Statement of the U.S. Chamber of Commerce

ON: **Reviewing the Rules and Regulations Implementing Federal Wage and Hour Standards**

TO: **U.S. House of Representatives**
Committee on Education and the Workforce
Subcommittee on Workforce Protections

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The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

STATEMENT OF LEONARD COURT
SENIOR PARTNER, CROWE & DUNLEVY, A PROFESSIONAL CORPORATION
BEFORE THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS
HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE

REVIEWING THE RULES AND REGULATIONS IMPLEMENTING FEDERAL WAGE AND HOUR STANDARDS

June 10, 2015

Mr. Chairman and Members of the Subcommittee:

I am honored to appear today on behalf of the United States Chamber of Commerce to address current enforcement approaches of the Wage and Hour Division of the U.S. Department of Labor and problems with the Fair Labor Standards Act. The United States Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector and region. My law firm Crowe & Dunlevy is one of the two largest firms in Oklahoma and is a member of the Chamber's Labor Relations Committee.

In speaking for the Chamber, I bring my personal experience of over forty years which involves advising and litigating employment matters including wage and hour issues on behalf of clients throughout the Midwest. Also, I have served as the Chairman of the Wage, Hour and Leave Subcommittee of the Chamber since 1999. Our subcommittee meets at least twice a year during which time members share their experiences with wage and hour enforcement techniques and issues and other concerns regarding the FLSA.

As you are probably aware, Fair Labor Standards Act suits are one of the fastest growing sources of litigation in our federal courts. Between April 2011 and May 2012, approximately 7,064 FLSA cases were filed nationally.[1] During the next 12 month period of April 2012 to March 2012, the number rose to approximately 7,764 FLSA cases.[2] From March 2013 through March 31, 2014, that number jumped to over 8,100 cases.[3]

Additionally, the Wage and Hour Division is changing its enforcement approach from a "complaint-driven approach" focusing on an individual's complaint toward what it calls "directed enforcement."[4] In fiscal year 2013, 45 percent of the agency's work stemmed from directed investigations which Wage and Hour Administrator David Weil characterizes as a "big change."[5]

[1] 145 BNA Daily Labor Report A-4, 7/27/12.
[2] 91 BNA Daily Labor Report A-5, 5/10/13.
[3] 97 BNA Daily Labor Report A-9, 5/21/14.
[4] 91 BNA Daily Labor Report A-7, 5/13/14.
[5] 28 BNA LRW 2496, 11/10/14.

Also, the Division has significantly increased its insistence on imposing liquidated or double damages and on assessing civil money penalties as part of settling wage and hour investigations prior to initiating litigation.[6] Additionally, the agency appears to be threatening to increase its use of its "hot goods" authority. Under sections 12(a) and 15(a)(1) of the Act, the Department can seek a court order to prevent shipment of goods produced in violation of the FLSA.

While the Chamber certainly supports appropriate enforcement of the FLSA, and realizes that there are employers who do not compensate their employees appropriately, unfortunately, what we have also seen is an increased use of questionable tactics by investigators trying to coerce settlements of wage and hour claims. This is the topic which I want to discuss with your Committee. While the examples that I use are anecdotal in nature, they have been confirmed by other members of the Chamber's Wage, Hour and Leave Subcommittee and other attorneys and human resource practitioners around the country.

DISCOURAGING USE OF LEGAL COUNSEL

Wage and Hour Division investigators are discouraging companies from using legal counsel during investigations. This is being done in a variety of ways. At the outset of an investigation, an investigator may say to the employer that this matter can be resolved quicker and cheaper if legal counsel is not involved. The implication is that seeking legal advice will cause the liability findings to increase significantly.

Quite frankly, if the investigator has done his or her job properly, then the investigator should have nothing to fear from the involvement of legal counsel for the company. The use of this tactic suggests that the investigator has something to hide.

Some investigators have also refused to allow legal counsel to attend interviews of management personnel in cases which do not involve the issue of misclassifying that specific employee as exempt. Management personnel have the ability to bind the company with their statements. Historically, the agency has allowed legal counsel to attend interviews of supervisors when the issue being investigated does not involve that particular supervisors pay or exempt status. For example, if the claim under investigation involves allegations of working non-exempt personnel off the clock, then legal counsel would be allowed to attend interviews of management personnel. The increasing number of instances of this tactic is troubling.

