wage, low-skill jobs simply because the middle-wage, middle-skill jobs are gone.

Think of ATMs and bank tellers. Think of robots and manufacturing jobs. That has put downward pressure on wages both in the middle-wage, middle-skill market and in the low-wage, low-skill market.

So we both, and I agree with the comment before. We need to skill workers up so that they can compete for those high-wage, high-skill jobs, but that is difficult for a lot of workers.

We also have to raise the bottom as much as we can by raising the minimum wage, raising overtime standards, making sure that we are protecting workers through tough enforcement.

Mr. DESAULNIER. And I appreciate that, but it is a leap of faith for the individual business owner to do that. I have found in my experience that when you took that leap of faith as a regional economy it benefited you in the long run.

Thank you, Mr. Chairman.

Chairman WALBERG. I thank the gentleman.

Now I continue with the California questioning by recognizing the gentleman from California, Mr. Takano.

Mr. TAKANO. Thank you, Mr. Chairman.

I am particularly interested this morning in this morning's testimony on the forthcoming Department of Labor proposed rule to update the *Fair Labor Standards Act* white-collar exemption for overtime pay.

We have heard from witnesses today that the FLSA is outdated and hasn't been updated to reflect the modern workplace. I would argue that is one of the very reasons an update to the overtime exemption is badly needed.

The intent of the white collar exemption to overtime pay was to exempt those with sufficient power in the labor market who are able to advocate for better wages and hours for themselves. This is clearly not the case anymore.

In 1975, 65 percent of salaried workers were eligible for overtime pay. Now only 11 percent of workers are eligible.

As we have heard this morning, Americans are working longer hours and are more productive, yet their wages are largely flat. Updating the overtime exemption will help millions of workers make ends meet and give an added boost to our economy.

Well, Mr. Harris, what is your response to those who will say that this will hurt the workers we want to help? If employers don't want to pay the extra overtime, won't they logically increase the hours of those working part-time and hire more workers?

Mr. HARRIS. Well, let me just say, if the biggest problem that workers have is that they will have too much money to spend, I think that is a problem that we can live with, and that is what is going to happen, is that workers who are currently exempted who are earning $27,000, $28,000, $29,000 a year and are working 50, 60, 70 hours a week, they are going to see their pay go up. Either because the employer genuinely believes that they should be exempt—they should have the status of an exempt employee and they raise their pay in order to get them over the threshold, or because they are going to have to be paid hourly and they are going to get more money because they are working in excess of 40 hours in a week and they are going to get time-and-a-half. So those workers' wages are going to go up.

But I think you are right. We are going to see some substitution where workers who are currently working part time in fast-food restaurants and other kinds of establishments are going to see their hours increase, particularly if the Labor Department focuses

on this primary duties test. If we say, "You know what? You can't work 99 percent of your time doing nonexempt work and still be an exempt employee," and we say that work has to be done by somebody else, I do expect that we are going to see more part-time employees getting more hours, as you predicted.

Mr. TAKANO. Thank you.

Mr. Harris, in your testimony you briefly talked about the types of workers who will benefit from raising the income threshold for overtime pay. Can you tell us more about the characteristics of these workers?

Mr. HARRIS. Right. So, as I said earlier in response to Ranking Member Scott's question, we have about 21 million, almost 22 million workers who are currently exempt with the threshold—or can be exempt at the current threshold of $455.

If we raise the threshold, that is largely going to benefit—not exclusively, but largely going to benefit women workers, because we have a lot of women in the low-wage ranks, particularly in industries like retail and fast-food and others. It will disproportionately benefit workers of color because, again, they tend to be over-represented in low-wage, low-skill jobs, unfortunately.

And it is going to help not the youngest workers, because that is not who are the assistant managers or the general managers; it is going to help workers who are in their 30s and 40s, not the millennials, who are going to—who are—who have gotten along in their career and have moved up a little bit in their career but are still not getting sufficient wages.

So the groups that have been left behind in our economy are the folks who are going to benefit the most from an increase in the overtime threshold.

Mr. TAKANO. Thank you.

And to add to Mr. Harris' remarks, I would like to ask unanimous consent to insert into the record a report from the National Employment Law Project. This report has stories of workers who would benefit.

[The information follows:]

NELP NATIONAL EMPLOYMENT LAW PROJECT

POLICY BRIEF | DECEMBER 2014

# The Case for Reforming Federal Overtime Rules:

## Stories from America's Middle Class

BY JUDY CONTI

### Introduction

America's middle-class workers are spending more hours at work than ever before, and yet are still falling behind. The erosion of overtime pay is a key factor in the deterioration of middle-class wages and living standards.[1] Reform of the nation's overtime rules is much needed and long overdue. The U.S. Department of Labor (DOL) has the authority to update regulations governing to whom overtime must be paid, and President Obama recently issued a Presidential Memorandum directing DOL to do just that. The stories of middle-class Americans that follow reveal how sorely needed an update is.

When the Fair Labor Standards Act (FLSA) was enacted in 1938, one of its most important provisions was premium pay for workers who put in more than 40 hours per week. Anything over that 40-hour threshold meant that workers were entitled to time-and-a-half their regular hourly wage.[2]

The overtime premium was instituted for two primary reasons. First, one of the stated purposes of the FLSA was to protect employees from difficult working conditions that are "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[3] Workers need leisure time for themselves, time to spend with their family, time for parenting, going to school, or enjoying other activities that help rejuvenate them from the stresses of work. Thus, overtime provides a financial incentive not to overwork employees, but when an employer nonetheless insists on long hours per week, workers then receive a wage premium that compensates them for working so hard.

Second, if there is so much work to be done that more than 40 hours per week from staff is regularly necessary to accomplish it, the overtime premium creates an incentive for employers to hire more people, rather than overworking their existing employees. This job-creation incentive is especially important during periods of high unemployment.

### The White-Collar Exemption to Overtime Pay

Not all workers qualify for overtime pay. The law contains a number of exemptions that are more fully defined in regulations issued by the U.S. Department of Labor. Among the most commonly used exemptions are those referred to as the "white collar" exemptions for "executive," "administrative," and "professional" workers. The purpose of these exemptions is to permit employers to pay a salary to higher-level employees who have managerial or professional duties and can exercise independent judgment in their jobs, including the ability to decide how to get their work done in whatever hours or time is required.

Employers must meet two requirements in order to exempt an employee under these provisions. First, a worker must be paid a salary of at least $455 per week,[4] which totals to $23,660 per year—assuming one is paid

for all 52 weeks in a year—an amount that is below the poverty line for a family of four. Any worker making less than $455 per week is per se entitled to overtime, no matter what their job duties are.

Second, the employer must show that the worker's job duties comport with the rule to ensure that the worker exercises sufficient independent judgment and managerial responsibilities. Simply being called an "executive" or "manager" in one's job title or employment contract is not enough to qualify someone as an exempt white-collar worker. The employee's primary duties are what determine whether an employer can claim a white-collar exemption to paying overtime or minimum wage.[5]

## Vague Definitions Lead to Abuse of the Exemption

While most employers comply with the FLSA's overtime requirements, there are still many who do not, for a variety of reasons. Some employers get away with violating overtime laws because workers resist coming forward to complain of overwork and low pay for fear of losing their jobs or other employer retaliation.[6]

As demonstrated in the worker stories below, many who are classified as exempt white-collar workers are in fact doing manual labor and working long hours that affect their health and well-being. But because they are classified as exempt, they do not receive overtime premium pay, even though their wages are already relatively low, especially considering the long hours they are working.

The problem with the current DOL definitions of "executive," "professional," and "administrative" employees is that they are too vague. Even though mere titles alone do not confer exempt status, the fact is that the rest of the current regulations afford too much leeway for employers to misclassify employees who are not truly managers in any meaningful sense of the word or who do not exercise independent discretion. For example, the current regulations do not place a limit on how much of an exempt employee's day can be spent doing non-exempt tasks, such as working as a line cook, stocking shelves, unloading freight off a truck, or simply answering phones and doing rote paperwork. Some employees spend as much as 95 percent of their time at work doing clearly non-exempt work, but they are still properly classified as an exempt executive and not entitled to overtime pay under the current rules.

The current regulations also make it too easy for employers to give an employee a title of manager or supervisor so that the employer can claim a white-collar exemption, in spite of clear judicial precedent making it clear that titles do not displace reality when it comes to classification. In many recent cases, employers have "promoted" employees to a titled position without giving them any real managerial power, while still requiring them to perform the same tasks as an employee they "supervise." After these meaningless promotions, the newly exempt employees not only lose their overtime pay but often find that their hours have increased dramatically.

Another tactic is for employers to give workers a little bit of authority so that they can classify them as exempt from the FLSA. In a recent Sixth Circuit case, the court overturned dismissal of a case in which employees allege that Eaton Aeroquip misclassified supervisors at a plant in Michigan as exempt executives. The supervisors filled out evaluations and made hiring recommendations, but they presented evidence that the company did not consider their opinion when making hiring and firing decisions. The court found that this was insufficient and meaningless "authority" to justify exemption from the FLSA's overtime requirement.[7]

## Stories from the Middle Class

Below are case stories of workers who allege they should not have been exempted from the FLSA's overtime protections, even though their employers treated them as exempt under the white-collar overtime rules. Workers such as these have little to no room to exercise discretion or judgment, and they perform routine or manual tasks, yet their employers misclassify them as FLSA-exempt and they end up working long hours for little pay. These stories are representative of what happens across the country and at all types of employers. These workers lose leisure and family time and are badly underpaid, and our economy suffers from the loss of jobs that would otherwise be created if the work were spread out among more people, or if the workers were properly classified and had more money to spend in our economy.

**Walter Bass, New York**

Walter Bass worked as a Pest Control Technician for a company based in Brooklyn, New York, earning approximately $35,000 per year. His job consisted of going to commercial building sites, including office buildings and the Barclays Center, where he would conduct inspections, spray for pests, or put down traps.

Walter's workday was planned out by headquarters; the company gave him a set schedule for the day that included which clients to visit and in what order. He had to check in and check out with his supervisor at each job site he visited and could not leave a job site without the permission of his supervisor.

His shifts were supposed to be eight hours a day, but usually they were longer; Walter worked as long as 13 hours some days. He also often worked from home: the company gave him a BlackBerry and expected him to answer calls and reply to emails within one hour, even if the call came outside of his shift. On average, Walter reports that he spent up to two hours per night answering e-mails, with the majority of these e-mails arriving between 7 to 9 p.m., while he was trying to eat dinner and spend time with his family. Instead of 40 hour weeks, Walter often worked as many as 50 hours per week, with no added compensation for overtime.

The unpredictable and uncompensated overtime hours had a detrimental impact on Walter's home life. He and his wife lost their daycare provider when he could not pick up their baby on time. And even though he had holidays off, he had to make up the appointments that would have been scheduled for that day by working extra hours without overtime pay during the rest of the week. Walter's $35,000 annual salary is scandalously low for him to be considered an exempt white-collar worker. If the salary threshold had been appropriately adjusted since 1975, Walter would be covered without any need to examine his job duties.

**Wanda Womack, Alabama**

Wanda Womack worked as a Store Manager for Dollar General for 11 years, where she was classified as an exempt executive employee. When she left the company in 2004, she was making around $37,000 per year and working 50 to 70 hours per week. She supervised six to eight employees, and in that capacity was required to handle scheduling and payroll, post monthly transactions, and go to the bank every day. Her work rarely stopped, and she was constantly answering phone calls related to work, even when she was at home after her shift or while on vacation

Although her job responsibilities sound like exempt work, in fact, most of Wanda's time was spent performing non-managerial tasks. Dollar General permitted each store manager to spend an allocated amount of funds on hiring. With the amount allotted for her store, Wanda could not hire enough employees to run the store and stay within budget. She thus spent the majority of her day working the cash register, performing inventory, and unloading freight, none of which were managerial tasks. In particular, delivery trucks would arrive two to three times per week containing 500 to 1,000 boxes each. Although she only weighed 110 pounds, Wanda routinely unloaded boxes that sometimes weighed 50 pounds or more.

As a result of all this heavy lifting, Wanda suffered from chronic pain in her shoulders, back, and neck. She has had three rotator cuff surgeries and suffers from a herniated disc. After her last surgery, her physical therapist told her that she could only lift a maximum of 25 pounds, 20 pounds less than the requirement at Dollar General. Wanda was forced to leave her job.

Wanda's story shows us two problems with the current overtime regulations. Because she performed some

managerial tasks, even though the bulk of her work was clearly non-exempt, Dollar General did not have to pay her overtime for the 10 to 30 extra hours she worked each week. Second, if the salary threshold for overtime were set at a more appropriate level and indexed to inflation, Wanda, like Walter and all the workers profiled in this paper, could have been eligible for overtime for all the hours she worked regardless of how she spent her time.

