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BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Changes Needed To Deter Violations Of Fair Labor Standards Act

The Fair Labor Standards Act, established to protect the wages of American workers, is not adequately accomplishing its objective. Employers who violate certain provisions of the act are not penalized either because penalties do not exist or because existing ones are not used as often as they should be.

The Department of Labor is also lax in recovering maximum back wages permitted by statute, and by not seeking interest Labor does not restore, to the maximum extent, the full value of illegally withheld wages. When some illegally withheld back wages are not restored to employees, employers profit because the statute of limitation relieves them of this obligation.

This report contains recommendations to

- strengthen Labor's enforcement program to deter employers from violating the Fair Labor Standards Act and
- improve Labor's ability to recover the full amount of back wages illegally withheld from employees.



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COMPTROLLER GENERAL OF THE UNITED STATES
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To the President of the Senate and the
Speaker of the House of Representatives

This report describes the Department of Labor's problems in administering the Fair Labor Standards Act and recommends legislative and administrative changes needed to deter recordkeeping, minimum wage, and overtime violations of the act and prevent employers from retaining back wages owed to employees. We made this review to determine if Labor's administration of the act effectively deterred employers from violating it and, if not, to propose actions for improving compliance and for recovering illegally withheld wages.

Copies of this report are being sent to the Secretary of Labor; the Attorney General; the Director, Office of Management and Budget; and other interested parties.

A handwritten signature in cursive script that reads "Milton F. Rowland".

Acting Comptroller General
of the United States

D I G E S T

The Fair Labor Standards Act of 1938 sets standards for recordkeeping, minimum wage, overtime pay, and other protections for about 60 million workers in over 4.1 million establishments engaged in interstate and foreign commerce. Noncompliance with the act--particularly the minimum wage provisions--can severely harm low-wage workers by causing their income to be substantially below the poverty level. While the act does protect employee wages when employers voluntarily comply, there are insufficient deterrents to discourage employers from violating the act, and administrative and statutory limitations can prevent the Department of Labor from fully recovering wages illegally withheld. (See pp. 1, 8, 23, and 45.)

DETERRENTS INEFFECTIVE OR NONEXISTENT
TO DISCOURAGE RECORDKEEPING VIOLATIONS

For one of the most important requirements under the act--recordkeeping--there are no civil penalties and although criminal penalties exist for willful recordkeeping violations, they are not used. Adequate records are essential to determine whether employers are complying with the act and how much illegally withheld back wages are owed to employees.

Without these basic wage records, the intent of the act cannot be fully carried out. It is to an employer's advantage not to maintain adequate records so that violations cannot be identified and back wages cannot be accurately computed--thus, employers profit at the expense of their employees. (See p. 8.)

GAO found that recordkeeping violations are extensive and that they often hamper Labor's ability to document and recover the full amount of back wages owed to employees. Labor often settles cases for less than the estimated amounts due when employers who have violated recordkeeping provisions dispute the compliance officers'

back wage estimates. While a compliance officer's estimates may not accurately reflect the back wages actually owed employees when records are not available, employers often appeared to profit when settlement negotiations substantially reduced the amounts restored to employees. Labor officials agreed that difficulties proving the extent of violations, due to inadequate records, are major factors in Labor's decision not to take cases to trial, thus causing negotiated settlements for less than the full amount of back wages due. (See pp. 8 and 9.)

GAO believes penalties for violating recordkeeping provisions are essential and that Labor should be authorized to assess civil penalties. Because of the extensive time required to complete cases in many district courts, the low priority given to Fair Labor Standards Act cases, and the reluctance of Labor's Office of the Solicitor to pursue court cases under these circumstances, GAO also believes a formal administrative process is necessary to assure fast action while still providing the due-process protections now afforded employers.

Formal hearings, conducted under the Administrative Procedure Act, are presently used to adjudicate penalties in many other regulatory cases. Such hearings would fully protect the employer's due-process rights by providing for an impartial hearing officer (an administrative law judge), a verbatim transcript of the proceedings, and the right to appeal adverse decisions to the courts where cases would be reviewed under the substantial evidence rule. Under the rule, Labor's decision would be set aside if the courts find the decision to be unsupported by substantial evidence. (See pp. 17 and 18.)

DETERRENTS INEFFECTIVE OR NONEXISTENT
TO DISCOURAGE WILLFUL MINIMUM WAGE AND
OVERTIME VIOLATIONS

The basic provisions of the Fair Labor Standards Act require employers to pay minimum wages and overtime, but there are no civil money penalties for violating the act. Although criminal and liquidated damage penalties exist for willful violations of the act by employers, they have not been used extensively. Labor can also obtain a court order requiring an employer to

comply with the act's minimum wage and overtime provisions. However, even if such orders are later violated, officials in the three regional solicitors' offices in the GAO review advised that monetary penalties for civil contempt generally are insignificant. (See p. 23.)

GAO found that many employers appear to have willfully violated the act and that current enforcement actions have not resulted in penalties that would deter these violations. (See p. 23.)

Many employers repeatedly violate the same sections of the act, and others apparently falsify or conceal records. Both actions strongly indicate that the violations are willful. For example, GAO's nationwide questionnaire, which was completed by Labor's compliance officers for 4,022 cases closed administratively in June 1979, showed that in 244 cases (or 6 percent) violators had apparently falsified or concealed records. In addition, GAO's review of

--about 75 percent of Fair Labor Standards Act cases closed in three Labor regional solicitors' offices in fiscal year 1978 showed that 86 of 230 employers (or 37 percent) had at least one prior violation of the act,

--cases administratively closed during June and July 1979 at six Labor area offices showed that 90 of 433 employers (or about 21 percent) had violated the act at least once before, and

--65 cases closed during fiscal year 1978, after having been filed in court, showed that regional solicitors alleged that employer violations were willful in 37 (or 57 percent) of the cases.

Compliance officers and regional solicitor officials agreed that willful violations are extensive. Although the act includes both a criminal penalty and a liquidated damage penalty to discourage employers from violating the minimum wage and overtime pay provisions, these sanctions are rarely used. (See pp. 23 to 26.)

Criminal penalties

Criminal penalties may be sought against willful violators of the act with fines up to \$10,000 and, after a second conviction, imprisonment of not more than 6 months. Until recently, solicitors in the three Labor regional offices had not sought criminal penalties against willful violators in at least the last 10 years. Labor officials explained that, overall, criminal sanctions are rarely sought because:

--Department of Justice attorneys do not have a high regard for Fair Labor Standards Act cases and would be hesitant to prosecute them.

--Filing criminal suits reduces Labor's ability to recover employee back wages.

Five of the seven U.S. attorneys GAO interviewed stated they would be willing to criminally prosecute Labor cases. They agreed that prosecuting cases criminally could delay back wage recoveries, but noted that, by coordinating the timing of criminal and civil suits, delays can be minimized.

After GAO brought these discussions to Labor's attention, solicitor officials agreed to explore the possibility of making more use of criminal sanctions. Subsequently, one regional office sent two criminal suits against employers to the U.S. attorney for action. GAO believes Labor should continue to use criminal sanctions after consulting with Justice officials to coordinate litigation strategies. (See pp. 26 to 32.)

Liquidated damage penalties

The Fair Labor Standards Act was amended in 1974 so that Labor could bring action in any court of competent jurisdiction to recover from employers the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. GAO found that several factors limit the usefulness of this sanction and that regional solicitors have seldom sought liquidated damage penalties

against employers who willfully violate minimum wage and overtime compensation requirements. As a result, habitual or flagrant violators receive no harsher treatment than do employers who inadvertently violate the act. (See p. 32.)

Liquidated damages are not an effective way to impose damages because they must be imposed by the courts, usually after a district court trial. Traditionally, however, few civil cases reach trial in the district courts. As a result, penalties are obtained in very few cases, and violators are not being deterred. During the year ended June 30, 1979, only 4.4 percent of the 1,175 Fair Labor Standards Act cases disposed of by the U.S. district courts, nationwide, reached trial where liquidated damages could have been awarded. (See pp. 32 to 38.)

Labor solicitor officials, district court chief judges, and administrative law judges agreed that few Fair Labor Standards Act cases reach district court for trial. Solicitor officials cited the lengthy wait for trial required in some courts, their reluctance to bring cases before a jury, evidence problems due to inadequate records, limited resources to pursue more cases to trial, and the low priority in district courts as the major factors that discourage them from pursuing cases to trial. Regional solicitors also noted that, in the few cases that have reached trial, the damages awarded were disappointingly small. (See pp. 38 to 41.)

To reduce the number and severity of violations of the act, GAO believes civil money penalties assessed by Labor should be substituted for Labor's authority under section 16(c) of the act to seek liquidated damages. Labor should be given the authority to assess a civil money penalty to deter minimum wage and overtime violations. Labor should be able to assess penalties that are sufficient to deter minimum wage and overtime violations. (See pp. 41 and 42.)

GAO believes that the rights of the employers can be protected effectively by giving employers the right to appeal Labor's back wage computations and penalty assessments at formal administrative hearings before administrative law judges. (See p. 42.)

WAGE RECOVERIES HAMPERED BY TIME
AND ADMINISTRATIVE PRACTICES

While penalties are important to deter violations of the minimum wage and overtime provisions, recovering illegally withheld employee wages is also important. To effectively deter violators, Labor's enforcement efforts should eliminate any benefits employers gain from their violations. Therefore, Labor should maximize back wage recoveries, including interest, which helps to make employees whole for the period during which back wages were illegally withheld. (See p. 45.)

Back wages lost due to running of
statute of limitations

The statute of limitations, established by the Portal-to-Portal Pay Act of 1947, restricts an employer's obligation to repay employees back wages to a 2-year period for nonwillful violations and 3 years for willful violations. Parts or all of the statutory periods may expire before an employer waives the right to claim the statute of limitation or before Labor files legal action in a district court. Either action stops the running of the statute (referred to as "tolling of the statute"). The reductions in back wages that employees can recover due to the passage of time are referred to as "back wages lost to the running of the statute." Considerable time usually passed from the date compliance officers started their investigations to the date when regional solicitors filed suit against employers and, as a result, back wages were lost due to the running of the statute of limitations. (See pp. 46 to 49.)

Although Labor may reduce amounts lost due to the running of the statute by filing cases in court earlier, its limited enforcement authority will continue to prevent recovery of full back wages due employees because time will continue to pass between the date a violation is identified and the date the case is filed in court. Current delays in tolling the statute are due to the time taken to

--negotiate cases with the employer at the
Labor area office and at the regional solicitor's office and

--analyze the case and file suit in district court.

The most effective time to toll the statute is when Labor determines that a violation occurred and computes the amount of back wages owed. GAO believes Labor should be given the authority to determine that a violation has occurred and to assess the amount of back wages due employees with the tolling of the statute of limitations at that point. GAO also believes that the rights of the employers can be protected effectively by giving employers the right to appeal Labor's assessments at formal administrative hearings before Labor administrative law judges. (See pp. 49 and 50.)

Administrative practices

Several administrative practices followed by Labor also limit the back wages employees eventually recover.

--Labor rarely seeks the third year's back wages (allowed under the act when violations are willful). (See pp. 50 and 51.)

--Labor rarely updates investigations to recover additional back wages that are sometimes illegally withheld by an employer between the date an investigation ends and the date an employer agrees to comply. (See pp. 51 to 55.)

--Labor does not have a program to follow up on employers with a history of violations to assure that proper wages are paid in the future. (See pp. 55 to 57.)

--Labor does not routinely seek interest for employees whose wages have been illegally withheld for long periods of time. (See pp. 57 to 59.)

RECOMMENDATIONS

GAO is recommending to the Congress that it amend the Fair Labor Standards Act to

--give Labor authority to assess civil money penalties large enough to deter recordkeeping violations,

--eliminate the section 16(c) liquidated damage provision of the act and in its place give Labor authority to assess civil money penalties large enough to deter minimum wage and overtime violations, and

--give Labor authority to formally assess a violation of the act as well as the amount of illegally withheld back wages, including interest.

Amendments to the act should also provide for a formal administrative process to adjudicate cases when employers appeal Labor's assessments. In addition, GAO is recommending to the Congress that it amend section 6 of the Portal-to-Portal Pay Act of 1947 so that the statute of limitations tolls when a violation of the Fair Labor Standards Act is formally assessed by Labor.

GAO is recommending to the Secretary of Labor administrative changes needed to strengthen Labor's enforcement program in order to deter employers from violating the Fair Labor Standards Act and to improve Labor's ability to recover the full amount of back wages illegally withheld from employees. (See pp. 18, 42, 60, and 61.)

AGENCY COMMENTS

GAO received comments from the Departments of Labor and Justice, the Administrative Conference of the United States, the Minimum Wage Study Commission, the Administrative Office of the United States Courts, and the Chief Judge of the United States Court for the Northern District of Illinois (see apps. III through VIII). Except for Labor's and the Administrative Office of the United States Courts' comments, the agencies' comments endorsed the report and recommendations. The Administrative Office of the United States Courts had no comments on the draft report as a whole but stated that, if GAO's recommendations are implemented, an increase in the Federal courts' workload might be expected. Labor did not comment on GAO's legislative recommendations and either did not concur with or declined to implement recommendations made to the Secretary of Labor. The agencies' comments and GAO's evaluation of them are included on pages 18 to 22, 43, 44, and 61 to 65.)

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ABBREVIATIONS

FLSA	Fair Labor Standards Act
GAO	General Accounting Office

CHAPTER 1

INTRODUCTION

The Fair Labor Standards Act (FLSA), enacted in 1938 and amended several times, sets standards for recordkeeping, minimum wage, overtime pay, and other protections for workers of firms engaged in interstate and foreign commerce. From 1938 to 1979 the number of employees covered under the act rose from 11 million to about 60 million in over 4.1 million private establishments.

Noncompliance with FLSA requirements--particularly the minimum wage provision--can severely harm low-wage workers who need a decent wage to provide themselves and their families with life's necessities. Although minimum wage increases have resulted in higher earnings for employees, the 1980 minimum of \$3.10 per hour provided only full-time year-round nonfarm workers with 87 percent of the amount needed to maintain a minimum standard of living for a family of four at the poverty level. Consequently, effective administration and enforcement of FLSA by the Department of Labor is needed to assure the economic well-being of low-wage earners.

FAIR LABOR STANDARDS ACT PROVISIONS

All employees of certain enterprises having workers engaged in interstate commerce, producing goods for interstate commerce, or handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person are covered by FLSA. The act covers other specific groups of workers, such as domestics. Criteria, such as minimum annual gross volume of sales a business does or the type of business engaged in, are used to determine whether an enterprise is covered by the act. Many enterprises not covered by FLSA may be covered by State labor laws.

Exemptions from the act

Some employees are excluded from the minimum wage or overtime provisions, or both. For example, executive, administrative, and professional employees who meet prescribed duty and salary tests are exempt from both minimum wage and overtime provisions.

Minimum wage and overtime rates

All employees covered by the act's minimum wage provisions must be paid at least \$3.35 an hour effective January 1, 1981. In some instances, employers are allowed credits toward the minimum wage, such as for tipped employees, defined as those who customarily and regularly receive more than \$30 monthly in tips. The employer may consider tips as part of wages, but such a wage credit must not exceed 40 percent of the minimum wage.

The act generally requires that employees covered by overtime provisions be paid at least 1-1/2 times their regular rate of pay for all hours worked in excess of 40 in a workweek.

Recordkeeping requirements

Employers are required to make and preserve records of wages, hours, and employment practices needed by Labor to enforce the act. An employer subject to FLSA must maintain records which include (1) personal employee information, such as name, occupation, sex, and home address, (2) time and day on which the employee's workweek begins, (3) employee's regular rate of pay and hours worked, and (4) straighttime and overtime compensation.

In addition to these basic requirements, employers must keep special information for certain employees. For example, employers who credit tips toward minimum wages must keep a record of the amount of tips employees receive each month.

Remedies against FLSA violators

Several remedies are available against employers who violate FLSA. Employees can bring suit against employers under section 16(b) of the act and the Secretary of Labor can bring suit under sections 16(c) or 17 to recover back wages. Criminal suits may be sought by the Secretary of Labor under section 16(a), but criminal proceedings may be brought only by the U.S. Attorney General.

Suits by employees

Any employee or group of employees may file suit against an employer under section 16(b) to recover the amount of unpaid minimum wages and overtime compensation plus an equal amount as liquidated damages. If Labor has already initiated legal action seeking back wages and an injunction or liquidated damage against an enterprise, employees are barred from also filing suit. Employees who win suits are entitled to recover reasonable attorney fees. The court may deny or partially award liquidated damages if it finds that the employer acted in good faith and believed he did not violate FLSA.

Liquidated damage suits by Labor

Labor may file suit against an employer under section 16(c) to recover unpaid minimum wages and overtime compensation plus an equal amount as liquidated damages. According to the act, funds recovered as a result of this suit for any employees Labor cannot locate must be deposited in the U.S. Treasury as miscellaneous receipts.

Injunction suits by Labor

Labor may file suit under section 17 against an employer to restrain future violations, including recordkeeping violations, and to recover unpaid wages. Although penalties are not available under this section, suits under this section of the act have the following features:

- Employers are not entitled to jury trials.
- Labor can recover back wages.
- Injunctions can be obtained against any employer violating the act regardless of the intent of the violation.
- Injunctions continue indefinitely, leaving employers open to contempt proceedings if future violations occur.

If found guilty of contempt for a subsequent violation, employers may have to pay monetary penalties. Imprisonment of employers is also possible but these penalties are rarely used.

Criminal suits by the Department of Justice

Criminal suits may be brought against employers only by the Attorney General of the United States; however, Labor's Office of the Solicitor must first recommend cases for criminal prosecution.

Labor may initiate such criminal penalties against employers under section 16(a) for willful violations of FLSA wage and hour provisions. Employers found guilty of a first offense are subject to a fine of not more than \$10,000. Second-time offenders may be punished by both a fine and imprisonment of up to 6 months. Unlike civil suits--which are subject to a 2- or 3-year statute of limitations--criminal suits can be filed within 5 years of the time violations are committed. Recovery of illegally withheld wages is not provided for under this section.

ADMINISTRATION AND ENFORCEMENT OF FLSA

Administration and enforcement of FLSA is the responsibility of Labor's Wage and Hour Division and Office of the Solicitor. The Wage and Hour Division investigates firms subject to the act to determine compliance, and the Office of the Solicitor enforces the act in district courts. Labor administrative officials and Office of the Solicitor attorneys are located in Washington, D.C., and 10 regional offices. Labor has over 1,000 compliance officers stationed nationwide in 89 area offices and 261 field stations.

FLSA enforcement is conducted by compliance officers who have authority to investigate and gather data on wages, hours, and other

employment conditions or practices to determine compliance with the act. When violations are found, these officers recommend restitution of back wages to affected employees and also may recommend changes in employment practices.

Compliance officers can investigate and examine the payroll practices and records of any establishment covered by FLSA. Labor initiates most FLSA investigations on the basis of employee wage complaints. In addition to identifying the various types of FLSA violations, compliance officers must also compute the amount of minimum wage and overtime pay illegally withheld. Labor cannot assess penalties against employers found violating FLSA or require them to pay back wages illegally withheld.

The Office of the Solicitor is responsible for initiating legal action against employers or settling FLSA cases that are not resolved by the Wage and Hour Division. Usually these cases involve employers who refuse to pay the employee back wages found due or who fail to provide an assurance of future compliance. The Office of the Solicitor includes regional solicitors, who represent the Secretary of Labor in district court appearances and appeals, except for criminal cases, and conduct negotiations with employers.

EXTENT OF NONCOMPLIANCE WITH FLSA

Labor's investigations of establishments demonstrate that non-compliance with FLSA recordkeeping, minimum wage, and overtime provisions is a serious and continuing problem. Labor is able to investigate annually only a small percentage of firms covered by the act. For example, in 1979 Labor investigated less than 2 percent of the 4.1 million establishments with paid employees subject to FLSA provisions. The number of covered establishments was last determined by Labor in 1977. Although Labor attempts to act on all FLSA complaints received, the complaint backlog has remained fairly constant--between 21,000 and 25,000--during the 3 fiscal years ended 1979. Results of Labor investigations of establishments in fiscal years 1978 and 1979 are shown on the next page.

	<u>1978</u>	<u>1979</u>
Number of FLSA investigations conducted	61,239	75,153
Number of establishments in violation of minimum wage provisions	30,519	35,251
Number of employees affected by minimum wage violations	378,363	425,956
Number of establishments in violation of overtime provisions	25,029	29,623
Number of employees affected by overtime violations	263,723	287,540
Back wages due (minimum wage and overtime)	\$91,726,521	\$123,996,372
Back wages restored (note a)	\$59,160,672	\$ 73,396,356

a/Represents money employers agree to or are ordered to pay back to employees. Wages actually repaid can be significantly less than wages reported as restored because Labor considers wages restored if the employer made a valid attempt to restore them even if the employees did not receive the wages.

Despite the adverse effect illegal wage underpayments have on employees, Labor obtained only restoration, in the 2 fiscal years shown above, for about 60 percent of the amount of back pay found due. 1/ Labor attributes the differences between the amounts found due employees and amounts restored largely to cases in which employers refused to pay employees and which Labor found unsuitable for litigation. Many cases appear to be unsuitable for litigation because of recordkeeping violations. These violations also limit Labor's ability to prove the extent of minimum wage and overtime violations in cases that are litigated.

OBJECTIVES, SCOPE, AND METHODOLOGY

We made this review to determine whether Labor's administration and enforcement of FLSA effectively deterred employers from violating the act and what actions can be taken to increase compliance with the act and to improve the recovery of illegally withheld wages.

1/The actual percentage of restorations to back wages found due cannot be computed for specific years since annual restoration figures include amounts recovered in cases investigated in prior fiscal years.

We reviewed Labor's enforcement policies and procedures at the national Wage and Hour Division and Office of the Solicitor. We also performed work at the regional Wage and Hour Division and regional solicitor offices in Boston, Chicago, and Dallas and at 15 area offices in these regions. The regions selected provided broad geographic coverage and included areas in which many low-wage earners were located. We interviewed nine U.S. district court chief judges, seven U.S. attorneys, and two administrative law judges to obtain their views on FLSA cases and suggestions for improving the process used to litigate these cases. We also discussed with officials of the Office of the Chairman of the Administrative Conference of the United States 1/ the appropriateness of an administrative civil penalty process. Additionally, several studies and reports on alternative litigation methods were reviewed.

We identified several problems relating to Labor's limited enforcement authority and inability to impose effective penalties. To demonstrate the extent of these problems and their impact on FLSA enforcement, we:

- Prepared and administered a nationwide questionnaire which was completed by Labor's compliance officers for 4,022 FLSA cases which had monetary findings and were closed administratively in June 1979. (See app. I.)
- Reviewed a random sample of 75 FLSA cases closed by three regional solicitor offices in fiscal year 1978. These cases, which account for about 25 percent of the cases closed by these offices during the year, were reviewed in depth to ascertain the effectiveness of the Office of the Solicitor's litigation actions.
- Reviewed 230 cases, or about 75 percent of FLSA cases closed by three regional solicitor offices in fiscal year 1978 to

1/The Conference was established by the Congress to assist the President, the Congress, administrative agencies, and executive departments in improving existing administrative procedures, including achievement of needed regulatory reform. The Conference has 91 members with 55 from the Government and the rest from the private sector including academic and public interest groups. It is responsible for conducting studies of the efficiency, adequacy, and fairness of present procedures by which the Federal administrative agencies and executive departments determine the rights, privileges, and obligations of private persons. On the basis of such studies, the Conference issues formal recommendations for improvements and encourages implementation of recommendations through appropriate agency, congressional, or judicial action.

determine the number of cases involving repeat violations. The 230 cases represent all FLSA cases closed for the 15 area offices covered by our review.

--Reviewed all 378 cases closed during June and July 1979 at six area offices in three regions to determine the extent of repeat violations of the FLSA.

--Judgmentally selected and reviewed 32 cases rejected by regional solicitors to determine to what extent the statute of limitations influenced decisions to reject cases.

Our questionnaire was developed and pretested in full cooperation with Wage and Hour Division officials and was sent to all 89 Wage and Hour Division area offices and their 261 field stations covering all 50 States, Guam, Puerto Rico, and the Virgin Islands. The 4,022 responses represent, insofar as we can determine, 100 percent of the universe of FLSA cases having monetary findings and closed administratively in June 1979, a month believed by Labor officials to be typical and generally representative of FLSA enforcement activity in fiscal year 1979.

The FLSA cases selected for onsite review were the result of applying various sampling techniques ranging from judgmental samples to random samples to selecting the entire universe at the specific offices we visited. Because of these varying samples and the relatively few cases involved at each location, it would be inappropriate to statistically project our case review results to the more than 30,000 FLSA violation cases identified annually by Labor's investigations. However, the data gathered through our nationwide questionnaires corroborated the FLSA enforcement and litigation problems identified in our case reviews.

We therefore believe that our questionnaire responses, coupled with the extensive onsite interviews and case reviews in the selected regional, area, and field offices, provide a very broad representative data base to evaluate the efficiency and effectiveness of FLSA enforcement and related litigative activities nationwide.

CHAPTER 2

DETERRENTS INEFFECTIVE OR NONEXISTENT

TO DISCOURAGE RECORDKEEPING VIOLATIONS

For one of the most important requirements under the Fair Labor Standards Act--recordkeeping--there are no civil penalties. Also, the existing criminal penalties for willful recordkeeping violations are not used. Regional solicitors can obtain a court injunction requiring an employer to maintain records in accordance with the act. However, even if such orders are subsequently violated, officials in the three regional solicitors' offices in our review informed us that monetary penalties for civil contempt of these court orders generally are insignificant.