IMMEDIATE SETTLEMENTS

Agency investigators have a growing insistence that companies agree to settlement proposals without allowing adequate time for consultation with either higher management or legal counsel. Three examples illustrate the problem:

A multistate employer with facilities in Oklahoma underwent a wage and hour investigation without the assistance of counsel. At the closing conference, the investigator insisted that the human resources manager immediately agree to and sign the settlement

[6] 91 BNA Daily Labor Report A-7, 5/13/14.

agreement without allowing time for the manager to consult with the home office in another state. Fortunately, the manager had the presence of mind to call me immediately. I spoke by phone with the investigator and insisted she call her supervisor concerning this issue. After contacting her supervisor, the investigator relented and allowed the company approximately three weeks to consider and respond to the proposal.

In another investigation, I was the individual who attended the closing conference for the client. The investigator insisted that I agree to and sign the proposal immediately, without time to consult with the client, or else he would refer it to litigation. Obviously, that did not happen.

The last example is less than a month old. This one involves a case in which I am not counsel for the employer. In this matter, the investigator found six figure liabilities and gave the employer only three days to consider the proposal or else the matter would be forwarded for litigation.

This type of immediate settlement demand is troublesome for several reasons. First, it deprives the employer of adequate time to analyze the findings and conclusions of the investigator. If the investigators were careful and usually correct in their conclusions, then this would not be a problem. But the simple fact is that they are not. Second, this demand for an immediate response ignores the realities of dealing with most companies—particularly multistate employers. Any type of significant settlement normally requires the approval of multiple individuals within the company in addition to legal counsel. If the investigator's conclusions are sound, then the investigator should not fear having those conclusions appropriately analyzed by others.

"HOT CARGO" THREATS

The recent use of the "hot cargo" provision as a tool to coerce settlement has created both controversy and judicial criticism. The agency historically uses this provision when an industry has a supply chain structure, such as the garment industry.

In 2012, the agency used the threat of the hot cargo provision to "persuade" two California blueberry growers to agree to back wage settlements by threatening to delay shipments of their crops which would result in them rotting. Both growers "agreed" to settlement and paid back wages which were allegedly due. However, the growers then sued the agency over alleged losses caused by the tactic. A federal court vacated the resulting consent decrees, finding that the use of the "hot goods" provision amount to economic duress.[7]

When these types of investigative tactics are discussed at our Subcommittee, many other members from around the country confirm that they have suffered similar conduct from wage and hour investigators.

[7] *Pan-American Berry Growers LLC v. Perez*, D. Or., No. 6:13-01439 4/24/14.

SYSTEMIC INVESTIGATIONS

Another example of this shift is a greater emphasis on expanded and expansive investigations. This is part of the emphasis on looking for systemic violations. Unfortunately, the expanded investigations also mean expanded costs for the employers that are being targeted. The investigations entail demands for hundreds, if not thousands, of pages of documents which the investigators insist must be produced in a very short period of time. Once this type of investigation begins, the agency will continue these demands, even when no violations are being unearthed. A colleague in a neighboring state had a client that had to deal with a relentless attempt by the Division to combine unrelated and independent businesses in order to satisfy the "enterprise coverage" test of the FLSA. Despite repeated submission of documentation showing the independence of these businesses, the investigation continued. The state's congressional delegation became involved in attempting to solve the problem. When this occurred, the investigation expanded to include subsidiaries of the entities. After the businesses were forced to spend near six figure sums on legal fees, the investigation concluded no liability existed.

LIQUIDATED DAMAGES AND CIVIL MONEY PENALTIES

Another dramatic change in enforcement tactics is the increased use of liquidated damages and civil money penalties during negotiations prior to litigation. The agency has increasingly demanded these remedies over the last five years.[8] The question raised by this tactic is whether it actually accomplishes the goal of the investigation which is to get any unpaid wages to the affected employees as quickly as possible. Under previous administrations, the incentive for an employer to settle an investigation was the threat of liquidated or double damages and civil money penalties if a suit were to be filed. By insisting on imposition of these penalties during the investigative stage, the agency may actually encourage employers to engage in litigation. This results in delaying the employees from receiving the back wages allegedly due.

Furthermore, the Portal to Portal Act seems to reserve the discretion for assessing liquidated damages or civil money penalties to the court.[9] The Wage and Hour Division is frequently treating violations as warranting these penalties that Congress designated for the most severe cases where there is no suggestion that the employer acted in good faith[10]; the Division does not seem to want to acknowledge the possibility of a good faith disagreement. Indeed, Solicitor of Labor Patricia Smith has made clear that employers should expect more demands for liquidated damages from the Wage and Hour Division.[11]

These experiences highlight a dramatic shift by the Wage and Hour Division in dealing with the employer community. While enforcement has always been a hallmark of the Wage and

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[8] 91 BNA Daily Labor Report A-7, 5/13/14.

[9] See 29 U.S.C. 260: "In any action commenced…to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938…if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title."