**Scott Wilson, California**

Scott Wilson was employed as an Asset Protection Manager at Wal-Mart from December 2011 to February 2014. His yearly salary was approximately $40,000 his first year, and a 15-percent cost-of-living adjustment increased it to approximately $46,000 his second year. His job description was to ensure the proper operation and repairs of alarm equipment, detain and process shoplifters, observe and review store surveillance cameras, train store associates on how to properly use equipment, and attend weekly informational conferences to learn about proper loss-prevention techniques, all in accordance with Wal-Mart's company policies. Like Wanda and Walter, he earned more than the current salary threshold, yet less than what the threshold would be if it had kept pace with inflation since 1975.

When Scott took over a new job at his store, Wal-Mart consistently assigned him menial jobs that should have been outside the normal duties of a manager. He was required to conduct manual repairs in the meat and bakery departments, unload trucks, push shopping carts, transfer merchandise for cashiers, and put together promotional displays, in addition to the job tasks stated above.

Ultimately, he spent almost all of his workday engaged in non-managerial, non-exempt work tasks for Wal-Mart. As a result, he would often have to stay late to complete his work. Scott usually worked six, and sometimes seven days each week, and his shifts were usually 10 hours, totaling 60 to 70 hours per week. The long hours and low pay had a negative effect on Scott's home life and his well-being, causing him to leave Wal-Mart.

**Anonymous, California**

LandSafe, a subsidiary of Bank of America, conducts home appraisals. It classifies its residential appraisers as exempt employees under the administrative and professional exemptions. The appraisers are guaranteed approximately $33,600 per year as a base salary, but can earn more depending on how many properties, usually single family homes, they appraise.

For each property assigned, LandSafe gives appraisers a set deadline by which they must complete their work and submit a report. If they fail to meet the deadline, they are penalized. Appraisals are very standard: The appraiser visits the property to inspect it, record information such as its condition and the quality of the building materials, and gather photographs and information about the property and the comparable properties. After taking pictures in the field and gathering information from databases from their home offices, appraisers complete a standardized appraisal form composed partly of various pull-down menus. Appraisers typically complete two to three appraisals per day. Refusing to appraise a property could result in a reduction in pay.

Appraisers often work extremely long hours to meet LandSafe's deadlines for appraisal reports. They are expected to be available for inspections whenever the homeowner is available, including weekends, evenings, and holidays. Working as an appraiser can be a surprisingly physical job that sometimes involves taking pictures of parts of the house that are not easily accessible.

One appraiser we spoke to typically worked at least 60 hours per week, and sometimes significantly more, to complete her assignments. She also worked late into the night to meet deadlines. In the rare instances when she took vacation, the appraiser usually took a laptop along and was expected to answer emails and finish work while on vacation.

Grueling hours, weekend and late-night work, and a lack of support from LandSafe had a negative impact on the appraisers' personal lives. "My life was my work, that was all I could do," one said. She missed out on graduations, birthdays, and seeing friends. When the appraiser did go out, the ticking clock and impending deadlines were always on her mind.

Clearly, there was more work than the current cadre of appraisers should have been expected to handle. But because LandSafe classified them as exempt professionals, it could get away with the long hours and constant demands made on its appraisers, rather than hiring more workers to handle the load.

**Matthew Dewan, Texas**

Matthew Dewan worked as a Drilling Fluid Specialist for M-I Swaco, an oil drilling company, earning a salary of between $50,000 and $58,000 per year. M-I Swaco classifies its drilling fluid specialists as exempt employees under the administrative exemption. Drilling fluid specialists work in the field, mixing "drilling mud," the liquid used in extracting oil from a well, and checking rigs to make sure there are no problems with the mud. Mr. Dewan's job involved keeping inventory on all products that he used; determining if he needed to make more mud; checking the system for problems; and taking samples of mud twice a day to check that it was okay. He had to follow a pre-set plan to mix the drilling mud and could not deviate from the mud plan without approval from a drilling engineer. He would test the mud at the site rather than working from an office. He and his colleagues often referred to themselves as "mud babysitters."

Not only was the work of a routine and entirely pre-determined nature, from which Mr. Dewan and his colleagues could not deviate, but they had absolutely no managerial responsibilities, and although their work was of tremendous value to the company, they did not exercise any discretion or independent judgment over any matters of significance for their employer.

In addition to losing overtime pay, Mr. Dewan had to work so many hours that it imposed extreme hardship on his family life as well. During the first year and a half at his job, Mr. Dewan worked one week on, and one week off, doing 24-hour service on the wells, which required living in a trailer on site. After several months, he began working on a drive-by basis, which meant he would have to visit rigs individually, usually driving 380 to 400 miles per day. Once transferred to drive-by, he worked 24 to 25 days in a row and then would have six days off. On the days he was working, he would be on-call all day. He was away from his house 10 to 12 hours each day on average, and sometimes longer.

## Recommendations for Updating Overtime Rules

Clearer regulations with more bright-line rules will benefit both workers and employers, both of whom deserve certainty and ease of evaluating positions. Our recommendations include the following changes:

1. **Significantly raise the salary threshold.** The current overtime salary threshold of $455 per week was set in 2004 and is not annually adjusted for inflation. Looking back a little further, we see that the salary threshold has not been adequately adjusted since 1975, when it was set at $250 per week. If the 1975 salary threshold had been annually adjusted with the Consumer Price Index, it would stand at $984 per week today, or $51,168 per year.[8] But also consider this: In 1975, 65 percent of all workers were paid less than the $250 per week salary threshold, making them eligible for overtime pay. Contrast that with today's workforce, in which only 11 percent of all workers fall beneath the overtime salary threshold. If we look to cover 65 percent of all of today's workers, the salary threshold would be $1,327 per week, or $69,004 per year.[9] These figures demonstrate that not only does DOL have a duty to adequately adjust the salary threshold, but that it also has a wide margin of discretion in how it sets a new threshold.

2. **Clarify that an exempt worker cannot spend more than half of his time in non-exempt work.** The current regulations provide no such definition, giving employers the incentive to give workers scant qualifying duties and still exclude them from overtime coverage. Using the concept of "concurrent duties," the current regulations permit exempt employees to spend the vast majority of their time doing non-exempt work while they simultaneously supervise or manage other employees. The DOL should establish a bright-line test that no more than half of an exempt employee's time may be spent performing non-exempt work.

3. **Specify that workers must exercise real independent judgment in how to do one's job.** If an employee cannot truly exercise independent judgment in performing the job, that worker should not be FLSA-exempt. So for instance, if a worker must follow a strict and inalterable set of steps for each task, or if tasks are dictated to the worker, or if the employee cannot truly independently decide how to perform the job duties, that worker should be eligible for overtime.

## Conclusion

As these representative stories make clear, in their current form, the regulations governing the FLSA's white-collar exemptions do not meet the needs of America's workers. The vague nature of the regulations, the low salary threshold, and the lack of a limit on how much time an exempt employee can spend performing non-exempt duties allow employers to claim overtime exemptions for workers that have no real managerial or supervisory duties.

By misclassifying workers, employers get away with not paying overtime or the guaranteed minimum wage. As a result, workers sometimes find their hours increasing dramatically once they are "promoted" to an exempt position, while their duties remain the same. The long hours and lack of overtime pay have had a negative effect on the well-being of many workers and our nation's economy. The U.S. Department of Labor should modernize its white-collar overtime regulations to ensure that workers are paid for the long hours they are working and that employers hire more workers when additional hours are required.

## Endnotes


1. Hanauer, Nick. "Whatever Happened to Overtime?" Politico Magazine, November 17, 2014.
2. See generally, 29 C.F.R. 541, et seq.
3. 29 U.S.C. § 202(a).1.
4. 29 C.F.R. 541.600.
5. Id. at 541.2.
6. Bernhardt, Annette, et al. Broken Laws, Unprotected Workers, 2009, pp. 28-29.
7. Bacon, et al., v. Eaton Corp, et al., at http://www.ca6.uscourts.gov/opinions.pdf/14a0351n-06.pdf.
8. Bernstein, Jared, and Eisenbrey, Ross. New Inflation-Adjusted Salary Test Would Bring Needed Clarity to FLSA Overtime Rules, Economic Policy Institute Report, March 13, 2014.
9. Shierholz, Heidi. It's Time to Update Overtime Pay Rules, Economic Policy Institute Issue Brief #381, July 9, 2014.


**About NELP**

For more than 45 years, the National Employment Law Project has worked to restore the promise of economic opportunity for working families across America. In partnership with grassroots and national allies, NELP promotes policies to create good jobs, enforce hard-won workplace rights, and help unemployed workers regain their economic footing. For more information, visit us at www.nelp.org.


**Acknowledgements:**

Special thanks to Nima Afshar for her invaluable assistance in compiling the stories in this brief.



© 2014 National Employment Law Project. This report is covered by the Creative Commons "Attribution-NonCommercial-NoDerivs" license fee (see http://creativecommons.org/licenses). For further inquiries, please contact NELP (nelp@nelp.org).

Chairman WALBERG. Without objection. Hearing none, it will be submitted.

Mr. TAKANO. Some would argue that changes to white collar exemption will result in more confusion for employees. It would seem to me that the current duties test is responsible for much of the confusion regarding exempt versus nonexempt employees.

Won't a clearer definition of executive, administrative, or professional work help employers properly categorize employees? And as a follow up, won't raising the income threshold make more employees eligible and mean employers will be less reliant on the duties test to determine if a worker is exempt or nonexempt?

Mr. HARRIS. With respect to the latter point, absolutely, yes. You are going to have many—if the threshold goes up, particularly if it goes up substantially, you will have many fewer employees to whom you have to apply the duties test because they will simply be covered by overtime because they are below the threshold.

With respect to the duties test itself, you know, I think employers are trying to make a choice now: Do they want the devil they know or do they want the devil they don't know that is coming in the regulations?

My view is let's wait and see what the regulations say. We have talked a lot about the regulations here. None of us know what are in these proposed regulations except we think that the salary threshold is going to go up.

Let's see them. Let's see whether or not they simplify the rules for employers.

One of the things I have said is that if we make a clear, bright line on the primary duties test to support some of the things that my colleagues on the panel have said, that will make it a lot easier for employers. Clear lines are better for people who are regulated so they can conform their behavior to the standards.

So I am hoping that they are going to do that in this regulation, and I expect they will.

Chairman WALBERG. Thank the gentleman. Time is expired.

Now I recognize the gentleman from Indiana, a great state with businesses and challenges, and now competition coming from the north finally, and look forward to your questioning.

Mr. ROKITA. We welcome the competition, and it is a good thing, Mr. Chairman. This hearing is also a good thing. I appreciate you holding it.

My apologies for not being able to be here for everyone's testimony, but we had a late vote series last night, so before that vote series I was able to look into some of your remarks and get acquainted with them. When you are trapped in the office you might as well work, right?

My first question, then, would go to, at this point I think, Mr. Court. In your testimony you testify to a substantial increase in FLSA lawsuits. And in fact, the GAO accounts for a 514 percent increase in lawsuits since 1991.

And Mr. Harris stated in his testimony that—he said the overwhelming majority—I am paraphrasing here, but correct me if I am wrong—the overwhelming majority of U.S. companies want to comply with the law and, in fact, do comply with the law. That is nice.

But then you also say—you at least admit the existing rules are too complex.

So, Mr. Court, in your opinion has confusion about FLSA rules contributed to the increase in FLSA litigation? Is there a correlation or a causation there?

Mr. COURT. I don't believe that the current test of primary duties is the source of this increase in litigation. Quite frankly, with all due deference to the congressman from California, the California bright line test of the 51 percent is indication of how litigation will occur, because California leads the country in wage and hour class action lawsuits.

They use a bright line test in California. Who is really going to get rich off of a bright line test is the attorneys, because it is simply going to increase the litigation.

Two years ago I spoke to the Oklahoma State Human Resources Conference, and I asked this very question, sort of the one that Mr. Harris indicated: Would you prefer a bright line test, which I think is the myth that is being spread by proponents of it, or do you prefer the current primary duties test? I asked for a raise of hands from an audience of over 150, "How many of you want a bright line test, a percentage test?" Not a single person in the room raised their hands.

Mr. ROKITA. This was an audience of who?

Mr. COURT. Human resource directors.

And then I was part of a delegation to meet with the secretary of labor and his staff over the proposed regulations, as they were doing their meetings with various contingency groups, and I told this story and a prominent member of that department said to me, "Leonard, that is what I am hearing from human resource directors all across the country." Businesses do not want the bright line test, contrary to what—the propaganda that is being spread.

Mr. ROKITA. Thank you for that, Mr. Court. Let me ask you this: Is it pretty much understood by let's say the folks in that audience, or even you, that the—there has been a reduction in the administration's compliance assistance in the agency, and actually the elimination of the issuance of opinion letters? Correct, right?

Mr. COURT. That is correct.

Mr. ROKITA. Right.

Mr. COURT. That is one of many.

Mr. ROKITA. Can that be attributed to this increase in lawsuits?

