

Testimony of Tammy D. McCutchen
Before the United States House of Representatives
Committee on Education & Labor
Subcommittee on Workforce Protections

Hearing on “Standing Up for Workers: Preventing Wage Theft and Recovering Stolen Wages”

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Chairwoman Adams, Ranking Member Keller and members of the Subcommittee:

Thank you for the opportunity to speak with you today about the important topic of “Standing Up for Workers: Preventing Wage Theft and Recovering Stolen Wages.”

Let me begin with a brief overview of my background of and commitment to increasing compliance with the Fair Labor Standards Act and state wage and hour laws. From 2001 to 2004, I served as the Administrator of the Department of Labor’s Wage and Hour Division (WHD). In that role, I was responsible for oversight of the enforcement of the FLSA, including investigations conducted by field employees in 250 wage and hour offices around the country.

During that time, my enforcement focus was protecting vulnerable low-wage workers. That focus included expanding low-wage industry initiatives – that is, targeted investigations in industries employing workers below, at or just above the minimum wage and with a history of violations as shown in the agency’s enforcement database (as opposed to investigations of employee complaints).

When I arrived at WHD, the agency had such strategic initiatives in only three industries: garment, agriculture and health care. We expanded these initiatives to include retail, hospitality, janitorial, security and other industries with vulnerable low-wage workers. We also implemented a process for investigators and managers in the District Offices to suggest initiatives based on their investigative experience, the enforcement data and analysis conducted by outside contractors. The field would identify industries, type of violations, the scope of the proposed initiative and resources needed. Then, staff in the Regional and National offices would review those proposals to plan enforcement for the year. In that way, we ensured that our investigators were going where they knew violations were most likely to be occurring and low-wage workers were most in need of our help.

You may know this approach as “strategic enforcement.” Today’s strategic enforcement at the Wage & Hour Division grew from the seeds we planted during the Bush Administration.

I remain fully supportive of that approach. Although I also suggest caution as strategic enforcement initiatives should not interfere with agency investigations of complaints. It takes a lot of courage for workers to file complaints with the agency, and those workers deserve to have their complaints quickly and thoroughly investigated.

Compliance with the FLSA continued to be my focus when I returned to private practice in 2004, although now by working with employers to identify and correct violations. In my practice, I conducted internal audits of employers' compliance in the areas of independent contracting, overtime exemptions, minimum wage and other non-exempt employee pay practices. When I found violations, I worked with my clients to correct their practices, including paying back wages.

I also was a founding executive of [ComplianceHR](#) where I developed applications to assess FLSA and other employment law compliance using expert system technology. I developed, for example, the Navigator IC and Navigator OT apps which assess independent contractor and overtime exempt status. These applications apply a series of tests and rules, based on federal and state statutes, regulations, case law and agency rulings, to user responses in an on-line questionnaire. With these apps, an employer (or an employee advocate) can quickly determine the likelihood of a violation at a much lower cost than engaging an attorney.

I am here today because I believe we all have a common goal: Increase compliance with the FLSA. We all want to do all we can to ensure that as many workers as possible are paid in compliance with the FLSA – and receive that pay when they perform the work, not months or years later. Justice delayed is justice denied. That is nowhere truer than when vulnerable low-wage workers must wait months or years to be paid. This workforce is often very transient, and the longer it takes to recover wages for these workers, the harder it is to find the workers to give them their hard-earned money.

The debate is how best to accomplish this common goal. I believe I bring a unique perspective to the problem. During my career, I have seen the worst of employers and the best of employers. I have seen horrible practices intentionally designed to violate the law and exploit workers. I have seen fabulous practices designed to ensure compliance, in fact to go far above what the law requires. I have seen bad people do bad things. I have seen amazing people do fabulous things but nonetheless and unintentionally miss the compliance mark.

How can that happen? Because the FLSA is not a simple law. It is not a matter of “just pay ‘em.” Even an employer committed to complying with all federal and state wage-hour laws can still have violations. A company, for example, who decides to convert independent contractors to employees, may find itself facing an investigation or lawsuit because it failed to recognize that a

pre-shift or post-shift activity is considered work that must be paid, or it provides a reward or bonus to workers without recognizing that providing that extra compensation comes with an overtime obligation. Most folks think that overtime pay is time-and-a-half the hourly rate, but that is a myth. Overtime must be paid at time-and-a-half the “regular rate” of pay as that is defined in the FLSA. That is so much more complicated that employers and employee representatives often get it wrong. My training for attorneys and HR professionals on how to calculate the regular rate is a solid two hours.

