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MINIMUM WAGES & OVERTIME PAY

Concerns About Statutory Provisions and Agency Tracking Systems

Linda G. Morra, Director
Education and Employment Issues
Human Resources Division

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SUMMARY

In December 1991, 5.6 million workers earned the minimum wage or less. The Fair Labor Standards Act of 1938 (FLSA) currently requires that covered employers pay a minimum wage of $4.25 an hour for up to 40 hours a week, and an hourly payment equal to 1-1/2 times the employee's regular hourly wage for all hours worked over 40 per week. It also requires that employers keep wage and hour records for all employees. Labor's Wage and Hour Division (WHD) within the Employment Standards Administration is responsible for FLSA enforcement, investigating complaints and requesting that employers found in violation pay any back wages owed to employees. When an employer refuses to pay, WHD refers the case to the Labor Department Solicitor's office for litigation on behalf of the employee, refers it to the employee to sue directly, or drops the case.

Statutory weaknesses identified in previous reports by GAO and Labor's Inspector General continue to impede enforcement of minimum wage and overtime laws. In addition, Labor lacks information to confirm the effectiveness of its procedures for obtaining back wages due to employees.

LACK OF PAYROLL RECORDS IMPEDES LABOR'S ENFORCEMENT EFFORTS, YET THE LAW PROVIDES LITTLE INCENTIVE TO MAINTAIN THEM. When employers fail to keep adequate payroll records as required by FLSA, Labor's ability to detect violations and collect back wages is greatly impeded. Yet the act provides no civil penalty for an employer's failure to comply with its recordkeeping requirements. Labor's Inspector General agrees with GAO that legislative change is needed. The Employment Standards Administration agreed with this position in September 1991, but as of March 1992 it has no position on whether penalties are needed.

REQUIREMENT FOR LITIGATION MAY RESULT IN SOME EMPLOYEES NOT GETTING BACK WAGES LEGALLY OWED TO THEM. When an employer refuses to pay back wages, Labor or the individual employee must sue the employer in court, a costly and time-consuming process. The law provides no formal administrative process that can be used instead of litigation. Since Labor does not litigate every case in which the employer refuses to pay, its decisions about which cases to litigate will result in at least some employees having to pursue cases on their own if they wish to collect their back wages. Yet some employees do not have the knowledge or resources to pursue their own cases.

STATUTE OF LIMITATIONS LIMITS BACK WAGE COLLECTION AFTER VIOLATIONS ARE FOUND. The 2-year statute of limitations on most cases allows the amount of back wages an employee can collect to be reduced while Labor investigates or negotiates with the employer. Back wages can be eroded entirely or reduced so much that litigation is not worthwhile.

WAGE AND HOUR DIVISION HAS TOO LITTLE DATA TO KNOW WHETHER PROBLEMS EXIST IN THE COLLECTION OF BACK WAGES. WHD has procedures that it believes are successful in obtaining back wages for employees. However, it does not collect information needed to confirm that its procedures are working. For example, it cannot provide reliable information on (1) the amount of agreed-upon wages actually collected by employees or (2) what actions it has taken on cases where employers refused to pay back wages.

Mr. Chairman and Members of the Subcommittee:

The Bureau of Labor Statistics reports that, as of December 1991, about 6 million American workers--more than 65 percent of them women--earned the minimum wage of $4.25 an hour or less; about 14 million earned $5.00 an hour or less.[1] Enforcement of federal minimum wage and overtime laws provides an important protection to these workers. You asked us to examine Labor's success in collecting back wages due to employees because of minimum wage and overtime violations. We did this by interviewing Department of Labor officials of the Office of the Solicitor and the Wage and Hour Division (WHD) at the national office and in the Philadelphia and San Francisco regions. We also reviewed internal Labor documents, such as operating manuals, strategic plans, and case records; the Labor Department Inspector General's recent report on WHD enforcement and related work papers;[2] and past GAO reports in this area.[3]

We found that statutory weaknesses identified in previous GAO reports and by Labor's Inspector General continue to impede enforcement of minimum wage and overtime laws. In addition, Labor lacks information to confirm the effectiveness of its procedures for obtaining back wages due to employees.

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[1]Employees who may legally be paid less than the minimum hourly wage include (1) those not engaged in interstate commerce, (2) teenagers working under special training conditions, and (3) tipped employees, who may receive a wage up to 50 percent below the minimum wage.

[2]The Effectiveness of the Wage and Hour Division's Enforcement Program: Final Report, Office of the Inspector General, U.S. Department of Labor, Sept. 30, 1991.