Mr. COURT. I think the——

Mr. ROKITA. Hold on, Mr. Harris. And let the record reflect Mr. Harris is nodding his head. But you just said——

Mr. HARRIS [continuing]. I was shaking my head——

Mr. ROKITA [continuing]. Shaking, excuse me, shaking your head. But you just testified earlier that, you know, apparently people like detailed, specific rules if they are going to be regulated. Well, the administration eliminating opinion letters seems to go against that testimony.

Mr. Court.

Mr. COURT. I would agree with that observation.

Another thing the Department of Labor has essentially ceased doing for literally decades, if I as an employer found that I had a violation, and I wanted to correct it, I have to get approval from

the Department of Labor to get an effective release. That is one of the methodologies.

And historically what we would do is go to the Department of Labor, say, "All right, we found this problem; we want to fix it," and get their assistance. Today, employers are not doing that because the Department of Labor has quit helping and quit giving the assurance that if I voluntarily come forward that won't result in a massive investigation which now could result in the liquidated damages and civil money penalties.

Mr. ROKITA. Yes. Seems to me this leads to an adversarial relationship when they could—the agency could just as easily spend its time and resources to help with compliance.

Mr. COURT. It does that, and quite frankly, it seems to me it is counterproductive to the very goal that we are sort of all talking about here, which is to quickly get the wages to the employees, because to the extent it encourages litigation, that delays the decision-making process.

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

I yield.

Chairman WALBERG. Let me just ask one question in following up with your train that was going there.

Ms. Berberich, what does "human resources" connote to you?

Ms. BERBERICH. I am sorry, can you repeat that question?

Chairman WALBERG. What does "human resources" connote to you? What does it mean to you when you hear the term "human resources?" And I am coming from a time when you used to be called "personnel department."

Ms. BERBERICH. Thank you, Mr. Chairman.

Chairman WALBERG. Could you quickly answer that?

Ms. BERBERICH. Human resources to me is servant leadership. The idea of human resources is to be there for your employees, interpret the laws, help management to make the correct decisions. We want to have those good-faith efforts in properly interpreting the law and making the decisions that are in the best interest of both the business and the employees.

Chairman WALBERG. Thank you.

I yield back.

The gentleman's time is expired.

I was just caught there as I was listening with that flashback as Mr. Court was speaking that we are in a different time—and I think it is a good time—that we are talking not simply about personnel department, "personnel" meaning fairly sterile—people hired to do a job—to the issue of human resources, as we look at it, I think, in most general cases, across the board. We look at it as a cooperative relationship.

Well, I appreciate the testimony today. I appreciate the answers the witnesses have given from both sides of the ledger and in between and all around.

And I appreciate the attention that the subcommittee members have given to this issue.

So now I would ask the Ranking Member for her closing statement.

Ms. WILSON. Mr. Chairman, I want to thank you again for holding this hearing and giving us an opportunity to discuss the *Fair Labor Standards Act.*

I want to thank all of the witnesses for being here today.

Today we have heard lots of statistics about how many Americans would benefit from strengthening the FLSA. We have heard stories about the people who would benefit from much-needed updates to the law.

But I want to remind my colleagues that these statistics and stories represent real people. These are our constituents. These are people who truly know what it means to struggle with low, stagnant, or unfair wages—millions of Americans who know what it means to work long hours and never get ahead.

These statistics and stories represent the 130 million Americans protected by FLSA. Thirty-eight million Americans would benefit from a raise to the minimum wage. These are the people who wake up every morning and go to their jobs knowing that at the end of the day, no matter how hard they have worked, they will not make enough to make ends meet. They are why we must pass the *Raise the Wage Act.*

The statistics and stories represent the millions of women who would benefit from the strengthening of the equal pay protection. These are the women, no matter how hard they work, may be denied the security of equal pay for equal work. It is unconscionable that women on average make $10,000 less a year than men. We must pass the *Paycheck Fairness Act.*

The stories we have heard today represent the millions of workers who work 60, 70, even 80 hours a week and make less than $24,000 a year with no additional pay for overtime. It is absurd that we think that these constituents and this scenario constitute fair wages. We must support an increased salary threshold for overtime pay.

All of these necessary updates—raising the minimum wage, equal pay guarantees, overtime adjustment—reflect the spirit that was enshrined in the FLSA 77 years ago. Congress came together to memorialize and venerate the rights we know all workers are entitled to.

These rights are predicated on a simple yet wholly undeniable fact: American workers deserve to work with dignity. Forty years of wage stagnation have chipped away that dignity. It has forced far too many Americans to work for far less than what they are worth.

As hard as Americans work to try to make a decent living, to provide food for their families, to pay their bills, to put their children through college, we cannot in good conscience take steps to erode where protections are in place.

I stand with my colleagues on this Committee—I don't care what side they are on, what party, but if they stand with me on this committee—who remain dedicated to ensuring we restore and uphold the dignity of work. I hope that our colleagues who don't will join us in our endeavor.

I appreciate this opportunity to talk about FLSA, and I urge this subcommittee to do more.

Hold a hearing on decreasing the gender wage gap. Hold a hearing on raising the minimum wage. Hold a hearing that finally puts the rights of American workers first. Hold a hearing on overtime versus comp time versus compensation.

Hold a hearing and finally agree that this country is facing a serious income inequality problem. We know this, and we must respect this, and we must respect the workers.

I yield back the balance of my time.

Chairman WALBERG. I thank the gentlelady, and I certainly would concur with the fact that the FLSA has served its purpose in many cases over many years in a very positive way.

And the grand old lady or gentleman that we want to call it, whatever gender we give to that legislation, it does need some updating. It needs to get into the real world of today.

And yes, I am glad that today we had stories of American workers told. But I am also glad we had stories of employers—American employers who provide opportunity for the American dream. And I think those two stories need to be told, but they need to coincide together in a way that is a continuity of that American dream that goes on.

We will have tension. We always will. It is part of America. That is why we are the greatest country in the world and have provided the greatest opportunity for all men and women, all colors, creeds, *et cetera*, in the world. And we want that to continue.

But we need to do it in the proper way, and we will have more hearings. We will look to more issues to, indeed, from my perspective, get government out of the way as much as possible to let the genius that is America and its people function.

I would say that we have an agenda, we have priorities, but I maybe ought to hold back. But I am not; 2009, 2010 was a time when the majority party of those two years, the 111th Congress, if these were important issues, as important as they are being perceived today and spoken of today—minimum wage, income equality and all the rest, overtime hours—why weren't they dealt with during that time in Congress, when the minority party of today controlled both houses and the White House? If it was that important then, and it is that important now, why wasn't it taken care of then with proposals?

And yet, we brought about legislation that mandated 30-hour full time that has caused significant problem to industries even seated at this table; 50-employee-level mandate for requirement of health care, which has caused extreme problems to our small businesses of today and a frustration of our economy moving forward. We don't want that to continue.

Just two weeks ago I had the privilege, along with the Chairman and several members of the full Committee, in visiting Skype in Estonia—Tallinn, Estonia. I realized I was not a millennial at that time or anything younger than that. But a creative environment where they had a 24-hour food service—hot food service there, cafeteria available for their employees; where they had beanbags, if they wanted to take a nap they could do that.

They had a sauna. For those of you that aren't Scandinavian, that is a sauna. They had a playroom. They had work stations without walls. And I felt very old there.

And yet, Microsoft and Skype are doing creative things there that allows for flexibility, creativity, authenticity of the workforce in doing things to move the common agenda forward for that company—Google and others like that.

But it is not just those companies. It is, as we heard, the food industry, the health care industry of both humans and animals, the brick and mortar manufacturing, sales forces, with the resources we have today that make it possible for you to do your work away from the workplace and do it well and still meet needs of the family concerns, of the individual concerns.

And that is something we want to get right when we look at FLSA, to make sure it is not just good for now but it is good for a number of—maybe not 75 years, with the rapid increase that we have. So I think that is, again, why flexibility has to be there, so we will keep looking at it.

I hope that Department of Labor has been listening today. I hope that they have heard real-world stories that have gone on. I hope they understand the creative tension that was even at the witness table today so that we don't do things that ultimately frustrate the movement forward not just for this country but for each individual in this country—the employee and the employer—so we can remain the standard for the world.

Let me just point out finally in conclusion, a lot of statements were made about the *Working Families Flexibility Act*, H.R. 1406, specifically. Let me make it very clear: The decision to receive comp time is completely voluntary.

Workers can withdraw from a comp time agreement whenever they choose. No worker can be intimidated, coerced, or forced to accept comp time instead of cash wages. All existing enforcement remedies, including action by the U.S. Department of Labor, are available to workers. Just make sure the facts of the legislation are clear.

Having no more issues to come before the Committee at this time, I declare it adjourned.

[Additional submissions by Chairman Walberg follow:]

# Statement
# On behalf of the
# National Restaurant Association

---

ON: REVIEWING THE RULES AND REGULATIONS IMPLEMENTING FEDERAL WAGE AND HOUR STANDARDS

TO: U.S. HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS OF THE EDUCATION AND WORKFORCE COMMITTEE

BY: ANGELO I. AMADOR, ESQ.
SENIOR VICE PRESIDENT & REGULATORY COUNSEL

DATE: JUNE 10, 2015

**Statement on: "Reviewing the Rules and Regulations Implementing Federal Wage and Hour Standards"**

**By: Angelo I. Amador**

**On Behalf of the National Restaurant Association**
**U.S. House Subcommittee on Workforce Protections of the Education and Workforce Committee**

**June 10, 2015**

Chairman Walberg and Ranking Member Wilson, thank you for holding this hearing and, in particular, for looking into the expected revisions to the Fair Labor Standards Act (FLSA) regulations on overtime. Please accept this statement for the record. My name is Angelo Amador and I am Senior Vice-President and Regulatory Counsel at the National Restaurant Association (Association).

Our Association is the leading business representative for the restaurant and food service industry. The industry is comprised of one million restaurant and foodservice outlets employing 14 million people—about ten percent of the total U.S. workforce. Restaurants are job creators and the nation's second-largest private-sector employer. Despite its size, small businesses dominate the industry; even larger chains are often collections of smaller franchised businesses.

The Spring 2015 Unified Agenda of Federal Regulatory and Deregulatory Actions lists the expected release date for the overtime regulations as "June 2015." Although our members and top Association executives met with Secretary of Labor Perez and senior members of his staff, media reports suggest that the proposed regulations on overtime may not address our concerns. Therefore, the timing of this hearing is critical.

I will address four issues in this statement: a) The Presidential Memorandum issued on March 13, 2014; b) The history of the "white collar exemptions"; c) The anticipated regulatory proposal; and, d) The impact of such a proposal on the restaurant industry.

**The Presidential Memorandum and Regulatory Background**

On March 13, 2014, President Obama issued a Presidential Memorandum directing the Secretary of Labor to consider revisions to the FLSA's main regulations related to an exemption from minimum wage and overtime – those issued under Part 541 of Title 29. Commonly known as the "white-collar exemptions," these regulations address the exempt status of employees working in an executive, administrative, professional, outside sales, and/or computer employee capacity.

We were surprised by the President's announcement, as, prior to that, Department of Labor's (DOL) Semiannual Regulatory Agenda made no reference to such an undertaking. In fact, even the Regulatory Agenda published on November 26, 2013 – the last one before the President's announcement – contained no reference to this undertaking.

We do understand that the Secretary of Labor has the authority to promulgate regulations in this area. When Congress enacted the white collar exemption, it required the Secretary to issue regulations to implement it.

However, the Department already conducted a detailed analysis and issued comprehensive regulations in 2004, clarifying the duties and salary basis tests and increasing the minimum salary from $155 per week to $455 per week. The proposal for the 2004 regulations included a 90-day public comment period. During that period, the Department received 75,280 comments. Approximately 600 of which included substantive analysis of the proposed revisions.

In the 2004 regulations, the Department (among other things):

- Eliminated the 20% limitation on non-exempt duties for employees in an executive or administrative capacity;
- Eliminated the requirement that executive employees regularly and customarily exercise discretionary powers;
- Eliminated the requirement that administrative employees perform work related to management "policies" (requiring simply that the work be related to "management");
- Reduced the reliance upon the "production vs. staff dichotomy," which required a determination whether the work is "related to the administrative operations of the business as distinguished from production";
- Provided clear guidance with respect to numerous specific types of jobs, including financial services, executive assistants, team leads, and human resources professionals;
- Allowed professional employees to acquire their required knowledge through a combination of intellectual instruction and work experience;
- Increased the required salary level;
- Clarified the salary basis requirements; and,
- Reaffirmed the definition of "primary duty" as the most important duty, without strict reliance upon any particular percentage of time spent on exempt tasks.

**Expected Proposal for Regulatory Revision**

In the Presidential Memorandum, President Obama directed the Secretary of Labor to "restore the common sense principles" related to overtime. In his remarks, the President focused on his contention that overtime protections have "eroded," that "if you work more, you should be paid more," and that "millions" of workers who currently are eligible for the FLSA's overtime exemption should not be.

