

Testimony of
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Improving the Federal Wage and Hour Regulatory Structure

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

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

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

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

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

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

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

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

Enactment and Purpose of the FLSA

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

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

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

¹ 29 U.S.C. §206.

² Id. at §207.

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

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

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

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

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

Current Conditions for Hourly Workers

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

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

⁴ 29 U.S.C. §212.

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

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

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

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

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

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

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

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

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

A few other important findings are worth noting:

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

⁸ Annette Bernhardt, et al. Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (2009), <http://www.nelp.org/page/-/Justice/BrokenLawsPresentation2010.pdf?nocdn=1>.

⁹ For those workers who were employed by a company with more than 100 employees, 15.2% experienced minimum wage violations, 52.8% were victims of overtime violations, 64.9% were made to work off the clock, and 63.8% had a meal break violation. Those who worked for smaller companies experienced minimum wage violations at a rate of 28.5%, overtime violations at a rate of 82.4%, off the clock work at 73.6%, and meal break violations at a rate of 73.5%. *Id.* at 30.

¹⁰ *Id.* at 42.

¹¹ *Id.* at 31.

¹² *Id.* at 34.

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

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

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

The Role of the Wage and Hour Division

The U.S. Department of Labor’s Wage and Hour Division (WHD) is and can be a powerful ally in efforts to enforce and improve just pay laws. Though it is well documented how understaffed and under-resourced the WHD is relative to the number of employers and workers subject to its jurisdiction, especially before the relatively recent addition of investigators thanks to appropriations in the American Recovery and Reinvestment Act¹⁴ it is nonetheless a powerful

¹³ For an excellent summary of the abuses rampant in agricultural labor, please see “Weeding Out Abuses: Recommendations by Farmworker Justice and Oxfam America.:

<http://www.farmworkerjustice.org/files/immigration-labor/weeding-out-abuses.pdf>.

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

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

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

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

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

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

¹⁵ <http://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

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

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

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

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

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

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

¹⁶ <http://www.hup.harvard.edu/catalog.php?isbn=9780674725447>.

¹⁷ <http://www.dol.gov/sec/stratplan/FY2014-2018StrategicPlan.pdf>, page 52.

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

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

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

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

Obama Administration demonstrate that the WHD has done exemplary work responding to the GAO reports from 2008 and 2009.¹⁹

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

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

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

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

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

¹⁹ Wage and Hour Enforcement Statistics from FY 2001 through FY 2013. U.S. DOL WHD and Printing Industries of America, <http://www.printing.org/page/10114>.

²⁰ <http://www.dol.gov/whd/flsa/index.htm>.

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

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

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

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

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

²¹ <http://www.gao.gov/assets/660/659772.pdf>, at 35.