United States General Accounting Office

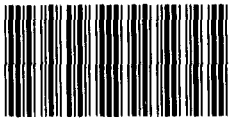
GAO

Report to the Chairman, Employment and Housing Subcommittee, Committee on Government Operations, House of Representatives

September 1992

MINIMUM WAGES & OVERTIME PAY

Change in Statute of Limitations Would Better Protect Employees



GAO/HRD-92-144

GAO

United States
General Accounting Office
Washington, D.C. 20548

Human Resources Division

B-248343

September 22, 1992

The Honorable Tom Lantos
Chairman, Employment and Housing Subcommittee
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

On March 25, 1992, we testified before your Subcommittee on weaknesses in the Fair Labor Standards Act (FLSA) and in the Department of Labor's systems for tracking back wages owed by employers to their employees.[1] Following the testimony, you requested that we provide additional information about the statute of limitations governing the FLSA and the extent to which Labor obtains waivers of this statute in FLSA back wage cases. You also asked that we provide information about Labor's 1986-87 investigation of Food Lion, Inc., in order to illustrate the impact of the statute of limitations on employers' liability for back wages.

To respond to your request, we

- examined the legislative history of the Portal-to-Portal Act,[2] which contains the statute of limitations for the FLSA, to determine why it tolls the statute of limitations[3] when a case is filed in court and compared the statute of limitations in the Portal-to-Portal Act with the statutes of limitations for some labor laws other than the FLSA;
- surveyed all district offices of the Department of Labor's Wage and Hour Division (WHD) to obtain WHD estimates of the extent to which it obtained waivers of the statute of limitations in fiscal year 1991 FLSA back wage cases; and
- completed a case study of Labor's 1986-87 investigation of Food Lion by examining the case files and conducting interviews with Labor and Food Lion officials.

We conducted our review from May to July 1992 in accordance with generally accepted government auditing standards.

[1]Minimum Wages & Overtime Pay: Concerns About Statutory Provisions and Agency Tracking Systems (GAO/T-HRD-92-21, Mar. 25, 1992).

[2]29 U.S.C. 255.

[3]A statute of limitations defines the time period in which an individual can file a claim or the recovery period for which the claim is made. The statute runs until the time period has elapsed or an action is taken which "tolls" the statute (stops it from running), such as filing a suit in court.

Results in Brief

The legislative history of the Portal-to-Portal Act contains no discussion regarding when the statute of limitations for the FLSA should toll. The statute of limitations the Portal-to-Portal Act establishes for the FLSA tolls only when a complaint is filed in court. In contrast, the statutes of limitations for some other labor laws toll when a complaint is filed with the appropriate regulatory agency. (See p. 4.)

According to Labor headquarters officials, employees seldom lose back wages as a result of their claims expiring under the statute of limitations because, when needed, Labor obtains waivers of the statute of limitations from employers. However, because Labor does not collect data on the number of cases in which waivers are needed, we were unable to determine whether it obtains waivers whenever they are needed to protect employees' back wage claims. Estimates we obtained from WHD's district offices indicate that they use waivers infrequently; they estimated that they obtained waivers in less than 10 percent of their fiscal year 1991 FLSA back wage cases, and most of the waivers were for employers who had agreed to pay the back wages but wanted to pay them on an installment basis. Even when WHD obtains a waiver of the statute of limitations, employees' back wages are not completely protected because some of the waivers used by WHD can be revoked by employers with 20 or 30 days' notice and some can expire before employers have paid any or all back wages owed. (See p. 5.)

The 1986-87 Food Lion case illustrates how an employer's liability for back wages can be reduced because of the running of the statute of limitations. In Labor's initial investigation, three former employees lost over $11,800 in back wages because their claims expired under the statute of limitations. (See p. 6.)

Labor officials' assertion that employees seldom lose back wages due to the statute of limitations is based in part on statistics showing high recovery rates for back wage claims. Labor may, however, be overstating the percentage of back wages employers agree to pay. In our Food Lion case study, the amounts entered into WHD's management information system led to a substantial overstatement of the recovery rate for this case. Interviews with WHD officials and Labor's comments on our draft report suggest that such overstatements may have happened in other cases as well. (See p. 7.)

Background

The FLSA is the primary federal law regulating the wages and working conditions of American workers. The law requires that covered employees receive a minimum wage of $4.25 an hour for up to 40 hours a week. For all hours worked over 40 a week, the law also requires an hourly payment equal to 1-1/2 times the employee's regular hourly wage.

WHD, in the Department of Labor's Employment Standards Administration, is responsible for enforcing the FLSA's minimum wage and overtime provisions. WHD has 10 regional offices that oversee the operations of 60 district offices nationwide. It investigates most cases in response to complaints from employees or their representatives. During these investigations, when WHD identifies other employees who are owed back wages, these additional employees are included in the investigations although they did not file complaints with Labor. WHD also conducts "directed" investigations, which are initiated by WHD rather than by complaints from employees, in which employees who are owed back wages may be identified.

In fiscal year 1991, an average of 10 months elapsed from the time an employee filed a complaint with WHD until it completed its investigation and resolved the complaint. This period included the time between the date an employee filed a claim and the date WHD started its investigation, which Labor officials estimated usually took from 4 to 6 months.

The Portal-to-Portal Act contains a statute of limitations for FLSA minimum wage and overtime violations that limits the period of time an employee has in which to file suit in court to 2 years (or 3 years for a willful violation[4]) from the date a violation occurs. The only action that tolls the statute of limitations is filing a suit in court. Labor can file suit in court on behalf of employees, or employees may file suit without first filing a complaint with Labor. Because back wage amounts are generally small, however, there is often little incentive for attorneys to take such cases on the typical contingency fee basis. In addition, establishing that a "pattern and practice" of minimum wage or overtime violations exists in a company, as often required in this type of litigation, may be difficult for individual employees. Labor had no data on the number of individuals who file suits on their own.

Labor officials maintain that employees seldom lose back wages because of the statute of limitations. Although Labor does not track the amount of

[4]To be in "willful" violation of the FLSA, an employer must either know its actions are in violation of the FLSA or be in reckless disregard of the FLSA's requirements.

back wages employees lose, headquarters officials gave two reasons why they believe employees seldom lose back wages because of the statute of limitations:

- Most of the time, employers agree to pay the back wages owed. Labor officials stated that WHD obtained agreements by employers to pay 81 percent of the back wages they owed in fiscal year 1991. Labor bases this "recovery rate"[5] on two data elements in its WHD Management Information System (WHMIS): the amount of back wages WHD determines are owed (the "findings") and the amount of back wages the employer agrees to pay.
- When employers have not yet agreed to pay back wages and employees are in danger of losing back wages because of the statute of limitations,[6] Labor requests that the employers sign waivers of the statute of limitations. However, Labor does not collect data on how often (1) employees are in danger of losing back wages, (2) district offices ask employers to sign waivers, or (3) employers agree to sign waivers when asked to do so.

We recommended to the Congress in 1981 that the statute of limitations for the FLSA be changed to better protect employees' back wage claims.[7] Specifically, we recommended that the Congress amend the Portal-to-Portal Act to change the tolling of the statute of limitations from when a lawsuit is filed against an employer to an earlier point — when Labor assesses violations at the end of its investigation. To date, this recommendation has not been implemented.

Principal Findings

Statutes of Limitations in Some Other Labor Laws Differ From the Statute Applicable to the FLSA

The statute of limitations for the FLSA differs from the statutes of limitations for some other labor laws because different actions toll the statutes of limitations. (See app. I for a comparison of the statute of limitations for the FLSA with statutes of limitations for some other labor laws.) Under the Portal-to-Portal Act, which contains the statute of

[5]Although Labor refers to this calculation as a "recovery rate," it is the percentage of back wages employers agree to pay, not the percentage of back wages paid to employees. Labor does not track whether all back wages are actually paid to employees.