The President's remarks indicate that any regulatory proposal will represent a fundamental change. Although he mentioned that there will be efforts at clarification and simplification, it appears that the end goal of these regulatory revisions will be to dramatically decrease the number of employees for whom employers may claim an overtime exemption.

The details are still sparse, with the President directing the Secretary to consider how the regulations could be revised to:

- Update existing protections in keeping with the intention of the FLSA;
- Address the changing nature of the American workplace; and,
- Simplify the overtime rules to make them easier for both workers and businesses to understand and apply.

Based on public statements by Administration officials, including Secretary Perez, it appears that the Administration will seek to raise the salary level for the exemption to apply. Articles reference salary levels ranging from $640 per week (California's current level) to as high as $984 per week.

In some key respects, it appears that the Administration is attempting to "undo" the 2004 regulations. For example, the Administration has indicated its intention to adjust the primary duty test, presumably to implement a California-style hard 50% limitation on work deemed non-exempt.

In addition, it also appears that the Administration may attempt to eliminate managers' ability to engage in management and non-exempt work concurrently. It's likely that other changes to the duties tests will also be proposed. For example, the Administration may seek to re-introduce the requirement that an administrative employee's work be related solely to management "policies."

It is critical to note that while the President has directed the Department of Labor to issue these regulations, the Secretary has broad discretion to issue regulations that would only modestly disrupt the current labor market.

**Potential Impact on Restaurant Industry**

The anticipated salary increase and primary duty test revision appears directly aimed at the restaurant and retail sectors. Some estimates indicate that a salary increase to $970 would impact between 5-10 million workers, many of whom would be in the restaurant industry. Some points worth noting:

- The combination of the salary increase and the primary duty test revision essentially forces the entire country to operate the same way as California, where application of the exemption is exceedingly difficult;
- The impact of a salary increase would depend upon the exact size of the increase. It would almost certainly have a larger impact in Southern states and rural areas than it would in the Northeast and metropolitan areas;
- The elimination of a manager's ability to engage in "line work" and management concurrently could mean the loss of the exemption for restaurant managers, particularly in smaller restaurants:
    - For example, each time that a manager – even one who was unquestionably "in charge" of the restaurant – rang up an order, wiped down a table, or jumped in to deliver an order to a table, her employer would need to track that time to ensure that it did not exceed whatever limitation the Department's revisions would require. Alternatively, the employer could simply decide in advance that the employee would be non-exempt.
- The pre-2004 version of the regulations specifically permitted concurrent supervision and line work, which means that concurrent supervision has been the law since at least 1949;

- To the extent that assistant managers are classified as exempt, the increased salary level and changes to duties requirements would all but ensure that they would be classified as non-exempt;
- "Non-exempt" does not mean that employees will be paid more due to a windfall of overtime hours. As labor is such a large component of restaurant costs, operators closely manage and limit employees' work hours to avoid having to pay overtime. There is no reason to believe that they would act differently in this context;
- Changes to non-exempt/non-managerial status in the restaurant industry oftentimes means a change in benefits packages. Implementing these revisions may result in many employees going from full-time employees with comprehensive health plans and other excellent benefits to less-than-30-hour employees with no health coverage and no eligibility for some of the employer's better benefits;
- The restaurant industry has spent millions of dollars to defend against expensive litigation related to manager positions. Just as the litigation wave has started to settle down and employers have obtained some judicial clarity on these classification issues, this new proposal will once again increase the profile of this issue, resulting in additional litigation and high transaction costs. Additionally, any significant revisions will change employers' obligations under the law, which will likely generate an entirely new wave of litigation.

The feedback I have received from our members in California is that its "duties test" approach should not be emulated nationally. The duties test has become impractical and, as expected, confusing – leading to excess litigation and undermining an employer's ability to utilize this statutory exemption without fear. Adopting a quantitative test, regardless of the percentage, would create a tremendous regulatory burden. Such an environment, would require employers to track an employee's work tasks on an hour-by-hour, or even a minute-by-

minute, basis and to figure out whether each task is exempt or non-exempt in nature – destroying over 70 years of settled federal case law.

Ultimately, the precise impact on the restaurant industry can only be determined once we learn the contours of the Department's proposal. All indications, however, suggest that the Department intends to take an entire level of management and convert them to hourly employees.

**Conclusion**

While finding ways to help workers earn additional money is shared by most people, the envisioned changes to the overtime regulations do not advance this cause. Rather, there will be significant negative consequences to many employees who are forced to be reclassified from exempt to non-exempt.

Once again, we appreciate your consideration of these issues. Please, feel free to contact us for additional information.

**National Association of Home Builders**

1201 15th Street NW
Washington, DC 20005

T 800 368 5242
F 202 266 8400

www.nahb.org

**Government Affairs**

James W. Tobin III
Senior Vice President & Chief Lobbyist

June 9, 2015

The Honorable John Kline
Chairman
U.S. House of Representatives
Committee on Education and the Workforce
2439 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Kline:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I am writing to express our appreciation to the House Education and Workforce Committee for deliberating on the importance of overtime requirements under the Fair Labor Standards Act (FLSA). NAHB is concerned that changes to the current overtime standard will reduce job-advancement opportunities and cut the hours of full-time construction supervisors, leading to construction delays, increased costs, and less affordable housing options for consumers.

Many home builders employ individuals whose primary function is to supervise and manage the process of constructing homes, the contractor relationships, and many of the administrative tasks associated with the construction process. While their titles and specific duties may vary from home builder to home builder, they all perform many common administrative functions, including managing the home building and scheduling process from receipt of the building permit to closing of the sale. Some supervisors also perform manual work in the course of their day-to-day business.

NAHB believes that a dramatic increase of the overtime salary threshold and changes to the primary duties test under the FLSA standard will not result in an increase in workers' take home pay. Instead, employers will likely make significant adjustments in the structure of their workforce to compensate for the new regulatory structure.

NAHB stands ready to work with the House Committee on Education and the Workforce as it continues to discuss the FLSA's overtime standard. Thank you for considering our views.

Sincerely,

James W. Tobin III

United States Government Accountability Office

Report to the Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, House of Representatives

December 2013

# FAIR LABOR STANDARDS ACT

## The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance

GAO-14-69

December 2013

# GAO Highlights

# FAIR LABOR STANDARDS ACT

## The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance

Highlights of GAO-14-69, a report to the Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, House of Representatives

### 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 report (1) describes what is known about the number of FLSA lawsuits filed, and (2) examines how WHD plans its FLSA enforcement and compliance assistance efforts. To address these objectives, 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 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 compliance assistance efforts.

### What GAO Recommends

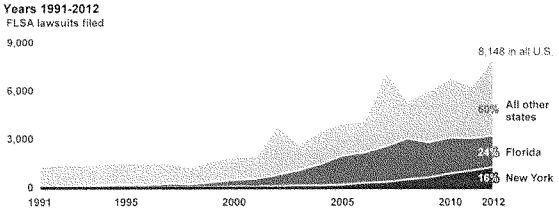
GAO recommends that the Secretary of Labor direct the WHD Administrator to develop a systematic approach for identifying and considering areas of confusion that contribute to possible FLSA violations to help inform the development and assessment of its guidance. WHD agreed with the recommendation, and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

View GAO-14-69. For more information, contact Revae Moran at (202) 512-7215 or moranr@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 and the percentage of total civil lawsuits filed that were FLSA cases, but large increases were concentrated in a few states, including Florida and New York. The number of workers involved in FLSA lawsuits is unknown because the courts do not collect data on the number of workers represented. Many factors may contribute to this general trend; however, the factor cited most often by stakeholders, 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 (DOL) 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, but it does not compile and analyze relevant data to help determine what guidance is needed, as recommended by best practices previously identified by GAO. In planning its enforcement efforts, WHD targets industries it determines have a high likelihood of FLSA violations. Although WHD does not analyze data on FLSA lawsuits when planning its enforcement efforts, it does use information on its receipt and investigation of complaints about possible FLSA violations. In developing its guidance on FLSA, WHD considers input from its regional offices, but it does not have a systematic approach that includes analyzing relevant data, nor does it 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. Since 2009, WHD has reduced the number of FLSA-related guidance documents it has published. 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 overtime pay and other requirements.

# Contents


| | | |
|---|---|---|
| Letter | | 1 |
| | Background | 3 |
| | FLSA Lawsuits Have Increased Substantially over the Last Decade and Share Some Characteristics | 6 |
| | WHD Plans Its FLSA Enforcement and Compliance Assistance Efforts Annually but Does Not Analyze Relevant Data to Improve Its Guidance | 18 |
| | Conclusions | 22 |
| | Recommendation for Executive Action | 23 |
| | Agency Comments | 23 |
| Appendix I | Scope and Methodology | 25 |
| Appendix II | Comments from the Department of Labor | 30 |
| Appendix III | GAO Contact and Staff Acknowledgments | 32 |
| Figures | | |
| | Figure 1: Number of FLSA Lawsuits Filed in Federal District Court, Fiscal Years 1991-2012 | 7 |
| | Figure 2: 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 | 9 |
| | Figure 3: Estimated Percentage of FLSA Lawsuits Filed in Federal District Court in Fiscal Year 2012, by Type of Allegation | 15 |
| | Figure 4: FLSA Lawsuits Filed in Federal District Court in Fiscal Year 2012, by Initiation Type | 17 |

**Abbreviations**

| | |
|---|---|
| DOL | Department of Labor |
| FLSA | Fair Labor Standards Act of 1938 |
| GPRA | Government Performance and Results Act of 1993 |
| NAICS | North American Industry Classification System |
| PACER | Public Access to Court Electronic Records |
| WHD | Wage and Hour Division |

This is a work of the U.S. government and is not subject to copyright protection in the United States. The published product may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.

GAO U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

December 18, 2013

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
Committee on Education and the Workforce
House of Representatives

Dear Mr. Chairman:

After 75 years, the Fair Labor Standards Act of 1938 (FLSA), as amended, remains the primary federal law that sets minimum wage and overtime pay standards applicable to most U.S. workers.[1] 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.[2] In July 2008, we found that WHD did not effectively take advantage of available information and tools in planning and conducting its enforcement and compliance assistance activities, and we recommended that WHD establish, maintain, and report on performance measures for the FLSA.[3]

More recently, as the number of FLSA lawsuits has increased, questions have been raised about the effect of the FLSA on employers and workers and about WHD's enforcement and compliance assistance efforts.

This report examines the following questions:

1. What is known about the number of FLSA lawsuits filed?
2. How does WHD plan its FLSA enforcement and compliance assistance efforts?

[1] Ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-19).

[2] WHD administers the FLSA with respect to private employers, state and local government employers, and certain federal employers. WHD is also responsible for the administration of other federal laws such as the Family and Medical Leave Act of 1993.

[3] GAO, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, GAO-08-962T (Washington, D.C.: July 15, 2008).

To describe what is known about trends in the number of FLSA lawsuits filed, we analyzed data from the federal district courts for fiscal years 1991 through 2012 provided by the Federal Judicial Center.[4] We also reviewed complaints from a randomly selected and generalizable sample of 97 FLSA lawsuits filed in federal district courts in fiscal year 2012 to generate estimates about selected characteristics of such lawsuits.[5] We did not review FLSA lawsuits filed in state courts or cases from the federal appeals courts.[6] To describe how WHD plans its FLSA enforcement and compliance assistance efforts, we reviewed the agency's planning and performance documents and its published guidance on FLSA enforcement and compliance assistance. We also compared WHD's planning process to internal control standards and best practices that we have previously identified.[7] We did not assess WHD's implementation of its enforcement and compliance assistance plans. To inform both objectives, we interviewed DOL officials, attorneys who specialize in wage and hour cases, federal judges, officials from organizations representing workers and employers, and academics about FLSA litigation trends and WHD's enforcement and compliance assistance activities, and reviewed relevant federal laws and regulations.

We conducted this performance audit from November 2012 to December 2013 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

[4] The Federal Judicial Center is the research and education agency of the federal judicial system. It compiles data from the federal courts via the Administrative Office of the U.S. Courts for research purposes.

[5] A "complaint" is the legal term for the document the plaintiff files with the court to initiate a civil lawsuit. For this analysis, we reviewed only the initial complaint from the lawsuits in our sample. 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. All estimates from our sample have a 95 percent confidence interval of within plus or minus 10 percentage points.

[6] Within this report, unless otherwise specified, "FLSA lawsuits" refers to lawsuits filed in federal district court under the FLSA.

[7] GAO, *Managing for Results: Enhancing Agency Use of Performance Information for Management Decision Making*, GAO-05-927 (Washington, D.C.: Sept. 9, 2005); *Standards for Internal Control in The Federal Government*, GAO/AIMD-00-21.3 (Washington, D.C.: November 1999); *Managing for Results: Strengthening Regulatory Agencies' Performance Management Practices*, GAO/GGD-00-10 (Washington, D.C.: Oct. 28, 1999).

our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. For more information on our scope and methodology, see appendix I.