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

Our major points are as follows:

-- Statutory weaknesses limit Labor's ability to detect and collect back wages owed to employees. These include (1) lack of civil monetary penalties for failure to keep adequate payroll records, (2) reliance on litigation-dependent enforcement procedures rather than more expedient formal administrative procedures, and (3) a statute of limitations that allows the back wages due to employees to be reduced while Labor investigates the case or negotiates with the employer.

-- The Wage and Hour Division has established procedures that it believes are successful in obtaining back wages for employees. However, its collection and management of information is inadequate to confirm whether that system is working. It cannot provide reliable information on (1) the amount of agreed-upon back wages employees actually collected or (2) what actions it has taken on cases where employers refused to pay back wages.

BACKGROUND

The Fair Labor Standards Act of 1938 (FLSA) is the primary federal law regulating the wages and working conditions of American workers. As of the end of 1991, FLSA's minimum wage and overtime provisions covered over 80 million of America's workers, including almost 6 million minimum wage workers. The law currently 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 per week, the law also requires an hourly payment equal to 1-1/2 times the employee's regular hourly wage. The law also specifies that employers must keep records of the wages paid and hours worked for employees.

Since April 1990, FLSA has provided a civil monetary penalty of up to $1,000 for each employer who repeatedly or willfully violates the minimum wage and overtime provisions. Proposed regulations for implementing these penalties, which will be assessed by Labor, were issued in June 1991. There is no civil monetary penalty for recordkeeping violations. The act also provides, for willful violations of minimum wage, overtime, and recordkeeping provisions, criminal penalties of a fine up to $10,000 and imprisonment for up to 6 months. Criminal prosecution must be done by the Department of Justice, upon referral by Labor. Such referrals are rarely made.[4]

Related legislation, the Portal-to-Portal Pay Act of 1947, contains a statute of limitations that governs payment of back wages. It limits recovery of back wages for minimum wage and overtime violations to 2 years (or 3 years for a willful violation). Once Labor investigates a case, the amount of the employer's back wage liability for any violations that existed as much as 2 years ago starts to decrease. The amount of wages due continues to decrease until (1) the employer pays, (2) the case is litigated (a suit is filed in court), or (3) the employer signs a waiver agreeing that the calculation of back wages due will be from the date of the waiver rather than the date the case is resolved.[5]

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[4]See, for example, DOL Criminal Enforcement, Office of the Inspector General, U.S. Department of Labor, June 4, 1990, which reports that WHD opened only one criminal investigation in fiscal year 1989.

[5] For example, a hypothetical employer underpaid an employee $50 every 2-week pay period for 2 years, January 1990 to January 1992. When Labor investigated the complaint in January 1992, the employer's total back wage liability was $2,600, $50 times the 52 pay periods during the 2-year period. If it takes until May 1992 for Labor to get the employer to agree to pay, the back wage liability will include only those back wages for the period May 1990 through January 1992. The employer's liability is reduced to $2,100 because the employer is no longer liable for 10 pay periods,

WHD, a part of the Labor Department's Employment Standards Administration, is responsible for enforcing FLSA's minimum wage and overtime provisions. WHD investigates primarily in response to complaints from employees or their representatives. When it finds minimum wage or overtime violations and determines the amount of back wages owed, it asks employers to provide restitution to employees for the underpayment of wages. The employer may either agree to pay the back wages owed or refuse to pay, as the figure below shows. When employers refuse to pay employees back wages, or if they initially agree to pay but WHD finds that they have failed to do so, WHD tries to negotiate with the employer. If this is unsuccessful, WHD either refers the case to the Solicitor's Office for litigation on behalf of the employee, refers it to the employee to sue directly, or drops the case.[6]

The decision as to whether to litigate cases or refer them back to the employee is made at the regional level, involving both WHD and the Solicitor's Office. WHD's national office gives regional offices written guidance that specifies which cases must be referred to the Solicitor for litigation, and it suggests criteria that may be used in selecting among optional cases to refer.[7] It requires each WHD regional administrator and Solicitor to develop their own written supplemental guidelines for referring cases for litigation.