[6]For example, after WHD informs an employer of the results of its investigation, the company may request time to conduct its own investigation, review WHD's findings, or negotiate with WHD before an agreement to pay is reached.

[7]Changes Needed to Deter Violations of Fair Labor Standards Act (GAO/HRD-81-60, May 28, 1981).

limitations for the FLSA,[8] the statute of limitations tolls only when a suit is filed in court; under some other labor laws, the statutes of limitations toll when the employee files a claim with the appropriate regulatory agency.[9] Unless the statute of limitations is tolled, the period of time an employee has decreases until the entire claim expires under the 2-year statute of limitations. Therefore, the amount of back wages employers are required to pay for a violation under the FLSA can decrease while Labor investigates cases and negotiates with employers.[10]

We recommended in 1981 that the statute of limitations for the FLSA be changed so that it tolls when WHD completes its investigations of back wage claims. This would protect employees' back wages from the running of the statute of limitations during the time that Labor negotiates with the employer and, if necessary, prepares the case for litigation. Back wages would not be protected, however, during the time that it takes Labor to start and complete its investigations of back wage claims. Employees who do not file complaints with Labor but are found to be owed back wages during WHD investigations were not addressed in the 1981 recommendation.

WHD District Offices Obtained Waivers Infrequently

Employers agree to waive the statute of limitations for FLSA cases infrequently;[11] most waivers are obtained because employers request to pay back wages on an installment basis. WHD officials estimated that in fiscal year 1991 FLSA back wage cases, district offices obtained waivers from employers in less than 10 percent of the cases (about 2,300 cases). In most cases (about 90 percent of the 2,300 cases), waivers were obtained because employers wanted to pay back wages on an installment basis. (See app. II for the results of the survey of WHD's use of waivers in fiscal year 1991.)

[8]The statute of limitations in the Portal-to-Portal Act also applies to the Walsh-Healey and Davis-Bacon Acts.

[9]Some other labor laws differ from the FLSA in that they require the employee to file claims with a regulatory agency before instituting court action (see app. I). However, few employees exercise their right under the FLSA to file claims directly in court. Instead, they file their complaints with Labor.

[10]For example, employees work for a company from the beginning of January 1990 to the end of December 1991 and are not paid for all of their overtime work. They file a claim with WHD in January 1992 for the back wages owed. If WHD started an investigation in May and completed it in December 1992 but did not obtain a waiver for the period under investigation, the employees could lose 50 percent of their back wages because their claim for the violations in 1990 would have expired under the statute of limitations by the time WHD completed its investigation.

[11]Waivers of the statute of limitations are obtained from employers by WHD's district offices or by Labor's regional solicitor's offices after WHD refers cases to them for possible litigation. Neither WHD nor the solicitor's offices can require employers to sign waivers.

Since Labor does not collect data on the number of cases in which waivers are needed, we were unable to determine whether the number of cases in which WHD obtained waivers was appropriate to the need for such waivers. The district offices estimated that employers agreed to pay some or all of the back wages without a waiver in about 86 percent of the cases. This does not, however, mean that waivers were not needed in all of these agree-to-pay cases. Waivers might still have been needed if, for example, the employer later failed to pay all of the back wages owed.

In addition, obtaining a waiver does not guarantee that employees will be protected from losing back wages as a result of their claims expiring under the statute of limitations. The purpose of obtaining a waiver of the statute of limitations, according to Labor officials, is to guarantee that there is a period of time during which the employer's liability is secured from "eroding" and action can be taken if needed. Some of the waivers used by the district offices we surveyed, however, can be revoked by employers at any time with 20 or 30 days' notice and others can expire before employers have paid any or all of the back wages owed.

Guidance provided by WHD's Field Operations Handbook requires that waivers be requested "in any case in which protection against the operation of the statute of limitations is considered necessary," but it does not specify particular circumstances when waivers should be requested and no standard waiver form is provided. WHD has, however, drafted significantly expanded guidance as part of its revision of one chapter in the Field Operations Handbook. As of September 17, 1992, the draft was being reviewed within the Department of Labor and WHD expected that it would be issued soon.

Waiver Did Not Protect All Back Wages Owed to Food Lion Employees in WHD's 1986-87 Investigation

In WHD's 1986-87 investigation, three Food Lion employees lost back wages because their claims expired under the statute of limitations. WHD began investigating one Food Lion store in early 1986, after receiving complaints in August 1984 from current and former Food Lion employees about unpaid overtime hours they had worked. (See app. III for selected milestones in Labor's 1986-87 investigation of Food Lion.) Because WHD did not start an investigation of these claims until February 1986 and did not obtain a waiver of the statute of limitations for the initial period investigated, three former Food Lion employees lost over $11,800 in back wages.

In March 1986, WHD expanded its investigation to include six additional Food Lion stores. The expanded investigation covered the 2-year period from October 1, 1984, to September 30, 1986. In May 1987, Food Lion agreed to waive the statute of limitations for the entire 2-year period investigated. Since WHD obtained this waiver, none of the employees involved in the expanded investigation lost back wages as a result of their claims expiring under the statute of limitations. If Food Lion had not signed the waiver, however, the company's potential liability for the 2-year period WHD investigated, calculated by WHD to be approximately $1.2 million, could have been reduced under the statute of limitations by 30 percent at the time the waiver was signed.[12]

Food Lion, however, paid less than 25 percent of the $1.2 million in back wages WHD investigators determined were owed. (See app. IV for a description of how WHD computed the back wages owed.) Labor settled the case for $300,000, which was divided among 171 current and former Food Lion employees.

Labor's regional solicitor's office and WHD officials told us they settled the case without filing suit in court. This is because while Labor was investigating the case and negotiating with Food Lion, two similar cases filed by four individual Food Lion employees were decided in the company's favor. In these two cases, the appeals court ruled that the employer had not allowed uncompensated overtime work since the evidence did not establish that (1) the employer had actual knowledge of the work or (2) there was a pattern and practice of employer acquiescence in such work. The court that decided the two cases in favor of Food Lion was the same one that would have heard the appeal, had Labor filed suit. Therefore, Labor decided to settle its case rather than proceed with litigation that would have been time-consuming and costly, with an uncertain outcome.[13]

[12]This assumes an even distribution of the wages over the 2-year period investigated since 7 months of the total 24 months allowed under the statute had expired as of May 1987.

[13]Other complaints have been brought against Food Lion since this settlement. Two employees won a suit against Food Lion on the issue of uncompensated overtime (Tew v. Food Lion). The case was won in district court and upheld upon appeal to the same court that would have decided the case from the 1986-87 investigation. In addition, Labor is currently reviewing complaints from 238 current and former Food Lion employees involving 127 stores.

Labor's Overall Back Wage Recovery Rates May Be Overstated

Labor may be significantly overstating the percentage of back wages employers agree to pay. In our Food Lion case study, the amounts entered into WHD's management information system led to a substantial overstatement of the recovery rate for this case; information obtained from Labor officials indicate that overstatements may have happened in other cases as well.

Labor's statistics in the Food Lion case show a 100 percent recovery rate even though the amount the company agreed to pay was less than 25 percent of WHD's findings. During its 1986-87 investigation, WHD determined that Food Lion owed about $1.2 million in back wages. Although Food Lion claimed that WHD's findings should be reduced, the company did not provide any additional documentation to Labor to support this claim. The company offered to settle the case for $300,000, and WHD accepted the offer based on the recommendation of the regional solicitor's office. WHD entered in WHMIS the $300,000 Food Lion agreed to pay, however, as both the findings and the amount the company agreed to pay.