## Background

The FLSA requires that workers[8] who are covered by the act and not specifically exempt from its provisions be paid at least the federal minimum wage (currently $7.25 per hour) and 1.5 times their regular rate of pay for hours worked over 40 in a workweek.[9] The act also regulates the employment of youth under the age of 18 and establishes recordkeeping requirements for employers, among other provisions. There are a number of exceptions to the requirements of the FLSA; for example, independent contractors are not covered by the FLSA, and certain categories of workers, such as those in bona fide executive, administrative, or professional positions, are exempt from the minimum wage requirements, overtime requirements, or both. WHD has issued regulations implementing the FLSA that further define these exemptions and other requirements of the FLSA.[10]

The mission pursued by DOL through its WHD is to promote and achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce. The FLSA authorizes DOL to enforce its provisions by, for example, conducting investigations, assessing penalties, supervising payment of back wages, and bringing suit in court on behalf of employees. DOL's WHD also conducts a range of compliance assistance activities to support employers in their efforts to understand and meet the requirements of the law. WHD's enforcement and compliance assistance activities are conducted by staff in its 52 district offices, which are located throughout the country and managed by staff in its five regional offices and Washington, D.C. headquarters.

[8] In this report, we use the term "worker" to mean "employee" as defined by the FLSA, 29 U.S.C. § 203(e).

[9] See 29 U.S.C. §§ 206 and 207.

[10] See generally 29 C.F.R. pts. 510 – 794.

## WHD's Enforcement of the FLSA

In response to complaints of alleged FLSA violations it receives from workers or their representatives, WHD conducts several types of enforcement activities. These range from comprehensive investigations covering all laws under the agency's jurisdiction to conciliations, a quick remediation process generally limited to a single alleged FLSA violation such as a missed paycheck for a single worker. Before WHD initiates an investigation of a complaint, it screens the complaint to determine, among other factors, whether the allegations, if true, would violate the law, and to ensure the statute of limitations has not expired. If WHD identifies a violation through an enforcement activity, but the employer refuses to pay the back wages or penalties assessed, DOL's Office of the Solicitor may sue the employer on behalf of the affected workers. In fiscal year 2012, WHD conducted investigations or conciliations in response to about 20,000 FLSA complaints and DOL's Office of the Solicitor filed about 200 federal lawsuits to enforce the requirements of the FLSA on behalf of workers.[11]

In addition to responding to complaints, WHD enforces the requirements of the FLSA by initiating investigations of employers by targeting industries it believes have a high probability of violations but a low likelihood that workers will file a complaint. In fiscal year 2012, WHD concluded about 7,000 targeted FLSA investigations.

## WHD's FLSA Compliance Assistance

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 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. However, in 2010, WHD stopped issuing opinion letters and indicated that it would instead provide administrator interpretations, which are more broadly applicable. As a result of the Portal-to-Portal Act of 1947, which

[11] DOL may seek financial damages on behalf of affected workers, a court order prohibiting the employer from continuing to violate the FLSA, or both. The FLSA also provides for criminal penalties in certain circumstances.

established a "safe harbor" from liability under the FLSA for employers that rely in good faith on a written interpretation from WHD's administrator, certain WHD written guidance could potentially provide a "safe harbor" in FLSA litigation.[12]

## Lawsuits Filed by Workers Alleging Violations of the FLSA

The FLSA also grants workers the right to file a private lawsuit to recover wages they claim they are owed because of their employer's violation of the act's minimum wage or overtime pay requirements.[13] 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.[14]

FLSA lawsuits may be brought individually or as part of a collective action. A collective action is a single lawsuit filed by one or more representative workers on behalf of multiple workers who claim that an employer violated the FLSA in similar ways.[15] The court will generally

[12] 29 U.S.C. § 259. To avoid liability, the employer must prove that the violation was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the Administrator. An employer unable to prove the complete defense may still be able to avoid paying certain types of damages if it can prove it acted in good faith with reasonable grounds to believe the action was not in violation of the FLSA. 29 U.S.C. § 260.

[13] 29 U.S.C. § 216(b). Workers may also file a lawsuit seeking damages for an employer's retaliation against them under 29 U.S.C. § 215(a)(3).

[14] 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.

[15] 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.

certify whether an action meets the requirements to proceed as a collective; in some cases, the court may decertify a collective after it is formed if the court subsequently determines that the collective does not meet those requirements.[16] In such cases, the court may permit the members of the decertified collective to individually file private FLSA lawsuits.

## FLSA Lawsuits Have Increased Substantially over the Last Decade and Share Some Characteristics

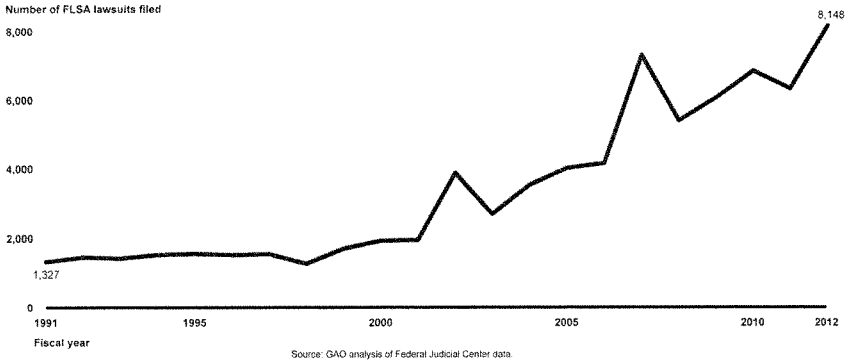
### FLSA Lawsuits Have Multiplied over the Last Decade and Most Were Filed in a Few States

Over the last two decades, the number of FLSA lawsuits filed nationwide in federal district courts has increased substantially, with most of this increase occurring in the last decade.[17] 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. Since 2001, when 1,947 FLSA lawsuits were filed, the number of FLSA lawsuits has increased sharply (see fig. 1). Not only has the number of FLSA lawsuits increased, but they also constitute a larger proportion of all federal civil lawsuits than they did in past years. In 1991, FLSA lawsuits made up less than 1 percent (.6 percent) of all civil lawsuits, but by 2012, FLSA lawsuits accounted for almost 3 percent of all civil lawsuits, an increase of 383 percent.

[16] 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. For example, the court may determine that the plaintiffs' jobs or pay structures are sufficiently dissimilar to require separate litigation of their claims.

[17] 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.

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.

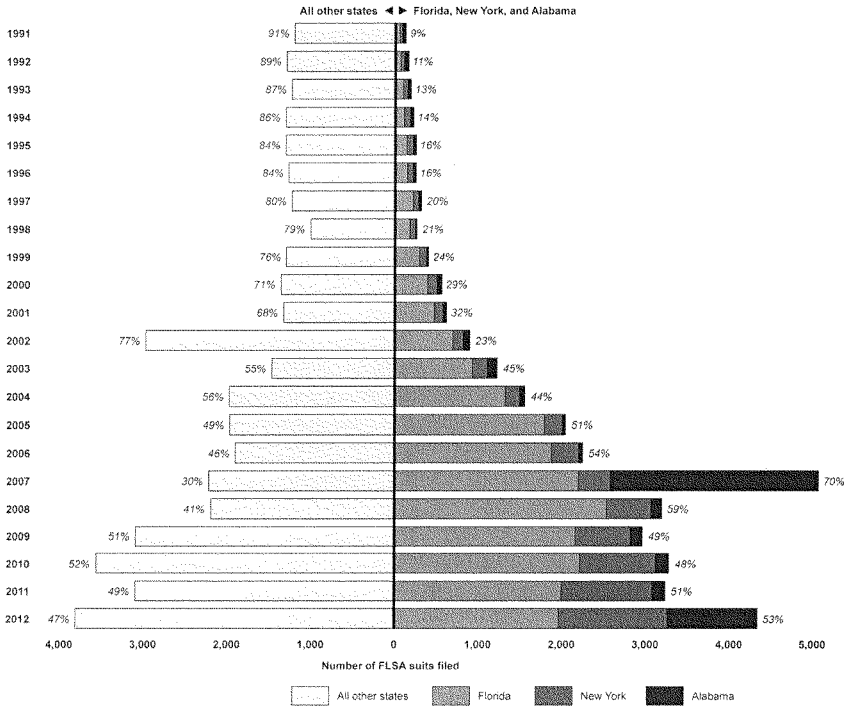
These increases, however, were not evenly distributed across all states. In fact, while federal district courts in most states saw increases in both the number of FLSA lawsuits filed and the percentage of all civil lawsuits filed that were FLSA lawsuits, increases in a small number of states were substantial and contributed significantly to the overall trends. In each of three states—Florida, New York, and Alabama—more than 1,000 more FLSA lawsuits were filed in fiscal year 2012 than in fiscal year 1991 (see fig. 2). Since 2001, more than half of all FLSA lawsuits were accounted for by filings in those three states. About 43 percent of FLSA lawsuits filed nationwide during this period were filed in either Florida (33 percent) or New York (10 percent). At the same time, the percentage of all federal civil cases that were FLSA cases in those three states also increased significantly. 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. Each spike in Alabama coincided with the decertification of at least one large collective action, which likely resulted in multiple

individual lawsuits.[18] From 1991 to 2012, while most states experienced increases in the number of FLSA lawsuits filed, the proportion of civil lawsuits that were FLSA lawsuits, or both, these trends were not universal. In 14 states, the number of FLSA lawsuits filed in 2012 was less than or the same as the number of FLSA lawsuits filed in 1991, and in 10 states the proportion of civil lawsuits FLSA cases made up was smaller in 2012 than in 1991.[19]

[18] For example, on August 7, 2006, the Chief District Judge for the Northern District of 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. 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.

[19] We conducted sensitivity analyses using different years for the starting and ending points. Changing the start date generally did not have a large effect. Using 2011 rather than 2012 as the final year of the timeframe yielded more states that had fewer FLSA lawsuits filed and more states that had a decrease in the proportion of civil lawsuits filed that were FLSA lawsuits; however, regardless of the final year used, most states showed increases in the number of FLSA lawsuits filed and in the proportion of civil lawsuits that were FLSA lawsuits.

**Figure 2: 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.

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.

While many factors have likely contributed to the overall increase in FLSA lawsuits and stakeholders we interviewed cited multiple factors, they 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.[20] In some states, specifically Florida, where nearly 30 percent of all FLSA lawsuits were filed from 1991 to 2012, several stakeholders, including federal judges, WHD officials, and a defense attorney, told us that plaintiffs' attorneys advertise for wage and hour cases via billboards, radio, foreign language press, and other methods. Two stakeholders we spoke with also said that some plaintiffs' attorneys, when consulted by potential clients about other employment issues, such as wrongful termination, will inquire about potential wage and hour claims; a plaintiffs' attorney we interviewed also said that it is generally easier to evaluate the potential merits of wage and hour cases than of wrongful termination and employment discrimination cases. While a few stakeholders said they did not view increased interest among plaintiffs' attorneys to be a significant factor in the increase in FLSA lawsuits, most did, including some plaintiffs' attorneys. Two stakeholders, including an academic and a representative of an organization that works on behalf of low wage workers, told us that this increased interest was beneficial because it served to counterbalance DOL's limited FLSA enforcement capacity.

In addition, several stakeholders told us that evolving case law may have contributed to the increased awareness and activity on the part of plaintiffs' attorneys. In particular, they mentioned the 1989 Supreme Court decision *Hoffmann-La Roche, Inc. v. Sperling*, which held that federal courts have discretion to facilitate notice to potential plaintiffs of ongoing collective actions.[21] 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

[20] 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.

[21] 493 U.S. 165 (1989).

had to identify potential plaintiffs and contact them to get them to join the collective. Stakeholders we interviewed said the *Hoffmann-La Roche* decision, which made it easier for plaintiffs' attorneys to identify potential plaintiffs, reduced the work necessary to form collectives. In addition, according to several stakeholders we interviewed, case law in other areas of employment litigation, such as employment discrimination, has evolved, making FLSA cases relatively more attractive for plaintiffs' attorneys who specialize in employment litigation and large multi-plaintiff cases. For example, one attorney cited two Supreme Court decisions in the late 1990s that made it more difficult for plaintiffs in employment-based sex discrimination lawsuits to prevail, and led plaintiffs' attorneys to consider other types of employment litigation such as FLSA cases.[22]

Stakeholders also cited other factors that may have contributed to the increase in FLSA litigation over the last two decades; however, these factors were endorsed less consistently than the role played by plaintiffs' attorneys. First, a number of stakeholders said that 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. 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. Moreover, one judge we interviewed noted that the recent recession has also been difficult for attorneys and may be a factor in the types of lawsuits and clients they choose to accept. In addition, 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 these exemptions 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

[22] See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). These cases established an affirmative defense for employers in certain employment-based sex discrimination cases under Title VII of the Civil Rights Act of 1964. The Court held that an employer will not be liable for sexual harassment committed by its supervisors if it can prove that (a) the employer exercised reasonable care to prevent and correct sexual harassment, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise avoid harm.

under these categories.[23] Finally, the potentially large number of wage and hour violations was given as a possible reason for the increase in FLSA litigation. 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 centralization in the management structure of businesses in retail, restaurant, and similar industries has contributed to FLSA lawsuits in these industries because frontline managers who were once exempt have become nonexempt as their nonmanagerial duties have increased as a portion of their overall duties. Service jobs, including those in the leisure and hospitality industry, increased from 2000 to 2010, while most other industries lost jobs during that period.[24]

Many stakeholders also told us that the prevalence of FLSA litigation by state is influenced by the variety of state wage and hour laws.[25] For example, while the federal statute of 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 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 may 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.