[10] *Id.*

[11] 36 BNA Daily Labor Report C-1, 2/23/2012.

Hour Division, and will always be necessary, the approach has shifted from one of cooperation and education to one of confrontation and coerced settlement.

In addition to my personal experiences, members of the Chamber's Wage, Hour and Leave Subcommittee have provided the following examples illustrating the change in enforcement tactics:

- From a lawyer in New Orleans: In my practice experience, WHD formerly had a policy to encourage employers who discovered violations to bring them to the agency for resolution. While that policy sounded counterintuitive to employers, WHD promised no liquidated damages, no attorney fees, and an effective release (the only other effective release is from a court). Now employers will go back to their old approach when discovering wage and hour violations – fix the problem quietly, in a low key way, such as at the beginning of a new fiscal/calendar year, and then "whistle past the graveyard" for the next three years until the limitations period has run.

- From a prominent Wage and Hour practicing attorney in Detroit: "The recent trend makes it appear that the DOL assumes the employers wish to violate the law," Robert Boonin told Bloomberg BNA January 7. In reality, Boonin said, most employers "try to comply with the law, but sometimes the law is just unclear."

  In particular, he said, the defense bar is concerned about "DOL's general position that certain penalties may be assessed without formal adjudication." He said the DOL "is taking the position with respect to many of its investigations lately that employers must pay liquidated damages in addition to unpaid overtime in order to resolve an adverse administrative finding," even though under the FLSA "liquidated damages may only be assessed by a court."

  "Settlements would be easier to work out if liquidated damages weren't on the table," Boonin said, adding that "many claims do not warrant liquidated damages since employers who find out that there may be overtime due were unaware of the overtime having been incurred."

  He lamented that "the WHD—particularly in light of the background of the likely new Administrator—appears primed to short-circuit the adjudication process and impose penalties normally reserved for after there's been a full adjudication of the matter."[12]

- From a Wage and Hour practicing attorney: In or around October/November 2011, a multi-generational family-owned nursery in Mississippi was investigated by DOL regarding pay practices. The investigator represented to the employer that it would need to pay back wages, but not to worry about liquidated damages. Later, supervisors of the investigator came to the employer and demanded payment of liquidated damages, threatening that if the employer did not agree to pay such damages, DOL would sue and "humiliate" the employer in the local press.

[12] 18 BNA Daily Labor Reporter S-19, 1/28/2014.

An effort was made to negotiate with the District Director in Birmingham, AL, but that was ultimately rejected. When a question was raised about DOL's ability to seek liquidated damages in this setting, the District Director reportedly said that he was authorized to do so.

- From a Washington, DC, based attorney: Wage-Hour has done something else that's even worse: Settled, and then after the settlement is entered come for liquidated damages. So, the employer thinks the matter is closed but DOL comes back for more—and uses the settlement as an admission, and uses past settlements to show the employer is a repeat offender. I've seen them do this to two clients who settled without representation by outside counsel.

REDUCED COMPLIANCE ASSISTANCE

The increased enforcement activity seems to be accompanied by a reduction to employers in compliance assistance. Thus the administration has eliminated opinion letters in which the agency answered specific questions from employers. According to David Fortney, former acting Solicitor of Labor, the letters provided certainty.[13] The current administration has abandoned opinion letters in favor of broader "administrator's interpretations" on specific issues. Unfortunately, few of these have been issued to date and they are not driven by employers' fact-specific inquiries, but by the Administrator's desires of what he wants to say.

One key question about Administrator's Interpretations, as opposed to Opinion Letters, is the degree to which an employer can use reliance on one as a defense to enforcement. Employers need to know what level of protection, or "safe harbor," they can expect from following an AI. The Portal to Portal Act makes clear that following administration guidance is one of the ways an employer can demonstrate good faith compliance[14]; if an employer's facts fit within an AI, there should be some form of a good faith defense/safe harbor. The Wage and Hour Division needs to specify how AIs fit within the Portal to Portal Act's good faith defense/safe harbor provisions.

AREAS OF NEEDED CHANGE TO THE FLSA

In addition to the problems I have outlined above with the enforcement tactics of the Wage and Hour Division, the law itself is badly in need of updating. The Fair Labor Standards Act was passed in 1938 during the industrial era when workers went to one location and punched a time clock to start their day. Today, workers may not even go to an employer's workplace, and their day may start by checking their portable electronic device to get their instructions for the day. The Fair Labor Standards Act is so out of sync with the contemporary workplace it is like trying to compare traveling by zeppelin with today's modern air travel.

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[13] 227 BNA Daily Labor Report C-1, 11/25/14.