The amounts employers agreed to pay may have been entered into WHMIS as findings amounts in other cases. Our discussions with WHD officials suggest that this practice may have been widespread. In addition, Labor acknowledged, in its comments on our draft report, that back wage agreed-to-pay amounts may in the past have been recorded as findings, when the total findings on a case exceeded $250,000 (see app. V).

Conclusions

Employees' claims for back wages under the FLSA would be protected more effectively if the statute of limitations tolled at an earlier point. This applies to both employees who file claims for back wages with Labor as well as employees for whom WHD determines back wages are owed during its investigations. Based on the additional analysis done in this study, however, we believe the statute of limitations should toll earlier than at the end of WHD's investigation, which we had previously recommended.

Changing the statute of limitations for the FLSA so that it tolls when an employee files a complaint with Labor would provide the same protection for claimants as in some other labor laws, under which the statutes of limitations toll when an employee contacts the appropriate regulatory agency.[14] The statute of limitations can now continue to run during the

[14]In complaint-initiated FLSA cases, WHD would establish the relevant time period for each employee, based on the date each employee filed a claim with Labor. WHD would no longer use one time period to calculate back wages for all employees in an investigation as it does now.

time it takes Labor to begin an investigation, complete it, negotiate with an employer, and obtain payment —which can take several months. Making this change would protect the back wage claims of employees who file complaints during the time it takes Labor to start and complete its investigations as well as after this time.

To protect employees who Labor determines are owed back wages but have not filed complaints, another time to toll the statute of limitations is needed. We believe it should toll as of the date Labor notifies the employer that it will be starting an investigation.

Labor cites a recovery rate of 81 percent—calculated from its management information system—as one reason to believe that employees seldom lose back wages as a result of the statute of limitations. If, however, that statistic substantially overstates the extent to which employees receive the back wages owed to them, then there is even more reason to consider changing the statute. Because we did not anticipate the kind of error we found in the Food Lion case, assessing the accuracy of information entered into WHMIS in other cases was outside the scope of this study. Determining whether the problem we found is occurring in other cases would require a comparison of case file data with information in WHD's computerized database.

Recommendations to the Congress

We recommend that the Congress amend the Portal-to-Portal Act so that its statute of limitations tolls (1) when a complaint is filed with Labor (for employees who file complaints) or (2) at the date Labor notifies an employer of the start of its investigation (for employees who do not file complaints but are found by Labor to be owed back wages).

Recommendations to the Secretary of Labor

We recommend that the Secretary of Labor (1) assess the extent of inaccuracies in the amounts entered as back wages owed to employees (findings) in WHMIS and (2) take appropriate action to correct problems identified.

Agency Comments

Labor provided comments on a draft of this report (see app. V). We incorporated changes, based on their comments, as appropriate.

As to our recommendation to the Congress on tolling the statute of limitations when a claim is filed with the Department of Labor, Labor agreed that such a change would protect employees' back wage claims during the time it takes Labor to start its investigations, but stated that it would have little impact on the loss of back wages during the time it takes Labor to complete its investigations as well as after this time. Because Labor does not track whether employees lose back wages because of the running of the statute of limitations, including whether employers who agree to pay back wages actually pay all of the back wages owed, we question Labor's assertion. Labor also pointed out that such a change would not protect the many employees found to be owed back wages during its investigations but who did not file complaints. Our recommendation now includes a provision for these employees.

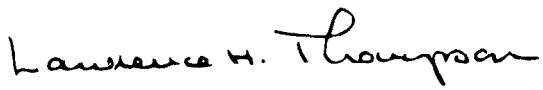
Labor concurred with our recommendation that it assess the extent of inaccuracies in amounts entered as findings in WHMIS and take action to correct problems it identifies. Labor expressed its confidence that any such inaccuracies are uncommon, but also mentioned that agreed-to-pay amounts may have been recorded as findings under its past procedures. Labor further stated that in some circumstances, it would be appropriate to record the agreed-to-pay amount as the findings, even though the employer did not agree to pay all back wages originally computed by WHD. Labor said its procedures should ensure that the amount of back wages owed should not be defined in an "overly technical or legalistic" manner and that potential back wages owed should not be entered as findings when the back wages computed by WHD cannot be supported because of "further evidence presented by the employer or disposition in the litigation process." For example, Labor said the computed back wages owed in the Food Lion case represented a "potential back wage liability," which was not entered as the findings because Labor was uncertain that it could sustain the potential liability as actual back wages owed.

We agree that it is appropriate to change the amount of the findings when employers provide additional information to support changing WHD's initial computations. It would be inappropriate, in our opinion, to change the amount of the findings because of "disposition in the litigation process" that would, as in the Food Lion case, include back wage settlement amounts negotiated with employers.

We provided Food Lion officials with a draft copy of the chronology of events in appendix III and invited them to comment. Although they told us they had a number of comments, they have not provided them as of this time.

We are sending copies of this report to the Secretary of Labor and other interested parties. This report was prepared by the Director, Education and Employment Issues, who can be reached at (202) 512-7014. Other major contributors are listed in appendix VI.

Sincerely yours,



Lawrence H. Thompson
Assistant Comptroller General

Contents

Abbreviations

FLSA	Fair Labor Standards Act
WHD	Wage and Hour Division
WHMIS	Wage and Hour Division Management Information System

Comparison of Statutes of Limitations Under Selected Labor Laws

				Whistleblower Protection Acts		
	Fair Labor Standards Act[a]	**National Labor Relations Act**	**Title VII of the Civil Rights Act of 1964**	**Whistleblower Protection Act[b]**	**Surface Transportation Assistance Act[c]**	**Occupational Safety and Health Act[d]**
Primary activity covered	Claims for minimum wages and overtime	Actions involving labor-management relations, especially labor unions	Claims of discrimination	Reprisals for whistleblower activities by federal employees	Reprisals for employee actions related to safety/health hazards	Reprisals for employee actions related to safety/health hazards
Who handles employees' complaints	Department of Labor	National Labor Relations Board (NLRB)	Equal Employment Opportunity Commission (EEOC)	Office of Special Counsel (OSC) and MSPB[e]	Department of Labor	Department of Labor
Action that tolls[f] the statute of limitations	Filing a lawsuit in court	Filing a claim with NLRB	Filing a claim with EEOC	Filing a claim with OSC or MSPB	Filing a claim with Department of Labor	Filing a claim with Department of Labor
Deadline for filing complaint with agency	None, but suit must be filed within 2 years of cause of action	6 months from the date of the alleged unfair labor practice	180 days from the date of the discriminatory practice	None to file with OSC; 60 days to file with MSPB	180 days from the date of the reprisal action	30 days from the date of the reprisal action
Is employee allowed to file suit directly in federal court?	Yes, until Labor files suit on behalf of employee(s)	No	No	No	No	No

[a]The statute of limitations that governs wage provisions of the Fair Labor Standards Act of 1938, as amended, is contained in the Portal-to-Portal Act of 1947. It also applies to the wage provisions of the Walsh-Healey and Davis-Bacon Acts.

[b]5 U.S.C 1213-1221.

[c]49 U.S.C. 2305.

[d]29 U.S.C. 660(c).

[e]Merit System Protection Board (MSPB).

[f]"Tolling" refers to an action that stops the statue of limitations from running.