Adequate records are essential to determine whether employers are complying with the act and how much illegally withheld back wages are owed to employees. In fact, recordkeeping violations are extensive and often hamper Labor's ability to document and recover the full amount of back wages owed to employees. Without these basic wage records, the intent of the act cannot be fully carried out. Without appropriate recordkeeping penalties, it is to an employer's advantage not to maintain adequate records so that violations cannot be identified and back wages cannot be accurately computed. In that way, employers profit at the expense of their employees.

We believe that penalties for violating recordkeeping provisions are essential and that Labor should be authorized to assess civil penalties. In addition, because of the (1) extensive time required to complete cases, including FLSA cases, in many district courts, (2) low priority given to FLSA and many other civil cases, and (3) reluctance of Labor's Office of the Solicitor to pursue court cases under these circumstances, we believe a formal administrative process--such as is presently used to adjudicate civil penalties in many other regulatory cases--is necessary to assure faster action while still providing the due-process protections now afforded employers. This formal administrative process should also be used to adjudicate other civil money penalties needed to deter violations of the act's minimum wage and overtime provisions. (See ch. 3.)

MANY EMPLOYERS INVESTIGATED BY LABOR VIOLATED FLSA RECORDKEEPING PROVISIONS

Recordkeeping violations are extensive and often hamper Labor's ability to document and recover the full amount of back wages owed to employees. In our nationwide questionnaire which was completed by Labor's compliance officers for the 4,022 cases which had monetary findings and were closed administratively in

June 1979, compliance officers reported that 1,965 cases (or 49 percent) contained FLSA recordkeeping violations. In 766 (or 39 percent) of the cases with recordkeeping violations (19 percent of the 4,022 violations), the compliance officers reported that the lack of records hampered the investigation from a great to a very great extent.

Further, in 244 cases, or about 12 percent of the cases with recordkeeping violations (about 6 percent of the 4,022 violations), the compliance officers noted evidence that the employer falsified or concealed records. Compliance officers told us that their investigations were hampered to a "great" or "very great" extent in about 76 percent of these 244 cases. Our more detailed review of 75 cases closed by regional solicitors during fiscal year 1978 showed that 55 employers (or 73 percent) had violated the act's recordkeeping provisions. In 43 of these cases, because of the recordkeeping violations, compliance officers had difficulty documenting the extent of the violations.

MANY EMPLOYERS UNJUSTLY GAIN FROM RECORDKEEPING VIOLATIONS

When employers disregard FLSA recordkeeping provisions, compliance officers must base estimates of back wage violations on whatever records are available and on employee statements. Without records to support estimates, employers can hold out for smaller or no back wage restitutions knowing that Labor will have difficulty proving the accuracy of estimates in court. Consequently, cases are closed both in Labor's area offices and in regional solicitor offices with either no restitution or less than full restitution of employee back wages.

Of the 4,022 cases from our nationwide questionnaire, 472 were settled and closed within area offices with either no recoveries or less than full recoveries of back wages estimated by compliance officers. They stated that, in 323 of the 472 cases, recordkeeping violations were present and that these violations hampered their investigations to a "great" or "very great" extent in 50 percent or 161 of the cases. The 323 cases had a total of \$982,197 in back wage findings applicable to 4,771 employees, but only \$344,283 (or 35 percent) was partially restored to 2,232 employees. The other 2,539 employees did not receive any back wages that were determined by compliance officers to have been illegally withheld.

The following cases, taken from the 4,022 cases, illustrate the difficulties compliance officers encounter in developing FLSA monetary violations during investigations when employers maintain little or no records. None of the following cases was forwarded to regional solicitors for review and, accordingly, the employers were not penalized for recordkeeping violations. On the basis of their investigations, compliance officers reported that:

- An employer had minimum wage violations estimated at \$530 owed to 7 employees, overtime violations of \$545 owed to 13 employees, and recordkeeping violations. The employer agreed to pay all back wages found due. The compliance officer noted that the findings would have been increased to a very great extent if the investigation had not been hampered by recordkeeping violations. He commented that Labor "* * *" needs a case to be tried on recordkeeping alone. As in this case, a garment industry, back wages were very conservatively estimated on the basis of employee statements. The more the garment industry in this area becomes aware that lack of records means less back wages, the more reason they have to not keep records. I had one case where an employer stopped keeping payroll records after a first investigation * * *."
- An employer had minimum wage violations estimated at \$10,000 owed to 77 employees and recordkeeping violations. The employer agreed to pay all back wages found due. The compliance officer noted, however, that because of a complete absence of records, the effective rate of pay for employees had to be established by circumstantial evidence which greatly affected the employees adversely. He added that civil money penalties for recordkeeping violations would have been appropriate in this case.
- An employer had minimum wage and overtime violations estimated at \$11,200 owed to 73 employees and recordkeeping violations. The employer agreed to pay all back wages found due. The compliance officer noted that the employer kept no wage records at all and, therefore, the hours worked were totally reconstructed. In this case, the compliance officer noted that the findings would have been increased to a very great extent if the investigation had not been hampered by recordkeeping violations.
- An employer had overtime violations estimated at \$1,025 owed to 11 employees and recordkeeping violations. The compliance officer noted that the investigation was hampered to a great extent because of the recordkeeping violation. He added that the employer's failure to record hours worked was used as a basis to dispute Labor's reconstructed hours. As a result, only \$770 of the \$1,025 finding was restored to 11 employees when the case was closed.
- An employer had minimum wage violations estimated at \$4,030 owed to 125 employees, overtime violations of \$238 owed to 2 employees, and recordkeeping violations. The employer agreed to pay all back wages found due. The compliance officer noted that lack of available records was the major

reason for this case taking so much time to complete-- 107 hours. He estimated that this case could have been completed in one-fifth the time expended had the proper records been available.

- An employer had an overtime violation estimated at \$3,050 owed to one employee and recordkeeping violations which hampered the investigation to a very great extent. The employer refused to restore any of the back wages due because he questioned the facts developed by the compliance officer. The compliance officer stated that there was an indication of records falsification but without timecards, it was not possible to be sure.
- An employer had overtime violations estimated at \$3,600 owed to two employees and recordkeeping violations. The employer did not maintain hourly wage records and refused to restore any back wages. The compliance officer noted that, if the employer had maintained hourly records as required, Labor could have undoubtedly forced a back wage payment.
- An employer had minimum wage violations totaling \$1,600 owed to 29 employees and recordkeeping violations. The employer agreed to restore all back wages owed to employees. The compliance officer noted, however, that recordkeeping violations caused a decrease in the amount of income restored because there were several addresses missing for employees owed back wages. In this case, even though the recordkeeping violation was seemingly minor and had little or no effect on the development of the finding, it prevented location of all employees entitled to receive back wages.
- An employer had minimum wage violations of \$96 owed to one employee and recordkeeping violations. The employer agreed to pay the back wages found due. The compliance officer noted that the employer kept no employee records whatsoever and as a result, he could not obtain names or addresses of persons to interview. The employer indicated that he employed casual labor, but no records were kept of their names or social security and income tax data. The compliance officer also said that assuming that previous employees were paid in the same manner as the complainant, more back wages could have been obtained if records were available. He concluded that the employer must know this and his promise of future compliance is simply rhetorical. The case was not submitted to the regional solicitor as "* * * mere recordkeeping violations by themselves are not prosecuted" according to the compliance officer.

ABSENCE OF RECORDS CREATES HEAVY
RELIANCE ON EMPLOYEE TESTIMONY

Widespread employer recordkeeping violations oftentimes create a need for employees to assist Labor in computing illegally withheld back wages and to testify in court regarding conditions and practices of employment. Many employees, however, do not provide the data needed by Labor because they are no longer employed, cannot be located, or are unwilling to testify. (It usually takes months or even years for cases to reach trial in district courts.) Therefore, a lack of or incomplete records, coupled with an inability to obtain employee cooperation, frequently result in reduced or no restoration of employee back wages.

When adequate records are not available, compliance officers must estimate employee back wages based on available employer records and information from employee interviews. According to an official in one regional solicitor's office, compliance officers will often project back wage estimates based on interviews with a few employees. It may not be possible to interview all employees and some may refuse to cooperate.

In FLSA court cases, witnesses are vitally needed to prove the existence and the extent of violations when payroll records are unavailable. Regional solicitor officials noted that estimates of employee back wages are often not acceptable in court without employee testimony. Regional solicitor attorneys also stated that recovery of back wages is often directly proportionate to the number of employees willing to testify. For example, in one case reviewed, the regional solicitor obtained employee witnesses from Mexico to testify against a restaurant owner in Fort Worth, Texas. The judge hearing this case awarded back wage restitutions only for the witnesses or employees directly named in testimony. Other employees who may have been entitled to back wage restoration but were not specifically identified were not awarded restitution. Consequently, the court ordered the employer to pay \$48,400, which was less than 10 percent of the back wages sought by Labor.

Time adversely affects cases by limiting Labor's ability to recover back wages. As time passes, employees move, die, or may decide not to cooperate any longer. Also, the seasonal nature of many businesses, such as restaurant and construction businesses, makes it extremely difficult to locate witnesses once an FLSA case finally comes to trial. Several Labor area officials agreed that witnesses become difficult to locate with the passing of time, especially when employers pay low wages and have high employee turnover.

A deputy regional solicitor said that, in cases where poor records are kept, the issue becomes limited to employer/employee testimony and which testimony is more creditable to the judge. He added that, because there is no penalty for poor recordkeeping, the incentive is to keep poor, inadequate records or none at all. He concluded that proving FLSA violations is difficult with no substantive records, especially on a first-time offense, and as a result, regional solicitors are forced to settle for less and employers profit from the settlement. The following case, taken from the 4,022 responses to our nationwide questionnaire, is a good illustration of the difficulty in obtaining back wage restorations if employee testimony is needed in lieu of employer wage records.

--An employer had minimum wage violations estimated at \$31,000 owed to 75 employees and recordkeeping violations. The employer refused to pay any back wages found due because, according to the compliance officer, he recognized that few employees were available to testify in case of litigation. Labor's investigation was hampered to a very great extent because of the recordkeeping violation. The compliance officer noted that the investigation involved employees who were transient in nature and, therefore, failed to respond to inquiry or failed to cooperate in the degree necessary to develop the case for litigation. In conclusion, he stated that otherwise this case would, without question, have been referred for litigation.

The following case, taken from our sample of 75 cases closed by regional solicitors, was analyzed from Labor's initial investigation to its completion and further illustrates the difficulty in obtaining back wage restorations if employee testimony is needed in lieu of employer wage records.

--The operator of an oil field equipment rental company had minimum wage violations of \$148 owed to 4 employees, overtime violations of about \$13,200 owed to 28 employees, and recordkeeping violations at four of its branch locations. The compliance officer reported that, in some instances, no records of hours worked were maintained, and in other instances, inaccurate records were kept. He had difficulty documenting the extent of the back wage violations. In addition, the employer denied the compliance officer access to certain records. A lack of witnesses also frustrated investigative efforts. At one branch location, only 3 of 22 employees signed statements showing their willingness to testify against the employer.

Similar minimum wage and overtime violations were found at one branch location during a prior investigation in 1974. Five employees were owed about \$2,800 in back wages because of employer FLSA violations. The case was settled in the area office when the employer agreed to pay the full amount of back wages. The area director subsequently learned that the employer had not paid about \$2,500 owed to one employee. According to this one employee, the firm offered him \$300 for his back wages. The area director requested the employer to pay the back wages, but the employer refused. Labor closed this case without further action.

In the current investigation, the compliance officer noted that the employer was continuing to violate the act even though FLSA provisions had been previously explained during the first investigation. The compliance officer recommended litigative action since the employer had been investigated previously and had not acted in good faith in the current investigation.

The regional solicitor filed suit to obtain an injunction. Prior to the start of civil legal action, the employer paid 10 employees \$3,725 in back wages. The regional solicitor quickly obtained an injunction against any future violations by the firm and settled the case out of court after the employer agreed to pay additional back wages totaling \$5,248 to 18 employees. In all, the employer paid back wages totaling \$8,973 to 28 employees, or about 67 percent of the total estimated back wages.

We discussed this case with an attorney in the regional solicitor's office and an assistant area director. The attorney stated that the employer recordkeeping violations were widespread, recurring, serious, and willful in nature. The assistant area director stated the employer was very familiar with FLSA and knew how to avoid compliance. In his opinion, the employer did not maintain records because he knew the nonexistence of records would keep the compliance officer from proving wage and hour violations. Because of recordkeeping violations, the compliance officer had to reconstruct hours worked through employees interviews. These interviews were contradictory and may not have been conclusive evidence in a courtroom. Furthermore, the employer denied any violations and obtained some employee affidavits which supported his position. The compliance officer believed that employees had been coerced into making false statements but was unable to prove it. The assistant area director stated that the lack of records undoubtedly resulted in a reduced back wage settlement.

EMPLOYERS ARE RARELY PENALIZED FOR RECORDKEEPING VIOLATIONS

Despite numerous recordkeeping violations, employers are rarely penalized for violating the act's recordkeeping provisions. While there are no civil penalties for violating FLSA recordkeeping provisions, regional solicitors can obtain a court injunction requiring an employer to maintain records in accordance with the act. However, officials in the three regional solicitors' offices in our review said that, even when employers again violate the act, the monetary penalties for civil contempt of a court order generally are insignificant. FLSA does provide a criminal penalty of up to \$10,000 and/or 6 months imprisonment for repeated willful recordkeeping violations. However, regional solicitors rarely seek criminal penalties for such recordkeeping violations.

Although falsification or concealment of records is one standard that Labor uses to decide whether to consider an FLSA case for potential criminal litigation, the recordkeeping violations must be accompanied by substantial violations of another major FLSA provision before the case is considered. As pointed out in chapter 3, Labor has criminally prosecuted very few FLSA cases because it believes U.S. attorneys would be reluctant to prosecute these cases and because filing criminal suits reduces Labor's ability to recover employees' back wages. Although we believe Labor can make more use of criminal suits to penalize the worst FLSA violators, clearly, criminal suits are not an appropriate way to penalize many employers who violate recordkeeping provisions.

Without penalties to discourage violations of the act's recordkeeping provisions, employers will probably continue to disregard them. Since proper recordkeeping is essential to carry out the intent of the act, Labor should have the authority to assess civil money penalties large enough to deter recordkeeping violations.

Civil money penalty sanctions are widely accepted today. The Congress has increasingly turned to this sanction to enforce a variety of Federal regulatory statutes, including Mine Safety and Health, Farm Labor Contractor Registration, and FLSA child labor provisions.

FORMAL ADMINISTRATIVE PROCESS NEEDED TO ADJUDICATE CIVIL PENALTIES

Even if civil money penalties are authorized, their effectiveness will be limited if cases need to be adjudicated in district courts. This is because of the lengthy processing time needed to complete cases--including FLSA cases--in many district

courts, the low priority given to FLSA cases, and the reluctance of the Labor solicitor's office to pursue court cases under these circumstances.

District court statistics for the year ended June 1979 show that the median time to conclude legal action for all 52 FLSA cases brought to trial by Labor was 28 months. Overall, during the same period, 9,017 civil cases that reached trial were completed. The median interval from court filing of a case to its court hearing and ultimate disposition for these cases was 19 months. In the 95 U.S. district courts, the median time taken to dispose of civil cases brought to trial ranged from 42 months in the Connecticut district court to 7 months in the Virginia Eastern, Tennessee Eastern, and Alabama Middle district courts. The median time to dispose of civil cases brought to trial exceeded 18 months in 46 of the 95 U.S. district courts.

Six U.S. district court chief judges interviewed cited a backlog of cases in district courts as a problem leading to long delays in resolving civil cases. Regional solicitors and attorneys interviewed in three regions also cited lengthy processing times and extensive delays reaching trial in district courts as a major factor discouraging them from bringing cases to trial. One regional solicitor said this was the most important factor and that FLSA cases do not "age gracefully" because, as time passes, witnesses move, die, or decide not to cooperate any longer.

Regional solicitors and their attorneys in the three regions visited believe that FLSA cases receive low priority in district courts and that many judges are not receptive to hearing such cases. Although chief judges interviewed generally did not feel they have a negative attitude toward FLSA cases, Labor perceives that judges are reluctant to hear such cases, and, therefore, Labor is reluctant to take these cases to trial. Chief judges stated that FLSA cases and most other civil cases do receive a relatively low priority compared to criminal cases and that FLSA cases do not need to be heard in district courts.

A formal administrative process for adjudicating penalties is a desirable alternative to seeking penalties through the courts. This process is used to adjudicate civil money penalties under statutes, such as Mine Safety and Health, Farm Labor Contractor Registration, and FLSA child labor provisions. The Administrative Conference of the United States recommended that an administrative process be used to adjudicate civil penalty cases because such a process avoids the delays and high costs associated with the district courts while preserving and even enhancing the parties' due-process rights. In addition, all nine district court chief judges we interviewed agreed that an administrative process for imposing civil money penalties would be more appropriate than a district court process.

If properly designed and managed, an administrative process would protect the employer's right to appeal Labor's penalty assessments and obtain a faster impartial hearing. After assessment of a civil money penalty, an employer could appeal the assessment within a reasonable time at a formal administrative hearing before an administrative law judge. The formal hearings could be conducted on the record with a verbatim transcript of the proceedings. Employers could have the right to appeal adverse agency decisions to the courts where cases could be reviewed under the substantial evidence rule. Basically, under that rule the decision could be set aside if a judge, after reviewing the hearing record, finds the decision to be unsupported by substantial evidence.

An administrative process for adjudicating appeals of civil penalties could also benefit employers who, under a district court process, may feel forced to agree to unfair settlements when faced with extensive delays and high court costs. Also, it traditionally takes less time for an administrative case to reach a hearing than it does for a civil case to reach a trial in district court, and a larger percentage of administrative cases actually reach a hearing.

For example, during fiscal years 1976, 1977, and 1978, Labor administrative law judges disposed of about 6,230 cases in an average of about 6 months from the date the case was filed to the date the case was decided. Almost half of these cases actually reached a hearing, compared to only about 7 percent of the civil cases completed in district courts in fiscal year 1979. A Labor administrative law judge said that, in contrast to district court judges who need to give priority to major cases involving criminal activities and constitutional questions and who accordingly must give FLSA cases low priority, administrative law judges would give FLSA cases a high priority.

CONCLUSIONS

Provisions for enforcing the essential FLSA recordkeeping requirements need to be strengthened. Without adequate records, Labor has difficulty proving the amount of back wages illegally withheld and must rely heavily on employee testimony. Yet, there are no civil penalties against employers who violate the act's recordkeeping provisions. As a result, many employers profit from recordkeeping violations. Criminal penalties are provided for willful recordkeeping violators, but Labor seldom uses this provision. Although a court order requiring an employer to maintain wage records in accordance with the act can be obtained, monetary penalties for civil contempt, if such orders are later violated, generally are insignificant. While Labor should use criminal and injunctive authority when appropriate to deter recordkeeping violations, it is not practical to apply such sanctions to many recordkeeping violators.

Since recordkeeping violators, including willful violators, are rarely penalized, employers have little incentive to comply with the act's recordkeeping provisions. This limits Labor's ability to compute, document, and recover for employees the full amount of back wages employers illegally withheld.

To deter recordkeeping violations, we believe that Labor needs statutory authority to assess civil money penalties. In addition, because of the extensive time required to complete cases, including FLSA cases, in many district courts the low priority given to FLSA cases, and the reluctance of the Labor solicitor's office to pursue court cases under these circumstances, we believe a formal administrative process to adjudicate civil money penalty assessments is necessary to assure faster action and still provide due-process protections now afforded to employers. If properly designed and managed, we further believe an administrative process for adjudicating civil money penalty assessments will lead to better enforcement and increased protection for employees and employers. The Congress has increasingly turned to an administrative process to impose civil money penalties, and the Administrative Conference of the United States has recommended the increased use of such a process to resolve civil money penalty disputes. Finally, all nine district court chief judges interviewed agreed that FLSA cases could be better handled in an administrative setting.

We also believe that Labor should use the FLSA criminal sanctions against flagrant and willful recordkeeping violators and injunction provisions, as needed, to obtain compliance with FLSA recordkeeping requirements.

RECOMMENDATION TO THE CONGRESS

We recommend that the Congress amend FLSA to give Labor authority to assess civil money penalties large enough to deter recordkeeping violations. The legislation should provide for a formal administrative process to adjudicate cases when employers appeal Labor's assessments.

AGENCY COMMENTS AND OUR EVALUATION

We received comments on our draft report from the Departments of Labor and Justice, the Administrative Conference of the United States, the Minimum Wage Study Commission, the Administrative Office of the United States Courts, and the Chief Judge of the United States Court for the Northern District of Illinois. We provided copies of the draft report for comment to two additional chief judges of two other district courts; but they did not provide written comments, and we were unable to obtain their oral comments in time to include them in this report.

Administrative Conference of the United States

By letter dated March 25, 1981, the Senior Staff Attorney of the Conference--at the Conference Chairman's request--responded to our draft report. (See app. III.) He stated that the Conference has never studied the activities of Labor under FLSA, so it is not in a position to evaluate the findings of the draft report that are particular to this program. However, he stated that the Conference has devoted considerable attention to the topic of civil money penalty procedures, and it finds the report's recommendations interesting, important, and quite persuasive. (See app. II for letter, with enclosures, from Executive Director, Administrative Conference of the United States to Member Agencies dated April 22, 1977, on implementation of recommendation relating to administrative imposition of civil money penalties.)

The Conference has defined those factors, which when present in a particular agency program, it believes warrant the agency asking the Congress for authority to impose civil penalties in a formal adjudicative proceeding within the agency. The Senior Staff Attorney's response listed and discussed those factors:

- A large volume of cases likely to be processed annually.
- The availability to the agency of more potent sanctions with the resulting likelihood that civil penalties will be used to moderate an otherwise harsh response.
- The importance to the enforcement scheme of speedy adjudications.
- The need for specialized knowledge and agency expertise in the resolution of disputed issues.
- The relative rarity of issues of law (e.g., statutory interpretation) which require judicial resolution.
- The importance of greater consistency of outcome (particularly as to the penalties imposed) which could result from agency, as opposed to district court adjudications.
- The likelihood that an agency (or a group of agencies in combination) will establish an impartial forum in which cases can be efficiently and fairly decided.

The Senior Staff Attorney stated that the Administration Conference's conclusion, after reviewing findings in the draft report in the context of the above factors, is that our proposal that FLSA be amended to substitute an administrative civil money penalty system for the current court-imposed liquidated damage system is a sound one.

Department of Justice

By letter dated March 13, 1981, Justice informed us that it has no objection to the recommendations contained in our draft report. (See app. IV.) Justice stated that additional civil penalties, such as we proposed, would assist enforcement of the statute's mandates, even in jurisdictions where scarce prosecutorial resources hinder effective criminal prosecution under the act.

Minimum Wage Study Commission

By letter dated March 5, 1981, the Executive Director of the Commission provided comments on our draft report. (See app. V.) He stated that the Commission's staff was generally most favorably disposed toward our report and its recommendations to both the Congress and the Department of Labor.

Administrative Office of the United States Courts

By letter dated March 17, 1981, the Director of the Administrative Office of the United States Courts stated that an increase in the workload of the Federal courts might be expected to occur if our recommendations are implemented. (See app. VI.) He stated, however, the degree and extent of the increase is not susceptible to precise measurement.

If our recommendations are implemented, the appeal of an administrative decision would be to a United States Federal court. Accordingly, we would expect there might be an increase in the workload of the Federal judiciary insofar as appeals are concerned. However, the workload of the district courts would be reduced by the elimination of FLSA trials.

U.S. District Court for the Northern District of Illinois

By letter dated March 5, 1981, the Chief Judge of the U.S. District Court for the Northern District of Illinois observed that our recommendations are well supported by the facts our study revealed and that the draft report described in detail the difficulties in administering the present laws. (See app. VII.) He stated that the changes we are recommending should bring about a much more effective, vigorous, and equitable approach to enforcement.

He also observed that, during the year ended June 30, 1980, 1,378 cases were filed by the Government under FLSA out of a total of 168,789 cases filed nationwide. This represents 0.82 of 1 percent of the total and indicates a reluctance on the part of Government to pursue the smaller cases. In this district court there

were only 41 such cases filed out of the total 12,016 cases filed during the 2 years ended September 30, 1980. This was 0.34 percent of total. He stated that the impact of removing this small group of cases from the filings in the district courts would be minimal, at least insofar as it would affect the workloads of the judges. On the other hand, to change the procedures to move more of the cases up through Government prosecution in the courts would be excessively costly and laborious to the point of being self-defeating.

He stated that given that (a) many of the employers mentioned in the report are in marginally profitable situations and/or are involved in industries which have traditionally hired a sizable percentage of their staff at or near minimum wage levels, (b) many of the employers who are found to have been in violation at one point in time are subsequently found to be in violation, (c) the amounts involved are often small (though of importance to the employees), and (d) the evidence and investigation/negotiation times involved work very much to the favor of the employer and against Labor and the employee, the use of an administrative forum to handle these cases appears far more appropriate than the use of district courts. As long as judicial review is maintained to assure due process, the change should expedite Labor's processing of the cases and bring about much better compliance by industry with the law and the standards of the Department.

The Chief Judge also stated that he concurred enthusiastically with our recommendation that there be a maximum use of civil fines.

