STATEMENT OF

PAUL DECAMP
JACKSON LEWIS P.C.

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING

"IMPROVING THE FEDERAL WAGE AND HOUR REGULATORY STRUCTURE"

JULY 23, 2014

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Good morning, Chairman Walberg, Ranking Member Courtney, and distinguished members of the Subcommittee. My name is Paul DeCamp, and I am pleased to provide this testimony to address the need for the U.S. Department of Labor's Wage and Hour Division ("WHD") to issue more, and better, guidance to the public clarifying ambiguities in the Fair Labor Standards Act (the "FLSA")[1] and its implementing regulations. I am a shareholder with Jackson Lewis P.C., a national law firm with more than 770 attorneys in 55 offices across the country practicing exclusively in the area of workplace law. I am testifying today in my individual capacity; the opinions I express are my own and do not necessarily reflect the views of my firm, its attorneys, or its clients.

EXECUTIVE SUMMARY

Enacted in 1938 and amended numerous times since, the FLSA continues to present serious compliance challenges for employers. From a distance, the FLSA looks simple enough: minimum wage, time-and-a-half after 40 hours for most employees, restrictions on work by minors, and recordkeeping obligations. Yet the statute and its regulations contain many vague and ill-defined terms, leading to substantial confusion among employers and employees, high violation rates, and a rapidly growing wave of costly litigation. Even now, nearly eight decades into the law's existence, the courts continue to grapple with such seemingly basic and foundational questions as who is an employee, what is work, which elements of compensation go into the regular rate when calculating overtime, and which employees are exempt from overtime.

By and large, over the past 5-1/2 years WHD has been all but completely uninterested in providing employers with guidance to assist them in complying with the FLSA. The agency has closed its doors to employers, abandoning the process it followed for more than half a century of issuing opinion letters in response to requests from the public for guidance regarding specific questions under the FLSA. Instead, the agency has turned to highly punitive enforcement, focusing on civil money penalties, liquidated damages, litigation, and publicly shaming

[1] 29 U.S.C. §§ 201-219.

employers in lieu of helping employers comply with the law and thereby avoid violations in the first place.

As things now stand, many employers have nowhere to turn for guidance regarding FLSA compliance. WHD is providing little, if any, information, so the main alternative is to hire lawyers. Large companies can usually afford to spend at least some amount of money on attorneys, but many smaller and medium-sized businesses simply do not have either the resources to expend on compliance or even the awareness that serious liabilities lurk beneath the surface of a seemingly simple and innocuous statute.

WHD can do better. There will always be employers who want to comply with their legal obligations, just as there will always be willful violators who intentionally skirt the FLSA's requirements. The manner in which WHD carries out its charge to secure compliance with the FLSA depends largely on how the agency, and more specifically its leadership and the leadership in the Department more generally, views the relative proportions of these two types of employers in the economy.

If one believes that the vast majority of employers act in good faith and try to comply with the law, though perhaps through no evil intent they do not always get it right, then one must think that there is real value in providing clarity via education and interpretive guidance to give employers a fighting chance to pay their workers correctly. If instead one believes that most employers are out to cheat their workers and to violate the FLSA if they think that they can do so without getting caught, then one will see compliance assistance as having little value, with heavy-handed enforcement appearing to be the most effective way to obtain compliance. What does the current leadership in WHD believe?

WHD should return to its historical practice of treating employers as stakeholders and partners in compliance, rather than as law-breakers. This starts with recognizing the need to issue many more guidance documents than the agency now produces. Moreover, WHD has the ability to gather and to examine information regarding the types of issues that give rise to frequent violations, as well as questions that employers commonly ask when seeking informal guidance. The agency should use that information to drive its choices in topics for guidance. If WHD pursues this path, the result will be more compliance, more workers receiving proper pay under the law, and fewer violations. All of the relevant stakeholders win.

BACKGROUND AND EXPERIENCE

I have been an attorney for 19 years. From 2006 to 2007, I served as the Administrator of WHD. Appointed by the President, I was the chief federal officer responsible for interpreting and enforcing the Nation's wage and hour laws, most significantly the FLSA.