Telephone Survey of WHD District Offices Concerning Their Use of Waivers for FLSA Back Wage Cases (Fiscal Year 1991)

TELEPHONE SURVEY OF
WHD DISTRICT OFFICES' CONCERNING THEIR USE OF WAIVERS
FOR FLSA BACK WAGE CASES (FISCAL YEAR 1991)

In June 1992, we conducted a telephone survey of all 60 WHD district offices to determine the extent to which they used waivers in fiscal year 1991 FLSA back wage cases. Because WHD officials do not track the information we requested, such as the number of cases in which they obtain waivers or the reasons employers signed waivers, they could only give estimates in response to our questions. We asked the following survey questions, and WHD officials responded (presented in the aggregate for all 60 district offices) as follows:

1. During fiscal year 1991, in about how many FLSA employer compliance cases did your office determine that an employer owed back wages?

   Response: 38,460 total cases estimated

2. During fiscal year 1991, in about how many of the FLSA employer compliance cases did the employer agree to pay some or all of the back wages owed without signing any document to waive the statute of limitations?

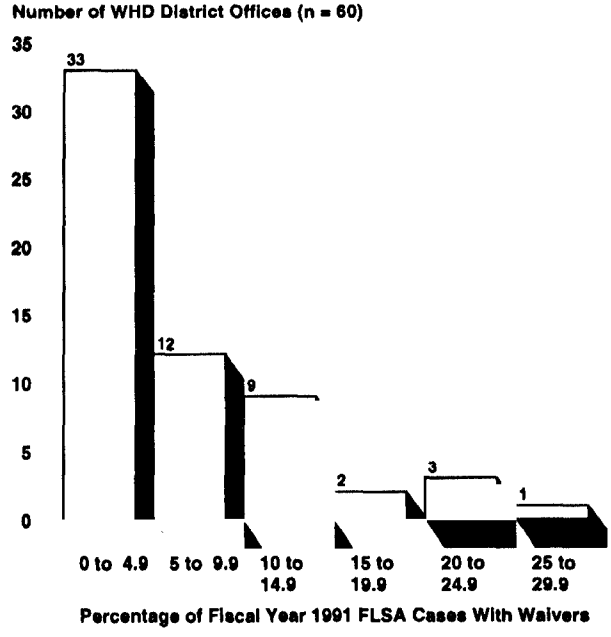
   Response: 32,989 total cases estimated

3. During fiscal year 1991, in about how many cases in which you determined back wages were owed, did the employer waive the statute of limitations?

   Response: 2,322[1] total cases estimated

[1]Over half of the district offices estimated that they used waivers in less than 5 percent of their fiscal year 1991 FLSA back wage cases (see figure II.1).

Figure II.1: Estimated Percentage of WHD District Office FLSA Back Wage Cases in Which Employers Signed Waivers (Fiscal Year 1991)



4. Of those employers who waived the statute of limitations during fiscal year 1991, about what proportion waived the statute primarily so that they could:

a. pay the agreed upon amount of back wages in more than one installment? 2,110 cases[2]

b. pay the agreed upon amount in a single payment at a later date? 13 cases

c. take time to compute the back wages owed? 56 cases

d. decide whether they will pay back wages? 72 cases

e. Any other reason(s)?

Employer wanted time to negotiate the amount of back wages owed	28 cases
Case sent to solicitor's office	3 cases
Employer wanted time to review WHD's findings	3 cases
Employer dependent on someone else, such as town council, for authority to make the payment of back wages	2 cases
WHD had employer sign a stipulation agreement, which included a waiver, to assure wages would go to the U.S. Treasury if the employees could not be located	35 cases
Total "other reasons"	71 cases

[2]Responses converted from proportions to number of cases.

5. Do you have written procedures, other than the Field Operations Handbook, for your investigators that specify when they should ask an employer to sign a waiver of the statute of limitations?

Response: 48 no[3]

12 yes

For the 12 district offices with procedures other than those issued by the national office in the Field Operations Handbook

10 had procedures from their regional offices

2 had procedures written by their own offices

[3]Includes 13 district offices in three regions; 10 other district offices in the same regions had procedures written by the regional offices and gave us copies of the procedures. A fourth regional office had provided information to all district offices in its region specifying instances when waivers should be obtained. None of the district offices in that region, however, responded to GAO's survey by saying they had received written guidance from their regional office about when to use waivers.

Selected Milestones in Labor's 1986/87 Investigation of Food Lion, Inc.

Food Lion, Inc. is a chain of retail supermarkets in the southeastern United States. As of January 1987, it had 388 stores located in Georgia, Maryland, North Carolina, South Carolina, Tennessee, and Virginia.

8/84	Complaint of "off-the-clock" work (uncompensated overtime) received by the Raleigh, N.C., Department of Labor district office from a former employee of the Food Lion store in Goldsboro, N.C. (store #128).
5/85	Complaint of off-the-clock work received by the Raleigh district office from a former Food Lion employee.
2/86	Complaint of widespread off-the-clock work by meat and produce department employees of Food Lion received by the Raleigh district office.
2/86	Investigator in the Raleigh district office followed up on complaints.
3/86	Labor notified Food Lion that $13,406 in back wages was owed to 16 current and former employees.
5/86	Complaints of off-the-clock work received by the Raleigh, N.C., Department of Labor district office from employees of Food Lion stores in the Wilmington, N.C. area.
6/86	Food Lion notified Labor that it did not agree with most of the findings on its investigation of store #128. The investigator recommended that the file be forwarded for legal action and that other Food Lion stores be investigated.
6/86	Davis v. Food Lion, a case involving similar complaints from employees that they were owed back wages for time worked off-the-clock, upheld in favor of Food Lion by the Fourth Circuit Court of Appeals. The issue was that the employees failed to prove that Food Lion management knew about the overtime work. The court held that the burden of proof was on the employees to prove Food Lion management knew about the work, not on the company to prove it did not.
8/86	Complaints of off-the-clock work received by the Raleigh, N.C., Department of Labor district office from employees of other Food Lion stores.

(continued)

9/86	Raleigh office opened investigations of six Food Lion stores for the 2- year period from October 1, 1984, to September 30, 1986, and had the investigator involved in the earlier investigation of store #128 update his computations of back wages using the same time period. Three former employees of store #128 who were owed $11,889 in back wages, according to Labor's earlier investigation, were not included in this investigation because their claims expired under the statute of limitations for the FLSA.
1/87	Labor investigators received complaints from 56 employees of other Food Lion stores, but decided not to open investigations of additional stores. Instead, the investigators decided to include computations for back wages owed to these employees with the back wage computations for employees of store #128 and the other six stores investigated.
2/87	Pforr et al. v. Food Lion, a case involving similar complaints from employees that they were owed back wages for time worked off-the-clock, decided in employees' favor in Virginia District Court.
3/87	The four district office investigators who worked on the case met with Food Lion officials to discuss the preliminary results of their investigation and obtain additional information (such as the dates of employment and pay rates for all employees included in the investigation).
4/87	Follow-up meeting held with Food Lion officials. The company agreed to sign a waiver of the statute of limitations for all current and former employees included in the case for the 2-year period investigated.
9/87	Conference held with Department of Labor officials and Food Lion's attorney to discuss possible settlement. Company offered to pay $300,000 with conditions.[a] Labor declined the offer.
10/87	Computations by Labor investigators completed showing that back wages of $1.2 million was owed by Food Lion to 192 employees.
11/87	File forwarded to the Atlanta regional solicitor's office with a recommendation that a suit be filed in federal court.
4/88	Initial legal analysis completed by the regional solicitor's office recommended that case be litigated, but suggested discussing the case first with Food Lion's attorney.
6/88	Pforr et al v. Food Lion reversed on appeal to the Fourth Circuit Court of Appeals (see 2/87 above). Appeals court held that the plaintiff did not show—by actual knowledge or by a pattern and practice—that the employer allowed the off-the-clock work claimed.