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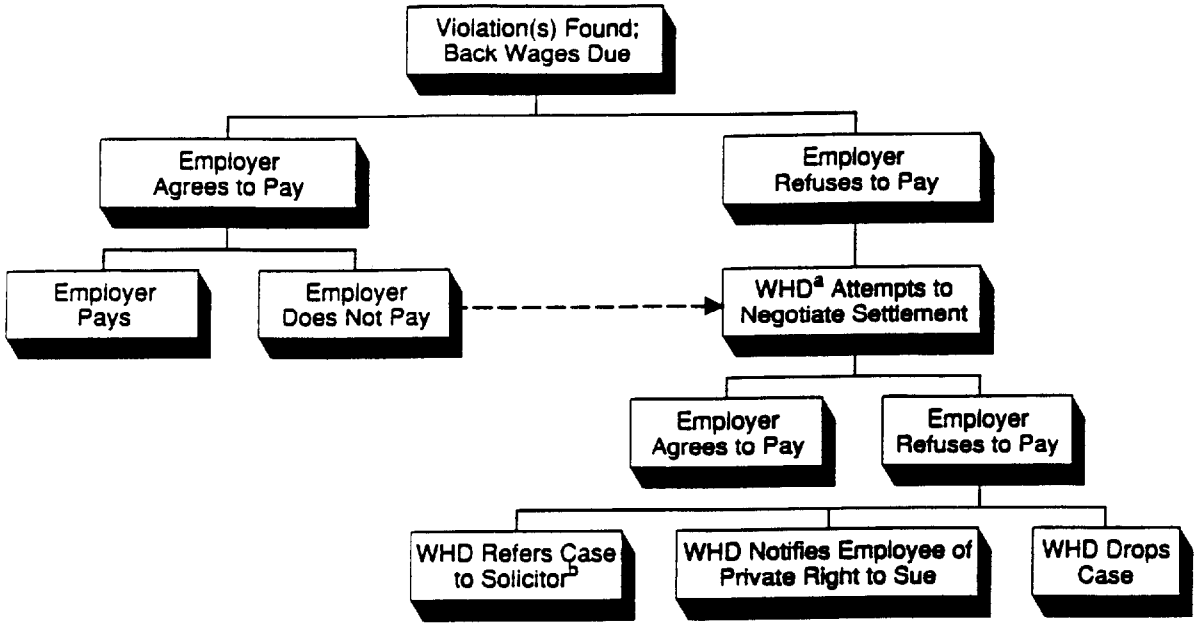
representing $500 in back wages.

[6]WHD may drop cases in such instances as when it agrees that it has made an error and no back wages are due, the employer is out of business or bankrupt, or the statute of limitations has eroded all back wages owed.

[7]For example, WHD must refer for litigation cases where, despite a court injunction, the employer will still not promise to make prompt payment of back wages due.

GAO Labor's Process for Collecting Back Wages Owed to Employees



[a]WHD is Labor's Wage and Hour Division.
[b]The Solicitor is in the Office of the Solicitor, a separate agency within Labor.

In fiscal year 1991, Labor detected about $143 million in back wages due to about 383,000 workers. Of these, employers either initially agreed to pay, or were ordered by the court to pay, $115 million, or 81 percent. Labor believes that employees actually collected most of the back wages employers agreed to pay. It considers the remaining 19 percent uncollectible by Labor because the employer refused to pay and Labor considered

the case unsuitable for it to litigate.[8] The proportion of wages deemed uncollectible has remained about the same over the last 5 years. (See attachment A.)

LACK OF PAYROLL RECORDS IMPEDES LABOR'S ENFORCEMENT EFFORTS, BUT THE ACT PROVIDES LITTLE INCENTIVE TO MAINTAIN ACCURATE RECORDS

An employer's failure to maintain the written wage and hour records required by FLSA prevents Labor from carrying out the intent of the act. When an employer does not keep accurate records, Labor has much greater difficulty detecting minimum wage and overtime violations. In addition, without accurate records, Labor has difficulty collecting back wages due. Labor officials we interviewed uniformly reported that employers failing to keep records are also more likely to refuse to pay. When they refuse to pay and available records are insufficient, the Solicitor must rely on employee testimony. If employees are reluctant to testify or be identified to the employer, cases must be dropped or referred to individual employees to sue directly.

Although WHD has no nationwide data about the number of recordkeeping violations or the number of cases where such violations made it impossible to collect back wages, separate studies by us and Labor's Inspector General (IG) provide some indication of the extent of the problem. For example, in 1985, we reported that the recordkeeping violations documented in our 1981 report continued to be a problem. In 1985, we found recordkeeping violations in 46 (87 percent) of the 53 randomly

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[8]WHD has noted that it may subsequently agree that some portion of the amount it initially determined to be owed to employees is not owed to them. Thus, this calculation overstates the amount that is uncollectible by Labor. However, WHD maintains no records on its revised determination of the amounts due, so there is no way to determine the extent, if any, to which this is an overstatement.

selected case files we examined, and 10 of them showed evidence that employers had falsified or concealed records. In 27 of the 46 cases, the inadequate records affected Labor's ability to obtain the full amount of back wages. The IG's review of cases opened and closed in fiscal year 1989 found recordkeeping violations in 95 (31 percent) of the 305 cases reviewed.