[23] 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).

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

[25] Based on our review of a sample of cases, in fiscal year 2012, almost 30 percent of FLSA lawsuits included a state wage and hour claim. Determining the effect, if any, of state wage and hour laws on federal FLSA litigation is difficult. State laws may vary and many factors influence decisions about where to bring FLSA lawsuits (e.g., in federal or state court, and if in state court, which state).

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

Our review of a representative sample of FLSA lawsuits filed in federal district court in fiscal year 2012 showed that approximately half were filed against private sector employers in four industries.[26] Almost all FLSA lawsuits (97 percent) were filed against private sector employers.[27] An estimated 57 percent of the FLSA lawsuits filed in fiscal year 2012 were filed against employers in four broad industry areas: accommodations and food services; manufacturing; construction; and "other services" which, in our sample, included services such as laundry services, domestic work, and nail salons.[28] Almost one-quarter of all lawsuits filed (an estimated 23 percent) were filed by workers in the accommodations and food service industry, which includes hotels, restaurants, and bars.[29] This concentration of lawsuits is consistent with what several stakeholders, including DOL officials, told us about the large number of FLSA violations in the restaurant industry. At the same time, almost 20 percent of FLSA lawsuits were filed by workers in the manufacturing industry. In our sample, most of these lawsuits 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.[30] It is important to note that,

[26] We reviewed only the initial complaint from each lawsuit in our sample. Our review did not include subsequent documents filed as part of the lawsuit, such as those filed by the defendant, amendments to the initial complaint, or final judgments, if any. Therefore, we cannot determine whether the allegations in the complaint were substantiated or whether the allegations changed during the course of the lawsuit. All estimates from our sample have a 95 percent confidence interval of within plus or minus 10 percentage points.

[27] In 2010, 2.1 percent of U.S. jobs were in the federal government and 13.6 percent of U.S. jobs were in state or local government, according to the most recently available data from the Bureau of Labor Statistics.

[28] We used the North American Industry Classification System (NAICS) when determining the industry of workers filing lawsuits. NAICS is the standard used by federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. See appendix I for more information about our classification of lawsuits by industry.

[29] 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.

[30] 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.

because of the presence of collective actions, the number of lawsuits filed against an industry's employers may understate the number of plaintiffs involved in these suits.

FLSA lawsuits filed in fiscal year 2012 included a variety of alleged FLSA violations in addition to at least one of the three types of claims—overtime, minimum wage, and retaliation—that each private FLSA lawsuit must at minimum contain.[31] Allegations of overtime violations were the most common type among those explicitly stated in the documents we reviewed (see fig. 3). [32] 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.[33] Thirty-two percent of the FLSA lawsuits filed in fiscal year 2012 contained allegations that the worker or workers were not paid the federal minimum wage, another main provision of the FLSA, while a smaller percentage of lawsuits included allegations that the employer unlawfully retaliated against workers (14 percent).[34] In addition, the majority of lawsuits contained other FLSA allegations, most often that the employer failed to keep proper records of hours worked by the employees (45 percent); failed to post or provide information about the FLSA, as required (7 percent); or violated requirements pertaining to tipped workers such as restaurant wait staff (6 percent).

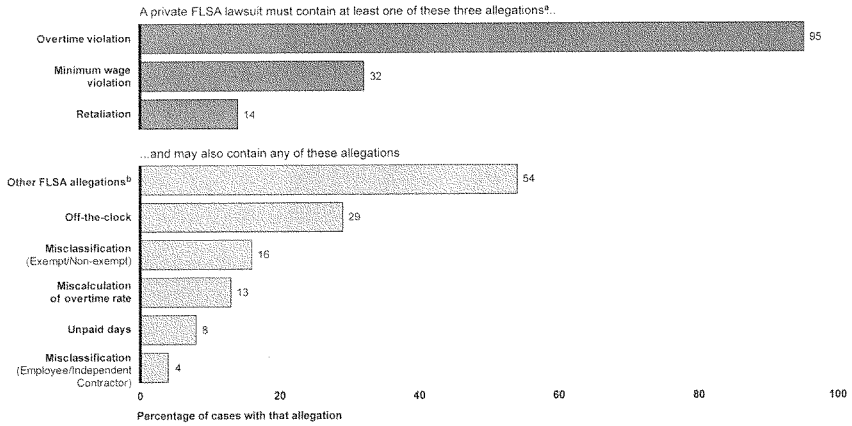
[31] FLSA lawsuits filed by DOL may contain certain other claims that may not be made by private litigants, such as those related to child labor violations. However, the DOL-initiated lawsuits in our sample did not include such additional allegations.

[32] Our estimates of allegations from FLSA lawsuits reflect only the issues that were specifically mentioned in the complaints that we reviewed from each lawsuit. Other lawsuits included in our sample may have involved these issues as well, but they were not specifically mentioned in the complaint, and therefore not counted for purposes of our review.

[33] Unless specifically exempted, workers covered by the FLSA are generally entitled to overtime pay. 29 U.S.C. § 207. However, 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).

[34] Many lawsuits included multiple FLSA allegations. For example, the complaint from a particular lawsuit could include allegations of both minimum wage and overtime violations.

**Figure 3: 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.

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]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.

We also identified more specific allegations about how workers claimed their employers violated the FLSA. Nearly 30 percent of the FLSA lawsuits filed in fiscal year 2012 contained allegations that workers were required to work "off-the-clock" so that they would not need to be paid for that time, and 16 percent alleged that workers were not paid appropriately because they were employees who were misclassified as being exempt

from FLSA protections.[35] In a similar proportion of cases (13 percent), alleged overtime violations were claimed to be the result of the miscalculation of the wage rate a worker was entitled to as overtime pay. Such miscalculations could be the result, for example, of an employer not factoring in bonuses paid to workers when determining their regular rate of pay, which is used for the calculation of the overtime pay rate. Other lawsuits included allegations that a worker was misclassified as an independent contractor rather than an employee (4 percent). Independent contractors are generally not covered by the FLSA, including its minimum wage and overtime provisions.[36]

In our review of FLSA lawsuits filed in fiscal year 2012, we found that a majority of them were filed as individual actions, but collective actions also composed a substantial proportion of these 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.[37] 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. We found that an estimated 58 percent of the FLSA lawsuits filed in federal district court in fiscal year 2012 were filed individually, and 40 percent were filed as collective actions. An estimated 16 percent of the FLSA lawsuits filed (about a quarter of all individually-

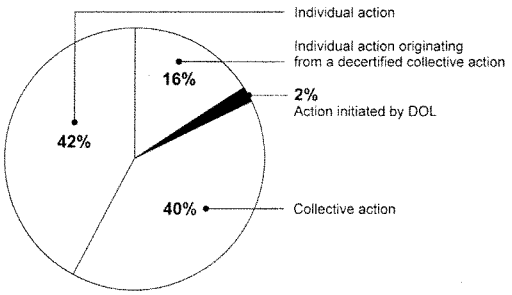
[35] For the purposes of our review, we defined an "off-the-clock" allegation as a claim that an employer did not pay workers for all of the hours they worked within a day. Examples include claims that workers were not credited or paid for time worked outside their scheduled work hours, such as the hours 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.

[36] We previously found that employee misclassification could be a significant problem with adverse consequences. See GAO, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Insure Detection and Prevention,* GAO-09-717 (Washington, D.C.: Aug. 10, 2009).

[37] 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).

filed lawsuits), however, were originally part of a collective action that was decertified (see fig. 4). For example, 14 of the 15 lawsuits in our sample filed in Alabama were filed by individuals who had been members of one of two collectives that were decertified in fiscal year 2012.[38]

**Figure 4: FLSA Lawsuits Filed in Federal District Court in Fiscal Year 2012, by Initiation Type**




Source: GAO analysis of complaints from FLSA lawsuits obtained through the federal judiciary's Public Access to Court Electronic Records (PACER) system

[38] There are a few examples of spikes in the number of FLSA lawsuits filed in other states in a particular year that may also relate to collective actions. For example, in Nebraska, no more than 19 FLSA lawsuits were filed in any fiscal year from 1991 through 2012, except for 2006 when 176 FLSA lawsuits were filed. In that year, a federal judge for the District Court of Nebraska rejected certification of an FLSA collective action filed by 177 plaintiffs, finding that the plaintiffs' circumstances were not sufficiently similar, and, therefore, the plaintiffs could not litigate their claims collectively.

## WHD Plans Its FLSA Enforcement and Compliance Assistance Efforts Annually but Does Not Analyze Relevant Data to Improve Its Guidance

### WHD Plans Its FLSA Enforcement Efforts Using an Annual, Data-Based Approach

Consistent with its stated mission of promoting and achieving compliance with labor standards, WHD has an annual process for planning how it targets its FLSA enforcement resources. Each year, WHD's national office plans the share of its enforcement resources that will be used for targeted investigations versus responding to complaints it receives from workers or their representatives about potential FLSA violations.

To plan the deployment of its resources for targeted investigations, WHD identifies broad initiatives that focus on industries it determines have a high likelihood of FLSA violations and where workers may be particularly vulnerable. For example, WHD has targeted industries where workers may be less likely to complain about violations or where the employment relationship is splintered because of models such as franchising or subcontracting. WHD's regional and district offices then refine the list of priority industries to develop plans that focus on the most pressing issues in their areas. Each year, with input and ultimate approval from the national office, WHD's regional and district offices use these plans to target their enforcement resources.

In developing their enforcement plans, WHD considers various inputs. For example, WHD officials consider the nature and prevalence of FLSA violations by using historical enforcement data to study trends in FLSA complaints and investigation outcomes in particular areas. University-based researchers under contract with DOL have also used the agency's historical enforcement data to help it plan for and strategize its FLSA

enforcement efforts.[39] In addition, WHD considers data from external sources, such as reports from industry groups, advocacy organizations, and academia. Although WHD's national office is aware of significant FLSA lawsuits through its monitoring of FLSA issues in court decisions, WHD's national, regional, and district offices do not analyze data on the number of FLSA lawsuits filed or use the results of such analyses to inform their enforcement plans. WHD officials noted that data on the number of FLSA lawsuits filed may not provide an accurate or sensitive gauge of FLSA violations because the number of workers involved and the outcomes of these lawsuits are not readily available.

In developing their annual enforcement plans, WHD regional and district offices identify approaches to achieving compliance given the industry structure and the nature of the FLSA violations that they seek to address. According to WHD internal guidance, strategic enforcement plans should not only include targeted investigations of the firms that employ workers potentially experiencing FLSA violations, but they should also 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.

## In Its Compliance Assistance Efforts, WHD Does Not Analyze Data on Requests for Information on the FLSA in Planning How to Improve Its Guidance

Our prior reports and DOL's planning and performance documents have emphasized the need for WHD to help employers comply with the FLSA. In documenting best practices about planning and performance management, we have suggested that agencies "involve regulated entities in the prevention aspect of performance."[40] In the case of WHD, this best practice means helping employers voluntarily comply with the FLSA, among other laws. Similarly, DOL's planning and performance documents have emphasized the importance of WHD promoting "sustained and corporate-wide compliance among employers" as a strategic priority.[41] According to federal standards for internal control,

[39] David Weil, principal investigator, "Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division," Boston University, May 2010.

[40] GAO, *Managing for Results: Strengthening Regulatory Agencies' Performance Management Practices*, GAO/GGD-00-10 (Washington, D.C.: Oct. 28, 1999).

[41] See, for example, the *U.S. Department of Labor FY 2012 Annual Performance Report*.

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.[42] In addition, according to our guidance on the Government Performance and Results Act of 1993 (GPRA),[43] for planning and performance measures to be effective, federal managers need to use performance information to identify problems and look for solutions and approaches that improve results.[44]

WHD expects staff in its regional and district offices to play a key role in delivering some forms of compliance assistance. For example, staff in the district offices respond directly to employers' questions about laws such as the FLSA by providing informal guidance, most of which is offered over the phone but is sometimes provided in writing when the guidance is particularly technical. In addition, in each of WHD's five regions, there are three or more staff who specialize in community outreach and planning.[45] These specialists are involved in planning meetings and developing outreach efforts and other forms of compliance assistance as part of the annual, district-specific enforcement plans. Finally, WHD investigators in the field are responsible for providing information and education to employers during their enforcement actions.