(continued)

12/88	Second legal analysis prepared by the regional solicitor's office recommending that the case be forwarded to the national solicitor's office for review and casting doubt on the suitability of the case for litigation.
3/89	Case returned from the regional solicitor's office to the Raleigh, N.C., district office for settlement conference, as requested by the district official in charge of the investigation.
4/89	Settlement conference held in the Raleigh district office. Food Lion agreed to pay $300,000 and sign a compliance agreement. Labor allocated the $300,000 in total back wages to current and former Food Lion employees.[b]

[a]Food Lion suggested that Labor send employees a confidential letter asking them if they had ever worked off-the-clock. If they answered yes, they would be paid back wages; if not, the amount would be deducted from the $300,000.

[b]As of 6/92, Labor had paid 94 percent of the $300,000 to the current and former employees. Labor had not yet located the other employees.

WHD Calculation of Back Wages in the 1986-87 Food Lion, Inc., Investigation

The calculation of $1.2 million in back wages for the 1986-87 Food Lion case was based on extensive investigative efforts as well as analysis of the data investigators obtained. The four WHD investigators recorded a total of 830 hours to complete their investigations of the seven Food Lion stores. Their work included examination of documents, such as payroll records and time cards, interviews with 145 current and former employees, reconstruction of the amount of overtime hours worked without compensation, and calculation of the wages owed each employee.

Information obtained through documents and interviews covered not only the number of unpaid overtime hours employees claimed they had worked, but also information about the company's operations, such as the management structure, sales volume of each store, and the dates inventories were taken. Information about these dates was particularly relevant to the investigation. For example, the investigators found instances in which the department managers' time cards did not show that the managers were working during the stores' monthly inventories, which were always done after 6:00 p.m. on the fourth Saturday of the month. The investigators also noted that on some Saturdays, employees clocked out on their time cards at noon; at one store, according to the information on the time cards, there was no one working at the store after noon.

WHD investigators used the information they obtained to calculate the average unpaid overtime hours for eight job classifications, which covered all employees who worked in the seven stores under investigation. For example, investigators determined that the typical number of hours produce managers worked off the clock was 8 hours per week. The investigators used this average, the "reconstructed overtime hours," in conjunction with pay rate and employment date information supplied by the company, to compute the amount of back wages due each employee for overtime work. In computing the amount of back wages owed, the investigators took into account that employees had time off for things such as illness, caring for sick family members, and vacations.

Comments From the Department of Labor

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington D C 20210

SEP - 4 1992

The Honorable Lawrence H. Thompson
Assistant Controller General
United States General Accounting Office
Human Resources Division
Washington, D.C. 20548

Dear Mr. Thompson:

Thank you for the opportunity to review your staff's draft report entitled, Minimum Wages and Overtime Pay: Change in Statute of Limitations Would Better Protect Employees (GAO/HRD-92-114).

Enclosed please find our response to the draft report, including our response to its recommendations to the Department of Labor as well as our comments on other matters raised in the draft as revised by GAO on September 1, 1992. I hope that you will give this information serious consideration in finalizing the report for Congressman Lantos.

I would like to add that I understand that the GAO staff who were responsible for preparing this report were both highly professional and cooperative with all the agency staff with whom they worked in their data collection and analysis. While we may have different views regarding some of their findings and conclusions, we appreciate their efforts and commend them on the high degree of professionalism that they brought to this assignment.

Please let me know if we can be of any further assistance as you finalize the report.

Sincerely,

CARI M. DOMINGUEZ

Enclosure

Minimum Wages and Overtime Pay:
Change in Statute of Limitations Would
Better Protect Employees
GAO DRAFT Report No. GAO/HRD-92-114

GAO RECOMMENDATION

"We recommend that Labor (1) assess the extent of inaccuracies in the amounts entered as back wages owed to employees ("findings") in WHMIS and (2) take appropriate action to correct problems that it finds."

Response

The Department concurs with this recommendation.

Comment

We agree, of course, that statistical reporting of the amount of back wages found to be owed by employers to their employees and the amount agreed to be paid must be as accurate as possible. We are confident, however, that any such inaccuracies are uncommon.

It is important to note, however, that in the one case cited where this was found by GAO to have occurred, the back wage recovery was negotiated by the Department's Solicitor's Office after referral of the case by Wage and Hour for litigation to achieve compliance and full back wage recovery for the affected employees. The cited back wage "findings" in the referenced case were estimated by the Wage and Hour investigators as the potential back wage liability, and never entered as such in the Wage and Hour Management Information System (WHMIS) because of the uncertainties of being able to sustain these as actual back wages owed.

It is, therefore, important that it be understood that our review pursuant to the GAO recommendation will be focused on assuring that WHMIS entries of "findings" and "agreements to pay" are accurate reflections of actual back wages owed and agreed to be paid in conformance with program procedures regarding the finalization and recording of these amounts. The recording of estimated or potential back wages (not "findings") will, however, continue to be restricted, particularly where the computed back wages cannot be sustained due to further evidence presented by the employer or disposition in the litigation process. We will, as well, review our procedures to assure, to the maximum extent possible, that the entered amounts reflect back wages owed and agreed to be paid from a perspective that is not overly technical or legalistic. This does not mean, however, that there will not be circumstances in which it would be perfectly appropriate and accurate to record the "agreed to pay" amount as the "findings" amount in circumstances other than where all back wages originally computed are agreed to be paid.

Additional Comments

Page 2 The draft report states that, "The legislative history of the Portal-to-Portal Act contains no discussion regarding why the statute of limitations for the FLSA tolls only when a complaint is filed in court."

While this statement is literally true, we believe that the Act itself contains language which is at least instructive in this regard and bears citing. Part I of the 1947 Portal-to-Portal Act, under "Findings and Policy" at Section 1(a) states:

> "The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the result that, if said Act as so interpreted ... were permitted to stand, (1) the payment of liabilities would bring about financial ruin of many employers ....

This section goes on to list ten reasons why Congress enacted the statute of limitations, if not why it was tolled only by the filing of an action in court.

Page 2 The draft report asserts that, "Labor headquarters officials told us they believe that employees seldom lose back wages due to expiration of the statute of limitations because, when needed, Labor's WHD district officials obtain waivers of the statute from employers." The report goes on to suggest, however, that this assertion is not supported because "WHD's district offices indicate that they use waivers infrequently; ... in less than 10 percent of their fiscal year 1991 FLSA back wage cases."

See comments 1 and 2.

We must again note that the frequency with which waivers are sought and obtained in the universe of FLSA back wage cases is not in any way indicative of whether waivers of the statute of limitations are being sought and obtained in those cases "**when needed.**" We do not believe that Wage and Hour headquarters officials stated or implied that waivers were sought or obtained in any certain percentage of FLSA cases, but only as needed given the particular circumstances of the case. In fact, data provided in Appendix II to the draft report seems to bear directly on this issue, though it is not referenced in the text of the draft report. In this regard, Appendix II indicates that Wage and Hour district officials estimated that during FY 1991 employers "agree[d] to pay some or all of the back wages owed without signing any document to waive the statute of limitations" in

32,989 -- or 86 percent -- of 38,460 FLSA violation cases. These data seem to indicate that in these cases it was unlikely that there was any need for a waiver of the statute of limitations.