Both GAO and Labor's Inspector General have concluded that, to increase the incentive for employers to comply, the law should provide a civil penalty for failure to keep the required records.[9] In response to the IG's September 1991 report, the Employment Standards Administration agreed that the Administration should, in future legislative initiatives, include a requirement for imposing a full range of penalties on employers for recordkeeping violations. It further stated that it was "considering proposing civil money penalties for recordkeeping violations." However, we were informed by the WHD Administrator in March 1992 that the department does not currently have a position on this matter.

RELIANCE ON LITIGATION RESULTS IN SOME EMPLOYEES NOT GETTING BACK WAGES LEGALLY OWED TO THEM

We have recommended that the Congress amend FLSA to replace its emphasis on litigation with more expedient administrative procedures that would also protect the employer's right of due process.[10] Under the current statute, when an employer refuses

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[9]See our 1981 and 1985 reports and the IG report previously cited.

[10]See the 1981 and 1985 reports. We advocated a formal administrative process, as recommended by the Administrative Conference of the United States, which would be similar to what Labor uses to adjudicate civil money penalties under the FLSA child labor provisions and the Federal Mine Safety and Health Act. Labor would assess a penalty that the employer must either pay or appeal

to pay back wages, Labor or the individual employee must sue the employer in court if they wish to force the employer to pay back wages. Because this is a costly and time-consuming process, some employees are probably not getting the back wages owed to them.

Because Labor does not pursue every case in which the employer refuses to pay, its decisions about which cases to litigate will result in at least some employees having to pursue cases on their own if they wish to try to collect their back wages. For example, one region we visited gave priority to cases involving the greatest dollars. A second region gives priority to cases where the employee is least likely to be able to litigate the case on his/her own.[11]

Although WHD has no nationwide data about the number of employees who are left to litigate their own cases, the IG's study provides some information about this. The IG found that 510 of 2,876 (18 percent) of the employees due back wages in fiscal year 1989 did not receive full restitution and were left to their own devices to seek repayment. The unrestored back wages totaled $507,033 (41 percent of the amount initially determined to be owed to employees).

Neither WHD nor the IG has documented how many of the employees left on their own to litigate their cases succeed in doing so. The IG expressed concern that many of the affected individuals, who were working at minimum wage jobs, had neither the financial

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to an administrative law judge. Employers would still have the right to appeal adverse agency decisions to the courts, where cases would be reviewed.

[11]For example, in the latter region, Labor may pursue cases that involve many employees each owed small amounts of money--even though the total dollar amount may be less than in another case--in the belief that it would be harder for those employees to obtain the assistance of private attorneys.

means nor the knowledge of how to pursue a legal settlement. Labor officials we interviewed shared that concern, stating that they believed few individual employees pursued their own cases. In response to that concern, the San Francisco WHD region initiated a project in early 1992 to determine the success of employees in collecting back wages when Labor left it to them to pursue these cases. In addition, they reported that they were developing assistance, such as a training program about how to file cases in small claims court.[12]

Although Labor has not taken a position on whether the act should be revised to provide for an administrative rather than a litigation-dependent approach for restitution of back wages, it is testing the use of alternative dispute resolution methods that would avoid the delay and cost of litigation.[13] This pilot project began in February 1992 in its Philadelphia region. However, because the law does not suspend the statute of limitations for this process, Labor officials have expressed concern that its use may further reduce the amount of back wages that can be collected if the process fails and the case is ultimately litigated.

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[12]The course would cover such matters as how to file a claim and what information they would need to present their case.

[13]In recognition of the costs of a litigation-based enforcement strategy, the administration has directed all executive agencies, including WHD, to implement a process of voluntary alternative dispute resolution before initiating litigation. Alternative dispute resolution includes a variety of negotiating techniques, such as mediation, mini-trials, the use of settlement judges, arbitration, and negotiated rulemaking.