[14] See 29 U.S.C. 258: "…no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act…if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or *interpretation*, of any agency of the United States or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged…." (emphasis added)

The FLSA needs a comprehensive review. The following is not intended as a comprehensive list, but discussed below are some areas that clearly stand out as needing attention. These changes are intended to provide employers with more clarity, employees with more flexibility, and help avoid expensive and resource draining litigation. The changes will positively impact multiple sectors of the economy, including IT, health IT, defense, pharmaceuticals, financial services, retail, insurance, distribution, telecommunications, and others that are drivers of job creation and economic growth.

There is no reason these changes cannot attract bipartisan support. In fact, the bill for updating the computer employee exemption was supported by Congressmen Jared Polis and Rob Andrews back in the 112th Congress.

Update and Modernize the Computer Employee Exemption

Codified nearly 25 years ago, the current definition of an exempt computer employee is outdated and too narrow to be very relevant today. Modern computer professionals require higher level of thought and skill to perform their duties, and many individuals have advanced degrees, yet they are non-exempt employees. For example, a database administrator maintaining a complex and large system who collaborates with technical teams from multiple areas (e.g., host and operating systems, storage, and other application support teams) to coordinate upgrades or repair problems is most likely considered non-exempt if they do not spend the majority of time designing, modifying, creating or making changes directly related to the program code or operating systems.

The solution is to expand the exemption to include a 21st century list of duties (e.g., securing, configuration, integration, maintenance, debugging or modification of computer or information technology). Congress clearly recognized that there are professionals in the computer and high tech industry whose duties warrant them being exempt from the overtime requirements—it is now time to update this exemption to reflect the modern computer and high tech workplace.

Create Exemption for Inside Sales Employees

Inside sales employees are non-exempt because they have a 'fixed office location,' unlike their outside sales counterparts, who are exempt. This distinction is artificial and outdated. Inside sales persons 'virtually' call on clients and are not 'order takers,' using the same technology as outside sales employees and selling the same products. Inside sales reps are doing the same work for clients as outside sales colleagues with the same technology, yet their workplace flexibility, hours and commissions are limited due to strict time-keeping requirements, salary caps and employers' needs to predict compensation costs.

The solution would be to include inside sales positions as exempt (like outside sales) by removing the 'fixed office location' requirement. Alternatively, the Commissioned Employees exemption could be expanded by removing the 'retail/service establishment' requirement. This would make this exemption available to a wide array of businesses, but only if they pay more than 50 percent of compensation in commissions.

Clarify the Definition of "Hours Worked"

The modern workplace gives rise to minor IT-related activities outside of the work day (e.g., checking email/calendar before leaving for work), which currently may be compensable depending on interpretation, and there is a lack of consistency in current interpretation. Activities resulting from either the use of technology or flexible work arrangements could turn the regular commute to and from work into compensable time under current interpretations of the FLSA. Indeed, the Department of Labor has noticed a Request for Information due out in August to explore how much work is done outside the traditional workplace and work hours in this way.

The "*de minimis*" exception, in terms of time and IT-related activities, is not defined. Again, this is a contemporary issue that was never anticipated by the original FLSA, nor even by the amendments to the Act as recently as 1990. Employers and employees need Congress to update the *de minimis* exemption to include current uses of technology and work habits.

Possible solutions would be to define specific *de minimis* activities and exclude said *de minimis* activity from "paid time." (e.g., checking scheduled assignments, work locations, emails, voice mail, electronic or other forms of calendars, and other similar activities). Also, the Act should specify that normal commute time is not compensable, even if work is performed before or after the commute.

CONCLUSION

The Fair Labor Standards Act is one of the key laws shaping the workplace. It embodies essential protections for employees and provides key directions to employers. Unfortunately, there is ample opportunity for differing interpretations and misunderstandings of the law's requirements in the contemporary setting. Into these areas of uncertainty has, in some measure, stepped the Wage an Hour and Division with aggressive enforcement tactics built around the presumption that all violations are intentional and worthy of the most severe penalties. This attitude is then combined with coercion intended to force employers into agreements that may not be appropriate. It is my hope that by highlighting these issues to your Committee, we can return to investigations and settlement that stand on their merits rather than attempt to simply coerce results, irrespective of their propriety.

Beyond the Department of Labor's approach to enforcement, the law itself is badly in need of being updated as applying a law passed in 1938 is exceedingly challenging in today's technology-driven, internationally competitive, and rapidly evolving workplaces. Too many of the key terms of this law no longer work for either employees or employers. Congress needs to make updating the Fair Labor Standards Act a high priority so that the jobs and workplaces of the 21st Century are not held back by a law from the early 20th Century.