Thus, it seems to us that the question should be whether the number of cases in which a waiver was sought and obtained -- estimated by agency officials to be more than 2,300 in FY 1991 -- was appropriate to the need for such waiver. One way of viewing this is that an estimated 2,300 waivers were obtained in a universe of only about 5,500 cases (those where back wages were found due but not recovered without the signing of a waiver), rather than a universe of more than 38,000 cases.[1] From this perspective, waivers were obtained in more than 40 percent of these cases. When it is realized that subsets of the 5,500 back wage cases would have been referred for litigation and some not pursued (with affected employees being advised of their private right of action under Section 16(b) of the FLSA), these data would indicate that waivers were sought and obtained in a much higher percentage of those cases where needed than the text of the draft report would lead a casual reader to conclude. Supported by the data contained in the Appendix, we think this would be an erroneous conclusion, and would urge that the text of the draft be revised in light of the data contained in Appendix II.

Nonetheless, as noted below, we are in the process of reviewing the guidance provided and being developed regarding the circumstances in which waivers of the statute of limitations should be sought to assure that efforts are made to obtain such waivers in all cases where needed.

Now on p. 2.

See comment 3.

Pages 2-3 The draft report states that, "In addition, obtaining a waiver does not completely protect employees because (1) some of the waivers used by WHD can be revoked by employers and (2) obtaining a waiver does not guarantee that employers will pay all of the back wages owed."

We believe that in those waivers here cited by GAO two important provisions are not discussed -- they contain a requirement for 30 days advance notice of the employer's intended date of revocation so as to allow time for the Department to take legal action if deemed necessary, and a stipulation that the "Employer agrees

[1] We would note that full fiscal year data recorded in WHMIS, rather than the estimates provided by the district directors through the GAO's survey, reveal that in FY 1991, violations were found in 45,263 FLSA cases and back wages were agreed to be paid in 41,741 of these cases. While we cannot tell from the information contained in WHMIS whether any of these cases had waivers of the statute of limitations effected, the data indicate that the universe of cases where a waiver was in order may have been as small as 3,500.

that a copy of the waiver may be introduced in any such action brought by the Secretary." These provisions afford more employee protection than implied by the text, which we suggest be amended to reflect these facts.

Further, it should be noted that the purpose of obtaining waivers is not to "guarantee that employers will pay all of the back wages owed," but rather to guarantee that there is a period of time which is secured from "eroding" and during which action can be taken if needed. A waiver of the statute of limitations provides for the protection of time, and only indirectly the protection of money owed during the time period. We suggest that part (2) of the above quote be deleted or appropriately modified, and parallel changes made to the paragraph on page 8 of the draft report which expands on this idea.

Now on p. 2.

Page 3 The draft report states that, "The 1986-87 Food Lion, Inc., case illustrates how an employer's liability for back wages can be reduced because of the running of the statute of limitations. ... The case also illustrates that obtaining a waiver does not ensure that employees will receive all back wages owed to them ...."

We think it appropriate and necessary that the draft be revised to clearly indicate that the statute of limitation/waiver issue at the center of the report is, at best, only marginally related to the Food Lion case. As indicated here, and again on page 9, only three Food Lion employees appear to have lost back wages due to the running of the statute of limitations. The substantive issues in this case -- on which a waiver of the statute of limitations was obtained by Wage and Hour -- had nothing to do with the running of the statute, but rather with how it could be most appropriately resolved in light of contemporaneous court decisions on the same issues in the same judicial jurisdiction. The mixing of these issues through the discussion of this case seems to create only a muddle.

We think it also appropriate that the draft report should point out that, under the law, employees have the choice of not waiting for the Department of Labor to file suit to toll the statute because they have a private right of action. Complainants are so advised when Wage and Hour acknowledges receipt of a complaint. This private right of action also allows recovery, in addition to the back wages owed, of an amount equal to the back wages as liquidated damages, plus attorney fees, so as to mitigate against an employee's financial circumstances discouraging the exercise of this right.

Now on p. 2.

Page 3 The draft report states that, "Labor may be significantly overstating the percentage of back wages employers agree to pay, however, by using inappropriate numbers to compute the recovery rates for back wage cases."

Based on the contents of the draft report, we understand that GAO did not find that "inappropriate numbers" were used "to compute the recovery rates for back wage cases," but rather that, in GAO's view, inappropriate numbers were recorded as the back wage "findings" amount. While this has the same potential effect in creating the possibility of "overstating the percentage of back wages employers agree to pay," we suggest that the draft be changed to read, "by using inappropriate numbers to record their back wage "findings."

Now on p. 3.

Page 4 The draft report states that, "On the average, from 10 to 14 months elapses from the time an employee files a complaint with WHD until it completes its investigation and resolves the complaint."

This statement should be corrected to read, "During FY 1991, on the average, 10 months elapsed from the time an employee filed a complaint with WHD until it completed its investigation and resolved the complaint."

Now on p. 3.

Page 4 The draft report states that, "A suit may be filed either by Labor or an employee (or a representative of an employee), but many employees do not have the knowledge or financial resources to pursue claims for back wages on their own in court."

Please see comment above regarding discussion of the private right of action, and the provisions of the FLSA that are intended to keep an employee's financial circumstances from being an impediment to exercise of this right, on page 3. We would note, however, that because back wage amounts are generally relatively small, there is often little incentive for attorneys to take such cases on the typical contingency fee basis, which can serve as an obstacle to the exercise of an employee's private right.

Now on p. 3.

Page 4 Footnote 3 states that, "To be in 'willful' violation of the FLSA, an employer has to have been both unreasonable and reckless in determining its legal obligation under the FLSA."

To commit a "willful" violation, an employer must either know its actions are in violation of the FLSA, or be in reckless disregard of its requirements. We suggest the cited passage be corrected accordingly.

Now on p. 4.

Page 5 The draft report states that, "Most of the time, employers agree to pay the back wages owed. Labor testified, in March 1992, that WHD obtained agreements by employers to pay 83 percent of the back wages they owed in fiscal year 1991."

We would point out that the cited testimony stated the percentage of findings agreed to be paid by employers during FY 1991 under both the FLSA and government contracts enforcement programs during that year. In only the FLSA program, employers agreed to pay 81 percent of back wage findings.

Now on p. 4.

Page 5 The draft report states that, "When employers do not agree to pay back wages and employees are in danger of losing back wages because of the statute of limitations, headquarters officials said they believe that district offices request that the employers sign waivers of the statute of limitations."

There are occasions (see Appendix II) when employers who disagree with our findings seek to negotiate resolution of a case or attempt to get us to change our view of whether violations have occurred may be asked and agree to execute a waiver of the statute of limitations while these issues play out. We believe, however, that there must have been a misunderstanding from this discussion because employers who "do not agree to pay back wages" -- because they contest that there were wage violations at all -- would have little reason to agree to sign a waiver of the statute. We would be pleased to help reconstruct the discussion to clarify this point, but do not believe that the draft report correctly reflects whatever point was being made.

Deleted.

Page 6 The draft report states, "The statute of limitations for the FLSA limits the period of time for which employers are liable for back wages, whereas the statutes of limitations for other labor laws limit the amount of time employees have within which to file a claim."

We would point out that all the "other labor laws" examined and compared by GAO have common characteristics which include that cases are initiated by an employee complaint to a Federal agency, and all cases, except under Title VII, are litigated administratively rather than as a private action in court. Under the FLSA, however, filing a complaint with the Department of Labor is not required in order to initiate a lawsuit.