At the national level, WHD publishes FLSA-related guidance including notably its interpretive guidance, though this guidance is not informed by systematic analysis of data on requests for assistance. To develop and assess its interpretive guidance about the FLSA, WHD's national office considers input from its regional offices, but it does not have a data-based approach that is informed by objective input, such as data on areas which

[42] GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999).

[43] GPRA, Pub. L. No. 103-62, 107 Stat. 285, required federal agencies to develop strategic plans with long-term goals, performance plans with annual goals and measures, and performance reports on prior year performance. GPRA was intended to improve federal program effectiveness, accountability, and service delivery, among other purposes. The GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (2011), amended GPRA and included a provision for agencies to conduct quarterly, data-driven performance reviews.

[44] GAO, *Managing for Results: Enhancing Agency Use of Performance Information for Management Decision Making*, GAO-05-927 (Washington, D.C.: Sept. 9, 2005).

[45] WHD has 26 such specialists nationwide.

employers and workers have indicated the need for additional guidance. Officials from WHD's Office of Policy, which is responsible for publishing interpretive guidance about the FLSA, told us they meet with WHD regional and national office leadership weekly to discuss ongoing initiatives and emerging issues. While WHD collects some data on the inquiries it receives from the public via its call center, the Office of Policy does not analyze these data to help guide its development of interpretive guidance. According to WHD officials, the call center frequently refers callers with technical questions to a WHD district office, but WHD does not compile data on FLSA-related questions received by its district offices. In addition, WHD does not use advisory panels to gather input about areas of confusion that might be addressed with the help of additional or clarified interpretive guidance on the FLSA. WHD officials cited the administrative burdens associated with the Federal Advisory Committee Act as a deterrent to using such panels to inform its guidance.

At the same time, despite the issuance of several FLSA-related fact sheets, WHD's publication of FLSA-related interpretive guidance has declined in recent years.[46] From 2001 to 2009, WHD published on its website, on average, about 37 FLSA interpretive guidance documents annually. However, in the last 3 years (2010 to 2012), WHD published seven FLSA interpretive guidance documents.[47] WHD officials cited various reasons for this decline, including the resource-intensive nature of developing the guidance; WHD's finite resources; and other priorities,

[46] Our review of trends in the quantity of interpretive guidance on the FLSA published by WHD included administrator interpretations, opinion letters, non-administrator letters, and field assistance bulletins. Field assistance bulletins, unlike the other forms of interpretive guidance, are addressed to WHD staff; but the field assistance bulletins are published on WHD's public website along with the other forms of guidance. Our review excluded guidance that is not published on WHD's website page for interpretive guidance. For example, our analysis excluded fact sheets, which are general guidance documents published elsewhere on WHD's website, and private correspondence to an individual employer or worker.

[47] Our analysis included published guidance that WHD subsequently withdrew: 1 opinion letter published in 2002, 1 opinion letter published in 2006, 1 opinion letter published in 2007, 18 opinion letters published in 2009, 2 non-administrator letters published in 2009, and 1 field assistance bulletin published in 2010. The withdrawal of the opinion letter published in 2006 was invalidated by the Court of Appeals for the D.C. Circuit, which held that DOL must use the rulemaking process—which requires DOL to provide public notice and an opportunity to comment on a proposed rule before it is finalized—to change an authoritative interpretation of DOL's regulations under the FLSA. See *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013).

such as promoting compliance with the Family and Medical Leave Act of 1993. In addition, WHD cited its issuance of several FLSA-related fact sheets, which WHD posts separately from interpretive guidance on its website. For example, in September 2013, WHD published several fact sheets about domestic service employment under the FLSA, and, in July 2013, it revised a fact sheet about ownership of tips under the FLSA. According to WHD officials, there is no backlog of requests for FLSA interpretive guidance; however, WHD does not maintain a system for tracking requests for such guidance.

Because WHD does not have a systematic approach for identifying areas of confusion about the FLSA or assessing the guidance it has published, WHD may not be providing the guidance that employers and workers need. Of the nine wage and hour attorneys we interviewed, seven indicated that more interpretive guidance on the FLSA would be helpful to them.[48] The attorneys cited determining whether workers qualify for exemptions and calculating workers' regular rate of pay for purposes of overtime compensation as examples of FLSA topics on which more guidance would be useful.

## Conclusions

Some policymakers have raised questions about the effect that an increasing number of FLSA lawsuits might have on employers' finances and their ability to hire workers or offer flexible work schedules and other benefits, but it is difficult to isolate the effect of these lawsuits from the effects of other influences such as changes in the economy. On the other hand, the ability of workers to bring such suits is an integral part of FLSA enforcement because WHD does not have the capacity to ensure that all employers are in compliance with the FLSA. While there has been a significant increase in FLSA lawsuits over the last decade, the reason for this increase is difficult to determine: 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.

Improved guidance from WHD might not affect the number of FLSA lawsuits filed, but it could increase the efficiency and effectiveness of WHD's efforts to help employers voluntarily comply with the law. Without

[48] These attorneys were a mix of those who tend to represent workers and those who tend to represent employers. For more information on how we identified them, see appendix I.

a precise understanding of the areas of the law and related regulations that are not clear to employers and workers, WHD may not be able to improve the guidance and outreach it provides in the most appropriate or efficient manner. 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. Moreover, using data about the needs of employers and workers in understanding the requirements of the FLSA would provide WHD greater confidence that the guidance and outreach it provides to employers and workers are having the maximum possible effect. Such data could, for example, serve as a benchmark WHD could use to assess the impact of its efforts.

## Recommendation for Executive Action

To help inform its compliance assistance efforts, the Secretary of Labor should direct the WHD Administrator to 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.

## Agency Comments

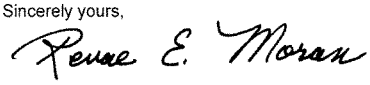
We provided a draft of this report to DOL for review and comment. DOL's WHD provided written comments, which are reproduced in appendix II. WHD agreed with our recommendation that the agency develop a systematic approach for identifying and considering areas of confusion that contribute to possible FLSA 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. WHD also emphasized that it is difficult to determine with sufficient certainty that any particular action contributed to the described increase in FLSA lawsuits. In addition, WHD provided technical comments, which we incorporated as appropriate.

We also provided a draft of this report to the Administrative Office of the United States Courts and the Federal Judicial Center. These agencies had no comments—technical or otherwise—on the report.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the Secretary of Labor, the Director of the Administrative Office of the United States Courts, and the Director of the Federal Judicial Center. In addition, the report is available at no charge on the GAO website at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-7215 or moranr@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix III.

Sincerely yours,



Revae E. Moran
Director, Education, Workforce, and Income Security Issues

# Appendix I: Scope and Methodology

## Analysis of the Number and Characteristics of FLSA Lawsuits

To describe what is known about trends in the number of lawsuits filed under the Fair Labor Standards Act of 1938, as amended (FLSA), we analyzed federal district court data provided by the Federal Judicial Center.[1] The data included case-specific information for all FLSA lawsuits filed in federal district court during fiscal years 1991 through 2012.[2] We analyzed these data by year, circuit, state, and district.[3] The Federal Judicial Center also provided data on the number of civil lawsuits filed during this time period, which we used to analyze the percentage of civil cases that were FLSA cases. We did not review FLSA lawsuits filed in state courts because data on these cases were not available in a consistent way. To provide context about identified trends such as the increase in FLSA lawsuits, we interviewed a range of FLSA stakeholders, including Department of Labor (DOL) officials, attorneys who specialize in wage and hour cases, federal district court and magistrate judges, officials from organizations representing workers and employers, and academics. To ensure balance, we interviewed both attorneys who represent plaintiffs and those who represent defendants. We identified some of these attorneys through organizations that represent workers, such as labor unions and advocacy organizations such as the National Employment Law Project, and industry organizations such as the National Small Business Association. In selecting judges to interview, we chose from districts with a significant increase in FLSA litigation in recent years as well as districts that had not seen such increases to ensure a variety of perspectives.

To provide information on selected characteristics of FLSA lawsuits filed, we reviewed a nationally representative random sample of complaints

[1] The Federal Judicial Center is the research and education agency of the federal judicial system. Among other things, it compiles data from the federal courts via the Administrative Office of the U.S. Courts for research purposes.

[2] Data on FLSA lawsuits in federal courts of appeals were not captured. FLSA lawsuits were identified as those with a "nature of suit" code of 710 (Fair Labor Standards Act). The nature of suit codes are a tool for categorizing the types of cases filed in the federal courts. The appropriate code is recorded by the attorney filing the lawsuit and filed with the court. Data are not readily available on the number of FLSA lawsuits that were collective actions or the number of plaintiffs contained in collective actions. Therefore, we were unable to determine the number of plaintiffs involved in these lawsuits.

[3] We included data on the number of FLSA lawsuits and total civil lawsuits filed in federal district courts in Puerto Rico, Guam, the U.S. Virgin Islands, the Northern Mariana Islands, and the District of Columbia. However, we excluded these areas when we conducted trend analyses that tallied states.

from FLSA lawsuits filed in federal district court during fiscal year 2012. The sample of 97 complaints from FLSA lawsuits was drawn from the case-specific FLSA lawsuit data provided by the Federal Judicial Center.[4] The filing date was determined by the "filing date" field, which records the date a case was docketed in federal court. Cases that were initially filed in federal court, cases removed from state court to federal court, cases transferred from another federal court, and cases for which a new federal docket was otherwise created during fiscal year 2012 (e.g., an individual docket created in fiscal year 2012 after a previously filed collective action was decertified) could be in our sample. We did not review cases from the federal courts of appeals because data linking appeals to their corresponding cases filed in district court were not readily available. All estimates from our sample have a 95 percent confidence interval of within plus or minus 10 percentage points. Because we followed a probability procedure based on random selections, our sample is only one of a large number of samples that we might have drawn. Since each sample could have provided different estimates, we express our confidence in the precision of our particular sample's results as a 95 percent confidence interval (e.g., plus or minus 10 percentage points). This is the interval that would contain the actual population value for 95 percent of the samples we could have drawn.

After the sample was drawn, we used the docket number associated with each lawsuit in the sample to retrieve the complaint from the Public Access to Court Electronic Records (PACER) database and review and record information about the lawsuit.[5] In cases where multiple complaints were associated with a docket, such as amended complaints, we used information from the first available complaint in the docket.[6] We selected

[4] After drawing the sample, we identified four cases that were given the code 710, indicating that they were FLSA-related cases, but they were actually petitions to compel arbitration of an FLSA claim under the Federal Arbitration Act. Because these were not cases filed under the FLSA, we excluded and replaced those cases in the sample.

[5] PACER is an electronic public access service that allows users to obtain case and docket information from federal appellate, district, and bankruptcy courts via the Internet. PACER is administered by the Administrative Office of the U.S. Courts.

[6] In some cases, this approach meant we reviewed a complaint that had been initially filed prior to fiscal year 2012. For example, when individual actions were initiated in fiscal year 2012 as a result of the decertification of an earlier collective action, the first available complaint in each individual docket was the original collective action complaint (which had been filed prior to fiscal year 2012). Thus, we recorded identical information for individual actions that originated from the same collective action.

this approach to ensure that we recorded information for each individual case at approximately the same stage of litigation. We relied solely on information that could be ascertained from the complaint; we did not do additional research to confirm the accuracy of the information.[7] With respect to our analysis of the specific types of violations alleged in our sample of complaints, our estimates include only those cases in which an allegation was explicitly made in the complaint. It is possible that a larger percent of FSLA litigation involved specific issues that were not alleged explicitly in the complaint and instead were described more generically as overtime or minimum wage violations.[8] In addition, we did not review subsequent documents filed in the case beyond the initial complaint. Therefore, our review does not provide any information about how these lawsuits were ultimately resolved. Information on the number of plaintiffs taking part in a collective action was neither consistently available in the complaints nor was it precise when it was available.

Our analysis with regard to the industries in which FLSA lawsuits are filed is based on the number of FLSA lawsuits filed, not the number of plaintiffs included in those lawsuits. A single collective action represents multiple plaintiffs. Therefore, the number of FLSA lawsuits filed against employers in a specific industry may not accurately reflect the number of workers or relative frequency of workers claiming FLSA violations by industry.

The complaint from each lawsuit was reviewed by a GAO analyst and a GAO attorney to identify the FLSA violation(s) it alleged and other information, such as whether the lawsuit was a collective action, whether there were associated allegations of state wage and hour law violations,

[7] For example, we did not research a specific defendant's company name in order to determine the industry of the worker or workers who filed the complaint, if the actual complaint did not provide enough information to make this determination.

[8] As a hypothetical example, an alleged overtime violation may have resulted from workers being required to work "off-the-clock," but the complaint may simply have described the issue as an overtime violation.

and the industry of the worker or workers who filed the lawsuit.[9] In cases in which the two reviewers recorded information about the lawsuit differently, a discussion between them was held to resolve the difference.