He also advised us that he has found no evidence in his court of an unwillingness on the part of employees to testify when records required by the act are not maintained. We believe this may be because only those cases in which employees are willing to testify would ever reach the district court level. If employees are not willing to testify, in all likelihood, Labor would not pursue a case in the courts, especially if required records were not maintained.

Department of Labor

By letter dated March 6, 1981, Labor stated it would be premature to comment at this time regarding our legislative recommendations but that it will examine our recommendations in conjunction with any recommendations that result from the forthcoming reports of the Minimum Wage Study Commission. (See app. VIII.) Labor also stated that any specific legislative activities which are decided upon will be presented at the appropriate time as part of the administration's program.

Labor agreed that failure by employers to maintain records complicates enforcement of FLSA. Labor stated, however, that it

is still feasible to prove violations where employee witnesses are available to testify and this has enabled the solicitor to recover back wages in numerous cases where records were inadequate or lacking.

We do not disagree with Labor that, where employee witnesses are available and willing to testify, Labor has been able to recover back wages where records are inadequate or lacking. However, many employees are not willing to testify in court cases. Therefore, a lack of or incomplete records, coupled with an inability to obtain employee cooperation, frequently result in reduced or no restoration of employees back wages. Relying on witnesses' testimony, when records are inadequate, is not productive when

- an employer heavily relies on seasonal employees who are no longer available when the investigation is conducted, or who will not be available when a case reaches trial;
- employee witnesses move away, die, or do not testify for fear of job loss;
- time needed to complete Labor's case for court trial plus time that elapses before it is heard in a district court could result in years before a trial actually occurs, thus discouraging employee participation; and
- needed testimony is sometimes not obtained from employees because of their antipathy toward court trial participation.

CHAPTER 3

DETERRENTS INEFFECTIVE OR NONEXISTENT

TO DISCOURAGE WILLFUL MINIMUM

WAGE AND OVERTIME VIOLATIONS

FLSA requires employers to pay minimum wages and overtime, but there are no civil penalties for violating these wage provisions. Although criminal penalties and liquidated damages can be imposed against willful violators, they are ineffective and have not been used extensively. Regional solicitors can also obtain a court order requiring an employer to comply with minimum wage and overtime provisions of the act. However, as discussed in chapter 2, even if such orders are later violated, monetary penalties for civil contempt generally are insignificant.

We found that many employers willfully violated the act and that current enforcement actions have not resulted in penalties that would deter these violations. Without penalties, the worst that happens to employers when they are found in violation is that they must repay the back wages they should have paid initially.

We believe that penalties are essential to remove the financial incentive employers have to violate the act and that Labor should be authorized to assess civil penalties. As pointed out in chapter 2, we also believe that a formal administrative process should be used to adjudicate cases where employers appeal Labor's assessment.

MANY EMPLOYERS INVESTIGATED BY LABOR WILLFULLY VIOLATED MINIMUM WAGE AND OVERTIME PROVISIONS

Our review showed that many employers repeatedly violated the same sections of the act and that others falsified or concealed records. Both these actions indicate that the violations were willful. The true extent of repeat offenders, however, is unknown because Labor generally does not ascertain whether illegal labor practices were corrected unless employee complaints are received later. We believe that many employers are willing to commit repeated violations of the wage and hour laws because chances of discovery are slim, penalties are unlikely, and the rewards of illegally withholding employee back wages can be great.

To determine the extent of repeat violations, we examined about 75 percent of the FLSA cases closed by regional solicitors in Boston, Chicago, and Dallas in fiscal year 1978 and found that 86 of 230 cases (or 37 percent) had at least one prior violation of the act. We also reviewed FLSA cases administratively closed

during June and July 1979 by six Labor area offices and noted that, of the 433 cases where employers were found violating the act, in 90 of the cases (or about 21 percent) the employers had at least one prior violation. In addition, 26 of the 86 regional solicitor cases and 21 of the 90 area office cases had three or more violations.

Repeat violations, especially those that are similar to prior violations, indicate willfulness because employers should normally understand the act's provisions after the initial Labor investigation. As part of their investigation, compliance officers are required to explain applicable FLSA provisions to employers. Despite this practice, most of the repeat violations were similar to prior violations. Of the 86 fiscal year 1978 closed regional solicitor cases with prior violations, available information on 49 cases showed that employers in 48 of the cases (or 98 percent) had previously violated the same provision of the act. Moreover, of the 90 administratively closed cases with prior violations, available information on 73 cases showed that 58 (or about 80 percent) had previously violated the same provision of the act.

While some of the repeat violations that were closed administratively may have been limited in scope and could have been inadvertent, for the most part, employers who wish to comply with the act after an initial investigation can do so. Employers can readily contact Labor representatives to resolve any subsequent minimum wage or overtime questions. Also, the extent of repeat violations is probably understated--perhaps significantly--by measuring only cases reinvestigated by Labor because (1) employees whose complaints are not resolved satisfactorily are less likely to complain about subsequent wage violations, (2) Labor relies primarily on complaints, and (3) Labor investigates only a few firms subject to the act.

Falsified or concealed records are an indication that FLSA violations are willful, and the 4,022 responses to our nationwide questionnaire showed that in 244 cases (or 6 percent) the compliance officer found evidence that the employer had falsified or concealed records. As noted in chapter 2, employer records are essential if Labor is to enforce adequately the act and fully recover employee back wages. Falsified or concealed records especially impede Labor's ability to document the extent of the violations and to recover the full back wages due to employees. For example, compliance officers noted that their investigation of employers was hampered from a "great" to a "very great" extent in 186 (or 76 percent) of the 244 cases having evidence of falsified or concealed records.

In several cases, employers altered their recordkeeping system after being investigated, apparently to conceal continuing violations. In one case from the 4,022 responses, the compliance officer noted that one employer stopped keeping payroll records

after an investigation by the Labor area office. Our review of 75 closed regional solicitor cases also revealed instances of employers changing their recordkeeping practices after a first investigation to avoid complying with the law or to conceal continuing violations. Two such examples follow.

--A building specialist's firm was found not paying overtime to its employees. The employer refused to pay back wages but agreed to future compliance. Afterwards, the employer changed payroll practices and began paying on a salary and piecework basis to avoid overtime. Subsequent investigation found no record showing hours worked even though records existed during the previous investigation. The compliance officer estimated an additional \$6,845 back wages underpayment. However, the settlement reached required the employer to pay only \$3,555, or about 50 percent. The compliance officer concluded that the employer changed payroll practices to avoid paying overtime and thereby violated recordkeeping provisions.

--The compliance officer found that a chain of grocery stores was not maintaining proper records of hours worked and not paying overtime. Subsequently, according to the compliance officer, the employer began a timecard reporting system, but told employees to report only 8 hours a shift and required that timecards showing over 8 hours be altered. The compliance officer reported that, in his opinion, the employer never intended to pay for all hours worked.

Our review of 65 cases closed during fiscal year 1978, after having been filed in court under section 17 of FLSA, showed that regional solicitors alleged that employer violations were willful in 37 (or 57 percent) of the cases. The case examples described in the following sections on criminal and liquidated damage penalties illustrate the flagrant nature of some of the willful violators among the 37 cases cited by Labor. These cases also show that current enforcement efforts have not deterred employers from continuing to violate the act.

None of the employers in our sample were penalized for their violations. In the three regions reviewed, the regional solicitors closed through either settlement or litigation 311 ^{1/} FLSA cases with minimum wage or overtime violations during fiscal year 1978. We sampled 75 cases, but 10 were settled without legal action. Regional solicitors filed suit against the other 65 employers seeking injunction and payment of back wages. Penalties were not sought, even against the 37 employers Labor cited as

^{1/}A total of 409 FLSA cases were closed, but this number was reduced to 311 after combining related cases.

willful violators. Three of the 65 litigated cases were eventually tried in court where Labor lost 2 cases, and no back wages were restored to employees. In the third case, an employer was found guilty of willfully violating FLSA. The other 62 litigated cases were settled out of court. In most instances, the employers agreed to restore all or a portion of the back wages. Also, injunctions barring employers from further FLSA violations were obtained in 51 of the 65 litigated cases.

Because employers are rarely penalized and often profit from illegally withholding back wages, they have a financial incentive to violate the law. FLSA includes both a criminal penalty and a provision for liquidated damages to discourage employers from violating the minimum wage and overtime provisions, but these sanctions are rarely used.

CRIMINAL PENALTIES ARE
RARELY USED BY LABOR

Criminal penalties, which have been available for over 40 years, may be sought against willful violators of FLSA with fines up to \$10,000, and after the second conviction, imprisonment for not more than 6 months. Labor has rarely sought this penalty even though some cases apparently met the criteria for such prosecution. One regional office, however, has recently recommended criminal action against two employers. Although we believe that the criminal sanction should be used more, it is appropriate for only the most flagrant willful violators.

Labor established specific standards, which state an FLSA case should be considered for potential criminal litigation if one or more of the following criteria are present:

- Falsification or concealment of records coupled with substantial violations of a major FLSA provision.
- Recurring violations found to have occurred under circumstances closely similar to those of the violations found in a previous investigation.
- Minimum wage and overtime violations which are not inadvertent.
- Violations by an employer who is under an injunction or who has been previously convicted under FLSA section 16(a) (criminal sanction).
- Violations of FLSA section 15(a)(3) whereby an employee is discharged or discriminated against for filing a complaint or participating in any proceeding related to FLSA.

Until recently, regional solicitors in Boston, Chicago, and Dallas had not sought criminal penalties against willful FLSA violators. Solicitor officials in two regions stated that until recently no FLSA cases were sent to U.S. attorneys for criminal prosecution in the past 10 years. The solicitor in the third region stated he has never sought suit under this section. Solicitor officials from headquarters confirmed that few criminal cases have been filed in recent years. Labor officials explained that criminal sanctions are rarely sought against employers because (1) U.S. attorneys do not like FLSA cases and would be hesitant to prosecute them and (2) filing criminal suits reduces Labor's ability to recover employee back wages because it delays the resolution of the back wage question.

Five of the seven U.S. attorneys we interviewed stated they would be willing to prosecute FLSA criminal cases. In addition, four U.S. attorneys stated that criminally prosecuting a few FLSA offenders would discourage future violators. One U.S. attorney stated that the criminal sanction could be a tremendous weapon because most employers are extremely fearful of obtaining a criminal record. This U.S. attorney felt that criminal suits, filed in the proper cases, would deter future violations. Another U.S. attorney said that criminally prosecuting a few willful violators would serve notice that the Government is serious about enforcement and would improve compliance.

Although Labor believes that criminally prosecuting FLSA cases can reduce the amount of back wages eventually restored to employees, U.S. attorneys noted that this problem can be minimized by coordinating the timing of criminal and civil suits. After we brought the U.S. attorney's views to Labor's attention, Office of the Solicitor officials agreed to explore the possibility of making more use of criminal sanctions.

The following examples are cases that apparently met the criteria established for considering criminal prosecution. These examples give an indication of the type of violators that are not being criminally punished but which probably should be.

Case 1

A restaurant owner willfully and repeatedly violated the minimum wage, overtime, and recordkeeping provisions. Minimum wage violations occurred because some waitresses were only paid tips while others were paid for considerably less hours than they actually worked. A few waitresses and a cook were not paid time and a half for overtime hours worked. The compliance officer reported that records of hours worked were falsified because the employer was underreporting the actual number of hours each waitress worked. In this regard, two employees' names did not appear on the payroll records. These employees were paid in cash.

Labor estimated that 19 employees were due \$28,409 in back wages which were computed based on a combination of available but falsified employer's records and employee interviews. The compliance officer noted that employees were reluctant to speak with her, since they feared employer reprisals. Only 8 of the 19 employees were willing to be interviewed by Labor. One of the interviewees also provided information on nine additional employees.

About 1-1/2 years earlier, this employer had violated the same minimum wage and recordkeeping provisions. Twenty waitresses were not paid the proper minimum wage since they only received tips. The employer also failed to maintain accurate records of hours worked. The case was settled in the area office when the employer paid the entire finding of about \$16,000 to 20 employees over 16 monthly installments. No interest was charged on these payments. (See ch. 4 for discussion of interest problems.)

Due to the firm's prior violation history, the Labor area office submitted the violations to the regional solicitor for litigation. The regional solicitor filed a civil complaint seeking an injunction, but settled the case before trial after the employer agreed to pay \$18,000 in back wages to 19 employees. The regional solicitor permitted the employer to pay the \$18,000 over 18 monthly installments. No interest was charged on these payments.

Although this case appeared to satisfy three of the potential criminal litigation criteria--records falsification, recurring violations, and violations which were not inadvertent--the regional solicitor did not refer the case to the U.S. attorney for criminal litigation. We discussed the case with the U.S. attorney having jurisdiction over the case. Based on the case facts presented, the U.S. attorney stated the case would probably have been suitable for legal action under the FLSA criminal sanction. He felt that the regional solicitor at least should have sent the case to his office for review.

Despite the apparent willful and flagrant FLSA violation, the employer was not penalized even after the second violation. He was required to restore only \$18,000 of the \$28,409 in back wages estimated to be owed to employees. The employer, accordingly, has a financial incentive to violate the law in the future. The regional solicitor, in fact, stated that "* * * there is no way to stop this type of employer from continually violating the law. The only thing that can be done is to periodically reinvestigate the firm." The ineffectiveness of Labor's enforcement

efforts is further shown from a third investigation of this company, which also disclosed continuing violations. As of August 1980, a case from Labor's third investigation of the employer was awaiting legal analysis in the regional solicitor's office. The area director said he recommended that the regional solicitor file a contempt action against the firm. Based on past experience, we believe it is unlikely that this employer will comply with the act until subjected to criminal prosecution.

Case 2

A meat market operator violated FLSA minimum wage, overtime, and recordkeeping provisions. Some employees were paid below the minimum wage and were not paid overtime due. The operator also kept a false record of employees. Labor found that some employees were paid in cash and that appropriate taxes were not paid or withheld.

The compliance officer reported that during the investigation, the employer fired two employees for talking with him. The employer asked one employee to sign a false affidavit stating that he only worked 42 hours per week when, in fact, the employee said he worked 65 to 70 hours per week. Also, according to the compliance officer, the employer altered some records after the investigation to hide violations.

Labor estimated, based on available records and employee interviews, that 16 employees were due \$7,893 in back wages. There were indications that additional back wages were owed to employees who could not be located.

The case was referred to the regional solicitor for litigation. Both the area director and compliance officer stated that the case had the best potential for criminal prosecution they had ever seen.

Following normal procedures the regional solicitor, however, filed suit seeking only an injunction requiring future compliance and the recovery of back wages. An out-of-court settlement was reached and the employer paid \$4,325 (or 55 percent) of the estimated back wages. The regional solicitor took no action on the employee firings because it appeared that one employee left voluntarily and because neither employee was willing to go back to work.

This case appeared to satisfy three of the potential litigation criteria--records falsification, violations which were not

inadvertent, and violations of provisions prohibiting discrimination against employees exercising their rights under the act--but the regional solicitor did not refer the case to the U.S. attorney for possible criminal litigation.

Case 3

The owner of a security protection agency violated FLSA minimum wage, overtime, and recordkeeping provisions. One employee was not paid for a 2 week, 3-day period as a result of a deduction made to cover the cost of repairing a company car used by the employee--FLSA prohibits this. A total of nine employees were owed back wages because of overtime violations. Recordkeeping violations existed because the employer instructed employees to falsify payroll records by recording less than the actual number of hours worked on their timecards.

Labor estimated that \$3,630 in back wages were owed to nine employees for the 2-year period ended in February 1972. The employer agreed with the finding but, after considerable delays, refused to pay the back wages. Accordingly, the area director referred the case to the regional solicitor in September 1972 and stated:

"Subject case warrants immediate action. Employer is very antagonistic and feels the Department will take no action. Firm's attorney has employed dilatory tactics in numerous Wage-Hour cases before. His comments allude to the fact that he knows we never take any legal action * * *"

The area director further noted that this was the second investigation of the firm, and the employer had continued to violate the overtime and recordkeeping provisions. The case files contained no additional information on the earlier investigation. He recommended that the regional solicitor file suit seeking an injunction and back wage payment.

Although the regional solicitor filed suit seeking an injunction in January 1973, willfulness was not alleged. In September 1975, after the employer requested a settlement, the regional solicitor requested the area director to update the investigation and to note any violations since 1972. The reinvestigation showed additional minimum wage and overtime violations which did not exist previously. Some employees were not paid the minimum wage because illegal deductions

were made for uniforms. In addition, the employer initiated a scheme to avoid paying overtime. Employees who worked over 40 hours weekly received two payroll checks. One check was issued for about half of the hours worked, while the remainder of the hours were paid by a separate firm. No overtime premium was paid. Two employees attested to the scheme, while another employee stated that he knew of three other employees who were paid on this basis.

Based on the updated investigation which covered February 1970 to September 1975, the compliance officer found that minimum wage and overtime violations totaled about \$5,000. Although the employer sought a settlement in August 1975, it was not until November 1977 that the regional solicitor finally obtained an injunction against the firm and settled the case for \$4,000 in back wages to 58 employees. In justifying the settlement, the regional solicitor's office noted that "* * * the case was set for trial. Records were disorganized and uninformative. Many witnesses had disappeared. Several weeks of lawyer and investigator time was needed to pull the case together." In arriving at a settlement, the regional solicitor did not verify if the firm had been in compliance with FLSA during the 26-month period since the September 1975 updated investigation.

In 1978, the area office received another complaint against this same security agency. The complaint was filed by a competitor--not an employee. This most recent investigation covered July 1976 to July 1978. The compliance officer found that despite the outstanding injunction, the firm was still violating the minimum wage and overtime provisions and had been in violation even before the November 1977 injunction and settlement. As found during the previous investigation, many employees were still not paid the minimum wage because deductions were made for uniforms. Also, three employees were paid straight time for overtime hours worked during some weeks in 1976 and 1977. Labor estimated that 120 employees were due \$5,353 in back wages.

The area director referred this case to the regional solicitor in October 1978 and recommended that the employer be cited for violation of the injunction and that liquidated damages be sought. In February 1980 the regional solicitor filed a contempt action against the employer. A contempt order was entered in June 1980 requiring the employer to repay \$7,000 in back

wages and assessing \$100 in court costs. No other penalty was imposed.

Although the regional solicitor took legal action by seeking a civil contempt judgment for not complying with the injunction, the penalty assessed against the firm was insignificant.

LIQUIDATED DAMAGE PENALTIES
ARE INEFFECTIVE

FLSA was amended in 1974 to provide that Labor may bring court action against employers to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. Senate Rept. 93-300, dated July 6, 1973, supporting the proposed amendment cited the need for liquidated damages as a necessary penalty to assure compliance with the act. At that time, the employer was only required to repay the wages that should have been paid initially. There was no penalty to deter future violations. Liquidated damages are not an effective way to impose penalties, however, because such damages must be imposed by the courts. Because so few cases actually reach the trial stage necessary for liquidated damage assessments in district courts, habitual or flagrant violators normally escape penalties.

Liquidated damages are seldom obtained
even though they are often warranted

Despite the fact that many employers investigated by Labor appeared to have willfully violated FLSA minimum wage and overtime provisions, Labor rarely sought or obtained liquidated damages.

- 57 percent of the 65 closed litigated cases sampled at regional solicitors' offices were identified as willful violations.
- About 37 percent of the 230 closed cases sampled at regional solicitors' offices had at least one prior violation.
- 21 percent of the 433 closed cases sampled at area offices had at least one prior violation and most involved similar violations.
- 6 percent of 4,022 violators identified by our questionnaire apparently falsified or concealed records.

Although not all of these cases were completely resolved when we reviewed them, none of the 75 closed cases resulted in a liquidated damage penalty. In fact, even though Labor identified 37 employers as willful violators, none of the cases were filed under the liquidated damage section. (Some of these cases involved

flagrant minimum wage and overtime violations that harmed low-wage employees.) Solicitor officials in three regions and in headquarters agreed that liquidated damage penalties are rarely sought against employers. Solicitor officials in the three regions said that almost 100 percent of FLSA cases are filed under the act's injunction provisions.

While many employers who willfully and repeatedly violate FLSA warrant penalties, the current liquidated damage provision is not an effective way to impose penalties. Regional solicitors rarely seek liquidated damages because of difficulties that prevent such cases from reaching trial in district courts where liquidated damages can be awarded. The regional solicitors believe they can be more effective by obtaining injunctions prohibiting future violations and recovering some illegally withheld back wages for employees. Solicitors in the three regions said their primary objective in filing injunctive suits is to obtain future employer compliance and to recover as much as possible of the illegally withheld back wages, rather than to penalize employers.

At the completion of our review, two regional solicitors said they were attempting to make more use of the liquidated damage sanction against employers. They said, however, that practical considerations will continue to limit the number of cases in which liquidated damages are awarded. One regional solicitor said he hoped the threat of liquidated damages will improve Labor's bargaining position and allow Labor to obtain better back wage settlements from employers. Another regional solicitor hopes that, if a few violators are assessed liquidated damages, others might be less likely to violate the act. Neither believes that liquidated damages would be assessed against more than a few willful violators.

Traditionally, few civil cases reach trial in district courts. During the year ended June 30, 1979, U.S. district courts, nationwide, disposed of 1,175 FLSA civil cases filed by Labor. Only 52 cases (or 4.4 percent) reached trial where liquidated damages could have been awarded. Therefore, even if liquidated damages have been sought by Labor, actual assessments against employers violating the act would have been minimal because of the few civil cases that actually reach the trial stage.

The following examples, taken from among the 37 willful violations in our 75 case sample, further illustrate the need for more effective penalties.

Case 4

The owner of four gasoline service stations repeatedly and willfully violated FLSA minimum wage, overtime, and recordkeeping provisions. Some employees were paid below the minimum wage while others did not receive overtime pay. In addition, the employer falsified

records to show that he had paid overtime when, in fact, he had not. The same violations were identified at one of four service stations during an earlier investigation. At that time the employer agreed to comply in the future and to pay four employees \$900. Labor found, however, that even though the employer submitted signed receipts showing the money had been paid, it was not paid and the employer had falsified the wage receipts.

During the latest investigation, the employer continued to falsify records. One station manager signed a statement that the owner, in his presence, refigured the hours worked in a new payroll book to show that time and one half was paid for overtime hours. This occurred after the investigation was started. The employer also instructed employees to lie to the compliance officer and threatened to fire at least one employee if he cooperated with the compliance officer.

The compliance officer estimated that \$16,330 in back wages were due to 17 employees. The regional solicitor obtained an injunction and settled the case before trial for \$7,034 in back wages to 16 employees. About \$2,743 of the \$9,296 adjustment was attributed to corrections to the original calculations, while the remainder resulted from negotiations between the firm and the regional solicitor's office.

An attorney from the regional solicitor's office said the primary reason the case was settled was that some employees were uncooperative, were reluctant to testify, and could not be located. The compliance officer, however, noted that although some current employees were afraid to admit they were not paid overtime, several other employees had signed statements confirming the violation. Also, two managers said that no one at any of the four stations was paid overtime and that records were changed to show overtime was paid. The assistant area director involved with this case agreed that the settlement was insufficient and that the firm should have been penalized criminally or through liquidated damages. He does not believe the firm is currently in compliance based on its history and attitude.

The injunction called for the firm to make three monthly payments ended in August 1978. The firm met the first payment date, but as of February 1980, the second and third payments totaling \$3,572 had not been made. At the completion of our fieldwork, the regional solicitor's office was attempting to collect the back wages through contempt action.

This employer apparently falsified records, repeatedly and willfully violated the act, violated the injunction requirements, and discriminated against employees who cooperated with Labor. Despite these actions by the employer, Labor did not seek either criminal or liquidated damage sanctions.

Case 5

Labor filed a willful complaint seeking an injunction and payment of back wages against a security guard firm for violating the minimum wage, overtime, and record-keeping provisions. Guards were told to record only scheduled hours on timecards regardless of the actual hours worked. In some cases, the employer reduced the hours recorded by guards. As a result, employees were not paid for all hours worked, a minimum wage violation. In addition, the firm made illegal deductions that reduced compensation below the minimum wage and did not pay any overtime. Labor estimated that a total of \$12,849 was owed to 79 employees (\$3,986 was for overtime violations that the regional solicitor later decided not to pursue). Labor settled the case for \$5,579 (or 43 percent) of the original finding. Some legally collectible back wages also were not included in the original finding.

The violations appeared willful because the employer had a history of violations and showed knowledge of FLSA provisions. The employer violated overtime provisions and agreed to pay \$3,522 during a previous investigation. The employer also showed knowledge of FLSA provisions by limiting the number of hours employees could record and by changing the hours actually recorded. The firm was also extremely uncooperative, refused to supply needed records and did not answer letters from the area director requesting access to records.

In spite of the willful nature of this employer's violation--repeated violation and falsified records--Labor did not seek penalties against the firm.

The attorney from the regional solicitor's office who negotiated the settlement said the back wages were reduced because recordkeeping problems made the compliance officer's estimates difficult to prove in court. He said some employee statements were inconsistent and the calculations would be confusing to explain in court. The area director noted that, although recordkeeping problems prevented the compliance officer from fully documenting the violations, the computations were as accurate as possible given the circumstances. He said the regional solicitor's settlement was reasonable, considering that the only alternative was to wait 2 or 3 years for a trial.

Case 6

The operator of a retail grocery store chain violated FLSA minimum wage, overtime, and recordkeeping provisions. The compliance officer reported that, during Labor's investigation, the employer told employees to lie to the compliance officer. He also required employees to write letters indicating that all overtime hours were paid and the hourly rate of pay was greater than the minimum wage. In addition, the employer required employees to record only 8 hours per shift on timecards. The compliance officer documented several interviews reporting these attempts at coercion and falsification. Employees were willing to testify for Labor.