In fact, there are other labor laws with statutes of limitations similar to FLSA, including the Walsh-Healey Public Contracts Act and the Davis-Bacon Act, which are subject to the same Portal-to-Portal Act statute of limitations as the FLSA. The statutes of limitations of the Employee Polygraph Protection Act (EPPA) and

the Employee Retirement Income Security Act (ERISA) also bear examination by GAO.

Now on p. 5.

Page 6 The draft report states that, "Unless the statute is tolled, the amount of back wages employers are required to pay for a violation under the FLSA continues to decrease (1) while Labor investigates cases and negotiates with employers and (2) in the interval between an employer's agreement to pay and the time when the employer actually pays all the back wages owed."

See comment 4.

While we agree that this would be generally true under a strict application of the Portal-to-Portal Act's statute of limitations (subject to estoppel, as discussed below), we had explained in our interviews with GAO staff that this is not how the statute is applied in practical terms. Our explanation bears a brief repetition.

In practice, Wage and Hour investigators examine employers' compliance during, and compute any back wage liability for the two-year period (three years in the case of willful violations) prior to the commencement of our investigation. Thus, assuming a continuing pattern of systemic violations through the employer's history (rather than a change in pay practices or economic circumstances that give rise to violations from a specific date or during a limited period), back wages may be "eroded" for the period prior to the two (or three) years preceding the commencement of our investigation -- i.e., for the period of time that an employee may have delayed in contacting the agency to register a complaint and during the delay from receipt of the complaint by Wage and Hour to the start of its investigation. But it is not generally true, in practice, that "the amount of back wages employers are required to pay ... continues to decrease ... while Labor investigates cases and negotiates with employers and ... in the interval between an employer's agreement to pay and the time when the employer actually pays all the back wages owed."

Back wages are typically recovered for the period initially established for our investigation, which includes the two (or three) year period prior to its initiation, and future compliance is obtained so as to avoid any further accumulation of back wage liability during the period when an employer pays the back wages owed. In addition, the draft report presents evidence -- but again only in Appendix II and not in the text of the draft report -- that waivers of the statute of limitations are most frequently sought and obtained when employers request the opportunity to pay their back wage liability in installments, and thus secure the inapplicability of the statute of limitations for the specific purpose of avoiding a situation where "the amount of back wages employers are required to pay ... continues to decrease ... in

the interval between an employer's agreement to pay and the time when the employer actually pays all the back wages owed."

Furthermore, as a general matter, conduct by an employer which affirmatively induces the plaintiff to delay in bringing a lawsuit can estop the employer from raising the statute of limitations defense. Thus, an employer's promise to pay or other acts or conduct which induce a party to believe that the case will be amicably resolved may create an estoppel against the statute of limitations defense.

Now on pp. 8-9.

Page 7 The draft report states that, "Changing the statute of limitations for the FLSA so that it tolls at an earlier point, when an employee files a claim with Labor, would protect employees' back wage claims during the time it takes Labor to start and complete its investigations as well as after this time."

See comment 5.

As discussed above, while strictly true as a legal matter, this statement does not recognize the practical application of the statute of limitations. We agree that such a change "would protect employees' back wage claims during the time it takes Labor to start ... its investigations" but, as a practical matter, would have little impact on any loss of back wages through "erosion" by the running of the statute of limitations "during the time it takes Labor to ... complete its investigations as well as after this time."

Tolling the statute of limitations when a claim is filed with the Department of Labor would seem to make little sense under the FLSA. Employees are not required to file complaints with the Department and, in fact, we ordinarily compute and recover back wages where violations are found for many more employees than those who file complaints with us. Secondly, we do not disclose the identity of those employees who do file complaints, and it appears that GAO's suggested tolling event would only serve to toll the running of the statute for the complainant and not for other employees who are equally affected by violations. Finally in this regard, it should be noted that the suggested change to the tolling of the statute of limitations would not affect the extent of protection of employees' back wages in the approximately 25 percent of investigations that are initiated by Wage and Hour as part of its "directed" enforcement program and which are not complaint-based. Should it be assumed -- or should the draft report address -- that the statute of limitations should be tolled in such cases with the commencement of Wage and Hour's investigation, which (as noted above) is, as a practical matter, a common result?

An even earlier tolling event than that suggested by GAO in this report[2] -- such as the occurrence of the violation -- would have the effect of expanding the extent of protection of employees' back wage claims during the time it takes them to recognize that a violation may be occurring and take action to seek redress through the administrative enforcement process rather than filing a lawsuit in their own behalf. Other possible tolling events include notification to a firm that it is to be investigated by Wage and Hour, or written notification to a firm by an employee (or their representative) that violations are taking place, each of which has different effects and implications.

Now on p. 5.

Page 7 Footnote 6 cites an illustrative example where the employees subject of the violations waited a full year after the violations ceased before filing a complaint with Wage and Hour.

See comment 6.

We suggest that the report note that the example offered to illustrate the running of the applicable statute of limitations would be time-barred under the statute of limitations for all of the other labor laws reviewed and cited in Appendix I. This is otherwise only discernable by reviewing the Appendix in conjunction with the example in the text.

Deleted.

Page 8 Footnote 7 states that, "WHD refers few cases to the regional solicitor's offices for litigation."

We do not know the basis for this assertion but believe that relatively large numbers of such cases are referred by Wage and Hour, averaging about 3,000 per year over the last decade. This constitutes a substantial litigation workload for the Solicitor's offices.

Necessarily, Wage and Hour seeks to resolve violations, recover back wages, and obtain future compliance through administrative means to the greatest extent possible, referring cases to the Solicitor's office for litigation only when necessary to obtain compliance or redress, because this best serves the interest of affected employees by getting their employer into compliance and the employees' back wages into their hands without the further delay that inevitably accompanies the litigation process, including the potential for further "erosion" of back wages by the operation of the statute of limitations.

[2] Which is earlier than previously recommended by GAO to the Congress, which was the date that Wage and Hour completes its investigation.

Now on p. 6.

Page 9 The draft report contends that, "No additional guidance that specifies when waivers should be requested is given [in Wage and Hour's Field Operations Handbook (FOH)], however, and no standard waiver form is provided.

See comment 7.

Guidance concerning the application of the statute of limitations and obtaining of waivers is contained in several sections of the FOH, including Sections 51a05, 53c02, 53c15, and -- specifically relating to the use of waivers -- 53c16. As an initiative well preceding and unrelated to the draft report, Wage and Hour has prepared significantly expanded guidance regarding seeking waivers of the statute of limitation, including a waiver form, as a part of its redraft of Chapter 53 of the FOH. This draft Chapter is currently being reviewed by regional offices so that their comments and input can be incorporated prior to finalization, clearance, and publication. We will carefully review these sections of the FOH as well as the new draft Chapter 53, and add any additional information or direction on this issue that is warranted.

Now on p. 8.

Page 11 According to the draft report, "Other WHD officials affirmed that amounts employers agree to pay have been entered into WHMIS as findings amounts. Prior to 1992, many district offices entered the amount the employer agreed to pay as the amount of findings in WHMIS, one district director said, because district performance ratings were affected by their recovery rates."

See comment 8.

The draft report fails to indicate that there are legitimate reasons for entering the amount of back wage findings based on agreements to pay. These include cases in which the investigator makes estimates of back wages owed, and the employer subsequently provides additional information that enables us to make accurate computations, which the employer agrees to pay and which may be somewhat less than the original back wage estimates. It is an unusual case in which completely accurate arithmetic computations for each individual employee due back wages can be made; in almost every case, some estimation is necessary. The estimates are made based on the information available at the time and the investigator's judgement and experience. Employers frequently disagree with this information or the estimates produced, and refuse to pay on that basis. In subsequent discussions with Wage and Hour personnel, the employer or counsel may identify factual errors, clarify misunderstandings, or simply provide additional information that mitigates the original estimated "findings." It is entirely appropriate in such cases to record the findings accordingly.