I have thought about this problem for 20 years, and these are the conclusions I have reached: We need clear and simple rules. We need swift and certain enforcement of violations. We need to provide incentives for employers to pay back wages without litigation, as litigation is a loss for the transient, low-wage workforce who need those wages now, not a year or two or three years from now. We need to punish bad employers while assisting good employers to achieve compliance.

Achievement of these goals will require meaningful FLSA reform, but I am afraid the current bill cannot achieve these goals and will not improve the lives of vulnerable low-wage workers. Let me tell you why.

State Law Provisions

The bill contains a number of new provisions on topics that have traditionally been regulated by state law only and have never been regulated under the FLSA: disclosures, pay stubs, final pay, and the “right to full compensation.” The bill recognizes the “discrepancy” in state wage and hour laws across the United States, with different states having chosen to provide different levels of protections. These provisions appear to be an effort to adopt the most burdensome and complicated of those laws using California and New York as a model.

Every state has its own paystub disclosure requirements, ensuring employees already receive an earning statement that includes hours worked, pay rate, gross and net wages, deductions and more. An additional layer of regulation would not add to the worker protections already there under state and federal law. Plaintiffs’ attorneys have made a lot of money from California class actions for minor violations of that state’s paystub disclosure violations (for example, listing regular hours and overtime hours, but not adding them together to show the total hours). Perhaps the goal here is to make a federal case out of such minor violations, allowing the plaintiffs’ bar to export California litigation to the rest of the country.

State laws also govern the frequency and timing of pay, including final pay: Some shorter than the 14-day standard proposed in the bill, and some longer. Having both federal and state laws on this topic would only lead to more complexity and confusion when employers try to figure

out which law is more protective, the new FLSA provisions or the existing state law provisions. Currently, the law most protective to employees governs. I once spent weeks designing a ComplianceHR application that would list all the disclosures needed on a paystub based on the states in which the form would be used. It turned out to be very complicated, even though I had the advantage of Littler's thorough 50-state survey on the issue, and we never got the app into production. Adding yet another layer of regulation would make compliance more difficult without significantly increasing worker protections beyond most state laws.

Only a few states have adopted laws requiring initial and modified disclosures as proposed in the bill. Requiring additional paperwork burdens can only improve worker protections at the margins, if vulnerable workers will read and understand the information provided. Our efforts to improve worker protections and increase compliance with the FLSA should be focused in more productive areas.

These topics should be left to state laws, allowing the states to determine the level of protections best for their own citizens.

I want to comment separately on the proposal to create a new FLSA right to "full compensation" as specified in an "employment contract or other employment agreement, including a collective bargaining agreement." This is a solution in search of a problem. The findings in the bill state that the "lack of a Federal right for employees to receive full compensation at the agreed upon wage rate ... has resulted in workers being able to recover only the applicable minimum wage, or the overtime rate if applicable."

Not true. Employees have a state law contract claim if an employer does not pay all compensation promised in the contract – and the statute of limitations in most states is longer than the current or proposed FLSA limitations period. Union members have the additional option of seeking redress through the arbitration procedures in collective bargaining agreements (a remedy, by the way, which this bill appears to eliminate). In short, workers are fully protected under state contract law and collective bargaining agreements – an additional remedy is unnecessary.

It would also raise more problems than it attempts to solve. What is "full compensation"? What is a "contract"? What is an "other employment agreement." Wage and Hour Division investigators and field management have no training or experience enforcing private contracts or collective bargaining agreements. Contract interpretation would be a completely new duty for WHD and create an entirely new and large body of litigation.

Enforcement

The heart of the bill focuses on enforcement. The table below summarizes the proposed new and increased back wages, liquidated damages, civil penalties, and criminal penalties.