The compliance officer estimated that 188 employees were underpaid \$21,557 in back wages for the 2-year period ended in September 1975. After investigating additional branch locations and unsuccessfully negotiating with the employer, the area director submitted the case file to the regional solicitor for legal action in March 1976. The regional solicitor filed suit seeking an injunction and back wages. He requested an updated investigation which found continued violations during the 2-year period ended in May 1977. The compliance officer estimated that \$10,004 in back wages was due to 77 employees. Of this amount, \$5,743 was a part of the \$21,557 of back wages found due during the initial investigation. Although the total unduplicated back wages from both investigations was \$25,818 owed 198 employees, the regional solicitor obtained an injunction and settled the case out of court for \$7,000 of back wages to 77 employees--a settlement representing \$18,818 less than the original estimate.

We discussed this case with the compliance officer assigned to the case who stated that the employer had previously violated the same FLSA provisions at one store. The violations occurred in January 1974, and the case was settled by the area office after the employer paid \$2,282 in back wages. He further stated that, in the latest investigation, recordkeeping violations reduced his ability to document wage violations, which encouraged the regional solicitor to settle the case.

Although the employer willfully and repeatedly violated FLSA, the employer was not penalized and apparently profited by not maintaining required records. Based on the nature of the violations and the fact that the employer restored only a small percentage of employee back wages, we believe that this employer

will have little incentive to comply with FLSA in the future. In this regard, the compliance officer stated that he doubted the employer came into compliance even after the current injunction. After our fieldwork, he had not, however, been assigned to re-investigate the firm since no new employee complaints had been received and other higher priority complaint cases were awaiting investigation.

Case 7

A hotel operator willfully and repeatedly violated FLSA minimum wage, overtime, and recordkeeping provisions. Tipped employees were paid below the minimum wage. Also, employees who should have received overtime pay were improperly paid straight time for all hours worked. Further, the firm destroyed timecards and failed to maintain a record of tips. The compliance officer estimated that 38 employees were owed about \$6,575 in back wages covering a 2-year period. The compliance officer also noted in his report that violations were willful in that the employer

--destroyed timecards representing a 2-year period after the compliance officer initiated the investigation,

--fired an employee for cooperating with the investigation,

--recorded overtime earnings on unmarked timecards, and

--forced employees to falsify tip credit records.

The Labor area director recommended that the regional solicitor sue to obtain an injunction or liquidated damages. The regional solicitor settled the case without filing suit for \$5,059 (or about 77 percent) of the original findings. An injunction was not obtained against the employer to restrain future violations.

We discussed this case with officials of the regional solicitor's office. They noted that the case would still be awaiting trial in district court if suit had been filed. Moreover, they stated that the out-of-court settlement was warranted because the firm had financial problems.

The employer has since violated the same FLSA overtime and recordkeeping provisions and the violations again appear willful. After the first investigation, the compliance officer explained to

the employer the proper method of computing overtime and record-keeping requirements. Based on the guidance provided, the firm should have been able to correct pay practices that violated FLSA. The willful nature of the second series of violations suggests, however, that the employer continued to violate the act because of the opportunity for financial gain. In fact, evidence indicates that the employer was not in compliance when the original settlement agreement was signed--despite the employer's assurance that compliance had been achieved.

The compliance officer stated that the employer specifically instructed managerial personnel on schemes to avoid paying time and a half for hours worked over 40. The compliance officer estimated that \$8,525 in back wages were owed to 10 employees. The regional solicitor has filed suit seeking an injunction and liquidated damages, but as of September 1980 the case was pending in the district court.

Factors that make the liquidated damage provision ineffective

Liquidated damages are not an appropriate way to penalize employers who willfully violate FLSA. To obtain liquidated damages, cases normally must reach trial; however, few cases reach trial in district court. District court chief judges and Labor solicitor officials agreed that roadblocks limit Labor's access to district courts.

Chief judges we interviewed at several U.S. district courts cited the (1) requirement that some cases, including criminal cases, receive first priority, (2) large volume of cases filed in courts, and (3) need to settle most cases to keep the courts from being overwhelmed as the major factors limiting not only FLSA cases but most civil cases from reaching trial.

Regional solicitor officials also identified several roadblocks that will continue to limit the number of cases Labor actually brings to trial and therefore will continue to limit the number of employers who can be penalized under the liquidated damages provision. The major factors discouraging Labor from pursuing liquidated damages by bringing more cases to trial in district court include

- the lengthy wait for trial required in many courts,
- Labor's reluctance to bring FLSA cases before a jury,
- the low priority labor cases receive in district courts,
- evidence problems due to inadequate records, and

--limited resources to pursue more cases to trial.

Solicitor officials in two regions noted that, in the few cases that have reached trial, the damages awarded were disappointingly small.

A study sponsored by the Administrative Conference of the United States 1/ identified similar roadblocks preventing cases from reaching trial in district courts and hindering enforcement efforts in other Federal regulatory programs that rely on district court trials. This study concluded that extensive delays reaching trial and the inappropriateness of district court judges hearing many highly technical, but relatively insignificant cases prevent most cases from reaching district courts and encourage agencies to accept low settlements. According to this study, the present system may also be allowing some of the worst offenders (those who will not settle but who cannot feasibly be brought to trial) to get away.

A brief discussion of roadblocks limiting Labor's willingness or ability to obtain liquidated damages follows.

Lengthy wait for trials in some district courts

As discussed in chapter 2, an inordinate amount of time is required to bring civil cases to trial in many district courts. This was cited by Labor officials as a major reason for not seeking liquidated damages.

District court chief judges we interviewed also cited the backlog of cases as a problem leading to long delays resolving civil cases. One judge noted that most cases do not come to trial because of the time and cost involved, which creates considerable pressure to settle. Another said that in his court cases take 2 years to reach trial. According to him, the backlog is a serious problem and he encourages parties to settle cases to control it. He noted, however, that in his experience the Government usually gives up the most in settling cases.

Jury trials

Labor officials advised us that they avoid seeking liquidated damages partly because they do not want to bring FLSA cases before a jury. These officials said that employers are entitled to a jury trial in section 16(c) liquidated damage actions if they

1/"An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies" by Harvey J. Goldschmid, Associate Professor, Columbia University School of Law.

desire. Labor's reluctance to face a jury trial stems partly from its perception that judges would be reluctant to use a jury to hear FLSA cases and partly from a recognition of the high cost involved in a jury trial relative to the amounts involved in a case.

FLSA cases receive low priority in district court

As discussed in chapter 2, regional solicitors and their attorneys in the three regions we visited believe that FLSA cases receive low priority in district courts and that many judges are not receptive to hearing FLSA cases. Solicitor officials in one region said judges' attitudes are a major factor encouraging settlements. They said judges do not want to waste their time on FLSA cases, which they see as insignificant, and therefore, the judges tend to give FLSA cases the lowest priority and encourage Labor attorneys to settle cases out of court.

The regional solicitor in another region said FLSA cases are minor ones, so district court judges give them the lowest priority. In the third region, the deputy regional solicitor said judges give FLSA cases low priority in court, reschedule cases several times, and pressure Labor attorneys to accept lower settlements in order to clear cases from their dockets.

In general, the chief judges we talked to did not agree that they disliked hearing FLSA cases, or that they give FLSA cases lower priority. One chief judge said, however, that FLSA cases are minor ones which do not belong in the courts and that it is ridiculous to tie up the courts with petty overtime cases. He said he gets the attorneys together and forces them to settle cases. Another chief judge noted that FLSA cases are nonpriority cases in the sense that the Congress has established priorities for other types of cases, such as criminal cases, but that FLSA cases are not given lower priority than most other civil cases.

Evidence problems

Inadequate records, as discussed in chapter 2, have an adverse impact on Labor's ability to document the extent of violations in court. As a result, Labor is reluctant to bring cases to trial when recordkeeping violations cause evidence problems.

Limited resources

Regional solicitor officials noted that limited resources restrict their ability to bring more FLSA cases to trial. Labor attorneys seek to settle as many cases as possible before trial and engage in extensive negotiations to settle cases. Regional solicitor officials said that cases that reach trial take more time to prepare than do cases that are settled, and that if more

cases reach trial, fewer cases overall can be handled. One regional solicitor cited limited resources and high caseloads as a serious problem limiting his ability to handle FLSA litigation cases.

A related problem cited by regional solicitor officials, as an additional cause of FLSA case processing delays, is the requirement that processing deadlines must be met for other types of cases. Occupational Safety and Health Act cases, for example, must be processed within strict time limits. Regional solicitor officials explained that, because FLSA cases do not have processing deadlines, they are sometimes put aside and delayed within the region because deadlines must be met for other types of cases.

CIVIL PENALTIES NEEDED TO DETER MINIMUM WAGE AND OVERTIME VIOLATIONS

As discussed in chapter 2, there are no civil penalties for FLSA recordkeeping violations. Similarly, there are no civil penalties for minimum wage and overtime violations. Without such penalties, employers will continue to violate FLSA provisions. To better protect employee wages, Labor should have the authority to assess civil penalties large enough to deter minimum wage and overtime violations.

FORMAL ADMINISTRATIVE PROCESS NEEDED TO ADJUDICATE CIVIL PENALTIES

As discussed in chapter 2, even if civil penalties are authorized, this alone will not be effective to deter recordkeeping violations. Similarly, civil penalties alone will not deter minimum wage and overtime violations because of extensive delays in completing cases in district courts; the low priority given to FLSA cases; and the reluctance of Labor's Office of the Solicitor to pursue court cases under these circumstances. Accordingly, there is a need to establish a formal administrative process to adjudicate civil penalties.

CONCLUSIONS

Labor's FLSA enforcement authority needs strengthening. To reduce the number and severity of FLSA violations, Labor needs the authority to impose civil money penalties that discourage violations. Although FLSA includes both a criminal penalty and a liquidated damages provision, Labor's current enforcement actions rarely, if ever, lead to penalties, even against the worst violators. Labor should consult more closely with Justice officials to coordinate criminal and civil litigation strategies. While the criminal penalty can be used more effectively to punish the worst offenders, criminal sanctions are only appropriate in a limited

number of cases. On the other hand, liquidated damages are not effective against most willful violators. Liquidated damages cannot normally be imposed without a full district court trial, and extensive delays and other roadblocks limit the number of cases in which Labor can obtain damages.

We believe civil money penalties, assessed by Labor, should be substituted for Labor's current authority to seek liquidated damages under section 16(c) of FLSA. Labor should be given the authority to assess a civil money penalty large enough to deter minimum wage and overtime violations. (See ch. 4 for a recommendation that Labor also be given authority to assess back wages owed to employees.) Labor should also continue to use the injunction provisions, as needed, to obtain compliance with FLSA minimum wage and overtime requirements.

As discussed in chapter 2, the process should protect the employers' rights to appeal Labor assessments and to obtain a fast, impartial hearing. We believe this can be accomplished most effectively by giving employers the right to appeal Labor's penalty assessment at formal administrative hearings before administrative law judges.

We also believe that Labor should use the FLSA criminal sanctions against flagrant and willful violators of the act's minimum wage and overtime requirements. To minimize the potential adverse impacts of using such sanctions, criminal and civil litigation strategies should be closely coordinated with the Department of Justice.

RECOMMENDATION TO THE CONGRESS

We recommend that the Congress amend FLSA to eliminate the section 16(c) liquidated damage provision of the act and in its place give Labor authority to assess civil money penalties large enough to deter minimum wage and overtime violations. The legislation should provide for an administrative system for adjudicating cases when employers appeal Labor's actions, as recommended in chapter 2.

RECOMMENDATION TO THE SECRETARY OF LABOR

We recommend that the Secretary make more use of FLSA criminal sanctions for willful minimum wage and overtime violations, after consulting with Justice officials to coordinate criminal and civil litigation strategies.

AGENCY COMMENTS AND OUR EVALUATION

Department of Justice

Justice noted that our draft report stated that one of the problems with criminal enforcement of FLSA is reluctance on the part of U.S. attorneys to prosecute such violations. Justice pointed out that the priority given FLSA cases by the U.S. attorneys is most often influenced by their particular caseload and the nature of pending litigation in their respective offices. Furthermore, even a willful violator of the act is not subject to imprisonment until after a second conviction.

Justice also noted that, according to our draft report, Labor officials stated that commencement of criminal actions reduces Labor's ability to recover employees' back wages because it delays the resolution of the back wage question. Justice stated that criminal prosecution may remove the incentive for defendants to enter into settlements with Labor in regard to civil actions filed to recover back pay; nevertheless, GAO should be aware that with respect to a criminal conviction under section 216 of the FLSA, U.S. attorneys are specifically instructed to make every effort to secure restitution of all employee claims for back pay as a condition of sentence. Justice also stated that probation may be conditioned with the requirement that the defendant make full restitution and that the postponement of sentencing pending restitution is an option. Therefore, Justice concluded, in the types of egregious cases illustrated in our report, criminal prosecution may in fact be a more effective and faster method of obtaining back pay claims than a civil suit filed by an employee or the Secretary of Labor.

Department of Labor

Labor stated that it does not concur with our recommendation that the Secretary of Labor make more use of FLSA criminal sanctions for willful minimum wage and overtime violations. Labor commented that regional solicitors have found that the resources of their offices are better devoted, on the whole, to seeking civil remedies which include restitution of back wages in the great majority of cases. Labor noted that the maximum criminal penalty which can be imposed on a first conviction is only \$10,000 and, apart from the fact that such a maximum penalty would rarely if ever be imposed, it is considerably less than can often be recovered in back wages.

We agree with Labor that the regional solicitors' primary emphasis in enforcing FLSA should be to recover employees' back wages. However, we continue to believe that increased use of FLSA criminal sanctions is warranted because the use of such sanctions would serve as a deterrent to FLSA violations and, as

noted above by Justice, can be an effective way of recovering back wages.

Labor said that at the time of our study, the section 16(c) liquidated damages remedy may have been infrequently sought, but it is now much more common to file suit under this provision. Labor stated that, in certain offices, up to 50 percent of FLSA suits are brought under section 16(c) and that these cases tend to be those in which witnesses are readily available and violations are of a recurring nature.

While the number of cases filed under section 16(c) may be increasing, we do not believe there will be a significant increase in liquidated damage awards. Between the filing of liquidated damage court suits against employers and the completed court hearing and assessment of liquidated damages, there is a long and arduous procedure strewn with obstacles. Some of the obstacles include

- inability of regional solicitors to apply resources to engage in many actual court hearings because their work not only concerns FLSA but other Labor acts, some of which require priority attention;
- inability to assess liquidated damages unless a suit culminates in a court trial;
- delays in preparing a case for trial plus time awaiting trial date can weaken a liquidated damage case; and
- the assessment of liquidated damages is not mandatory even after an employer is convicted of violating FLSA and, therefore, a convicted employer may not be assessed such damages.

Also, as Labor noted, section 16(c) actions tend to be used in cases where witnesses are readily available. As we pointed out in chapter 2 of this report, in many cases employees are not available to testify and, when available, they are reluctant to testify. Therefore, the unavailability of witnesses will also limit the number of liquidated damage cases.

CHAPTER 4

CHANGES IN TOLLING OF STATUTE OF LIMITATIONS

AND ADMINISTRATIVE PRACTICES NEEDED TO INCREASE

RECOVERY OF ILLEGALLY WITHHELD WAGES

While penalties are important to deter violations of FLSA recordkeeping, minimum wage, and overtime provisions, recovering illegally withheld employee wages is also important. Labor can do more to increase the amount of backwages restored to employees. However, its actions alone will not be sufficient to assure maximum recovery of illegally withheld back wages. The time at which the statute of limitations stops running--referred to as "tolling of the statute"--must also be changed to remove its overly restrictive effects. In connection with this change, Labor should also be given the authority to assess the amount of back wages owed to employees, including interest, which helps to make employees whole for the period during which back wages were illegally withheld.

We believe these changes will also deter willful violations, as will the penalties described in chapters 2 and 3. Coupled with the penalties, these actions will help to assure that employees will be made whole and that employers will not benefit from violating FLSA. As pointed out in chapter 2, we also believe that a formal administrative process should be used to adjudicate cases where employers appeal Labor's assessments.

We found that the recovery of illegally withheld wages could be improved by

- changing the time at which the statute of limitation is tolled,
- pursuing wage recoveries for 3-year periods permitted by FLSA for willful violations,
- updating investigations before settling cases,
- systematically reinvestigating employers who violate the act, and
- requiring employers to pay interest on back wages illegally withheld from employees.

Speedily resolving FLSA cases is especially important because delays adversely affect low-income employees. The time covered by the investigation and legal proceedings delays the date when employees--some of whom may be living below the poverty level--receive their back wages. As time passes, employees may receive

less back wages because as Labor's case gets weaker the regional solicitors will settle for less. Also, the value of back wages can be seriously eroded by inflation. Finally, if they cannot be located, the employees will not receive any back wages.

BACK WAGES LOST DUE TO RUNNING
OF STATUTE OF LIMITATIONS

The statute of limitations restricts an employer's obligation to repay employees back wages to a 2-year period for nonwillful violations and a 3-year period for willful violations. The amount of illegally withheld wages recovered, however, can be severely reduced by the time that passes either before an employer waives the right to claim the statute of limitations or before Labor files legal action in a district court. Either action stops the statute from running. The reductions in back wages that employees can recover due to the passage of time are referred to as back wages lost to the running of the statute. Therefore, if (1) violations in a nonwillful case dated back a full 2 years and (2) a delay occurred from the date of the most recent violation to the point in time when the employer waived his rights or Labor filed legal action, the employer's legal back wage liability would be less than what had been illegally withheld from the employees during the 2-year period covered by the investigation.

The 2-year statute of limitation was established by section 6 of the Portal-to-Portal Pay Act of 1947 (29 U.S.C. 255) which limited an employer's liability to pay minimum wages or overtime pay under FLSA and related statutes to a 2-year period. In 1966, the Congress extended the statute of limitations to 3 years for willful FLSA violations.

We found that delays stopping the statute of limitations from running, either at Labor area offices or at the regional solicitor's offices, reduced the amount of back wages employees could recover. Our review showed that considerable amounts of time usually passed from the date compliance officers started their investigations to the date when regional solicitors filed suit against employers. Because of these delays, a portion of employees' back wages was often not recoverable. In 65 of 75 cases reviewed, regional solicitors filed legal action against employers in U.S. district courts. An analysis of 42 of the 65 cases showed that an average of 12 months passed between when Labor's investigations began and when the court action was filed and the statute of limitations was tolled. Although individual case files rarely contained written explanations of how settlements were reached, we believe that back wages were lost to the running of the statute in 21 of the 65 litigated cases, as illustrated by the following cases.

Case 1

A restaurant owner violated FLSA minimum wage, overtime, and recordkeeping provisions. Busboys and kitchen help were paid below the minimum wage. In addition, some employees were paid straight time for overtime hours worked, while others were paid on a salary basis without additional compensation for overtime. The employer did not maintain records of the hours worked by salaried employees or of tips received.

The compliance officer estimated that, for the 2-year period ended September 1975, \$4,307 in back wages was owed to 22 employees. Although the investigation was initiated in September 1975, the case was not forwarded to the regional solicitor until August 1976. The delay was attributed partly to the employer's promise to pay back wages and subsequent refusal to pay. The regional solicitor filed an injunctive suit against the employer in March 1977. At this point, 18 months had passed since the start of the investigation, and accordingly, all but 6 months of the back wages were lost to the running of the statute.

A memorandum dated July 29, 1977, prepared by an attorney in the regional solicitor's office, included a recommendation that the case be settled for \$2,550, or 59 percent of the back wages. The attorney noted that the statute of limitations "* * * has run on all but 6 months and we could not do any better at trial." On September 20, 1977, the regional solicitor obtained an injunction prohibiting future violations and requiring the employer to pay \$2,250 in back wages to 22 employees. Consequently, up to \$1,757 of employee's back wages were lost to the running of the statute.

Case 2

A Labor investigation of a gasoline service station showed minimum wage and overtime violations estimated at \$8,212 over a 2-year period ended in April 1977. The owner paid 13 employees less than the minimum wage and deducted shortages from employees' pay. Minimum wage violations totaled \$1,074. Overtime violations totaling \$7,138 occurred because the employer paid 17 employees straight time wages for all hours worked, including overtime hours. The violations were apparent on the records, and substantiated by employee interviews. The employer admitted to the violation and agreed to comply in the future, but claimed he was not aware of the act's provisions. He also said he was financially unable to pay the back wages found due.

The area director sent the case to the regional solicitor in June 1977 and recommended that the solicitor file court suit to recover back wages. The regional solicitor filed suit in August 1977 based on the contention that at least some back wages could probably be recovered even though the employer contends he is unable to pay.

The regional solicitor accepted the employer's offer to settle the case, and in October 1977 a consent judgment called for future compliance and payment of \$5,000 to 17 employees. According to an attorney in the regional solicitor's office, the settlement was accepted because the running of the statute of limitations had made \$1,157 of back wages legally uncollectible and because the individual no longer owned the gasoline service station. The \$1,157 lost to the statute of limitations had been illegally withheld between April 1975 and August 1975.

We also reviewed 32 FLSA cases, 11 in Boston, 9 in Chicago, and 12 in Dallas that regional solicitors had rejected for litigation. Cases were primarily reviewed to determine if the regional solicitors had rejected them because of the statute of limitations. None of the Boston cases had been rejected because of the statute. However, in Chicago and Dallas regional solicitors took no legal action against employers in 8 of the 21 rejected cases because the statute of limitations had largely eroded any recoverable back wages. The following two cases illustrate such loss of back wages.

Case 3

A Labor investigation of two specialty food stores disclosed overtime and recordkeeping violations. Employees at both locations were not paid overtime and records of hours worked were not maintained for salaried employees. The compliance officer estimated that 17 employees were owed \$7,850 over a 2-year period from October 1974 to October 1976. While the employer agreed to comply in the future, he refused to pay back wages, claiming he was financially unable to pay.

The case was sent to the regional solicitor in December 1976, and a legal analysis was prepared that recommended filing suit to recover the back wages. Twelve months later, in February 1978, a second legal analysis noted that the firm had agreed to comply, and concluded that the case should be rejected because of delays in acting on it. According to the attorney's legal analysis, \$4,355 was not recoverable because of the statute of limitations. Rather than litigate the remaining amount at that late date, the regional solicitor rejected the case. The area director protested the rejection in a letter to Labor's regional office stating:

"Did you look at this file? This is the second one we have received in a few weeks that SOL (Solicitor) initially analyzed as suitable for litigation, but after a year laying on some attorney's desk, it was reanalyzed and found unsuitable because the statute of limitations had run out on the major portion of the back wages."

Case 4

A Labor investigation of a restaurant disclosed minimum wage and overtime violations of \$9,385 owed to 85 employees for a 20-month period ended August 1976. Waitresses and dishwashers were paid less than the minimum wage, and employees were paid straight time for all hours worked. Recordkeeping was not a problem, and the violations were calculated based on records of hours worked. The employer agreed to comply with the act but said he could not afford to restore the back wages.

In December 1976, the case was referred to the regional solicitor for legal action to collect the back wages. In August 1978, 1 year and 8 months later, the file was returned to the area office with no legal action taken. The regional solicitor, in rejecting the case, said the file was being returned because the running of the statute of limitations had made the back wages legally uncollectible.

According to Labor's assistant regional administrator in Dallas, losing back wages to the statute of limitations is a major factor affecting enforcement. In November 1979, he requested the regional solicitor to return 41 FLSA cases. Although these cases had been referred to the regional solicitor for legal action at least 1 year earlier, suit had not yet been filed in any of the cases. In his memorandum to the regional solicitor, the assistant regional administrator stated, "Since your limited resources precluded your handling these cases on a timely basis, I am requesting that they be returned for administrative disposition."

THE TIME AT WHICH THE STATUTE TOLLS SHOULD BE CHANGED

The point at which the statute of limitations is tolled should be changed to maximize the recovery of back wages. Current delays in tolling the statute are caused by the time taken to

--negotiate cases with the employer at the Labor area office and at the regional solicitor's office and

--analyze the case and file suit in district court.

These delays are described in the above examples under the discussion of the restrictive statute of limitations. While some improvements in the process obviously can be made to reduce these delays, no matter how efficiently Labor handles these cases, some back wages will continue to be lost to the running of the statute of limitations.

The problem can be resolved only if the statute of limitations tolls when Labor compliance officers determine that an FLSA violation occurred. Since the compliance officer has computed the back wages owed and notified the employer that Labor believes a violation exists, it does not make sense to allow the statute of limitations to continue to run, thereby reducing the back wages that employees can recover. Rather, Labor should have the authority to assess the amount of back wages owed to employees and the statute of limitations should toll at that time. The Portal-to-Portal Pay Act needs to be changed to allow the statute of limitations to toll when the FLSA violation is assessed. To protect the employer's right to a relatively fast, fair process for resolving disputes, the employer should have the right to appeal such Labor assessments through the formal administrative process described in chapter 2.

INVESTIGATIONS AND WAGE RECOVERIES SELDOM COVER 3 YEARS FOR WILLFUL VIOLATIONS

In 1966, the Congress attempted to deter violations while providing greater protection to employees by extending the statute of limitations to 3 years in cases where the violation is willful. Labor, however, has restricted pursuit of such third year back wage recoveries by requiring compliance officers to obtain, through area directors, authorization from both assistant regional administrators and regional solicitors in individual cases before computing illegally withheld wages for the third year.