For the past 6-1/2 years, I have been the national leader of Jackson Lewis's Wage and Hour Practice Group. I oversee a team of approximately 130 attorneys who devote a substantial portion of their practice to representing employers in wage and hour litigation, including class and collective action cases as well as individual litigation matters; defending employers in federal and state agency proceedings; conducting preventive compliance reviews; and providing day-to-day advice and counsel.

Since mid-2005, my own work has focused exclusively on wage and hour matters. I have represented large national clients, mid-sized regional companies, and small local businesses in all aspects of litigation, agency practice, and counseling. I have been lead counsel or co-counsel in dozens of wage and hour class cases across the country. I have successfully sued DOL to invalidate regulations that the court deemed inconsistent with the FLSA. I am a frequent speaker at conferences across the country, and I have published numerous articles and book chapters on wage and hour issues. In short, I live these issues each and every day.

CHALLENGES EMPLOYERS FACE IN COMPLYING WITH THE FLSA

The FLSA seems straightforward. Just pay workers at least $7.25 an hour, plus time-and-a-half for hours beyond 40 in a workweek, unless one or more exemptions or exceptions applies that would change or eliminate one or both of those requirements. But the devil is in the details. There is a reason why violation rates under the FLSA are so high, with DOL consistently reporting violations in 70% or more of the employers it contacts.

The statute itself does not provide useful definitions of such key terms as "employee" and "work", and WHD's regulations attempting to shed light on these issues and many more take up roughly 1,000 pages in the Code of Federal Regulations. In my time at WHD, as well as in my experience in private law practice, I have seen employers repeatedly struggle with identifying which workers are their employees under the FLSA, which activities constitute compensable work, what types of compensation factor into the regular rate for purposes of calculating overtime, and which employees are exempt from the FLSA's overtime requirements. There are certainly many instances where the answers are for all intents and purposes clear under the law, and it is reasonable to expect employers to understand and to follow these clear legal standards. But in a surprisingly broad array of circumstances, the legal requirements are ambiguous.

These are real-world problems for employers dealing with tight operating margins, especially in today's economy. These companies are often competing with businesses that take more aggressive positions on these same issues, such that simply defaulting to the most conservative approach where there is ambiguity can have crippling consequences by virtue of imposing a competitive disadvantage. "When in doubt, just pay the workers more" is not a recipe for remaining in business. So employers must make decisions about how to manage the gray zone between clear compliance and clear non-compliance, while at the same time mindful of the strong economic pressures often weighing in favor of a more aggressive approach.

I. WHO IS AN EMPLOYEE?

The FLSA's protections apply only to individuals who are "employees" under the FLSA. The statute, however, provides the following circular definition for this critical term: "the term 'employee' means any individual employed by an employer".[2] And the definition of "employ"? "'Employ' includes to suffer or permit to work."[3] The FLSA does not define "work".

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[2] 29 U.S.C. § 203(e)(1).

[3] *Id.* § 203(g).

Although in many circumstances it is perfectly clear who is an employee, there has been extensive litigation and agency enforcement action in a number of the significant gray zones. For example, one of WHD's major enforcement initiatives over the past several years has been to clamp down on what the agency perceives as misclassification of employees as independent contractors, with the focus being on addressing relationships that businesses have directly with workers such that the workers are nobody's employee. Industries heavily affected by this ambiguity include cable installation, parcel delivery, and information technology services.

Drawing the line between employees and bona fide independent contractors has proven incredibly difficult. It is not the type of inquiry that has lent itself to bright lines and determinate results. Indeed, I testified before this Subcommittee seven years ago tomorrow on the topic of independent contractor misclassification, and Congress is no closer today than it was then to solving this challenge.