	Current	Proposed
Back Wages	2 years	4 years
Back Wages – Repeat or Willful	3 years	5 years
Interest	Not Available	Required “at the prevailing rate”
Liquidated Damages	Equal to back wages	Two times back wages
Liquidated Damages – Retaliation	Equal to back wages	Three times back wages
Civil Fines – Any Violation	Not Available	\$22,030 per employee
Civil Fines – Repeat or Willful	\$2,203 per violation	\$110,150 per employee
Civil Fines – Tip Credit	\$1,234 per violation	\$12,340 per employee
Disclosures & Paystubs – Initial Violation	Not Available	\$50 per employee per violation
Disclosures & Paystubs – Repeat or Willful	Not Available	\$100 per employee per violation
Final Pay – Initial Violation	Not Available	Up to 30 days of additional pay and \$50 per employee per violation
Final Pay – Repeat or Willful	Not Available	Up to 30 days of additional pay and \$100 per employee per violation
Recordkeeping – Initial Violation	Not Available	\$1,000 per employee per violation
Recordkeeping – Repeat or Willful	Not Available	\$5,000 per employee per violation
Criminal Penalties	\$10,000	\$10,000 per employee

I have been sympathetic to increasing the consequences of violating the FLSA. In fact, while serving as Administrator, I proposed increases to the penalties for child labor violations, including higher penalties for repeat or willful violations. In my opinion, it took too long before such changes were made.

However, the increases proposed are very significant, even ridiculous, and I fear will be counter-productive of the goals of this bill. FLSA liquidated damages would increase from an amount equal to back wages to two or three times back wages. Penalties would increase by 900 to 4,900 percent or even higher – as the bill would require payment of penalties per employee rather than per violation. The bill would also extend the statute of limitations from two to four years for all violations and from three to five years for willful violations – longer than any state except for New York. If found in violation of the FLSA, employers faced with such massive damages and penalties, in addition to more years of back wages, will have only one way to react: litigate, litigate, litigate and litigate some more. Payment of back wages would be delayed for years. The plaintiffs’ bar will collect more fees, but transitory low-wage workers may see nothing at all.

The proposed new and increased damages and penalties also are inflexible with no room for discretion based on the size of business or the type of violation.

The increases seem designed for large business and could bankrupt small businesses. Larger businesses have professional human resources staff and access to in-house and outside attorneys. Thus, large business should know better or, at least, have the resources to learn what is needed to do to comply with the FLSA. Small businesses do not have such resources and finding clear guidance is often difficult and costly. The Wage & Hour Division recognizes this itself with a practice documented in its Field Operations Handbook of providing lower penalties for small business. If legislation is to increase damages or penalties, any increase should include lower amounts for small business.

Liquidated damages and penalties should not be increased for all violations, as not all violations are created equal. Some violations are clear and serious – “no brainers,” as I like to say: failure to pay minimum wage, not paying any overtime, firing employees who complain to DOL. The career professionals in the Wage & Hour Division have seen it all, and they can easily distinguish between the employer making best efforts to comply with the FLSA from the employer who just doesn’t care or affirmatively takes actions to hide its violations. I remember so well, for example, the owners of a Chinese buffet-style restaurant in Chicago who walked their employees to the bank to cash their back wage checks and then took the cash back from them. On the other hand, increased damages and penalties for the employer sued for paying off the student loans of employees but not including the cost of that benefit in the regular rate of pay would not further the goal of this reform to better protect the wages of the vulnerable.

If legislation is to increase damages or penalties, any increase should be limited, then, to repeat, willful and retaliation violations. Further, the terms “repeat” and “willful” need to be defined in the FLSA statute. Is it a repeat violation when an employer who miscalculated the

regular rate five or ten years ago then misclassifies an assistant manager as exempt? It took years of litigation before the U.S. Supreme Court settled the issue of whether pharmaceutical sales representatives were exempt. Was it willful for a company to classify its sales reps as exempt before the question was finally settled? Whether WHD seeks damages and penalties to resolve an investigation seems to be more a matter of geography than anything else – whether the WHD or Solicitor region in which the investigation occurred is one that aggressively seeks damages and penalties, or not.

Federal courts should be given the discretion to reduce damages and penalties consistent with the totality of circumstances. In one case in West Virginia, the DOL insisted on, and the court felt compelled to, award full liquidated damages although the employer was paying its unionized employees as required under a multi-employer collective bargaining agreement. The employer was willing to pay full back wages, but significant resources were wasted because DOL insisted on seeking liquidated damages to well-paid employees whose compensation was negotiated by their union. Damages and penalties should not be available at all unless an employer refuses to pay back wages during a WHD investigation; in other words, only employers who force the Labor Department to take them to court should face additional damages and penalties, thus incentivizing early settlement and payment of back wages. To protect vulnerable workers, we need to stop wasting time punishing good faith employers trying to do their best.