Our analysis of the 4,022 responses to our nationwide questionnaire showed that compliance officers found evidence of falsified records--a strong indication of willfulness--in 244 (or about 6 percent) of the cases. Yet, only 40 cases had investigations which were extended beyond a 2-year period. In addition, our review of the 75 sampled cases showed that regional solicitors alleged that violations were willful in 37 cases. Back wages for the full 3 years, however, were only computed and sought in four (or about 11 percent) of those cases where regional solicitors alleged willful intent to violate FLSA. Thus, illegally withheld wages are rarely recovered for the third year period and, as a result, most willful employer offenders are treated no differently than nonwillful offenders.

We discussed Labor's infrequent attempts to seek the third year of back wages with both regional solicitor and Labor area

office officials. The Boston Regional Solicitor said the possibility of seeking the third year of back wages is used primarily as a bargaining tool in settling cases.

He also stated, that although compliance officers must request permission from his office to seek the third year of back wages, they rarely make such requests. He added that once his office receives an FLSA case, it is very difficult to reenter a firm to compute the third year of back wages. Employers are often hostile and uncooperative upon learning the purpose of the visit. Therefore, he believes that compliance officers should automatically compute the back wage violations for a full 3 years if they appear willful.

Chicago and Dallas regional solicitor officials took a somewhat different position. They stated that the third year of back wages is not usually computed in willful cases because a significant portion of the third year violations often become legally uncollectible, due to the running of statute of limitations. Dallas regional solicitor officials also stated that computing the third year of violations would require spending additional compliance officer resources which could be more effectively utilized making other employer investigations. An attorney in this regional solicitor's office told us the extra work necessary to recover 3 years' back wages would further delay resolving the case.

Area directors stated that regional solicitors rarely request compliance officers to extend investigations to include the third year of back wages. One area director said he allows his compliance officers only to estimate violations for the additional year, but not to compute them, unless the attorney agrees to attempt to collect the additional back wages instead of bargaining them away to obtain a settlement. Another area director said it is not practical from a resource utilization standpoint to spend time computing additional back wages for disputed violations because settlements usually compromise the back wages owed and the third year's back wages are the first to go.

LABOR FREQUENTLY DOES NOT
UPDATE INVESTIGATIONS BEFORE
SETTLING CASES

Labor frequently does not update its investigation, before settling a case, to recover employee back wages illegally withheld between the date the investigation ends and the date the employer agrees to comply. Often, many months elapse before a regional solicitor can settle a case after the date of the last investigation. If employers do not comply with the act during this period, the amount of illegally withheld wages returned to employees will be limited. We found that some employers continued to violate FLSA provisions and underpay employees after completion of the investigation.

Our review of the 75 sampled cases showed that back wage estimates resulting from investigations were updated in only 17 cases before settlement. In three additional cases from one region, the solicitor obtained a written pledge of compliance from either the employer or the firm's attorney. These pledges usually stated that the firm had been in compliance with the act since investigation. In the other 55 cases, the original employee back wage estimates were not updated. Updating, however, was not warranted in 21 cases. For example, several establishments had gone out of business, eliminating a need for followup. In the other 34 cases, Labor's failure to verify compliance and update findings may have significantly contributed to unjust employer enrichment and denial of back wages to employees. Our analysis of the 34 cases where verification of compliance was warranted, but not performed, disclosed that an average of about 22 months elapsed from the date of the last violation noted in the investigation to the date the cases were settled. Overall, this period ranged from 6 to 52 months.

Failure to verify employer compliance is particularly significant in light of the results obtained when initial investigations are updated. For example, the regional solicitor in one region requested updated investigations in 13 of our sample cases. In doing so, compliance officers found that violations of the act were continuing in 8 of the 13 cases. Although 7 of the 13 employers had agreed to future compliance with the act after the initial investigations were completed, the updated investigations revealed additional violations in 4 of these 7 cases.

The following sample cases show that, when Labor does not update its investigations before settlement, employers may continue to violate FLSA.

--In July 1976, Labor investigated a hotel operator and found willful violations of the minimum wage, overtime, and recordkeeping provisions. The compliance officer estimated that \$6,574 had been illegally withheld from 38 employees. The employer refused to fully restore the back wages and stated he might not commit himself to future compliance.

The regional solicitor received the case in February 1977 and settled it for \$5,059 in January 1978--about 18 months after the investigation started. As part of the settlement agreement, the employer stated that he was currently in compliance with FLSA, but no mention was made of the previous 18-month period. Labor did not verify compliance after the initial investigation but before settlement.

In March 1979, Labor investigated this employer again based on another employee complaint, and found that the employer was not complying with the act when the previous settlement

agreement was signed. In addition, violations continued to occur despite the agreement. The second investigation, showing that \$8,525 was due to 10 employees, was sent to the regional solicitor for his review in May 1979. In January 1980, he filed suit against the employer for back wages. As of September 1980, the case was still pending in the court.

--An investigation of a chain of small convenience grocery stores in September 1976 found overtime violations of \$50,948 owed to 104 employees and recordkeeping violations. The case was sent to the regional solicitor in January 1977 with a note that the company had not pledged future compliance and a recommendation for court suit for back wages and liquidated damages. The solicitor did not pursue litigation but instead, settled the case in October 1977 for \$34,810, after granting an overtime exemption to store managers.

The firm's attorney signed a settlement agreement that included a note that the firm was currently in compliance with FLSA and had been since the start of the investigation in September 1976. Labor did not verify that compliance had occurred.

Although the solicitor accepted the firm's pledge of compliance, data in the case file at that time showed that the firm was not in compliance when the employer's attorney signed the settlement agreement. Additional case data indicated the firm was not in compliance after the signing of the settlement.

On September 6, 1977--about 6 weeks before the signing of the settlement agreement--the area director sent the regional solicitor an additional employee complaint. The area director stated, "The attached interview discloses continuing noncompliance with Sections 7 and 11 of the act. Please review and include in your file which has been submitted and recommended for litigation." In this interview statement dated September 1, 1977, the employee, who was an acting manager and cashier, stated in part:

* * * I worked approximately 66 hours per week
* * * I earned \$150 per week for all hours worked.
* * * It is my understanding all other employees
in all stores are subject to working the long hours
for a straight salary. * * * No accurate record
of hours worked was maintained. * * *

In addition, on May 23, 1978, the assistant area director submitted another complaint to the regional solicitor

showing that an employee, who was an assistant manager, stated he did not receive credit for all hours worked.

Our review of the case file disclosed that the regional solicitor took no action on either of these additional complaints. On July 23, 1979, we asked Labor to reinvestigate this firm to determine if this employer was complying with FLSA. On April 15, 1980, the area director responsible for the reinvestigation stated that Labor found that the employer had not paid employees most of the back wages that were due to them. He noted that Labor received a check from the firm for the remaining back wages on March 4, 1980. The compliance officer is now attempting to determine if the firm ever came into compliance. The area director noted that early indications show that the firm is still violating FLSA overtime provisions. In addition, several more employees have filed complaints against the employer.

--A chain of fast food restaurants was found violating FLSA minimum wage, overtime, and recordkeeping provisions. The investigation covered a 2-year period ended March 1975 and disclosed that 730 employees were owed \$25,641 in back wages. The case was sent to the regional solicitor in August 1975 because the employer refused to restore the full back wages to employees. Labor filed suit seeking an injunction against the employer in November 1975. In January 1977, the regional solicitor asked the area director to recompute the original back wage computations because of a recent change in overtime compensation instructions and to include any new complaints in the recomputation of back wages.

The back wage recomputation showed that \$19,121 was owed to 692 employees. An additional \$15,110 of back wages was also found illegally withheld from employers for the updated review period since the last investigation. In October 1977, Labor obtained an injunction against the employer and settled the case for only the \$19,121. The remaining \$15,110 applicable to the updated investigation period was not obtained from the employer for distribution to underpaid employees.

We discussed this case with the responsible regional solicitor attorney to determine why the updated back wages of \$15,110 were not reimbursed to underpaid employees. He advised us that these back wages were used as a leverage against the employer in settling the case and thus, were compromised away. He added that the employer would not have settled if he had not felt that he was gaining something. Although, in this case, necessary steps were taken to update the investigation, the employer unjustly profited from the settlement and will undoubtedly have little incentive to comply with FLSA in the future.

We discussed the policy of updating investigations before case settlements at three regional solicitor's offices and noted that:

- The Dallas Regional Solicitor's policy is to request the area office to verify current compliance and to update investigation findings before case settlement. The purpose of the update is to add additional violations which may have occurred during the interim period and to exclude violations lost to the statute of limitations. He added, however, that all violations during the interim periods may not be included in the settlement. The regional solicitor's primary concern, before settling a case, is that the employer has come into compliance with FLSA.
- The Chicago Regional Solicitor generally does not request the area office to update investigations before settling cases. The primary goal is to obtain future compliance, so the policy generally prefers that attorneys secure employer agreements to comply so that attorneys can proceed to another case.
- An official in the Boston Regional Solicitor's office said that if the employer or his attorney stated in writing that the firm is currently in compliance and had been since the investigation, estimates of back wages due employees would not be updated. The regional solicitor added that if the firm's attorney is reputable and trustworthy, the attorney's word alone would be acceptable assurance of past and present compliance. In addition he expressed some concern that updating could jeopardize or upset settlement negotiations with the employer.

We also discussed the policy of verifying compliance and updating back wage estimates before settling cases with officials from the Office of the Solicitor's Fair Labor Standards Division who stated that there is no formal policy regarding this matter. They said that regional solicitors, at a minimum, should request Labor to spot check employers for compliance before settling if there is any doubt about compliance. They added that regional solicitors should not settle a case without requesting an update, even though it may jeopardize tentative settlement agreements.

LABOR DOES NOT HAVE A SYSTEMATIC
PROGRAM TO REINVESTIGATE EMPLOYERS
WHO VIOLATE THE ACT

Labor does not systematically reinvestigate employers who previously violated FLSA although our review showed that many employers repeatedly violate the act.

As pointed out earlier, our review of cases closed administratively during June and July 1979 at six Labor area offices showed that 90 of 433 employers (or about 21 percent) had at least one prior violation, and 21 cases had three or more violations. In most cases the employer continued to violate the same sections of the act. The extent of repeat violations identified by Labor probably understates the actual extent to which employers continue to violate the act, however, because (1) employees whose complaints are not resolved satisfactorily are less likely to complain about later violations if the first enforcement action does not stop the violation, (2) Labor relies primarily on complaints in determining which firms it will investigate, and (3) Labor investigates only a small fraction of the firms subject to FLSA.

Labor is able to investigate only a small fraction of the firms that are covered by FLSA. In 1979, for example, Labor investigated only about 2 percent of the 4.1 million establishments subject to FLSA provisions. It also faces a substantial backlog of complaints from employees and others, and as a result, directs its investigative resources to complaint cases. Therefore, employers may continue to violate the act without being reinvestigated. An employer's promise to comply is often accepted by Labor, and followup investigations are rarely made unless an employee again complains.

Some employers not only continue to violate FLSA after being caught, but also realize they can get away with greater violations. One area office director said virtually every time he has administratively closed a case without an agreement to pay back wages, a later investigation of the same firm discovered even greater violations. He believes the system positively reinforces noncompliance. Further, in 11 cases closed by a regional solicitor during fiscal year 1978, which originated from this area office, employers usually paid all back wages after their first investigation, but refused to pay after later Labor investigations.

Area offices maintain records of FLSA violators which can be used to schedule reinvestigations of employers, but such records are seldom used to initiate reinvestigations because of heavy employee wage complaint backlogs. For example, as of August 1979, a total of 22,117 FLSA complaints were backlogged nationwide in area offices. Compliance officers said that employees become discouraged when their complaints are not investigated promptly with satisfactory results. Therefore, some employees refuse to complain further if they are dissatisfied with Labor's investigation.

One area office director said Labor's receipt of back wage complaints depends on two factors:

--If a previous investigation did not result in compliance or payment of back wages, employees will probably not complain again. However, if an employer came into

compliance and/or paid back wages, the employees will be much more willing to report repeat instances of noncompliance.

--If the employer has only a few employees, he has a better chance of intimidating them. The larger the organization, the better the chances one person will complain.

In addition, during periods of economic downturn, the Nation's lowest paid employees may be even less willing to complain when employers illegally withhold back wages from them because they fear losing their jobs.

Accordingly, Labor may not receive cooperation from the employees if the employer continues to violate the act, and Labor may not even become aware of the violation unless employees complain. For example, in one case a compliance officer described an employer who was investigated three times with minimal results. During the last investigation, one employee refused to talk with the compliance officer, even though he had previously sent wage complaints to Labor. This employee also advised fellow employees not to talk with the compliance officer because, if no results were achieved from previous investigations, there was no reason for them to risk their jobs.

Another case involved a security firm which violated the act three times, apparently without ever complying with the act after Labor investigations. The third investigation was based on a complaint from a competitor, rather than from affected employees.

EMPLOYERS GENERALLY HAVE INTEREST-FREE USE OF BACK WAGES ILLEGALLY WITHHELD

Labor does not routinely seek interest for employees, including those whose back wages have been illegally withheld for long periods of time. Thus, employers have interest-free use of back wages due to employees. Conversely, employees are denied use of back wages due to them during the same period. When they do ultimately receive their back wages, inflation may have substantially eroded the value of such wages. Thus, without interest the employees are not receiving just compensation.

Labor, in settling cases at the area office level, does not seek interest from employers on wages illegally withheld, including those withheld for long periods. One assistant regional administrator said there is no legal authority to seek interest for cases settled within the area office. However, Labor officials stated that the possibility of interest being assessed by the courts is used as a bargaining tool to entice employers to pay back wages at the area office level.

In filing FLSA suits against employers in U.S. district courts, regional solicitors usually request the court to assess interest on employee back wages. Complaint forms for filing legal action normally request that back wages be paid together with interest from the date such back wages become due until they are paid. If a case goes to trial, interest is assessed at the discretion of the court. As previously noted, however, few cases ever reach trial. Most cases are negotiated and settled out of court.

Regional solicitors do not generally obtain interest as part of agreements because it is normally negotiated away to reach out of court back wage settlements. According to regional solicitor officials, asking for interest could upset settlement negotiations. Since records of negotiation are not prepared showing factors considered in the final settlements between employers and regional solicitor officials, we could not determine what effect, if any, potential interest charges had on case settlements.

One regional solicitor told us he had instructed his attorneys, within the past year, to actively seek interest if employers are allowed to pay back wages on an installment basis. However, he said that the strength of the case and the final settlement dictates whether interest is sought. If a high settlement is obtained or if the findings are speculative, interest would most likely not be sought.

Our review of the 75 sample cases showed that both prejudgment interest, i.e., interest from the date back wages are due, and installment interest were rarely obtained. Prejudgment interest was only assessed in 5 of 75 sample cases. In each of these five cases, interest was assessed as part of a default judgment obtained against employers who failed to appear in court. Default judgments, however, do not insure the payment of back wages or interest since some employers are unable to pay or may never be found. In fact, prejudgment interest was only paid in two of the five default judgments. In 15 of the 75 sample cases, employers were permitted to pay employee back wages on an installment basis. The installment periods ranged from 3 to 33 months and averaged about 12 months. Regional solicitors, however, only obtained installment interest for employees in 1 of the 15 cases.

Employers who illegally withhold back wages from employees generally have the interest-free use of these wages for several years. Our review of the 75 sample cases showed that investigations went back at least a full 2 years in 55 of the 75 cases. In addition, although employers in 63 of the 75 cases paid all or portions of employee back wages, in 36 cases payments were not made until an average of 25 months had passed since the investigation. Furthermore, the 15 employers who restored employee back wages on an installment basis took an average of 12 additional months to complete payments.

To illustrate how employers profit from not being required to pay interest on back wages, in one of the cases in our sample, a regional solicitor recovered portions of back wages. However, the employer had interest free use of the illegally withheld wages for about 10 years and, therefore, profited considerably by violating the law. First, the firm obtained interest-free use of employees' wages for the 3-year period in which violations occurred. Second, the employer did not pay interest on back wages from the start of the investigation to the time the case was settled. A final settlement of \$70,000 plus \$1,000 court costs was reached approximately 4 years and 3 months after the start of the investigation. The employer had interest-free use of \$70,000 throughout this period. Finally, the solicitor agreed to allow the firm to make quarterly back wage payments to employees over a 33-month period, but did not demand interest on the installments.

The money that employers can save by not paying interest for illegally withheld wages is often substantial. Some back wage amounts are large and litigation periods lengthy. The following table shows simple interest savings to five employers included in our sample. We computed interest on the final back wage settlement.

<u>Em- ployer</u>	<u>Back wage settlement</u>	<u>Length of litigation (note a)</u>	<u>Simple interest savings at 9 percent</u>	<u>Percent interest is of judgment</u>
1	\$ 19,121	2.2 years	\$ 3,786	20
2	187,932	3.1 years	52,433	28
3	4,000	2.3 years	828	21
4	3,251	2.3 years	673	21
5	200,000	2.1 years	37,800	19

a/Computed from the date the case was received by the regional solicitor's office to the date final payment was made to employees. This estimate is conservative because it does not include time for which the wages were illegally withheld before being submitted to the regional solicitor.

Labor's failure to seek interest on wages illegally withheld penalizes employees because, as time passes, inflation erodes the value of the back wages. For example, during the 5-year period ended in 1978, the consumer price index--which reflects changes in prices for fixed group of items such as food, housing, apparel, transportation, medical care, and entertainment--increased from 134.7 to 193.1. If wages had been withheld from an employee for this 5-year period, the value of these dollars would have decreased by over 40 percent. To prevent employers from profiting by illegally withholding employee wages without paying interest, Labor should be authorized to assess a reasonable amount of interest in addition to the amount of back wages.

CONCLUSIONS

We believe that Labor should be given the authority to determine that a minimum wage and overtime violation has occurred and to compute and assess the amount of employee back wages illegally withheld from employees, including interest. Changes to the Portal-to-Portal Pay Act are needed to allow Labor to stop the running of the statute of limitations when it determines that a violation has occurred. This would materially increase the illegally withheld back wages restored to employees--many of whom are low-wage earners--that are now lost because of the mere passage of time.

Tolling the statute of limitations at the time a determination is made that wages have been illegally withheld would also provide Labor with greater incentive to calculate the third year of back wages--which is now largely ignored--when employer violations are willful. Labor's fuller utilization of a 3-year period in computing back wages in willful cases would conform to the intent of the Congress to deter violations.

Labor does not routinely update its investigations to recover back wages illegally withheld between the date an investigation ends and the date an employer agrees to comply. Consequently, this administrative practice limits the amount of back wages that employees can recover. Labor should update cases to assure that employees receive the full amount of back wages they are entitled and to prevent employers from profiting from violations.

Labor also does not systematically reinvestigate employers that violate the act even though many repeatedly do so. We believe a systematic program to reinvestigate some employers that previously violated the act will improve FLSA compliance. We recognize, however, that Labor's complaint backlog and limited resources will limit the number of employers Labor can reinvestigate.

In addition, Labor should routinely seek interest for employees whose wages have been illegally withheld. The assessment of interest would eliminate the incentive for employers to illegally withhold wages and would help make the employees whole for the period during which wages are illegally withheld.

RECOMMENDATIONS TO THE CONGRESS

We recommend that the Congress:

- Amend FLSA to authorize Labor to formally assess a violation as well as the amount of illegally withheld back wages due, including interest.

- Amend section 6 of the Portal-to-Portal Pay Act of 1947 so that the statute of limitations tolls when an FLSA violation is formally assessed by Labor.

RECOMMENDATIONS TO THE
SECRETARY OF LABOR

We recommend that the Secretary:

- Issue instructions requiring compliance officers to compute the third year's back wages in willful violation cases. While Labor can do more to identify and recover back wages withheld during the third year in some cases, we believe it will have only limited success until the legislative changes to stop the running of the statute of limitations and strengthen enforcement authority are adopted.
- Reinvestigate firms before settling cases referred to the regional solicitor's offices to assure that employers have come into compliance and to calculate any additional back wages owed to employees.
- Establish a program to systematically monitor firms found in violation of the act. All firms considered likely to again violate the act, and a sample of other firms that have violated the act should be reinvestigated within the 3-year statute of limitations period to assure that employers do not profit from continuing violations and that illegally withheld employee back wages are fully restored.

AGENCY COMMENTS AND OUR EVALUATION

United States District Court for the
Northern District of Illinois

The Chief Judge noted that the Portal-to-Portal Pay Act, in many instances, limits Labor's ability to recover illegally withheld wages. He concluded that this can and should be remedied as we indicated.

The Chief Judge stated that he concurred enthusiastically with our recommendations that there be effected a change in the point at which the 2- or 3-year statute of limitations period is tolled and that a maximum use of interest be brought about.

Department of Labor

Labor stated that it does not concur in our recommendation that instructions should be issued requiring compliance officers to compute the third year's back wages in willful violation cases, if our recommendation applies to all willful violation cases.

Labor also stated that the courts in some jurisdictions have provided guidance as to what circumstances amount to willful violations but that the issue generally requires careful scrutiny, particularly if the case arises in a jurisdiction which has no prior court precedent on the issue of willfulness. As a result, Labor said the regional solicitor's input is needed on a case-by-case basis.

We continue to believe that Labor should issue instructions requiring compliance officers to compute the third year's back wages in willful violation cases. It was the Congress' intent, in enacting section 6(a) of the Portal-to-Portal Pay Act, that recovery of third-year back wages in such cases be pursued and, in our opinion, pursuing third-year recoveries in such cases on a consistent basis would serve as a deterrent to FLSA violations. In addition, pursuing recovery of third-year back wages would undoubtedly result in significant voluntary recoveries of such wages from employers as presently is the case with the pursuit of the first 2 years of back wages. We do not concur with Labor that input from the regional solicitor is needed on a case-by-case basis. Labor has issued instructions for the guidance of compliance officers on what constitutes willfulness for potential criminal litigation. Similarly, Labor can issue instructions to compliance officers where courts have provided interpretations of willfulness.

Reinvestigation and monitoring of employer wage payment practices

Labor concurred with our recommendations for reinvestigation of cases prior to settlement and for establishing a program to reinvestigate employers who violate FLSA. Labor believes, however, that if our recommendations are to be effectively implemented, more resources are needed. Labor said that, in many cases, investigations are being updated at the time of settlement. Labor also said that firms are scheduled for reinvestigation when there is any doubt concerning future compliance and, more importantly, when enforcement resources are available. Labor added that the availability of enforcement resources has precluded any commitment to a systematic re-scheduling program but it has been done when an employer's assurance of future compliance is questionable. Labor concluded that demands from the employee complaint backlog, special directed enforcement programs, and other priorities create a drain on resources that precludes reinvestigation on a regular basis.

Labor's response, in effect, raises the question of what is the most effective use of staff resources. While we concur that the investigation of new complaints is desirable, the present practice of limited monitoring of firms found in violation of FLSA and reinvestigation of firms before settling cases, in our opinion, results in inconsistent enforcement actions and creates a lackadaisical compliance attitude in many employers who profit from willful

violations of the act. We believe that a consistency in reinvestigating firms before settling cases and systematically monitoring firms found in violation of the act would be an effective deterrent to violations of FLSA and ultimately would reduce the number of repeat violators. Accordingly, we continue to believe Labor should implement our recommendations.

Tolling of the statute of limitations

Labor commented that our report presents an unhappy picture of back wages lost by reason of the running of the statute of limitations. Labor said we alleged this occurred because of the time taken by the regional solicitors' offices to review investigative files submitted for potential litigation. Labor stated, however, that to the extent that there have been delays in the past, significant steps have already been taken to remedy the problem of back wages being lost due to running of the statute of limitations. Labor added that standards are now in place which set time deadlines for regional solicitors, with respect to action taken on FLSA case files.

Under present conditions, it is almost impossible for Labor to process a case without losing some back wages to the running of the statute, unless an employer agrees to waive the statute or unless the violations are very recent. For example, in an investigation which includes numerous violations occurring about 2 years before the investigation completion date, the oldest back wage violations will start being lost to the running of the statute because of just the normal time it takes to process a case through the area office, assistant regional administrator, and regional solicitor before the court filing. This normal process time may include area office supervisory case review, negotiation with an employer at Labor's area and regional solicitors offices, regional solicitor attorney case analysis, and filing the suit in court. These are valid functions that, no matter how efficiently carried out, will continuously result in some back wages being lost to the running of the statute. Accordingly, while the establishment of standards and time deadlines in regional solicitors' offices should alleviate the problem, in our opinion, it will not eliminate the loss of back wages due to the running of the statute.

Seeking interest on back wages

Labor stated that it is currently a common practice in regional solicitor offices to seek interest in connection with settlements permitting installment payments.

We believe that it is a sound practice to seek interest for employees on back wages that employers have agreed to pay on an installment basis. However, this does not, in our opinion, negate the need to seek interest for employees during the time that their back wages have been illegally withheld.

CHAPTER 5

ADDITIONAL DEPARTMENT OF LABOR COMMENTS

AND OUR EVALUATION

Labor referred to the statement in the cover summary of our draft report that FLSA, established to protect the wages of American workers, is not accomplishing its objective. Labor stated that

- there is little or no support in the report for this conclusion, except for isolated, anecdotal bits of evidence selected in a highly unscientific manner;
- there is no evidence whatever in the report that more than a small minority of employers seek to avoid their obligations under the act;
- the Minimum Wage Study Commission will shortly publish the results of its noncompliance survey, which will constitute the most reliable measure of compliance with the statute; and
- the overall conclusion of the report is thus premature, to say the least, and surely not justified on the basis of the evidence presented in the report.