Another point of emphasis among workers' advocates in recent years has been to push for a much broader notion of joint employment than has traditionally been the case. In short, a claim of joint employment involves asserting that one entity is actually responsible as an employer for securing the FLSA's protections with respect to workers employed by another business. We have seen WHD and the plaintiffs' bar active in this area with respect to traditional contracting and subcontracting relationships, with the claim being that an employer higher up in the contracting chain is a joint employer of workers employed by subcontractors. This issue has become significant in the residential construction industry, among others.

This type of joint employment claim has also arisen in the context of the relationship between franchisors and franchisees. We have seen substantial interest in the claim that the employees of a franchisee are also the employees of the franchisor entity. This issue has arisen primarily in restaurant and retail operations.

We have also seen class action litigation addressing whether unpaid interns are actually employees under the FLSA. A number of media companies, among others, have found themselves on the receiving end of lawsuits challenging the interns' unpaid status and seeking compensation. The same issue also exists with respect to individuals receiving pre-employment training, which has affected among other industries businesses that prepare tax returns for members of the public.

Unfortunately, WHD's guidance on these issues has been sparse. There is a fact sheet on the employment relationship, plus some older opinion letters that set forth a general six-factor test that most courts have rejected. But we have seen very little in terms of efforts by the agency to clarify this persistent and difficult ambiguity in the law.

II. WHAT IS WORK?

In order for the protections of the FLSA to apply, an employee must engage in compensable work. Although there is a broad range of activity that clearly qualifies as work—i.e., when an employee is performing core job duties at the worksite during a scheduled shift—issues continue to arise at the margins. These issues have major economic significance insofar as a retroactive determination that activity treated as noncompensable actually counts as work can

have a devastating effect on a company, especially in light of the reality that an employer who knows in advance to treat the activity as compensable would set the wage rates accordingly so as to arrive at the same overall level of compensation.

The types of activity that tend to generate WHD investigations and litigation include, among others, donning and doffing (primarily in meat and poultry processing, mining, and high-technology fabrication), security screening (in a variety of industries including warehouses, information technology, power generation, and airports), and using mobile devices and remote network access. Indeed, the Supreme Court is currently considering whether security screening at a warehouse is compensable work.[4] WHD and the courts have yet to develop workable standards that provide clear, determinate answers for whether these kinds of activities constitute work.

Even activity may be work, employers face the question of whether the work is so brief as to fall within the long-recognized *de minimis* exception that allows employers to disregard a few seconds or minutes of work that does not involve core job duties and would be administratively difficult to measure. WHD has taken an aggressive position with respect to the *de minimis* rule, though many courts continue to apply the rule.

As the types of job-related activity that people perform increases, and as the opportunities to engage in that activity away from the workplace expand due to technology, it becomes even more important to adapt the FLSA to the times. This includes providing guidance to explain to employers how to handle these situations that are often far removed from the 1930s brick-and-mortar factory paradigm that gave rise to the FLSA.

III. Which Types Of Compensation Go Into The Regular Rate?

Another recurring issue that employers face is which elements of compensation factor into an employee's regular rate for purposes of calculating overtime. The general rule is that all compensation an employee receives for work becomes part of the equation for determining the employee's regular rate, meaning the effective average hourly rate for the workweek, that serves as the basis for calculating the half-time overtime premium.[5] This rule, however, contains numerous exclusions, including discretionary bonuses and contributions to certain benefits plans.[6]

Nearly all employers understand that base hourly pay goes into the regular rate, and most employers that pay shift premiums know to include that money as well. But hardly a week goes by that I do not have at least one employer asking whether a certain type of bonus payment qualifies as discretionary, and thus excludable from the regular rate. WHD's enforcement position has been much more aggressive in practice than the agency's guidance on this issue would suggest. Although the regulations appear to treat a bonus as discretionary so long as the employer does not commit in advance to paying any particular amount of bonus money, or to

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[4] *Integrity Staffing Solutions, Inc. v. Busk* (U.S.) (No. 13-433).

[5] *See* 29 U.S.C. § 207(e).