STATUTE OF LIMITATIONS LIMITS BACK WAGE COLLECTION AFTER VIOLATIONS ARE FOUND

In past reports, we have expressed concern that the statute of limitations allows the amount of back wages an employee can collect to be reduced during the period in which Labor investigates the case or negotiates with the employer. Because an employer's obligation to pay back wages begins to erode, the longer the period of investigation and the longer WHD negotiates the case without a waiver, the smaller becomes the employer's back wage liability. Back wages can be eroded completely or reduced to such a trivial amount that litigation is not worthwhile.

Labor has no nationwide data on the extent to which the amount of back wages due is reduced by the statute of limitations while the case is being investigated or negotiated. However, our 1985 review found that employees in 11 of the 53 cases lost some back wages because the statute of limitations did not stop when the violation was detected. (In those cases, an average of about 1 year elapsed between the date the violations were identified and Labor filed suit.)

Labor has taken no position on the need for statutory change, and regional representatives from WHD and the Solicitors' Office provided contradictory opinions on the effect of the statute. Some officials told us that the statute of limitations was not a problem because most employers, even when they had refused to pay back wages, still agreed to sign waivers that they would later pay the full amount if they paid anything. However, other officials told us that the statute of limitations reduced total collectible back wages in most cases in which the employer refused to pay. These officials stated that most employers who signed waivers were those who had already agreed to pay but were

doing so on an installment basis, rather than those who had refused to pay and were still negotiating with Labor.

LABOR LACKS DATA TO CONFIRM WHETHER IT IS OBTAINING BACK WAGES FOR EMPLOYEES

The Wage and Hour Division has established procedures that it believes are successful in obtaining back wages for employees. After an employer agrees to pay back wages, WHD procedures call for investigators to request receipts or other evidence that payment was made or to reinvestigate employers if they believe such additional steps are needed. These procedures rely, to some extent, on the diligence of investigators and the time available to them. They also rely on the assumption that employees who have complained about a perceived violation will pursue the matter with WHD if they are not paid. Even if the employer initially refuses to pay back wages, WHD officials told us they believe that Labor eventually obtains restitution in all cases where the evidence is sufficient either to successfully negotiate with the employer or to litigate the case.

However, WHD's collection and management of information is inadequate to confirm whether the procedures for collecting back wages are working. WHD cannot provide reliable information on (1) the amount of agreed-upon back wages actually collected by workers or (2) what actions it has taken on cases where employers refused to pay back wages.

The Amount of Agreed-Upon Back Wages Actually Paid to Employees

Labor collects information on the total amount of back wages it initially determines to be owed and the amount employers ultimately agreed to pay. However, Labor does not record what

steps it took to confirm that employees were paid or the amount of back wages employees actually received as a result of Labor's collection efforts. In an unpublished review of WHD's collection procedures, the Inspector General's office found numerous examples of employees who did not receive the promised back wages.[14]

Labor's Action on Cases Where Employers Refused to Pay Back Wages

Labor does not have sufficient data to measure the effectiveness of its efforts to obtain back wages for employees when employers initially refuse to pay. It has no information about (1) how many employers initially refused to pay back wages, (2) how many agreed to pay after informal negotiation with WHD, or (3) what actions it took when employers still refused to pay after negotiations with WHD. That is, it cannot identify how many times when an employer still refused to pay back wages it (1) referred the case to the Solicitor for litigation on behalf of the employee, (2) referred it to the employee to sue directly, or (3) dropped the case.

Both WHD and the Solicitor's Office have systems to track litigation, but we found--and WHD officials agreed--that data from the tracking systems are inconsistent and unreliable. Some WHD regions report none of their referrals to the WHD system, while others report some but not all cases. In addition, the tracking system used by the Solicitor's Office is incompatible with that of WHD. Thus, Labor cannot determine how many of the cases in which employers refuse to pay are referred for litigation or how many are eventually litigated.

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[14]For example, one employee reported being told by Labor in 1989 that the employer had agreed to pay him over $11,000 in back wages but that 2 years later he had not yet been paid.

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In conclusion, we believe that the statutory problems we previously identified continue to impede enforcement of minimum wage and overtime laws. We still consider valid our previous recommendations that the Congress amend the laws to (1) allow Labor to assess civil monetary penalties for recordkeeping violations, (2) substitute a formal administrative process for the current litigation-based enforcement strategy, and (3) stop the statute of limitations at the point that Labor formally assesses an FLSA violation. In addition, we are concerned that Labor lacks information confirming the effectiveness of its procedures for obtaining back wages due to employees.

This concludes my prepared statement. I will be glad to answer any questions you may have.

ATTACHMENT A

Amount of Wages Labor Deemed Uncollectible, Fiscal Year 1987 through 1991