Labor also said that restitution, as shown in our report, of approximately 60 percent of the amounts of back wages found due in the course of its investigations is quite impressive.

We revised the cover summary to say that FLSA is not adequately accomplishing its objective. However, we disagree with Labor's views on the adequacy of our review. We believe the description in chapter 1 of our objectives, scope, and methodology clearly shows that our review was not based on anecdotal material, but rather on extensive review and analysis. Also, the results of our review set forth in chapters 2, 3, and 4 firmly establish the many problems in administration and enforcement of FLSA that prevent adequate protection of workers' wages under the act.

Data provided by the Minimum Wage Study Commission from its 1979 Noncompliance Survey indicate the magnitude of noncompliance with FLSA and nonrecovery of illegally withheld back wages. Results of the survey indicate that approximately \$370 million in back wages were owed to 5 million workers in a 2-year investigation period as a result of FLSA minimum wage and overtime violations. The survey results also indicate that minimum wage underpayments represent 8.5 percent of all earnings received by workers paid an hourly equivalent of the minimum wage or less during the fourth quarter of calendar year 1979. The survey disclosed that

about 5 percent of all subject establishments did not comply with the minimum wage provisions, while 20 percent of all firms using overtime hours violated the act's overtime provisions during the survey's "current workweek."

With respect to back wages restored to employees, we noted in chapter 1 that Labor's statistics on wage restorations represent money employers agree to or are ordered to pay back to employees. In an April 18, 1980, report, Labor's Office of Inspector General revealed that tests of the \$59 million of back wages reported by Labor as paid to employees nationwide during fiscal year 1978 can be overstated by as much as one-third or about \$20 million. Therefore, the 60 percent restoration figure referred to by Labor is inflated. Whatever the present percentage of back wages Labor is actually able to get restored, we believe that the amount of back wages found due and the percentage of back wages restored can be substantially increased if the recommendations included in this report are implemented.

U.S. GENERAL ACCOUNTING OFFICE
SURVEY OF FAIR LABOR STANDARDS ACT
COMPLIANCE ACTIONS HAVING MONETARY FINDINGS

GAO Form A

Instructions

The U.S. General Accounting Office, in cooperation with the Department of Labor, is conducting a review of enforcement activities under the Fair Labor Standards Act (FLSA). To complete this review, we need the help of compliance officers and area office management in filling out a short questionnaire. The purpose of this questionnaire (GAO Form A) is to survey the monetary findings and income restored of FLSA minimum wage and overtime violations, and recordkeeping violations.

To be specific, we need certain figures which are not recorded on Form ESA-33 and hence are not available on a national basis. These figures will allow us for the first time to analyze the impacts of the major causes for minimum wage, overtime, and recordkeeping violations on the nation as a whole and the various parts of the labor force. We are asking for your help because you and your fellow compliance officers working in the field are in the best position to report on these findings.

The compliance officer is asked to consider only those minimum wage and overtime and recordkeeping FLSA violations cases having monetary findings. Complete one GAO Form A for each such case during the calendar month of June 1979 for which a Form ESA-33 was filled out. Since some of the case information we need is already recorded on Form ESA-33, the compliance officer is also asked to provide a copy of this form with the GAO Form A questionnaire. Be sure to consider all conciliations and limited investigations as well as all full investigations.

Unless the case is very complicated, most of the GAO Form A questionnaires can be completed in a little less than half an hour. Most of the time will be taken up by questions 5, 6, 7, and 8. Here we ask for a more detailed breakout of the Monetary Finding and Income Restored figures presented in the ESA-33 data fields 29-32 and 38-41. For example, in question 5, we would like to know what proportion of the total number of employees affected by minimum wage violations (ESA-33 data field no. 29) was accounted for by each of the following types of minimum wage violations: no payment for all hours worked, pure minimum wage violations, illegal deductions, tip credit violations, etc.

Please disregard the key punching codes, the numbers in the shaded parentheses to the right of each question.

In the instances where it is difficult to develop exact numbers (percentages) from the case records, please provide a best estimate rather than delay or fail to respond.

If more than one compliance officer worked on a particular case, the form should be filled out by the officer most familiar with the case.

To minimize the compliance officer's reporting burden, we are collecting data for only the calendar month of June 1979. So it is essential that the compliance officer's policies and practices for completing cases not be changed during this month. All cases that would normally be completed should be completed; don't hold any back. If our results are to be valid, this must represent a typical June month. This is important, so please bear with us as we review some of your procedures.

Before you begin the questionnaire, we suggest that you get a copy of the ESA-33 and pull the case file. Then quickly read the entire GAO questionnaire so that you have a general idea of what is to be asked of you and what types of information you may need from your files.

When you finish filling out this form, please staple the yellow copy (or a photocopy) of the completed Form ESA-33 to the front of GAO Form A. This is very important because ESA-33 contains needed information not asked for on GAO Form A.

If you have any questions about GAO Form A or if there is any difficulty in providing the information, please call Ted Alves (617/223-6536) at the GAO Boston Regional Office or Charlie Gareis (202/523-8706), a GAO representative at the Labor Department in Washington, D.C. They will be standing by to help.

After completing both ESA-33 and GAO Form A, check to make sure both forms are stapled together and then forward both forms to your area director. The area director will send them to Mr. Charles J. Gareis, GAO Representative, Room N1509, New Department of Labor Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210 not later than July 6, 1979.

Please write legibly. Your cooperation is greatly appreciated.

(Start Card 1) (1)

I. Case & Area Office Identification

1. Area Code (AC) (2-4)
(Transcribe from item 3 on Form ESA-33)
2. Serial No. (SN) (5-9)
(Transcribe from item 4 on ESA-33; if serial no. has not been assigned, go to 3)
3. If a serial number has not yet been assigned to this case, enter below the name of the employer involved.

Name of employer (Item 1 on ESA-33)

4. What kinds of FLSA violations are cited in this case? (Check all that apply)

1. FLSA minimum wage (10) 2. FLSA overtime (11) 3. FLSA recordkeeping (12)

II. Minimum Wage Violations

A. Monetary Findings: Breakout of Total

5. Consider the total number of employees affected by the monetary findings and the total dollar amount of the minimum wage violation monetary findings for this case (Item 16B, Data Fields 29 and 30 on Form ESA-33). These totals were developed by summing the monetary findings, the number of people, and the dollar amounts accounted for by each specific type of minimum wage violation. We need you to review the work papers used to develop this summary and estimate the proportion or percent of the total figures that was accounted for by each specific type of violation. Hence, the question is: What percent of the total number of employees due the back wages (data field 29), and what percent of the total dollar amount (data field 30), was accounted for by each of the following minimum wage violations: no payment for hours worked, illegal wage deductions, improper uniform charges, tip credit, pure minimum wage, and other violations? For example, assume that the ESA-33 data field 29 listed 30 employees as due back wages because of minimum wage violations. Also, assume that the case file showed that 10 of these employees were not paid for all the hours worked and that all of the employees (30) were subjected to illegal deductions. You would answer item 1: Hours worked by writing 33% in column A (10/30 = .33) and item 2: Illegal Deductions by writing 100% in column A since all 30 employees were affected. Note that because the same employees may be subjected to multiple violations, the column A total could exceed 100%. This is not the case for the column B totals, the dollar amounts. (In answering this and other similar questions consult your case work papers and write the percent figures in the appropriate spaces. Enter NA in any space that does not apply to this case. For example, tip credits would not apply to office workers. Write zero if there are no violations. If the precise information is not readily available, provide us with a reasonable estimate rather than spend a great deal of time working up the figures.)

NOTE: MINIMUM WAGE VIOLATIONS ONLY. DO NOT INCLUDE OVERTIME.

Minimum Wage Violations	Monetary Finding (Item 16B on ESA-33)	
	A. % of total no. of employees in Data Field 29 affected by each violation	B. % of total \$ amount in Data Field 30 accounted for by each violation
1. <u>Hours Worked</u> : The employer did not pay employees for all hours worked (Note: Include non-payment of wages and off-the-clock time.)	_____ % (13-15)	_____ % (16-18)
2. <u>Illegal Deductions</u> : The employer made illegal deductions for such things as shortages or breakage which reduced employee wage below the minimum rate.	_____ % (19-21)	_____ % (22-24)
3. <u>Uniforms</u> : The employee made payments for such things as uniforms purchased and maintained which reduced employee wages below the minimum wage rate.	_____ % (25-27)	_____ % (28-30)
4. <u>Tip Credit</u> : Tip credit provisions were violated.	_____ % (31-33)	_____ % (34-36)
5. <u>Pure Minimum Wage</u> : Employees whose straight time rate of pay, whether paid hourly rate or on salary, is less than the Federal minimum wage rate. (Do not include amounts related to hours worked, illegal deduction, uniform, or tip credit violations.)	_____ % (37-39)	_____ % (40-42)
6. <u>Other</u> : Violations other than those listed above. (Please specify)	_____ % (43-45)	_____ % (46-48)
TOTAL	100%	100%

II. Minimum Wage Violations (continued)

B. Income Restored: Breakout of Total

6. Now consider the total number of employees affected by income restored and the total dollar amount of income restored because of minimum wage violations (ESA-33, Item 17A, Data Fields 31 and 32). We would like to know what % of the total number of employees was affected or due back wages, and what % of the total dollar amount was accounted for, by each of the following minimum wage violations: no payment for hours worked, illegal wage deductions, improper uniform charges, tip credit, pure minimum wage, and other violations? (Consult your files and write the percentages in the appropriate spaces. Remember, if the precise information is difficult to provide, approximations are good enough.)

NOTE: MINIMUM WAGE VIOLATIONS ONLY. DO NOT INCLUDE OVERTIME.

Minimum Wage Violations	Income Restored (Item 17A on ESA-33)	
	A. % of total no. of employees in Data Field 31 affected by each violation	B. % of total \$ amount in Data Field 32 accounted for by each violation
1. <u>Hours Worked</u> : The employer did not pay employees for all hours worked. (Note: Include non-payment of wages and off-the-clock time.)	_____ % (44-51)	_____ % (52-54)
2. <u>Illegal Deductions</u> : The employer made illegal deductions for such things as shortages or breakage which reduced employee wage below the minimum rate.	_____ % (52-57)	_____ % (58-60)
3. <u>Uniforms</u> : The employee made payments for such things as uniforms purchased and maintained which reduced employee wages below the minimum wage rate.	_____ % (61-63)	_____ % (64-66)
4. <u>Tip Credit</u> : Tip credit provisions were violated.	_____ % (67-69)	_____ % (70-72)
5. <u>Pure Minimum Wage</u> : Employees whose straight time rate of pay, whether paid hourly rate or on salary, is less than the Federal minimum wage rate. (Do not include amounts related to hours worked, illegal deduction, uniform, or tip credit violations.)	_____ % (73-75)	_____ % (76-78)
6. <u>Other</u> : Violations other than those listed above. (Please specify) _____ _____	(Start Card 1) (1) (AC) (2-4) (SN) (5-9) _____ % (10-12)	_____ % (13-15)
TOTAL	100%	100%

III. Overtime Violations

A. Monetary Findings: Breakout of Total

7. In the next questions, 7 & 8, you will be asked to estimate the impact of each of the major types of overtime violations rather than minimum wage violations (questions 5 & 6). Since the procedure for making these estimations is explained in question 5, it is not repeated here. However, if you have not read and answered questions 5 & 6, do so before continuing; otherwise, you may make a mistake in answering the next series of questions.

Consider the total number of employees affected or due back overtime wages and the total dollar amount of the overtime violations monetary findings (ESA-33, Item 16B, Data Fields 38 and 39). What % of the total number of employees affected, and what % of the total dollar amount, was accounted for by each of the following overtime violations: employee misclassification, additional customary remunerations not considered, improper premium, and other violations? (As in question 5, consult files & write percentages in appropriate spaces. Again, use approximations if necessary.)

Overtime Violation	Monetary Finding (Item 16B on ESA-33)	
	A. % of total no. of employees in Data Field 38 affected by each violation	B. % of total \$ amount in Data Field 39 accounted for by each violation
1. <u>Misclassification (Part 541)</u> : Employees were erroneously classified - employer was denied exemptions under Part 541.	_____ % (15-18)	_____ % (19-21)
2. <u>Additional Remuneration</u> : The regular pay rate used to calculate overtime pay did not include additional remuneration for such things as board, lodging, or other facilities customarily furnished by the employer, including production bonuses and commission payments.	_____ % (22-24)	_____ % (25-27)
3. <u>Improper Premium</u> : The employer did not pay the proper premium for all overtime hours worked. (Do not include amounts covered by items 1 & 2 above).	_____ % (28-30)	_____ % (31-33)
4. <u>Other</u> : Violations other than those listed above. (Please specify) _____ _____	_____ % (34-36)	_____ % (37-39)
TOTAL	100% (may total to more than 100% due to multiple violations)	100%

III. Overtime Violations (continued)

B. Income Restored: Breakout of Total

8. This time, consider the total number of employees affected or due back overtime wages and the total dollar amount of the Income Restored because of overtime violations (ESA-33, Item 17A, Data Fields 40 and 41). What % of the total number of employees affected, and what % of the total dollar amount of income restored, was accounted for by each of the following overtime violations: employee misclassifications, additional customary remunerations not considered, improper premiums, and other violations? (As in question 5, consult the case files and write percentages in appropriate spaces. Use approximations when necessary.)

Overtime Violation	Income Restored (Item 17A on ESA-33)	
	A. % of total no. of <u>employees</u> in Data Field 40 affected by each violation	B. % of total \$ <u>amount</u> in Data Field 41 accounted for by each violation
1. <u>Misclassification (Part 541)</u> : Employees were erroneously classified - employer was denied exemptions under Part 541.	_____ % (40-42)	_____ % (43-45)
2. <u>Additional Remuneration</u> : The regular pay rate used to calculate overtime pay did not include additional remuneration for such things as board, lodging, or other facilities customarily furnished by the employer, including production bonuses and commission payments.	_____ % (46-48)	_____ % (49-51)
3. <u>Improper Premium</u> : The employer did not pay the proper premium for all overtime hours worked. (Do not include amounts covered by items 1 & 2 above).	_____ % (52-54)	_____ % (55-57)
4. <u>Other</u> : Violations other than those listed above. (Please specify) _____ _____	_____ % (58-60)	_____ % (61-63)
TOTAL	100% (may total to more than 100% due to multiple violations)	100%

IV. Recordkeeping Violations

9. Did your compliance action/investigation disclose evidence that FLSA Section 11 recordkeeping provisions were violated? (Check one) ~~(64)~~

- 1. Yes (GO TO QUESTION 10)
- 2. No
- 3. Not sure } (GO TO QUESTION 13)

10. To what extent, if at all, was this investigation hampered or made more difficult because of recordkeeping violations? (Check one) ~~(65)~~

- 1. to little or no extent (GO TO QUESTION 12)
 - 2. to some extent
 - 3. to a moderate extent
 - 4. to a great extent
 - 5. to a very great extent
- } (CONTINUE)

11. To what extent, if at all, would the findings have been increased if your investigation had not been hampered by recordkeeping violations? (Check one)

- 1. to little or no extent (65)
- 2. to some extent
- 3. to a moderate extent
- 4. to a great extent
- 5. to a very great extent
- 6. don't know

12. Did your investigation disclose evidence that relevant records were falsified or concealed? (Check one)

- 1. Yes (67)
- 2. No
- 3. Not sure

V. Statute of Limitations and Refusal to Pay

13. Did your investigation of this firm disclose any evidence that the employer was in violation of the act prior to the period covered by your investigation? (Check one)

- 1. Yes (68)
- 2. No
- 3. Not sure
- 4. Not applicable (investigation covered entire period of operation under current management, etc.)

14. If the employer refused to pay part or all of the back wages found due his employees, what do you consider to be the employer's primary reason(s) for refusing to pay? (Check all that apply; if not sure, check with the Area Director or Assistant Area Director.)

- 1. Not Applicable - Employer agreed to pay all back wages found due. (69)
- 2. Not covered by act. (70)
- 3. Exempt under the act. (71)
- 4. Statute of limitations. (72)
- 5. Other question of law. (73)
- 6. Questioned facts developed. (74)
- 7. Outstanding personal loan to employee. (75)
- 8. Financial inability to pay. (76)
- 9. Other reason (please specify) _____ (77)

15. Was this case recommended to be sent to the Regional Solicitor's Office for review and possible litigation?

- (Check one; if not sure, check with the Area Director or Assistant Area Director.)
- 1. Yes (78)
 - 2. No

VI. Additional Comments

16. Please use this space to provide any additional information which you believe should be considered by GAO in analyzing your responses to any of the above questions. (Be sure to indicate which numbered question you are commenting on.) (79)

NOTE: Please review this questionnaire to make sure you have answered all the questions that are applicable to this case. Unless instructed to skip, each response space should have an answer, a check, a zero or NA. Make sure you have attached a copy of the ESA-33 to the front of this form. Then, send the questionnaire to the Area Director (or in his/her absence, the Assistant Area Director) for forwarding to GAO.

Thank you.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

OFFICE OF
THE CHAIRMAN

April 22, 1977

MEMORANDUM

TG: Member Agencies

FROM: Emmett Gavin
Executive Director

SUBJECT: Enclosed Memorandum and Sample Statute for Implementation of ACUS
Recommendation 72-6 Relating to the Use of Civil Money Penalties as
a Sanction

To aid you in your consideration of Recommendation 72-6, I am enclosing
a sample civil money statute with accompanying explanatory memorandum.

When the Administrative Conference adopted Recommendation 72-6, many
agencies requested us to supply them with such a sample statute. We believe
that this statute is as useful today as it was then in 1973, especially given
the Supreme Court's recent approval of the Occupational Safety and Health Act's
civil money penalty scheme in Atlas Roofing v. OSHRC, 45 USLW 4312 (U.S. Supreme
Court, decided March 23, 1977).

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037

December 27, 1973

OFFICE OF
THE CHAIRMAN

TO : Member Agencies

FROM : Antonin Scalia
Chairman

SUBJECT : Implementation of Recommendation 72-6 Relating to Civil Money Penalties.

The Administrative Conference of the United States has recommended that agencies consider the use (or increased use) of civil money penalties to supplement other civil and criminal sanctions; and that in appropriate situations authority should be sought to impose such penalties in administrative proceedings rather than in the courts, with the agencies' determinations subject to review on a substantial evidence test, but not subject to trial de novo or to collateral attack in a collection proceeding. Recommendation 72-6, adopted December 14, 1972, 38 Fed. Reg. 19792.

Several agencies have asked the Chairman's Office of the Conference to formulate a sample statute that would grant authority for administrative imposition of civil money penalties, as an aid to those agencies that might desire to seek such legislation. The present memorandum and attachment are an attempt to provide such assistance. While the suggestions they contain pertain to implementation of Recommendation 72-6, and have received the attention of the Conference's Committee on Compliance and Enforcement, they are not formal recommendations of the Conference itself.

The attached sample statute contains those provisions which we consider the minimum that are necessary and desirable. It is intended as a useful point of departure for the agencies' own drafting processes, and variation or addition will be appropriate in particular situations. Some issues not alluded to in the statute require special discussion, since they should be resolved either in the legislation or the implementing regulations but can be treated so variously that sample language is not feasible.

(1) Preliminary procedures. Before commencing a formal administrative proceeding to assess a penalty, an agency will normally communicate with the person involved by means of a written notice calling attention to the apparent violation and requesting an explanation. See, for example, 2 A.C.U.S. 919-22 for a description of the preliminary procedures followed by the Federal Aviation Administration and the Federal Communications Commission.

Experience demonstrates that most assessments either will not be contested or will be compromised. It is therefore important that field evaluations and low level staff recommendations to impose penalties be given careful review within the agency before an assessment is made.

If apparent violations are brought to the attention of the agency by complaint from private parties, the extent to which complainants may participate in later stages of the proceeding should be described in agency rules.

(2) Content of Notice. Regulations should specify that each notice assessing a penalty must contain:

- (1) The statutory section, rule or regulation allegedly violated;
- (2) The material facts constituting the alleged violation;
- (3) The penalty assessed and its justification in light of the statutory standards in subsection (b) of the statute;
and
- (4) The procedural remedies available to the person (e.g., right to an agency hearing) and the steps that must be taken to obtain them.

(3) Location of the Hearing. Hearings may be held in the area of the residence of the person involved, at the regional office of the agency, or at the central office of the agency. The appropriate location of the hearing depends on a variety of factors, including the nature of the program, the volume of decisions, the costs involved, and the convenience of parties and witnesses. Normally, local or regional hearings should be preferred.

(4) Hearing Officers. The hearing officer will usually be an Administrative Law Judge employed by the agency itself. Administrative Law Judges may be borrowed from other agencies however, (5 U.S.C. § 3344) so that where several agencies administer similar programs Administrative Law Judges employed by one agency may be loaned to the others as the need arises. In one program, penalties are assessed by an independent agency established for that purpose, which employs Administrative Law Judges and reviews their determinations. See 2 A.C.U.S. 930-31, n.88.

(5) Expedited Procedure. Where proceedings involve uncontested facts, agencies should consider a procedure that permits the Administrative Law Judge to make a determination solely on the basis of written presentations. It should be noted, however, that while such a procedure may permit an efficient disposition of cases, it may also encourage persons to request a determination rather than settling informally, thereby actually increasing the overall workload of the agency.

(6) Review of Initial Decision. The attached statute provides that the decision of the Administrative Law Judge will be reviewed by the agency

in the same manner as other formal adjudications, subject to the separation of functions and other provisions of the Administrative Procedure Act. Rather than imposing these requirements by reference to section 554 of Title 5, the agency may wish to set them forth expressly in the proposed legislation.

In reviewing routine cases the agency may wish to adopt the initial decisions of the Administrative Law Judges as its final orders. If authorized by statute, an agency may also provide that such decisions are final subject only to discretionary review by the agency, or not subject to agency review at all.

(7) Subpoenas. If the agency does not have power to issue subpoenas, it may be desirable to include provisions authorizing their use in connection with proceedings relating to civil money penalties. The Conference is considering general legislation relating to subpoenas which, if enacted, would render such provisions unnecessary.

(8) Types of Penalties. The sample statute assumes that the amount of the penalty may be set in the agency's discretion up to a specified maximum. Alternatively the statute may provide for a fixed penalty or may give the agency a choice between two or more fixed penalties, depending on the seriousness of the violation.

(9) Standards for Determination of Penalties. Penalty standards that may be appropriate in addition to those set forth in subsection (b) of the sample statute can be found at 2 A.C.U.S. 946-47 (comments B-1 and B-4). If the program does not involve a "business" (e.g., noncommercial airplane pilot licenses), the standards set forth in subsection (b) should be appropriately revised.

(10) The Reviewing Court. The specific Court of Appeals with jurisdiction to review an order imposing civil money penalties should be designated. This will usually be either the Court of Appeals for the District of Columbia Circuit or the Court of Appeals for the Circuit in which the person involved resides. The Conference considered the suggestion that review be vested in the District Courts. This was rejected since judicial review is likely to be sought only in cases involving matters of principle or establishing significant precedent, which would probably be appealed to the Court of Appeals in any event.

(11) Pleas of Nolo Contendere. The Conference's study and recommendation did not address the effect which imposition of a civil money penalty might have in private litigation relating to the act or omission in question. In view of the possibility of such an effect, however, the agency might wish to seek specific statutory authority to accept pleas which permit collection without admission of wrongdoing.

(12) Minor Variations from the Sample Statute. There are numerous minor variations from the enclosed sample statute that will be appropriate. Thus the words "any person," "this Act," "Administrator," and the like, should be defined or replaced by the appropriate term. Different procedures may be appropriate for an agency which is part of a department than for multi-member independent agencies. In certain circumstances, the collection proceeding set forth in subsection (e) may be supplemented by other collection techniques. See 2 A.C.U.S. 944-46. Finally, if the agency already has statutory authority for other formal adjudicatory proceedings it may find some portions of the sample statute unnecessary.

Sample Statute for Implementation of ACUS Recommendation 72-6
Relating to the Use of Civil Money Penalties as a Sanction

Section _____. Civil Money Penalties.

(a) Assessment of Penalty. Any person who violates any provision of section ____ of this Act may be assessed a civil money penalty of not more than \$ ____ for each violation. The penalty shall be assessed by the Administrator, or his delegate, by written notice.

(b) Standards. In determining the amount of the penalty the Administrator shall take into account the gravity of the violation, degree of culpability, any history of prior offenses, ability to pay, size of the business entity, effect upon ability to continue in business, and such other matters as justice may require.

(c) Hearing. The person assessed shall be afforded an opportunity for agency hearing, upon request made within ____ days after issuance of the notice of assessment. In such hearing, all issues shall be determined on the record pursuant to section 554 of Title 5. The agency determination shall be made by final order which may be reviewed only as provided in subsection (d). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(d) Judicial Review. Any person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States Court of Appeals for _____ by filing a notice of appeal in such court within ____ days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the Administrator. The Administrator shall promptly certify and file in such court the record upon which the penalty was

imposed, as provided in section 2112 of Title 28. The findings of the Administrator shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(e) of Title 5.

(e) Reference to the Attorney General. If any person fails to pay an assessment after it has become a final and unappealable order, or after the Court of Appeals has entered final judgment in favor of the agency, the Administrator shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States District Court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(f) Compromise or Remission. The Administrator may, in his discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under this section.