[6] *See id.* § 207(e)(1)-(8).

paying any bonus at all,[7] in reality WHD will challenge almost any bonus as non-discretionary, and thus includable in the regular rate. Employers need to know how to treat these bonuses, both because the overtime calculations can be cumbersome and because excessive risk in this area discourages employers from paying bonuses in the first place.

Similar concerns arise with respect to contests and prizes, as well as corporate wellness programs. Employers are constantly looking for creative and flexible ways to reward their employees. But ambiguities in the law force employers to choose between (1) treating the compensation as part of the regular rate, thereby incurring higher costs and a greater administrative burden; (2) paying money to consult an attorney; (3) excluding the compensation from the regular rate, thereby running the risk of litigation or agency enforcement action; or (4) deciding that it is just not worth the hassle and foregoing the additional compensation entirely.

IV. WHICH EMPLOYEES ARE EXEMPT FROM OVERTIME?

Exempt status is a major concern for employers and employees alike. Being "salaried" denotes a level of status and accomplishment that in most workplaces represents important responsibilities, higher overall compensation, and greater upward mobility. It also means not worrying so much about week-to-week fluctuations in the workload causing unanticipated drops in pay. Hourly-based compensation tends to encourage slower work and a feeling of being on the clock and a cog in a machine, whereas salary-based compensation drives efficiency and innovation, as well a greater feeling of autonomy and alignment with the employer.

It is also important to remember that the FLSA's overtime requirement is not primarily designed to put more money into the pockets of workers who work long hours. Instead, the goal is the opposite: to create a strong economic incentive for employers to spread work around among more employees so as to avoid the overtime penalty. In short, the purpose of the overtime requirement is to alleviate unemployment, which makes eminent sense in light of the roughly 20% unemployment the country faced in 1938 when Congress enacted the FLSA. In my experience, employees converted from exempt to non-exempt normally see their hours reduced to 40 or less per week, and their pay declines accordingly.

Based on my dealings with employers and employees in both counseling and litigation, current employees want to be exempt, and former employees want to be non-exempt. When we see litigation over exemption status, it tends to involve former employees, at least at the outset of the case. When WHD investigates, the agency often takes aggressive and unanticipated positions with respect to roles long thought to be exempt.

Classifying an employee as exempt or non-exempt is a very important step in deciding an employee's compensation, and employers need to get it right. The consequences of choosing wrong are substantial, given that most employers do not track the hours of employees classified as exempt, and courts calculate damages based not on what the hourly rate would have been if the employer had treated the employee as non-exempt from the start, but instead based on the pay that the employee actually received. The result is that the employee receives overall

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[7] *See* 29 C.F.R. § 778.211.

compensation, once back wages come into play, far in excess of the actual market value of the job. On the other hand, classifying as non-exempt an employee who could qualify for an overtime exemption imposes significant operational costs on the employer and limits the overall utility of the employee, in addition to limiting opportunities for promotion and higher compensation.

For most workers today, exempt status is not an issue. The general rule is that employees get overtime for working beyond 40 hours in a week unless an exemption applies, and courts have traditionally construed exemptions narrowly. As a result, most workers in the economy today are clearly non-exempt.

Nevertheless, there is a large and growing number of salaried office workers earning in the range of $30,000 to $90,000 per year who are in the gray zone between clearly exempt and clearly non-exempt status. These are not manual laborers, and many of these workers have a college degree. Employers need to know how to classify these employees, without having to resort to calling the lawyers each time or just taking the most conservative approach.

For example, there has been growing interest in litigation over the executive exemption[8], the exemption generally that applies to supervisors and managers. We have seen this most frequently in the retail setting, but it affects other industries as well. The challenge for employers is that the regulations and other WHD guidance leave room for employees (and especially former employees) to contend that their "primary duty" was not actually management, or that they did not have sufficient supervisory authority over other employees. This ambiguity in the standards encourages more litigation.