We assessed the reliability of the data received from the Federal Judicial Center by interviewing officials at the Administrative Office of the U.S. Courts and the Federal Judicial Center and by reviewing documentation related to the collection and processing of the data. In addition, we conducted electronic testing to identify any missing data, outliers, and obvious errors. We determined that certain data fields were not sufficiently reliable, and therefore did not use them. For example, we could not analyze data about judgments such as the amount of monetary awards in FLSA lawsuits because, for a large percentage of the cases, the information on the judgment was missing. We determined that the data included in our report were sufficiently reliable for our purposes.

## Analysis of WHD's Planning Efforts

To describe how DOL's Wage and Hour Division (WHD) plans its FLSA enforcement and compliance assistance efforts, we reviewed the agency's planning and performance documents, as well as its published guidance on the FLSA. In addition, we interviewed DOL officials in WHD's Office for Planning, Performance, Evaluation, and Communications; Office of Policy; two regional WHD offices; and DOL's Office of the Solicitor about the agency's enforcement and compliance assistance activities. In addition, we asked the other stakeholders we interviewed about their views of WHD's enforcement and compliance assistance efforts. To provide context throughout the report, we also reviewed relevant federal laws and regulations. Finally, we compared WHD's planning process to internal control standards (see GAO, *Standards for Internal Control in The Federal Government*, GAO/AIMD-00-21.3, Washington, D.C.: November 1999) and best practices that we have previously identified (see GAO, *Managing for Results: Enhancing Agency*

[9] We used the North American Industry Classification System (NAICS) as a reference when determining the industries in which the workers who filed the lawsuits worked. The NAICS is the standard used by federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. In some cases we were unable to determine the industry of the worker or workers who filed the lawsuit from the information contained in the complaint. The NAICS codes for the industries that appeared most frequently in our sample—accommodations and food services; manufacturing; construction; and other services (excluding public administration)—were 72, 31-33, 23, and 81, respectively.

*Use of Performance Information for Management Decision Making*, GAO-05-927, Washington, D.C.: Sept. 9, 2005; and *Managing for Results: Strengthening Regulatory Agencies' Performance Management Practices*, GAO/GGD-00-10, Washington, D.C.: Oct. 28, 1999). We did not assess WHD's implementation of its enforcement and compliance assistance plans.

We conducted this performance audit from November 2012 to December 2013 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 that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

# Appendix II: Comments from the Department of Labor

**U.S. Department of Labor**

Wage and Hour Division
Washington, DC 20210

November 27, 2013

Barbara D. Bovbjerg
Managing Director
Education, Workforce, and
Income Security Issues
U.S. Government Accountability Office
Washington, D.C. 20548

Dear Ms. Bovbjerg:

The Department of Labor's Wage and Hour Division (WHD) appreciates the opportunity to submit a statement in response to the recommendation in the Government Accountability Office (GAO) Draft Report (Report) entitled *"Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Improving Its Guidance"* (GAO-14-69).

GAO's original objectives in conducting this study, as outlined in its letter to then-Secretary of Labor Hilda L. Solis on December 6, 2012, were to examine: (1) the types of Fair Labor Standards Act (FLSA) lawsuits that have been filed in recent years and what is known about their impact on employers and employees, and (2) the extent to which any Department of Labor (DOL or Department) policy or operations changes have affected the number and types of FLSA lawsuits filed. It is the Department's understanding, based on conversations with GAO staff, that GAO concluded it cannot attribute the increase in FLSA lawsuits, which accelerated more than a decade ago, to changes in DOL policies or operations. Accordingly, GAO modified its original objectives to examine the two questions that are addressed in the Report: (1) what is known about the number of FLSA lawsuits filed, and (2) how does WHD plan its FLSA enforcement and compliance assistance efforts. As the Report states, GAO ultimately concluded that "many factors have likely contributed to the overall increase in FLSA lawsuits" (pg. 11); the Report discusses a number of possible factors dating as far back as 1989 (pgs. 11-14). The Report further notes that, "[w]hile there has been a significant increase in FLSA lawsuits over the last decade, the reason for this increase is difficult to determine: 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" (pg. 24). We agree that the reasons for the increase in FLSA litigation are varied, complex, and subject to speculation and that it is difficult to show with sufficient certainty that a particular action resulted in, or contributed to, the increase. We also agree with the Report's conclusion that the ability of workers to bring private lawsuits is an integral part of FLSA enforcement because WHD does not have the capacity to ensure that all employers are in compliance with the FLSA.

The GAO Report does contain one recommendation for the Department, based on its observation that "[b]ecause WHD does not have a systematic approach for identifying areas of confusion about the FLSA or assessing the guidance it has published, WHD may not be providing the guidance that employers and workers need" (pg. 23). Our current and planned actions are described below.

*Recommendation:*

> *That 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 Response:**

WHD agrees that it can institute additional processes for identifying and considering areas of the FLSA that could benefit from development of guidance or revisions to existing guidance. WHD's Office of Policy is in the process of developing systems to further analyze trends in correspondence and communications received from stakeholders, including workers and employers. The agency will include findings from this analysis of correspondence and communications as part of the process for developing new or revised guidance. WHD will continue to include in its process for developing guidance the various other considerations that it has already identified to GAO, such as observations from its own enforcement efforts and information from regular communications with its regional officials. The overarching purpose of WHD's guidance efforts is to increase compliance with the FLSA, so its process for developing new or revised guidance must include consideration of all factors that suggest a particular guidance document will lead to an increase in compliance.

Again, thank you for the opportunity to comment on the Report. If you have any questions, please do not hesitate to contact us.

Sincerely,

Laura A. Fortman
Principal Deputy Administrator

2

# Appendix III: GAO Contact and Staff Acknowledgments

## GAO Contact

Revae Moran, (202) 512-7215 or moranr@gao.gov

## Staff Acknowledgments

In addition to the contact named above, Betty Ward-Zukerman (Assistant Director), David Barish, James Bennett, Ed Bodine, David Chrisinger, Sarah Cornetto, Justin Fisher, Joel Green, Ying Long, and Walter Vance made significant contributions to this report. Also contributing to the report were Jessica Botsford, Susanna Clark, Melinda Cordero, Ashley McCall, Sheila McCoy, Drew Nelson, Catherine Roark, Sabrina Streagle, Anjali Tekchandani, and Kimberly Walton.

| | |
|---|---|
| GAO's Mission | The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability. |
| Obtaining Copies of GAO Reports and Testimony | The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's website (http://www.gao.gov). Each weekday afternoon, GAO posts on its website newly released reports, testimony, and correspondence. To have GAO e-mail you a list of newly posted products, go to http://www.gao.gov and select "E-mail Updates." |
| Order by Phone | The price of each GAO publication reflects GAO's actual cost of production and distribution and depends on the number of pages in the publication and whether the publication is printed in color or black and white. Pricing and ordering information is posted on GAO's website, http://www.gao.gov/ordering.htm.<br><br>Place orders by calling (202) 512-6000, toll free (866) 801-7077, or TDD (202) 512-2537.<br><br>Orders may be paid for using American Express, Discover Card, MasterCard, Visa, check, or money order. Call for additional information. |
| Connect with GAO | Connect with GAO on Facebook, Flickr, Twitter, and YouTube. Subscribe to our RSS Feeds or E-mail Updates. Listen to our Podcasts. Visit GAO on the web at www.gao.gov. |
| To Report Fraud, Waste, and Abuse in Federal Programs | Contact:<br><br>Website: http://www.gao.gov/fraudnet/fraudnet.htm<br>E-mail: fraudnet@gao.gov<br>Automated answering system: (800) 424-5454 or (202) 512-7470 |
| Congressional Relations | Katherine Siggerud, Managing Director, siggerudk@gao.gov, (202) 512-4400, U.S. Government Accountability Office, 441 G Street NW, Room 7125, Washington, DC 20548 |
| Public Affairs | Chuck Young, Managing Director, youngc1@gao.gov, (202) 512-4800 U.S. Government Accountability Office, 441 G Street NW, Room 7149 Washington, DC 20548 |

Please Print on Recycled Paper.

[Additional submission by Ms. Wilson follows:]

June 9, 2015

**Re: Working Families Flexibility Act**

Dear Member of Congress,

As an organization dedicated to promoting fairness in the workplace and economic security for all workers, we write to express our opposition to the Working Families Flexibility Act of 2015, H.R. 465/ S. 233, introduced by Representative Martha Roby in the House and Senators Mitch McConnell and Mike Lee in the Senate. Too many people today are struggling to meet the demands of work and family, as well as to make ends meet. America needs legislation that supports working families, but this legislation does not achieve that goal. Although the bill's proponents assert it would provide workers with much needed flexibility, in reality it would offer a pay cut for workers without any guaranteed flexibility or time off to care for their families or themselves. We oppose this legislation out of concern for its impact on all workers, and in particular, its impact on women workers, who still shoulder the majority of caregiving responsibilities and make up a disproportionate share of workers in low-wage jobs. We urge Congress to instead pass legislation that provides real workplace protections, including ensuring that workers have a say in their schedules.

**The Working Families Flexibility Act makes false promises.** The bill permits workers to choose paid time off, rather than time-and-a-half wages, as compensation for working more than 40 hours in one week ("comp time"). Although the bills' supporters claim this choice would give hourly workers more flexibility, the legislation does not actually guarantee that workers will be able to take the accrued time off when they actually need it. In reality, this legislation would result in cash-strapped and time-strapped workers forfeiting the overtime pay that is crucial to the economic security of working families in order to earn comp time, and then in many instances being denied the choice of *when* to take that paid time off.

**The Working Families Flexibility Act does not give workers a meaningful say in their work schedules.** Like the public sector comp time law, which permits state and local government employers to provide comp time in lieu of overtime pay, the proposal gives the employer, not the employee, the "flexibility" to decide if and when accrued comp time can be used. An employer may deny the request entirely if that employer deems it would "unduly disrupt" operations. The bill only requires the employer to permit the use of comp time within a "reasonable period" after receiving the request. When an employee needs a day off, it is usually for a specific purpose such as going to a doctor's appointment, caring for a sick child or relative, or attending a parent-teacher conference. The loose requirements that the legislation would place on employers, together with lower-court precedent on comp time in the public sector that gives employers significant leeway to refuse requests for particular days off, leaves little hope that employees will be able to rely on comp time when they need time off on a particular date.

**Workplace realities mean that many workers won't feel that comp time is a choice.** Despite the bill's provision that employers can only provide comp time in lieu of overtime pay when employees voluntarily agree, many workers—particularly workers in low-wage jobs—are likely to view comp time as a non-negotiable term of employment. Private sector unionization hovers around 6.6 percent, meaning that most low-wage workers will not have the benefits of union representation when it comes time to negotiate a comp

time agreement with their employers. Low-wage workers with little bargaining power are unlikely to feel empowered to say no to their employers requests that they accept comp time in lieu of overtime pay. Because it is cheaper to provide comp time than to pay overtime wages, employers would be incentivized to hire fewer people and rely on overtime hours—paid for in future comp time. Employees who do not accept comp time could be penalized with reductions in hours or bad shifts.

**Employees already have too few tools to fight back against rampant wage and hour violations in the private sector.** Violations of existing wage and hour laws are already rampant in the private sector, and these violations routinely go unchecked. In one study of workers in low-wage jobs in Chicago, Los Angeles, and New York City, researchers found that 76 percent of workers who worked more than 40 hours in a week were not paid the legally required overtime rate. The bill would amount to weakening existing overtime protections and does not provide for additional funds for the education and enforcement efforts the new provisions would require. It also leaves workers with few remedies in cases of employer misconduct or bankruptcy. The Department of Labor simply does not have the resources to prosecute all of these violations, and low-wage workers often cannot afford to retain counsel. This bill would likely give rise to yet another form of wage theft that would go unchecked.

**Congress should instead focus on workplace legislation that truly gives workers the flexibility they need.** Workers should not be forced to choose between earning enough to provide for their families and receiving time off to care for them. To address the needs of workers and their families, Congress should instead pass:

- The Schedules That Work Act, which gives workers a say in their work schedules and begins to curb the most abusive unpredictable and unstable scheduling practices that threaten working families' financial security;
- The Healthy Families Act, which makes earned paid sick days available to millions of workers;
- The FAMILY Act, which provides paid family and medical leave, modeled on successful state programs;
- The Raise the Wage Act, which brings the minimum wage back to a reasonable level, and, in so doing, provides business with customers, improves our economy, and helps communities thrive;
- The Paycheck Fairness Act, which helps close the gender-based wage gap.

**Workers should not have to work extra time and forgo pay in order to manage their responsibilities at home and at work.** If Congress wants to act to support working families, there is a clear policy agenda to follow. Comp time in lieu of overtime pay is not part of the solution.

Sincerely,

Emily Martin
Vice President & General Council
National Women's Law Center

Liz Watson
Senior Counsel & Director of Workplace Justice for Women
National Women's Law Center

[Whereupon, at 12:13 p.m., the subcommittee was adjourned.]

○