(g) Regulations. The Administrator shall promulgate regulations establishing procedures necessary to implement this section.

(h) Disposition of Penalties. All penalties collected under authority of this section shall be covered into the Treasury of the United States.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W. SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

March 25, 1981

William J. Anderson
Director
General Government Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

Chairman Robertson has asked me to respond to your letter of February 11 requesting our comments on the draft of your proposed report to the Congress entitled "Legislative and Administrative Changes Needed to Deter Recordkeeping, Minimum Wage and Overtime Violations and Prevent Employers From Retaining Back Wages Owed to Employees." I apologize for the tardiness of our comments.

The report examines the Department of Labor's program to enforce the provisions of the Fair Labor Standards Act of 1938 (FLSA) which sets standards for recordkeeping, minimum wage, overtime pay and other protections for about 60 million workers throughout the United States. The Act's enforcement provisions are complicated. Under section 16(c) of the Act the Secretary of Labor may bring a civil suit on behalf of aggrieved employees, against an employer to recover the amount of unpaid wages plus an equal amount as liquidated damages. Under section 17, the Secretary may seek injunctive relief against an employer to restrain future violations, including recordkeeping violations. Aggrieved employees may sue in their own right for unpaid wages and liquidated damages, but such private suits may be maintained only in situations where the Secretary has not filed suit. Finally, section 16(a) provides for criminal penalties for willful violations of the Act's provisions.

The draft report's general conclusion is that this statutory scheme has not proved satisfactory for effective enforcement of the Act. The report finds that violations of the Act's recordkeeping provisions are extensive and largely unpunished since there is no statutory sanction for past recordkeeping violations short of the rarely used criminal penalty for willful violations. The lack of a credible deterrent leads to failure to maintain records needed to prosecute back pay/liquidated damage cases in court. As for substantive violations of FLSA, the report finds that criminal penalties for willful violation, again, are rarely sought and that most civil actions filed under section 16(c) do not obtain liquidated damages since 95% of such suits are settled prior to trial. As for the back pay sought in such actions, the study indicates that overall, the Department is able to obtain from employers agreements to pay about 60% of the amounts sought.

To improve enforcement, the draft report recommends that a civil money penalty sanction be substituted for the liquidated damages sanction, and that such civil money penalties be imposed in a formal administrative hearing process within the Department of Labor, with review on the record by the courts of appeals.

GAO note: Page references in this appendix may not correspond to page numbers in the final report.

Comments

The Administrative Conference has never studied the activities of the Department of Labor under the FLSA, so we are not in a position to evaluate the findings of the draft report that are particular to this program. We have, however, devoted considerable attention to the topic of civil money penalty procedures, and we find the report's recommendations interesting, important and quite persuasive. As the report points out, members of your study team consulted us about our work in this area and we are pleased that your conclusions mirror, to a large degree, the conclusions we have reached in our more general recommendations pertaining to the use of civil penalties. Our 1972 study, performed by Professor Harvey Goldschmid, diagnosed many of the same problems with agency enforcement schemes as were found in your study of the FLSA. And the solution recommended by the Administrative Conference in our Recommendation 72-6 (Attachment A) has largely been adopted by your report.

Paragraph A(2) of our recommendation states that civil money penalties are often particularly necessary to supplement more potent remedies already available to an agency whose use may prove unduly harsh or infeasible. Under FLSA, criminal sanctions are available, but are rarely used. Such sanctions are undoubtedly necessary and useful for egregious cases, but a more flexible, less harsh sanction must be available. In 1974 Congress sought to provide this alternative remedy by amending the Act to add a provision for liquidated damages. This, in theory, is similar to a civil money penalty provision (a doubling of the back pay award), but in practice apparently, very few such awards are made. Hence your recommendation for a further change to an administrative imposition system of civil money penalties.

In paragraph B of our 1972 recommendation the Conference urged agencies to consider asking Congress for authority to impose civil penalties in a formal adjudicative proceeding within the agency, with judicial review in the court of appeals on the basis of the substantial evidence test of 5 U.S.C. 706(e) (as opposed to de novo judicial review in district court). We then listed 6 factors whose presence "tends to commend such a course" with respect to a particular program: These bear close analysis:

(a) A large volume of cases likely to be processed annually.

Your study indicates that the Department's investigations result in upwards of 30,000 FLSA violation cases annually and that there is a large backlog of complaints to be investigated. Furthermore in the year ending June 1979, a total of 1,175 FLSA cases were "terminated" by federal district courts (though only 52 cases reached trial). This is obviously a high-volume program, and even though more than 90% of the cases do not reach the federal courts, over 1,000 do. A movement to administrative imposition would, remove a large bloc of cases from the federal courts, and would also enhance the attention given to meritorious cases that now are among the 90% that apparently are settled due to the difficulties in bringing suit in the federal district court. Under an agency imposition system of civil money penalties, settlements would likely continue to predominate, but the number of cases set for hearing (before administrative law judges) would likely increase and the rate of recovery both in settlement and after decision, would likely be improved. Non-meritorious cases could be challenged equally well, since employers would have a right to a fair hearing before the ALJ, review by the agency and then judicial review.

(b) The availability to the agency of more potent sanctions with the resulting likelihood that civil penalties will be used to moderate an otherwise too harsh response.

If the Department of Labor were given administrative imposition authority, it could then use civil penalties instead of the inflexible, more potent, and stigmatizing criminal penalty. At present, the criminal sanction is rarely used, and the liquidated damage provision, which also requires district court trials, is apparently an impractical alternative. Indeed, as was pointed out in your study, criminal cases receive precedence over such civil cases on federal court dockets. Thus court-assessed civil money penalties may paradoxically be more cumbersome than criminal cases. This might lead to an undue emphasis on the use or threatened use of criminal penalties, when lesser, more flexible penalties would be more appropriate.

(c) The importance to the enforcement scheme of speedy adjudications.

Your study found that for the year ending in June 1979, the median time to "conclude legal action" for all 52 cases brought to trial by the Department of Labor was 28 months as compared to 18 months for other civil cases and as compared to a much shorter time for cases heard by Department of Labor ALJs. Although your statistics might be more clearly presented, it is evident that the low priority assigned to FLSA cases within the federal district courts creates greater delays and inhibitions that would not be present if the cases were heard by ALJs (even if some fraction of initial decisions required review by the Secretary or delegated review board).

It also seems clear that speedy adjudications are important to the enforcement scheme, since in an inflationary time it is to the violator's benefit to delay payment (especially since interest is rarely recovered in a settlement or even in a judgment). Such incentive to delay can only contribute to a general disrespect for the entire enforcement program. If the Department were given imposition authority, it could manage its caseload to minimize this problem.

(d) The need for specialized knowledge and agency expertise in the resolution of disputed issues.

While this study does not discuss (except in the case studies) the nature of the issues disputed in these cases, we would speculate that the issues recurring under the 43-year old Act tend to be within the specialized knowledge of the Department's Wage and Hour Division, and Office of the Solicitor. Furthermore, assignment of hearings to Department of Labor ALJs, who now conduct hearings in FLSA child labor cases, FLSA rulemaking proceedings and Service Contract Act enforcement cases, among others, would lead to more informed initial decisions than would occur under the present system where hundreds of district court judges might each hear one or two cases a year. The "agency expertise" rationale is not one to be used unthinkingly, but in this situation where the expert investigators in the Wage and Hour Division settle 90% of the cases already, and an agency adjudication system familiar with similar issues is in place, it seems wasteful to increase the number of trials in the district courts.

(e) The relative rarity of issues of law (e.g. statutory interpretation) which require judicial resolution.

The report sheds little light on this factor. Under the agency imposition system, one would expect that issues of law will continue to be raised in appeals of the agency's final decisions to the courts of appeals. If cases frequently turn on legal issues (which we have no reason to believe), this would argue against having the trials in the agency; since the agency could not make authoritative decisions on the legal issues, the flow of appeals to the courts would not abate. While we suggest that your study address this point in

more detail, we would speculate that whatever legal questions might arise in the course of civil penalty proceedings could probably be decided authoritatively in appeals to the courts of appeals, and that most cases would turn on fact-finding that agency ALJs should be competent to perform.

- (f) The importance of greater consistency of outcome (particularly as to the penalties imposed) which could result from agency, as opposed to district court, adjudications.

Given the large volume of complaints (which would increase if recordkeeping violations were made subject to civil penalties), the nationwide scale of the program, and the relatively small amounts involved per violation, it would seem quite important to have consistent decisional standards and penalty amount standards in enforcing this program. A system of administrative imposition should certainly lead to more consistency than one that depends on decisions by 95 district courts throughout the nation.

Your draft report does not discuss the specifics of the recommended statutory amendment (other than citing our draft model statute). In general, as we stated in our later Recommendation 79-3, "A penalty intended to deter or influence economic behavior should, at a minimum, be designed to remove the economic benefit of the illegal activity, taking into account the documented benefit and the likelihood of escaping detection." Thus, any statutory civil money penalty provision ought to contain penalty maximums sufficiently large to deter future violations, but not so unreasonable as to permit "blackmail" initial assessments. Perhaps, as in the tax code or customs code, and like the concept of liquidated damages, the statutory penalty amount ought to be explicitly tied to the amount of wages lost (plus interest). Or the statute could contain some maximum amount per violation, which would enable the Department to set standard amounts for particular types of violations. This would insure consistency of application and a more flexible fine-tuning of the system to provide maximum fairness and deterrence. But our basic point is that in a program like this one, consistency clearly would be facilitated by an administrative imposition system.

- (g) The likelihood that an agency (or a group of agencies in combination) will establish an impartial forum in which cases can be efficiently and fairly decided.

This factor boils down to the question of whether the Department of Labor can provide a fair, due process hearing to those charged with violations of the FLSA. As we mentioned above, the Department currently employs ALJs to preside over a large number of benefit claims cases and cases arising under other enforcement programs, using the hearing procedures of the Administrative Procedure Act.¹

Furthermore Congress has, in recent years, used the administrative imposition model more frequently when enacting civil penalty statutes. In 1972 when Professor Goldshmid surveyed the field, only a few statutes provided for agency imposition of civil money penalties without de novo court review, most notably the OSH Act. But since 1972 at least 13 statutes have provided for agency imposition.²

¹ Appeals from initial decisions of ALJs under these programs do not, however, follow any uniform procedure. The Benefits Review Board hears appeals in longshoremen's and black lung benefits cases, initial decisions in some programs are final agency action (e.g., Farm Labor Contractor Registration Act, FLSA child labor cases), and some reviews are conducted by the head of the Administration involved.

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On occasion, particularly in controversial enforcement programs, complaints are heard that it is unfair to litigants to deprive them of a right to a trial by jury in the federal district court and that a hearing before an agency ALJ, even with opportunity for agency review and judicial review, is unfair since the agency also houses the investigators and prosecutors. Congress responded to some of these concerns in the OSHA program and the similar mine safety program by establishing specialized independent review agencies³ staffed with a corps of ALJs to administer the imposition of penalties sought by the Department of Labor. The OSHA enforcement scheme has been upheld by the Supreme Court in Atlas Roofing Co. v. OSHRC 430 U.S. 442 (1977). Establishment of such specialized review agencies, however, can create a whole new set of problems and should probably be reserved for the most controversial and policy-laden enforcement programs. We do not suggest such a course here, especially given the Labor Department's well-established hearing process for other types of cases under FLSA and similar programs.

Our conclusion, after reviewing your findings in the context of the factors listed in our Recommendation 72-6, is that your proposal that the FLSA be amended to substitute an administrative civil money penalty system for the current court-imposed liquidated damage system is a sound one. I should add that the basic thrust of our 1972 recommendation was reaffirmed in 1979 in Recommendation 79-3 (Attachment B) which also urged agencies to better articulate their penalty standards and utilize fair informal procedures for initially assessing and settling of cases prior to trial.

Additional comments

1. The report's title may be too much for some to swallow. Why not, "Legislative and Administrative Changes Needed to Improve Fair Labor Standards Act Enforcement"?
2. The current lack of adequate sanctions for recordkeeping violations seems to be dragging down the whole enforcement effort. This area, especially, seems to require a flexible penalty system.
3. The organization of Chapters 2 and 3 of the report seem needlessly duplicative, since you have to make the argument for civil penalties and for agency imposition twice. Why not establish the need for civil penalties in each area and then have a separate chapter discussing the need for administrative imposition?

² See the following statutory provisions in the 1976 Supplement of the U.S. Code: 7 U.S.C. §9 [CFTC, commodities trading]; 7 U.S.C. §193(b), 213(b) [USDA, packers and stockyards]; 7 U.S.C. §2048(b) [Labor, farm labor contractors]; 15 U.S.C. §2615 [EPA, toxic substances control]; 16 U.S.C. §1540a [Commerce and Interior, endangered species]; 16 U.S.C. §1858 [Commerce, fishery conservation]; 29 U.S.C. §216(e) [Labor, child labor]. 1977 Supplement: 30 U.S.C.A. §819 [FMSHRC, mine safety and health]; 30 U.S.C.A. §1268 [Interior, surface mining and reclamation]; 42 U.S.C.A. §7420 [EPA, clean air]. 1978 Supplement: 47 U.S.C.A. §503(b)(3)(A) [FCC, communications (optional procedure)]. See also: P.L. 95-630 §§101, 102, 103, 106(a), 106(c), 107(e)(1)-(4), 108 [banking agencies] and P.L. 96-25 §10 [FMC].

³ The Occupational Safety and Health Review Commission and the Federal Mine Safety and Health Review Commission.

4. You recommend elimination of the liquidated damage provision of the Act. This seems harmless, since few awards are made. But do you intend that employees should continue to receive back pay awards? Would any of the civil penalty money be given to the employees? Would employees retain the right to file suits on their own behalf? [Perhaps liquidated damages should be retained in employee suits.]
5. Your caseload table on page 8 indicates that there were 75,153 FLSA investigations in 1979, that there were 35,251 establishments in violation of minimum wage provisions and 29,623 establishments in violation of overtime provisions. Does this mean that multiple violations were found in most investigations? It indicates a high rate of violations per investigation. How do these numbers relate to the figure of 30,000 FLSA cases annually (p. 10a)?

On pages 22 and 25 your caseload figures are confusing. What does "to conclude legal action" mean? With respect to the Labor ALJ cases, you seem to be lumping all categories of cases to come up with a figure of six months for the hearing stage of the case. This requires greater explanation. Also, the time taken on appeal to the agency head or review board should be added.

6. Your statement on page 25 that DOL ALJs would give FLSA cases high priority, leads me to ask whether the Department can obtain enough ALJs to hear these cases. More information is needed on the size and productivity of the DOL ALJ corps.
7. It should be noted that the recordkeeping problems, discussed at page 54, would cause difficulties in administrative hearings as well. Solving these problems seems crucial to any overall solution. Similarly, delays caused by the lack of processing deadlines as compared to other DOL cases (p.55) would not be ameliorated by the proposed reform.
8. We have no comment on Chapter 4, dealing with a modification of the statute of limitations and other investigative and collection practices.
9. Some minor corrections ought to be made in your references to the Administrative Conference. On page 9 you make reference to "the Chief Investigator" of the Conference. There is no such official. We suggest that the sentence begin, "We also discussed with officials of the Office of the Chairman of the Administrative Conference" In the fifth line of the footnote on page 9 we suggest substituting the number "55" for the word "half."

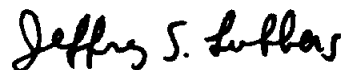
On page 52, the footnote citation to Goldschmid should be followed with the citation, "2 Recommendations and Reports of ACUS 896."

Finally, we appreciate the inclusion of our model civil penalty statute as Appendix

II. May we also suggest that the enclosed Recommendation 72-6 be included as well?

In conclusion, we appreciate the opportunity you have given us to consult with your researchers during the study and this additional opportunity to comment. If we can be of any further assistance, please do not hesitate to let us know.

Sincerely yours,



Jeffrey S. Lubbers
Senior Staff Attorney

Attachments: ACUS Recommendation 72-6, 79-3

cc: Reuben Robertson, Chairman

§ 306.72-6 Civil Money Penalties as a Sanction (Recommendation No. 72-6).

(a) Federal administrative agencies enforce many statutory provisions and administrative regulations for violation of which fixed or variable civil money penalties may be imposed.¹ During Fiscal 1971, seven executive departments and thirteen independent agencies collected well in excess of \$10 million, in over 15,000 cases; all evidence points to a doubling or tripling dollar magnitude and substantially increasing caseload within the next few years.

(b) Increased use of civil money penalties is an important and salutary trend. When civil money penalties are not available, agency administrators often voice frustration at having to render harsh "all-or-nothing decisions" (e.g., in license revocation proceedings), sometimes adversely affecting innocent third parties, in cases in which enforcement purposes could better be served by a more precise measurement of culpability and a more flexible response. In many areas of increased concern (e.g., health and safety, the environment, consumer protection) availability of civil money penalties might significantly enhance an agency's ability to achieve its statutory goals.

(c) In developing a range of sanctions adequate to meet enforcement needs, Congress and agencies must often determine whether a "criminal fine" or a "civil money penalty," or both, should be applied to a given regulatory offense. The choice they make has large consequences. Criminal penalties expose an offender to the disgrace and disabilities associated with "convictions"; they require special procedural and other protections; and they can not be imposed administratively. These factors make it appropriate to consider whether criminal sanctions should not be supplemented or replaced by civil money penalties.

(d) Under most money penalty statutes, the penalty cannot be imposed until the agency has succeeded in a de novo adjudication in federal district

court, whether or not an administrative proceeding has been held previously. The already critical overburdening of the courts argues against flooding them with controversies of this type, which generally have small precedential significance.

(e) Because of such factors as considerations of equity, mitigating circumstances, and the substantial time, effort and expertise such litigation often requires in cases usually involving relatively small sums (an average of less than \$1,000 per case), agencies settle well over 90 percent of their cases by means of compromise, remission, or mitigation. Settlements are not wrong *per se*, but the quality of the settlements under the present system is a matter of concern. Regulatory needs are sometimes sacrificed for what is collectible. On the other hand, those accused sometimes charge that they are being denied procedural protections and an impartial forum and that they are often forced to acquiesce in unfair settlements because of the lack of a prompt and economical procedure for judicial resolution. Moreover, several agency administrators warn that some of the worst offenders, who will not settle and cannot feasibly be brought to trial, are escaping penalties altogether.

This recommendation is intended to meet the problems posed above.

RECOMMENDATION

A. Desirability of Civil Money Penalties as a Sanction. 1. Federal administrative agencies should evaluate the benefits which may be derived from the use (or increased use) of civil money penalties as a sanction. Such penalties should not be adopted as a means of supplanting or curtailing other private or public civil remedies.

2. Civil money penalties are often particularly valuable, and generally should be sought, to supplement those more potent sanctions already available to an agency—such as license suspension or revocation—whose use may prove: (a) Unduly harsh for relatively minor offenses, or (b) infeasible because, for example, the offender provides services which cannot be disrupted without serious harm to the public.

3. Each federal agency which administers laws that provide for criminal sanctions should review its experience with such sanctions to determine whether authorizing civil money penalties as another or substitute sanction would be in the public interest.

¹For purposes of this recommendation, no distinction has been drawn between sanctions denominated "money penalties" and sanctions denominated "forfeitures" (e.g., in FCC legislation) and "fines" (e.g., in Postal Service legislation) so long as: (i) The sanction is classified as civil and (ii) money is, in fact, subject to collection by an agency or a court. Excluded are situations involving penalties or liquidated damages assessed pursuant to the terms of a government contract or sums withheld or recovered for failure to comply with the terms of a government grant.

Title I—General Provisions

Such authority for civil money penalties would be particularly appropriate, and generally should be sought, where offending behavior is not of a type readily recognizable as likely to warrant imprisonment.

B. Adjudication of Civil Money Penalty Cases in an Administrative Imposition System. 1. In some circumstances it is desirable to commit the imposition of civil money penalties to agencies themselves, without subjecting agency determinations to *de novo* judicial review. Agencies should consider asking Congress to grant them such authority.³

Factors whose presence tends to commend such a course with respect to a particular penalty provision include the following:

(a) A large volume of cases likely to be processed annually;

(b) The availability to the agency of more potent sanctions with the resulting likelihood that civil money penalties will be used to moderate an otherwise too harsh response;

(c) The importance to the enforcement scheme of speedy adjudications;

(d) The need for specialized knowledge and agency expertise in the resolution of disputed issues;

(e) The relative rarity of issues of law (e.g., statutory interpretation) which require judicial resolution;

(f) The importance of greater consistency of outcome (particularly as to the penalties imposed) which could result from agency, as opposed to district court, adjudications; and

(g) The likelihood that an agency (or a group of agencies in combination) will establish an impartial forum in which cases can be efficiently and fairly decided.

Considerations such as those set forth above should be weighed heavily in favor of administrative imposition when the usual monetary penalty for an offense or a related series of offenses would be relatively small, and should normally be decisive when the penalty would be unlikely to exceed \$5,000. However, the benefits to be derived from civil money penalties, and the administrative imposition thereof, should also be considered when the penalties may be relatively large.

2. An administrative imposition system should provide:

(a) For and adjudication on the record pursuant to the Administrative Procedure Act, 5 U.S.C. 554-57 (1970), at the option of the alleged offender or the agency;

³Due to the special procedures and status of the United States Tax Court, the rationale for administrative imposition may have only limited applicability to civil money penalties administered by the Internal Revenue Service.

(b) For finality of an agency's decision unless appealed within a specified period of time;

(c) That, if the person on whom the penalty is imposed appeals, an agency's decision will be reviewed in United States Courts of Appeals under the substantial evidence rule in accordance with the Administrative Procedure Act, 5 U.S.C. 706(e);

(d) That issues made final by reason of (b) above and issues which were raised, or might have been raised, in a proceeding for review under (c) above may not be raised as a defense to a suit by the United States for collection of the penalty.

Agencies should adopt rules of practice which will enable just, inexpensive and speedy determinations. They should provide procedures for settlement by means of remission, mitigation or compromise.

§ 305.79-3

§ 305.79-3 Agency Assessment and Mitigation of Civil Money Penalties (Recommendation No. 79-3).

(a) The civil money penalty has become one of the most widely used techniques in the enforcement programs of federal administrative agencies. Most regulatory offenses punishable by civil penalties involve adverse social consequences of private business activity. The motivational impact of these penalties depends in large part on the certainty of imposition and uniformity of amount, although some cases may require individualized tailoring to the circumstance of the offender so as to remove the economic benefit of the illegal conduct. Other civil penalties may also serve a secondary function of compensating society for the harm caused by unlawful conduct.

(b) Recommendation 72-6 urged that the advantages of civil money penalties would be best achieved through an "administrative imposition system" in which the agency would be empowered to adjudicate the violation and impose the penalty after a trial-type hearing, subject to "substantial evidence" judicial review. Such a system, it was stated, would avoid the delays, high costs, and jurisdictional fictions inherent in the traditional and most common system of imposing civil money penalties by a court in a civil action initiated on behalf of the agency by the Department of Justice.

(c) Since adoption of that Recommendation in 1972, the use of civil money penalties in general and of administratively imposed civil money penalties in particular has increased significantly, and the constitutionality and desirability of administratively imposed penalties has been widely recognized.

(d) Experience has shown that agencies play a crucial role and exercise broad discretion in the administration of civil penalty programs, whether or not the statute in question authorizes an administrative imposition system.

Agencies possessing such authority have found it efficient to try to resolve cases before the formal hearing stage, through settlement and negotiation. Those agencies not possessing administrative imposition authority operate under a wide variety of statutes: some make no express reference to an agency role in the penalty process, while others confer on the agency only a power to "assess" or to "mitigate" penalties, thereby expressly or implicitly reserving to the respondent the right to seek a subsequent de novo fact-finding hearing by the court in a collection proceeding. Agencies typically exercise their statutory authority to "mitigate" in resolving contested penalty assessments prior to the initiation of formal enforcement action. In these recommendations the term "mitigation" refers to any informal process of resolving a contested initial penalty assessment.

(e) Whatever the statutory framework, the enforcing agency typically makes the initial assessment, and provides a process for mitigation of the penalty. Thus, both where there exists administrative imposition authority and where such authority does not exist, agencies and respondents customarily utilize these initial assessment and mitigation processes to resolve the great majority of civil money penalty cases without reaching the stage of formal administrative adjudication or court collection proceeding.

(f) These informal processes for the initiation and termination of civil penalty proceedings represent an area of previously unstudied and largely discretionary agency action. Appropriate standards and structures for the exercise of such discretion are needed to improve the consistency, efficiency and openness of agency assessment and mitigation processes.

(g) The recommendations that follow focus on: (1) The need for agencies to develop standards for determining penalty amounts, (2) agency procedures for initially assessing penalties, (3) agency mitigation procedures, and (4) the use by agencies of evidentiary hearings to impose civil penalties where such a procedure, though not required by statute, might result in a limited scope of judicial review.

§ 305.79-3

Title 1—General Provisions

RECOMMENDATION

A. Standards for Determination of Penalty Amount

1. Agencies enforcing regulatory statutes, violation of which is punishable by a civil money penalty, should establish standards for determining appropriate penalty amounts for individual cases. In establishing standards, agencies should specify the factors to be considered in determining the appropriate penalty amount in a particular case. To the extent practicable, agencies should specify the relative weights to be attached to individual factors in the penalty calculation, and incorporate such factors into formulas for determining penalty amounts or into fixed schedules of prima facie penalty amounts for the most common types or categories of violation. A penalty intended to deter or influence economic behavior should, at a minimum, be designed to remove the economic benefit of the illegal activity, taking into account the documented benefit and the likelihood of escaping detection. Penalty standards should, in addition, specify whether and to what extent the agency will consider other factors such as compensation for harm caused by the violation or the impact of the penalty on the violator's financial condition. In order to reduce the cost of the penalty calculation process and increase the predictability of the sanction, simplifying assumptions about the benefit realized from or the harm caused by illegal activity should be utilized.