Another area that has long confused employers is the administrative exemption, which applies to employees engaged in "work directly related to the management or general business operations of the employer or the employer's customers" who exercise "discretion and independent judgment with respect to matters of significance"[9]. This is the category for office workers who are not supervisors or managers, and who do not qualify for exemption as a learned or computer professional. The standards are especially amorphous, and much of the guidance available from the courts and WHD is inconsistent and contradictory.

Even WHD has had trouble applying the administrative exemption. For the first several decades of the agency's existence, WHD classified its wage and hour investigators as exempt pursuant to this exemption. In the 1970s, the Office of Personnel Management ("OPM"), which has enforcement authority under the FLSA with respect to most federal employees, conducted an audit and determined that WHD had misclassified hundreds of these investigators. These are the very individuals whose job it is to go around the country telling employers whether they have or have not correctly applied the FLSA. But OPM concluded that the investigators are production employees rather than administrative, and thus that the administrative exemption does not apply.

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[8] *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.100-.106.

[9] *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.200-.204.

There is also much confusion regarding the learned professional[10] and the computer professional[11] exemptions. The available WHD guidance suggests that not every learned professional must have a college degree so long as the norm for entry into the field is obtaining the degree, yet there is little to no guidance explaining to employers how to apply this standard. In addition, there is very little case law or WHD information applying the computer professional employee exemption to specific fact situations. The standards for the computer employee exemption date back to the early 1990s, and today's information technology world looks almost nothing like the pre-internet, pre-mobile device world that gave rise to the exemption and its regulations.

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One of the most difficult aspects of the vague standards is the potential for class and collective action litigation. The way that the case law has developed over the past twenty years, when a plaintiff comes into court alleging that a business violated his or her FLSA rights and that there are other similarly situated people out there, most courts do not hesitate to authorize notice at the early stages of the case to a broad class of employees. Thereafter, even if it turns out that the employees are not similar to the original plaintiff, the plaintiff's lawyer has names and contact information for many additional clients. In effect, the collective action device under the FLSA has become a powerful recruitment and solicitation tool for the plaintiffs' bar. Employees who did not think that they had a problem find themselves encouraged to press often dubious claims against their employer.

It is one thing to expect employers to comply with clear legal standards; we should demand this of every employer. But it is something else entirely for companies to have to face massive litigation over gray areas in the law. Legal ambiguities encourage litigation, and often the transaction costs of litigating a dispute are more than the amount of damages claimed. Clear standards lead to compliance, and they make it easier for employers and workers alike to know whether pay practices comply with the FLSA.

WHD'S RESPONSE TO THESE CONCERNS

In early 2009, WHD withdrew 20 opinion letters, 18 of which were Administrator letters and two of which were non-Administrator letters, subject to "further consideration". In the more than five years since, WHD has not reissued those letters, or even stated one way or the other whether the agency believes that the guidance provided in those letters is correct.

Then in 2010, WHD announced that it was abandoning entirely its decades-old practice of issuing opinion letters. No longer would employers or workers have an opportunity to submit questions to the agency for a formal ruling. Instead, the agency would select issues on its own, and then make broad policy pronouncements. Since that time, WHD has issued five so-called Administrator Interpretations concerning the FLSA, including one that focuses on agriculture and the handling of pine straw, as well as two Administrator Interpretations concerning the Family and Medical Leave Act. The first two of WHD's Administrator Interpretations simply

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[10] *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.300-.304.

[11] *See* 29 U.S.C. § 213(a)(17); 29 C.F.R. §§ 541.400-.402.

reversed positions taken under the FLSA during the previous administration. The Supreme Court is currently considering whether WHD complied with the Administrative Procedure Act in issuing one of those interpretations.[12]

These various quick reversals of agency enforcement positions have created substantial confusion among employers. The fact that the courts in many instances refuse to defer to agency guidance where an agency changes views from one administration to the next makes it even more difficult for employers to know and to understand what exactly their compliance obligations really are.

In lieu of issuing guidance and providing robust compliance assistance, WHD has instead focused its efforts on conducting broad investigations, seeking liquidated damages in a broad range of investigations, imposing civil money penalties on the basis of an employer's status as a "repeat" violator even where the prior violation was years ago and involved a completely different issue, and shaming employers through the use of press releases and other techniques to publicize what WHD believes to be an employer's non-compliance.