The bill also appears to require the Labor Department to refer (“shall refer”) any case involving willful violations to the Department of Justice for prosecution. Referral to and prosecution of a criminal case should be left to the discretion of DOL and DOJ.

Collective Actions

I don’t understand at all why a bill focused on protecting the wages of vulnerable, low-wage workers would remove the FLSA “opt in” litigation procedures. The findings claim that this “provision limits the ability of employees to unite and pursue private lawsuits against employers.” There is no evidence of that. This provision applies only to private litigation, not to litigation by the Labor Department. Plaintiffs’ attorneys have no problem filing thousands of federal collective actions and state class actions year after year. The “opt in” process has worked for decades. The bill proposes to remove it but does not address what will replace it. Would the Federal Rules of Civil Procedure apply? Would the standards be the same or something different from other types of class actions filed under those rules? The confusion would generate yet more litigation – which benefits only lawyers, not low-wage workers. In fact, this proposed change seems taken from the plaintiffs’ bar Christmas wish list. It will not help low-wage workers in any way as their claims are usually too small to attract the attention

of plaintiffs' attorneys whether for an FLSA collective action or a state law class action. Any reform effort needs to focus the FLSA on protecting wages for vulnerable and transient low wage workers. Changes designed to make life easier for plaintiffs' attorneys should not be a part of reform.

Arbitration

Also in this category of helping plaintiffs' attorneys, but not low-wage workers, is the proposal to ban arbitration.

Low wage workers are best protected by the FLSA when employers comply voluntarily and pay employees what they are due at the time that work is performed. Any delay in wage payments can be a severe hardship for workers who live paycheck to paycheck and are often transitory. As Administrator, I worked to decrease the time necessary to resolve a complaint by including this metric as part of investigator performance standards. It worked; the time to resolve an employee complaint decreased significantly.

Swift and certain resolution of wage payments is essential to the protection of vulnerable, low-wage workers. But this bill will delay worker pay by months even years by banning waivers of the right to bring FLSA wage claims in court. Arbitration is less formal but fair with significant protections for employees. It is more cost-effective; it is less time consuming; and it offers more immediate finality by avoiding years and years of appeals in the courts. What protects the wages of vulnerable workers more: receiving their wages after a two-month arbitration or having to wait through two years of litigation?

Arbitrating wage claims is not the same as in sexual harassment cases, where arbitration was used to hide bad actors from public view, letting those actors violate civil and criminal laws over and over again. Payment of back wages cannot be hidden by arbitration, as such payments are reported to the IRS for tax purposes.

Tolling the Statute of Limitations

Another provision of the bill that could significantly delay the payment of wages to vulnerable workers is the proposal to suspend the statute of limitations "during the period beginning on the date on which the Secretary of Labor notifies an employer of an initiation of an investigation or enforcement action and ending on the date on which the Secretary notifies the employer that the matter has been officially resolved by the Secretary."

The Wage & Hour Division has been criticized for taking too long to resolve complaints. If investigations go too long, the agency can lose the ability to collect some back wages – although every new day that passes often is another day for which back wages are owed.

Nonetheless, I tried to address this issue when serving as Administrator by setting standards for investigators and tracking the days taken to complete investigations.

Investigation should be resolved more quickly but tolling the statute of limitations will only remove all incentives for WHD to do so. If long delays in investigating complaints have no consequences, we will see the days required to resolve complaints grow longer and longer. I respectfully submit that my approach would have a greater impact: set metrics that investigators must meet or risk impacting their compensation. This Committee also could demand more transparency, and conduct effective oversight on this issue, by directing WHD to publish with its enforcement data the average number of days to resolve investigations each year.

Finally, the Labor Department has an existing effective means of protecting the wage claims of employees from expiring limitations periods in requesting employers to sign tolling agreements. The standard tolling agreement was developed by the Solicitor's office and has been in use with few changes from the Bush Administration. Most employers asked to sign such agreements do so. Although I would respectfully suggest that tolling agreements are only appropriate when investigation delays due to employer conduct or settlement discussion, not when caused by the inattention of WHD.

The Grant Program

Finally, the bill would establish a grant program within the Wage & Hour Division to provide funding for "community partners" to disseminate information, conduct outreach and training, provide assistance to employees in filing wage claims, assist enforcement agencies in conducting investigations, monitor compliance, and perform joint visitations to work sites with WHD staff.