In addition, we believe that back wage "agreed to pay" amounts may have been recorded as "findings" amounts in the past when procedures, since rescinded, required headquarters' approval to

enter findings in excess of $250,000. Since such approval was often difficult to obtain in a timely manner, regional staff may have recorded the smaller amount as "findings" in order to avoid this requirement. It should also be noted that "findings" are often projected or reconstructed by investigators over the two-year investigation period, including for employees who may not have been interviewed, and -- in some cases at least, perhaps including the referenced Food Lion case -- actually constitute more of an estimate of back wage liability than a "finding" per se.

Much more seriously, the report suggests, reportedly based on the contention of one district director, that historically widespread falsification of data reports has been carried out by district office managers entering agreed to pay amounts as back wage findings amounts in order to affect their performance ratings and, presumably, bonus eligibility. This is an extremely serious charge against members of a highly professional corps of program managers who are known for, and pride themselves on, their integrity as well as their professionalism. In this context, we find the allegation somewhat incredible, but it certainly necessitates further investigation due to its profound seriousness.

Page 11[3] With respect to the language in the discussion of the effect of the statute of limitations, please see the comments listed above with regard to the discussion of this same issue on Page 7.

Now on p. 20.

Page 18 In Appendix III, the Food Lion case chronology item relating to events in January 1987 states that, "Labor investigators received complaints from 56 employees of other Food Lion stores but decided not to open investigations of other stores. Instead, they decided to include computations for back wages owed to these employees with the back wage computations for employees of store #128 and the other 6 stores investigated."

See comment 9.

This statement implies that additional back wages were computed without investigation of the veracity of the alleged violations and without examining whether other employees in the stores from which these new complaints came were subject to similar violations. At the time that the additional complaints were received, Wage and Hour had already determined that "off the clock" work formed the basis for wage violations in the seven stores previously investigated and that case was in the Joint Review Committee process, to assess its suitability for litigation, with the Regional Solicitor's office. On the advice of the Regional

[3] The following comments on pages 11 and 12 of the draft report refer to the revised draft pages telefaxed in "unofficial" form on September 1, 1992.

Solicitor's office, Wage and Hour undertook to analyze the information from the complaints and investigation findings to determine if there was sufficient evidence to establish a pattern and practice of systemic "off the clock" work, as well as to seek back wage recovery. Wage and Hour does not, and could never, investigate all stores in a nationwide or regional chain with so many stores as Food Lion. It does, however, ascertain whether there is a pattern and practice of systemic violations and seeks back wage recovery accordingly.

Now on p. 21.

Page 19 In Appendix III, the Food Lion case chronology item relating to events in March 1989 states that the Food Lion case was "returned from the Regional Solicitor's office to the Raleigh, N.C. district office for settlement conference as requested by the district official in charge of the investigation."

See comment 10.

We believe that this statement may imply that Wage and Hour officials were, in effect, abandoning the case by acting to prevent it from being forwarded to the National Office of the Solicitor for further review. Such implication would be inappropriate since the investigation file was recovered from the Regional Solicitor's office because Food Lion's counsel had contacted our district office officials directly to discuss the possibility of settlement of the case. In accordance with our established procedures, upon receiving this inquiry, Wage and Hour's district management consulted with the Regional Solicitor's office regarding whether such discussion would be appropriate and, with the agreement of the Regional Solicitor, the investigation file was returned to our district office for review and the requested meeting was scheduled to include Food Lion's counsel, an attorney from the Regional Solicitor's office, and Wage and Hour district management officials.

GAO Comments

1. Since Labor does not collect data on the number of cases in which waivers are needed, we were unable to determine whether the number of cases in which WHD obtained waivers was appropriate to the need for such waivers. We revised the report to point out that this information is needed, but that Labor officials could not provide it.

2. WHD officials estimated that in 32,989 out of 38,460 fiscal year 1991 FLSA cases (about 86 percent), employers agreed to pay some or all back wages without waiving the statute of limitation (see app.II). We disagree with the assumption that cases in which an employer agrees to pay some or all back wages are cases in which a waiver is not needed to protect employees' claims from the running of the statute of limitations. It is possible that in some cases, employers paid only some of the back wages because their liability for the full amount had been eroded by the statute of limitations.

3. We revised the report to reflect that some waivers used by WHD can be revoked in writing with 20 or 30 days' notice. Labor's comments referred to 30 days' notice, but we found examples of waivers that require only 20 days' notice.

4. We revised the report to delete the reference to a decreasing liability for back wages during the interval between an employer's agreement to pay and the time when an employer actually pays all the back wages owed. We did this in acknowledgement of the fact that as Labor pointed out, the employer's agreement to pay could be used in court to obtain the back wages even if claims had expired under the statute of limitations.

Labor acknowledges that without a waiver, employers' statutory liability to pay back wages erodes while WHD investigates and negotiates cases. Although Labor asserts that in practice, WHD calculates and employers voluntarily pay back wages for a full 2-year period, our review raises questions about the statistics that cause Labor to believe that back wages are "typically recovered."

Labor's explanation of the "practical application" of the statute of limitations also assumes that (1) there is a continuing pattern of systematic violations through the employer's history and (2) employees owed back wages remain employed for the 2-year period prior to the end of WHD's investigations. These assumptions will not be met in all cases.

5. We revised the report to clarify suggested changes in the statute of limitations for the FLSA that would better protect not only employees who file claims with Labor, but also employees who do not file claims with Labor but are found during WHD investigations to be owed back wages.

6. We believe Labor misunderstood the time frames in the illustrative example in which employees worked for a company from the beginning of January 1990 to the end of December 1991 and were not paid for all their overtime work during this period. In the example, employees filed a claim with WHD in January 1992, which is 1 month, not 1 year, after the violations ceased, therefore, their claims would not have been barred by time under any of the labor laws included in our comparison in app. I.

7. We revised our report to reflect Labor's development of guidance on waivers. However, the references provided from the Field Operations Handbook (sections 51a05, 53c02, and 53c15) do not provide guidance on the use of waivers.

8. We revised the report to reflect the information presented in Labor's comment about reasons, based on agreements to pay, for entering the amount of back wages to WHMIS. We did not mean to imply that WHD officials were falsifying records in order to gain personal benefit, such as receiving larger bonuses; therefore, we deleted this information from the report.

9. Our only intent in presenting the information in the Food Lion case chronology for events in January 1987 is to make a factual statement. We did not mean to imply impropriety in the investigation of back wages for employees of additional stores.

10. We reviewed Labor's case file from the 1986-87 investigation of Food Lion, Inc., and interviewed both regional solicitor's office and WHD officials who worked on the case. There was no indication in the files or from our interviews that Food Lion's counsel communicated with Labor, at that point in the sequence of events, to discuss the possibility of settling the case. As noted in the report, Food Lion officials were invited to comment on the chronology of events in app. III but had not provided us with their comments as of 2 days prior to the issuance date.

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Minimum Wages & Overtime Pay: Concerns About Statutory Provisions and Agency Tracking Systems (GAO/T-HRD-92-21, Mar. 25, 1992).

The Fair Labor Standards Act: Back Wage Case Management (GAO/HRD-88-110, July 28, 1988).

The Department of Labor's Enforcement of the Fair Labor Standards Act (GAO/HRD-85-77, Sept. 30, 1985).

Changes Needed to Deter Violations of the Fair Labor Standards Act (GAO/HRD-81-60, May 28, 1981).

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