WHD has also been very reluctant to supervise settlements. In light of long-standing Supreme Court precedent[13], courts have generally held that the only way to effectuate a binding release of FLSA liability is through a judgment in court (or arbitration), or a court-approved settlement, or a settlement supervised by WHD. In the past, if an employer discovered a violation, the employer had the option of going to WHD to have the agency supervise the payment of back wages. In the past several years, WHD has been unwilling to consider request to supervise settlements, effectively leaving employers with no option to address their back wage exposure without the risk of follow-on litigation.

Making matters even more challenging for employers, WHD is now looking at significantly revising the white-collar overtime exemption regulations in response to the President's memorandum to Secretary of Labor Thomas Perez declaring that "millions of Americans lack the protections of overtime" as a result of problems with the regulations.[14] Employers who have relied on WHD regulations, court rulings, and what little WHD guidance exists now must face the prospect of substantially revamping their compensation policies. At the same time, a new wave of litigation is all but inevitable as employees frustrated by the changes forced by the new regulations will seek to hold their employers responsible, regardless of whether the employer paid the workers correctly.

WHD CAN, AND MUST, DO BETTER

WHD needs to recognize that employers are not the enemy. The undeniable reality is that most employers want to comply with the law. With regard to the FLSA, most employers have no idea how complicated and difficult it can be to pay workers correctly. And with a law

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[12] *Perez v. Mortgage Bankers Ass's* (U.S.) (No. 13-1041).

[13] *Brooklyn Sav. Bank v. ONeil*, 324 U.S. 697 (1945).

[14] *Presidential Memorandum—Updating and Modernizing Overtime Regulations* (Mar. 13, 2014), available at www.whitehouse.gov/the-press-office/2014/02/13/presidential-memorandum-updating-and-modernizing-overtime-regulations.

that is so seemingly simple—minimum wage plus time-and-a-half—employers are not for the most part on notice of the need to master 1,000 pages of regulations, 70-plus years of agency guidance, and numerous court rulings. Given WHD's own track record of misclassifying half or more of its own employees as exempt, the agency should be more understanding of how and why violations occur. While there will always be a need for strong coercive enforcement measure for willful violators, good and effective government requires calibrating enforcement to address the needs and the nature of the regulated community. This means acknowledging that most employers will comply with the law if someone simply tells them what the law requires.

As discussed above, the many ambiguities in the FLSA and its regulations cry out for more agency guidance. Even though compliance assistance does not necessarily show up in an agency's enforcement numbers, insofar as it is all but impossible to quantify the effect of guidance documents in preventing violations, making information available to the public is the right thing to do. Employers need help complying with the FLSA, and the law should not be so complex that the only option is to seek legal counsel.

Based on my time in WHD, as well as my years of working with employers, the best way to increase compliance is to provide standards that are as clear as possible. This means issuing guidance documents that actually help employers to understand the key issues that they face on a daily basis. Given WHD's long history of enforcing the FLSA, as well as its experience fielding calls from the pubic seeking information about compliance, the agency and the public would surely benefit from an approach that identifies points of recurring violations and frequently asked questions and then focuses on issuing guidance tailored to that need. If WHD focuses more research on issuing guidance documents, and on the topics that are of greatest importance to the public, then we will see substantial benefits in the form of better compliance and fewer violations.

CONCLUSION

Employers and employees alike benefit when WHD provides clear guidance on relevant FLSA topics. WHD should embrace the value of preparing and issuing such guidance documents, and it should allocate more resources to identifying areas of particular concern to large numbers of employers and employees, and then crafting appropriate guidance documents. If the agency commits to such an approach, the result will benefit everyone, including most importantly the workers the FLSA aims to protect.

Mister Chairman, this concludes my prepared remarks. I will be happy to answer any questions you or the Members of the Subcommittee may have.