2. Agencies should periodically evaluate the continuing effectiveness of their penalty standards. Such evaluations should be based upon the results of compliance surveys and internal audits of agency assessment and mitigation decisions as well as data on the nature and frequency of violations routinely generated by the agency's enforcement program.

3. Agencies should make such standards known to the public to the greatest extent feasible through rulemaking or publication of policy statements. Such an approach is especially desirable where adjudications that produce written decisions are rare.

4. Agencies should collect and index those written decisions made in response to mitigation requests or after agency assessment hearings, and make such decisions available to the public except to the extent that their disclosure is prohibited by law. Whenever a respondent cites a previous written decision as a precedent for the agency to follow in the respondent's case, the agency should either do so, distinguish the two cases, or explain its reasons for not following the prior decision.

B. Initial Assessment of Penalties

1. Agencies should give adequate written notice to the respondent of the factual and legal basis for, and amount of, the penalty assessment.

2. Agencies should not mechanically assess variable civil money penalties at the statutory maximum if reliable evidence in their possession indicates the presence of mitigating factors. Nor, if they possess such evidence, should agencies assess at the statutory level fixed penalties which are subject to an express administrative "mitigation" authority.

3. The greater the degree to which an agency decentralizes its penalty assessment authority, the more it should structure the exercise of that authority by the use of highly specific standards. Agencies should not ordinarily delegate discretionary authority to assess civil money penalties to investigative personnel unless the delay inherent in review by an independent assessment official would materially impair the effectiveness of the enforcement process.

C. Mitigation of Penalties

Respondents in civil money penalty cases have a right to a trial-type hearing at either the administrative or judicial level. It is nevertheless desirable that agencies establish fair and economical procedures whereby respondents may informally contest the initial assessment of civil penalties without the necessity of going forward to trial-type hearings. These procedures should be governed by the following principles:

1. Agencies should provide the respondent with a right to reply in writing to a penalty claim.

2. Agency staff should not refuse a reasonable request to discuss a penalty claim orally. But an informal conference need not be built into the process except in those categories of cases where the use of written communications is likely to prove inadequate because of such factors as the unsophistication of violators or the prevalence of factual disputes.

3. Agencies should consider providing an opportunity for administrative review of a decision denying a request for mitigation.

4. Agency decisions on mitigation requests should be in writing and should be accompanied by a brief indication of the grounds for the decision.

5. In regulatory programs typically involving the imposition of small penalties, agencies may appropriately rely most heavily on readily ascertainable standards of liability, fixed schedules of prima facie penalty amounts for the most common types of categories of violations, and highly objective inspection procedures. Opportunity for mitigation should be narrowly confined and

mitigation requests entertained only if in written form.

6. In regulatory programs typically involving the imposition of large penalties, agencies may appropriately provide an opportunity to a respondent to present a request for mitigation, orally or in writing, request an oral conference thereon, receive a written decision, and submit a written petition for review of such decision or for compromise of such claim at a higher agency level.

D. Evidentiary Hearings

As expressed in Recommendation 72-6, it is desirable that agencies be given express authority to employ the procedures of adjudication on the record pursuant to the APA, 5 U.S.C. 554-557, for the imposition of civil money penalties. Where its statute does not provide for such procedure but confers upon the agency authority to "assess" or to "mitigate" a penalty, particularly if the agency is required to conduct a "hearing," the agency should consider establishing such procedures by regulation, especially where by doing so a de novo proceeding upon judicial review could be avoided. Where such a hearing procedure has in fact been observed by the agency, and the statute does not provide for de novo judicial proceedings, the court should ordinarily utilize a limited scope of review of such agency action imposing civil money penalties.

[44 FR 38824, July 3, 1979]

U.S. Department of Justice



MAR 13 1981

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

This letter is in response to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "Legislative and Administrative Changes Needed to Deter Recordkeeping, Minimum Wage, and Overtime Violations and Prevent Employers from Retaining Back Wages Owed to Employees."

The Department has no objection to the basic recommendations contained in the draft report suggesting that the Fair Labor Standards Act (FLSA) and the Portal-to-Portal Pay Act be amended to give the Secretary of Labor expanded administrative authority to determine violations of the FLSA, assess civil penalties, provide administrative hearings, and toll the applicable statute of limitations. Any action taken by Congress should, of course, be consistent with the Administrative Procedure Act and other acts providing for similar administrative authority and procedures.

The draft report notes that FLSA criminal cases are rarely brought to a United States Attorney--only 2 in 10 years--because they are subject to serious evidence problems, are a low priority of the courts, and such trials would seriously delay back wage recoveries. Accordingly, the General Accounting Office (GAO) recommends legislative and administrative changes needed to strengthen the Department of Labor's (DOL) internal and administrative remedies, i.e., administrative hearings instead of district court proceedings. The Department endorses these recommendations as realistic measures in terms of helping the recovery of lost wages as a primary goal, and recognizing the practical impossibility of obtaining any additional relief from the already over-burdened United States Attorneys and United States District Courts.

The following specific comments are offered on the report's discussion of proposed sanctions under the FLSA:

1. Additional Civil Remedies for Recordkeeping, Minimum Wage and Overtime Violations.

The Department has no objection to the proposed additional civil penalty for violations of the FLSA recordkeeping, overtime, and minimum wage requirements. Such additional civil penalties would assist enforcement

of the mandates of the Statute, even in those jurisdictions where scarce prosecutorial resources hinder effective criminal prosecution under the Act.

2. Feasibility of Criminal Prosecution Under Section 216.


The draft report states that one of the problems with criminal enforcement of the FLSA is reluctance on the part of United States Attorneys to prosecute such violations. We would point out that the priority given FLSA cases by United States Attorneys is most often influenced by their particular case load and the nature of pending litigation in their respective offices. Furthermore, even a willful violator of the Act is not subject to imprisonment until after a second conviction. In the case of egregious or repeated violations, where civil action has been ineffective, DOL is free to refer cases, including criminal contempt for violation of civil court orders, to the appropriate United States Attorneys through the Criminal Division of the Justice Department.

3. Restitution.

Finally, according to the draft report, DOL officials stated that commencement of criminal actions reduces DOL's ability to recover employees' back wages because it delays the resolution of the back wage question. True, criminal prosecution may remove the incentive for defendants to enter into settlements with DOL in regard to civil actions filed to recover back pay, nevertheless, GAO should be made aware that with respect to a criminal conviction under Section 216 of the FLSA, United States Attorneys are specifically instructed to make every effort to secure restitution of all employee claims for back pay as a condition of sentence as stated in the enclosed United States Attorneys' Manual, Title 9-139.230. As the Manual explains, probation may be conditioned with the requirement that the defendant make full restitution. Moreover, the postponement of sentencing pending restitution is also an option. (18 U.S.C. § 3651 et seq. and U.S. v. Berger, 145 F.2d 888 (2nd Cir. 1944).) Therefore, in the types of egregious cases illustrated on pages 37 - 42 of the report, criminal prosecution may in fact be a more effective and faster method of obtaining back pay claims than a civil suit filed by an employee or the Secretary of Labor.

We appreciate the opportunity to comment on the draft report. Should you desire any additional information, please feel free to contact us.

Sincerely,



Kevin D. Rooney
Assistant Attorney General
for Administration

Enclosure

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

9-139.230 Restitution

Following conviction under section 216(a) for a monetary violation, every effort should be made to secure restitution as a condition of sentence. Thus, probation may be conditioned with the requirement that the defendant make restitution. Postponement of sentencing pending restitution is an alternative procedure. In this regard, see 18 U.S.C. 3651, et seq., and United States v. Berger, 145 F.2d 888 (C.A. 2, 1944). In no instance, however, should voluntary restitution by the defendant be regarded as a quid pro quo for dismissal of a criminal action. Finally, as a matter of policy, the court imposition of a fine accompanied by a suspension of an amount equal to the delinquent back-wage payments, pending restitution, should be opposed as without support by Federal or state case law, notwithstanding the broad sentencing powers of the Federal judiciary.

Commissioners:
 James G. O'Hara, Esq.
 Chairman
 William D. Byrum
 Jay H. Foreman
 S. Warne Robinson
 Clara F. Schloss
 Dr. Michael L. Wachter
 Dr. Phyllis Ann Wallace
 Sandra L. Willett

Minimum Wage Study Commission

1430 K Street, N.W., Suite 500
 Washington, D.C. 20005
 (202) 376-2450

March 5, 1981

Mr. Gregory J. Ahart, Director
 Human Resources Division
 United States General Accounting Office
 GAO Building
 441 G Street, N.W., Room 6864
 Washington, D.C. 20548

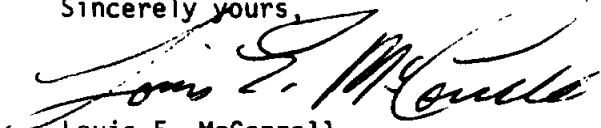
Dear Mr. Ahart:

Enclosed are two copies of comments drafted by the staff of the Minimum Wage Study Commission in response to your letter of February 3, 1981, which requested Commission review and comments on GAO's draft report entitled, "Legislative and Administrative Changes Needed to Deter Recordkeeping, Minimum Wage, and Overtime Violations and Prevent Employers from Retaining Back Wages Owed to Employees."

We appreciate the opportunity to review your report and as the enclosed comments indicate, the staff was generally most favorably disposed toward your report and its recommendation to both the Congress and the Department of Labor. Hopefully, the critique will enable you to strengthen your final submission to the Congress.

Should you have any questions regarding the comments, please contact Mr. Stephen W. Welch, Senior Economist, or Mr. Robert J. Miller, General Counsel.

Sincerely yours,



Louis E. McConnell
 Executive Director

Enclosures

GAO note: The critique of our draft report by the Commission staff has been excluded from this appendix because it does not represent the formal views of the Commission. Technical and content improvement changes suggested by the Commission staff have been incorporated in this report when, in our opinion, such changes were warranted.

**ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS**

WASHINGTON, D.C. 20544

WILLIAM E FOLEY
DIRECTOR

March 17, 1981

JOSEPH F SPANIOL, JR
DEPUTY DIRECTOR

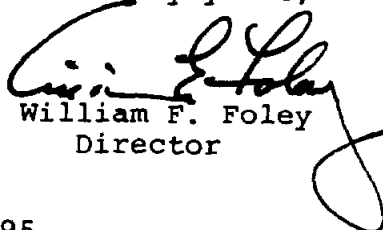
Mr. William J. Anderson
Director, General Government
Division
United States General Accounting
Office
Room 3836
441 G Street, N. W.
Washington, D. C. 20548

Re: "Legislative and Administrative
Changes Needed to Deter Record-
keeping, Minimum Wage, and
Overtime Violations and Prevent
Employers From Retaining Back
Wages Owed to Employees"

Dear Mr. Anderson:

Thank you for the opportunity to comment on the above-captioned proposed draft report. The recommendations affect the Federal Judiciary by providing for judicial review of administrative assessments of the recordkeeping, minimum wages, and overtime provisions of the Fair Labor Standards Act and by changing the point at which the statute of limitations is tolled for purposes of maximizing the recovery of back wages. In addition, the Federal courts' jurisdiction over actions by the Labor Department for criminal sanctions and injunctive relief would remain substantially the same. An increase in the workload of the Federal courts might be expected to occur if these recommendations are implemented; however, the degree and extent of the increase is not susceptible to precise measurement. With respect to the proposed draft report as a whole, we have no additional comments at this time.

Sincerely yours,



William F. Foley
Director

United States District Court
For the Northern District of Illinois
Chicago, Illinois 60604

Chambers of
James Denton Parsons
Chief Judge

March
fifth
19 81

Mr. William J. Anderson, Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Re: Proposed Report of GAO re: Legislative and Administrative
Changes Needed to Deter Recordkeeping, Minimum Wage, and
Overtime Violations and Prevent Employers from Retaining
Back Wages Owed to Employees

Dear Mr. Anderson:

This relates to the subject proposed report concerning portions of the Fair Labor Standards Act and other legislation under the supervision of the Department of Labor, which you sent to me for study and comments. I have studied the proposed report and discussed its contents with several of the judges of this court whose opinions in this area of law would be valuable to me in preparing to comment on it. I also have had the report studied and analyzed by the Chief Clerk of my court, Mr. H. Stuart Cunningham. Mr. Cunningham is our statistician, and his records keep me advised of the rises and falls of filings in various types of cases and the reasons for them.

I observe that your recommendations are well supported by the facts your study reveals. The report describes in detail the difficulties in administering the present laws.

To assist myself in discussing your recommendations may I capsulize here the major areas about which you have concern. They are:

(a) Employers often fail to maintain the records required by the Act. As a result of this failure, Labor has problems bringing cases to court, particularly if employees are unwilling to testify or cannot be found. As many of the employers involved did not seem adverse to threatening employees who cooperated with Labor with the loss of their job, Labor's difficulties in bringing suit were further compounded. (We have found no evidence here of unwillingness on the part of employees to testify.)

(b) In many instances the amounts involved while of significance to the employees, were small in comparison to the amounts involved in many of the cases brought in federal courts. You mentioned in several places the possibility that Fair Labor Standards Act cases were accorded low priority in federal district courts. (Our court gives them the same priority it gives other civil cases to which the statutes give no especial priority.)

(c) The Portal-to-Pay Act of 1947 provides that up to two year's illegally withheld wages can be recovered. A 1966 amendment permits three year's wages where willful violations are involved. The effect of this statute, however, still is to limit, in many instances, Labor's ability to recover illegally withheld wages. For example, if an employee complains that wages were illegally withheld during the preceding 18 months and then it takes the Labor Department 12 months to investigate the claim, negotiate and then file suit, only the most recent 12 months of wages of the employee will fall within the statute. (This can and should be remedied as you indicate.)

(d) You found that a number of the employers against whom cases were filed had had previous cases filed against them. Labor apparently lacks a program of systematically reviewing past violators for current compliance.

(e) Even where wages have been recovered, the employee often fails to get full recovery because the matter is settled. The amount in a settlement is always less than the amount at issue. This generally happens because the employee can no longer be found, and because there was no interest charge placed on the amounts involved. The time that lapses between failure to pay and settlement payments were often at least several years.

(f) For a variety of reasons, the Labor Department has rarely used the criminal provisions of the statute.

(g) Various factors have made the liquidated damages provisions of the Act ineffective.

The changes you recommend should bring about a much more effective, vigorous and equitable approach to enforcement.


You recommend various changes in the law and in Labor's policy. You recommend that (a) provide for civil penalties administered under administrative procedure in Labor reviewable by the Court of Appeals, (b) include provisions for interest on any assessments made against employers; and (c) change the point at which the statute is tolled to that where a violation is formally assessed by Labor. You recommend (a) requiring the third year's back wages to be computed in willful violation cases; (b) reinvestigating firms before there is a settlement to assure that there is current compliance; and (c) instituting a program of systematically reviewing firms found in violation of the act.

I observe that during the year ending June 30, 1980, 1,378 cases were filed by the government under the Fair Labor Standards Act out of a total of 168,789 cases filed nationwide. This represents 0.82 of one percent of the total, and indicates a reluctance on the part of government to pursue the smaller cases. In this District Court there were only 41 such cases filed out of the total 12,106 cases filed during the two years ending September 30, 1980. This was 0.34 of one percent of total. The impact of removing this small group of cases from the filings in the district courts would be minimal, at least insofar as it would effect the workloads of our judges. On the other hand to change the procedures to move more of the cases up through government prosecution in the courts would be excessively costly and laborious to the point of being self defeating.

Given (a) that many of the employers mentioned in the report are either in marginally profitable situations and/or are involved in industries which have traditionally hired a sizeable percentage of their staffs at or near minimum wage levels, (b) that many of the employers who are found to have been in violation at one point in time are subsequently found to be in violation, (c) that the amounts involved are often small (though of importance to the employees), and (d) that the evidence and investigation/negotiation times involved work very much to the favor of the employer and against Labor and the employee, the use of an administrative forum to handle these cases appears far more appropriate than the use of district courts. As long as judicial review is maintained to assure due process, the change should expedite Labor's processing of the cases, and bring about much better compliance by industry with the law and the standards of the Department.

Finally I concur enthusiastically with your recommendations that there not only be effected a change in the point at which the two or three-year period is tolled, but that also there be brought about a maximum use of civil fines and interest.

Very truly yours,



JAMES B. PARSONS
Chief Judge

U.S. Department of Labor

Office of Inspector General
Washington, D.C. 20210



Reply to the Attention of:

MAR 6 1981

Mr. Gregory J. Ahart
Director
Human Resources Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Ahart:

This is in reply to your letter to the Secretary requesting comments on the draft GAO report entitled, "Legislative and Administrative Changes Needed to Deter Recordkeeping, Minimum Wage, and Overtime Violations and Prevent Employers from Retaining Back Wages Owed to Employees".

The Department's response is enclosed.

The Department appreciates the opportunity to comment on this report.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank Yeager". The signature is written in a cursive style with a large, sweeping initial "F".

Frank Yeager
Acting Deputy Inspector General

Enclosure

U. S. Department of Labor's Response To
The Draft General Accounting Office Report
Entitled ---

Legislative and Administrative
Changes Needed to Deter Recordkeeping,
Minimum Wage, and Overtime Violations
and Prevent Employers from Retaining
Back Wages Owed to Employees

Recommendation #1:

"...the Secretary of Labor make more use of FLSA criminal sanctions for willful minimum wage and overtime violations, after consulting with Justice officials to coordinate criminal and civil litigation strategies."

Response:

The Department does not concur.

Regional Solicitors have found that the resources of their offices are better devoted, on the whole, to seeking civil remedies which include restitution of back wages in the great majority of cases. The maximum criminal penalty which can be imposed on a first conviction is only \$10,000. Apart from the fact that such a maximum penalty would rarely if ever be imposed, it is considerably less than can often be recovered in back wages. Criminal penalties were more frequently invoked between 1949 and 1961, when the statute authorized only injunctive relief (without any back wages) under Section 17.

Recommendation #2:

"Issue instructions requiring compliance officers to compute the third year's back wages in willful violation cases. While Labor can do more to identify and recover back wages withheld during the third year in some cases, we believe it will have only limited success until the legislative changes to stop the running of the statute of limitations and strengthen enforcement authority are adopted."

Response:

To the extent that this recommendation would require legislative action, the Department is not in a position to comment at this time for the reasons provided below (see "Additional Comments" section).

To the extent that this recommendation suggests computing the third year's back wages in all willful violation cases, the Department does not concur. The current guidelines state that the third year's computations be made only when the Compliance Officer "is specifically instructed to do so in a particular case by the Area Director after consultation, as appropriate, with the Assistant Regional Administrator and the Regional Solicitor." This review is needed because cases must be examined on the basis of their meeting potential litigation criteria. Requiring that all willful violations cases be computed would also do away with the needed flexibility to decide when to do the third year's computation.

The Portal-to-Portal Act in Section 6(a) permits a third year of back wages only where the violations have been "willful". The courts in some jurisdictions have provided guidance as to what circumstances amount to willful violations. However, the issue generally requires careful scrutiny, particularly if the case arises in a jurisdiction which has no prior court precedent on the issue of willfulness. As a result, the Regional Solicitor's input is needed, on a case-by-case basis. This is particularly important in order not to expend our limited resources in extending the investigation period to a third year unless there is a strong probability that a court would agree with an allegation of willfulness. Therefore, until we receive more guidance from the courts we feel it is preferable to continue our present policy of consulting with the Regional Solicitor before computing the third year's back wages.

Recommendation #3:

"Reinvestigate firms before settling cases referred to the Regional Solicitor's offices to assure that employers have come into compliance and to calculate any additional back wages owed employees."

Recommendation #4:

"Establish a program to systematically monitor firms found in violation of the Act. All firms considered likely to again violate the Act, and a sample of other firms that have violated the Act should be reinvestigated within the three year statute of limitations period to assure that employers do not profit from continuing violations and that illegally withheld employee back wages are fully restored."

Response:

The Department concurs.

These two recommendations share a common requirement for more resources if they are to be effectively implemented. We agree that investigations should be updated at the time of settlement and, in many cases, this is being done now. It is certainly prudent to encourage such a practice whenever possible and we will continue to do so. Recommendation #4 involves the establishment of a continuous "monitoring" program. Firms which have a history of non-compliance or which have indicated that their future compliance is less than assured would be systematically scheduled for investigation. The resource requirements for such an undertaking are evident. We do schedule firms for reinvestigation when there is any doubt concerning future compliance and, more importantly, in accordance with our available enforcement resources. The latter consideration has precluded any commitment to a systematic rescheduling program but it has been done whenever serious questions have been raised as to an employer's assurance of future compliance. The WH-136, Investigation Transmittal Form, provides an action box for "Consider for reinvestigation". Reinvestigation is a keystone to any effective enforcement program and should be given serious consideration. Unfortunately, demands from the complaint backlog, special directed enforcement programs and other priorities create a drain on resources that precludes reinvestigations on a regular basis although we intend to continue to schedule reinvestigations whenever the facts warrant.

Additional Comments:

In the Cover Summary, the GAO draft report states that the "Fair Labor Standards Act, established to protect the wages of American workers, is not accomplishing its objective." We find little or no support in the GAO draft for this conclusion, except for isolated, anecdotal bits of evidence selected in a highly unscientific manner. There is no evidence whatever in the report that more than a small minority of employers seek to avoid their obligations under the Act. The Minimum Wage Study Commission will shortly publish the results of its non-compliance survey, which will constitute the most reliable measure of compliance with the statute. The overall conclusion of the GAO report is thus premature, to say the least, and surely not justified on the basis of the evidence presented in the report.

GAO concludes, on the basis of data for fiscal years 1978 and 1979, that DOL obtained restitution of approximately 60 percent of the amounts of back wages found due in the course of Wage and Hour investigations. Apart from the fact that 60 percent is a respectable figure for any law enforcement program, it is also important to bear in mind that the back wage figures resulting from Wage and Hour investigations are only a rough measure of amounts which are recoverable in a legal sense. These figures oftentimes include amounts attributable to violations which turn out not to be provable in court, usually because of insufficient evidence, and sometimes because the court does not accept the legal theory on which the case is based. Viewed in this context, a 60 percent recovery figure is quite impressive.

1. Recordkeeping Violations:

Although it is true that the failure by employers to maintain records complicates enforcement of the FLSA, it is still feasible to prove violations where employee witnesses are available to testify. In the landmark case of Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), the Supreme Court ruled that where employees produce sufficient evidence to show the extent of improperly compensated work "as a matter of just and reasonable inference," the burden then shifts to the employer to disprove such evidence. This rule has enabled the Solicitor to recover back wages in a large number of cases where records were inadequate or lacking.

2. Minimum Wage and Overtime Violations:

A. Liquidated Damages

Although at the time of the GAO study, the Section 16(c) liquidated damages remedy may have been infrequently sought, it is now much more common to file suit under this provision. In certain offices, up to 50 percent of FLSA suits are brought under Section 16(c), seeking liquidated damages for willful violations. These cases tend to be those in which witnesses are readily available and violations are of a recurring nature.

B. Statute of Limitations

The GAO report presents an unhappy picture of back wages lost by reason of the running of the Statute of Limitations, allegedly because of the time taken by the Regional

Solicitor's offices to review investigative files submitted for potential litigation. The evidence of these asserted delays, like most other evidence in the draft report, is not scientifically based. However, to the extent that there have been delays in the past, significant steps have already been taken to remedy this problem. Standards are now in place which set time deadlines for the Regional Solicitors, with respect to action taken on FLSA case files received in their offices from the Wage and Hour Division. As a result, significant delays in handling trial litigation files are not expected.

With regard to updating Wage and Hour investigations to include violations occurring prior to settlement in the Solicitor's office, it presently appears that such updating is routinely sought, where appropriate. For the most part, this would apply to cases where trustworthy assurances of current compliance have not been obtained, or where considerable time has elapsed since the close of the Wage and Hour investigation. The Wage and Hour Division has been cooperative in updating case files, where requested to do so by the Solicitor's office.

It is currently a common practice in Regional Solicitor's offices to seek interest in connection with settlements permitting installment payments.

3. Recommendations to Congress:

Recommendation 1

The Congress should amend FLSA to give Labor authority to assess civil money penalties of sufficient size to deter recordkeeping violations. The legislation should provide for a formal administrative process to adjudicate cases when employers appeal Labor's assessments.

Recommendation 2

The Congress should amend FLSA to eliminate the liquidated damage provision and in its place give Labor authority to assess civil money penalties of sufficient size to deter minimum wage and overtime violations. The legislation should provide for an administrative system for adjudicating cases when employers appeal Labor's actions as recommended in Chapter 2.

Recommendation 3

Amend FLSA to authorize Labor to formally assess a violation as well as the amount of illegally withheld back wages due, including interest.

Recommendation 4

Amend Section 7 of the Portal-to-Portal Pay Act of 1947 so that the statute of limitations tolls when an FLSA violation is formally assessed by Labor.

It would be premature for the Department to comment at this time regarding legislative recommendations. The Department will be examining those recommendations in conjunction with any recommendations that result from the forthcoming reports of the Minimum Wage Study Commission. Any specific legislative activities which are decided upon will be presented at the appropriate time as a part of the Administration's program.

(201600)

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