I have several concerns with this program. First, the Wage & Hour Division already disseminates information, conducts outreach and provides training to employees, employee representatives and employers. I question whether grants to "community partners" without the training and experience of the career professionals at WHD would better protect vulnerable, low-wage workers. WHD already has a significant community outreach program. During the Obama Administration, the WHD created the new position of Community Outreach Research and Planning (CORP) as a pilot program. The Trump Administration made the position permanent and expanded it to every one of the 54 district offices around the country. The CORP are former investigators whose sole duties are community outreach and strategic initiatives. With over four dozen WHD employees dedicated to community outreach, the tools are already in place to accomplish what the grant program envisions – but with expert WHD staff.

WHD could do more to assist employees in filing wage claims. While serving as Administrator, I suggested to my staff that the agency adopt more formal procedures for employees to file complaints, receive updates about the status of investigations and even receive right to sue letters, as the EEOC has done for decades. I was surprised by the level of resistance to the suggestions. But 20 years later, the technology is available to allow employees, with or without help from community partners, to file complaints; to screen out complaints that the agency itself does not handle; to send automatically generated status letters to employees; and to route the complaint to the appropriate office (inside or outside WHD) for investigation. I could design an application to do so in just a few months. Leveraging available expert system technology would be faster, more cost-effective, and lead to better results than the proposed grant program.

Second, the Wage and Hour Division is not a grant awarding agency. It is an enforcement agency. Responsibility to administer a grant program would distract from its primary enforcement mission. Without experience in awarding grants, I fear this program is set up to fail.

Third, and perhaps most importantly, deputizing unions and employee advocates to “assist[] ... in conducting investigations” and “perform[] joint visitations to worksites” would eradicate the long tradition of employers voluntarily cooperating with WHD investigations. In the vast majority of investigations, employers voluntarily produce documents, welcome investigators into their worksites, and facilitate employee interviews. It is rare for an employer *not* to cooperate with investigators voluntarily.

We sometimes forget that the Fourth Amendment applies to WHD investigations. I have never advised an employer to assert its Fourth Amendment rights. But, if WHD attempts to partner with union representatives or other employee advocates to conduct investigations, employers most likely will stop cooperating and insist that WHD seek a search warrant to enter a worksite and go to federal court to enforce document subpoenas. The result: Investigations could take years rather than months. Delay of investigations and recovery of back wages will harm low-wage workers disproportionately – both because they will not have the money when they need it, and because the longer it takes to get the money, the harder it is to find the workers.

Alternative FLSA Reform Suggestions

Before I close, I would like to leave you with some alternative FLSA reform suggestions that could achieve our common goals of increasing compliance and workforce protections, especially for our most vulnerable workers. These suggestions are designed to simplify the rules, provide incentives to employers to comply, ensure back wage are paid quickly, and re-

focus FLSA protections to where it needs to be – vulnerable, low-wage workers (not highly compensated workers):

1. Amend the definition of a covered enterprise from a business with \$500,000 in annual gross volume of business to \$5,000,000 in business.
2. Create an affirmative defense to liquidated damages, civil penalties, and criminal penalties for employers who adopt and communicate complaint procedures to address employee wage claims, investigate such claims, and take appropriate action.
3. Create a new program, such as the former PAID program, allowing employers to ask the Labor Department to supervise the payment of back wages, as proposed by Rep. Stefanik in H.R. 5743.
4. Allow employees and their representatives to enter private settlements of FLSA claims with protections similar to the Older Workers Benefits Protection Act so employers can correct mistakes they find in payroll calculations without fear of litigation.
5. Adopt a definition of “willful” and “repeat” violations.
6. Amend the definition of regular rate in Section 207(e) to expand the types of extra pay and benefits that are excluded from the overtime calculation. In particular, new exclusions from the regular rate for childcare, student loan repayment and similar benefits would provide incentives for employers to provide employees with such benefits and remove the fear of violating the FLSA.
7. Adopt a new exemption for highly compensated employees.
8. Amend the Section 7(i) exemption for commissioned employees.
9. Update the computer employee exemption.
10. Revive the companion exemption to its original scope to prevent home care workers from going into the underground economy to provide care for families that cannot afford to hire caretakers through regulated and safer agency oversight.