BY THE U.S. GENERAL ACCOUNTING OFFICE

Report To The Chairman Subcommittee On Labor Standards Committee On Education And Labor House Of Representatives

The Department Of Labor's Enforcement Of The Fair Labor Standards Act

GAO reviewed the actions taken to correct the problems in detecting and collecting wage underpayments that were identified in its 1981 report on the Department of Labor's enforcement of the Fair Labor Standards Act's minimum wage and overtime provisions. Most of the problems GAO identified in 1981 still exist, but the number of staff-years devoted to the act's enforcement has decreased.

Labor recently instructed its regional solicitors to routinely seek additional compensation for employees, in the form of liquidated damages, when they take legal action to obtain wage underpayments from employers. GAO is recommending that Labor monitor the regional solicitors to determine whether they are complying with the instructions.

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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

HUMAN RESOURCES
DIVISION

B-201792

The Honorable Austin J. Murphy
Chairman, Subcommittee on Labor Standards
Committee on Education and Labor
House of Representatives

Dear Mr. Chairman:

Pursuant to the Subcommittee's request, this is our report on (1) actions taken by the Department of Labor and the Congress in response to the recommendations in our May 28, 1981, report Changes Needed to Deter Violations of Fair Labor Standards Act (HRD-81-60) and (2) the cumulative effect of staff reductions since May 1981 in the number of Labor compliance officers and the assignment of other duties to the remaining compliance officers on enforcement of the Fair Labor Standards Act's (FLSA's) provisions.

In doing our work, we reviewed records and interviewed officials at Labor's national office in Washington, D.C., and selected regional and area offices. Most of our work was done in the same three Labor regions covered in our 1981 report--Boston, Chicago, and Dallas. However, we expanded our work on Labor's use of FLSA's liquidated damages provision to the Solicitor of Labor's offices in three additional regions--Atlanta, Kansas City, and San Francisco--because the first three regions had continued infrequent use of the liquidated damages provision. We also met with officials of the Department of Justice and reviewed legislative proposals to amend FLSA. Appendixes I and II provide detailed discussions of our work on the actions taken on the recommendations in our prior report and on compliance officer staffing, respectively. Our objectives, scope, and methodology are detailed in appendix III.

OUR PRIOR REPORT

In our 1981 report, we reported that noncompliance with FLSA's minimum wage, overtime, and record-keeping provisions was a serious and continuing problem and that employers who violated these provisions were often not penalized. We also reported that Labor was not seeking the maximum compensation permitted for employees who were due wages.

We recommended that Labor (1) use FLSA's criminal sanctions more often, (2) compute the third year's unpaid wages for willful violations,[1] (3) update investigations before settling cases referred to the regional solicitors' offices, and (4) systematically monitor and reinvestigate firms found in violation of the act.

We recommended that the Congress amend FLSA to:

--Give Labor authority to assess civil money penalties for record-keeping violations and provide a formal administrative process to adjudicate appealed cases.

--Eliminate section 16(c) of the act, which permits Labor to sue for back wages and for liquidated damages of 100 percent of the amount of back wages and, in its place, authorize Labor to assess civil money penalties for minimum wage and overtime violations with an administrative process for appeals.

--Authorize Labor to formally assess violations, as well as the amount of illegally withheld back wages due including interest, and change the statute of limitations so it stops running when Labor formally assesses violations rather than when Labor files suit against employers.

In commenting on our recommendations in 1981, Labor disagreed that it should make more use of FLSA's criminal sanctions because its regional solicitors believed their resources would be better spent seeking civil remedies. Labor also disagreed with computing back wages for 3 years in all willful violations cases. It said that its limited resources should not be spent on extending an investigation to a third year unless there was a strong probability that a court would agree with an allegation of willfulness.

Labor had agreed with our recommendations to update investigations before settlement and systematically monitor and reinvestigate firms that had previously violated FLSA. However, Labor said it did not have the resources to effectively implement the recommendations.

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[1]Recoveries for unpaid wages are limited to 2 years before the start of legal action except, for willful violations, unpaid wages can be recovered for 3 years.

ACTIONS TAKEN SINCE OUR PRIOR REPORT

During our current review, we found that most of the problems we identified in our 1981 report still exist.

The criminal penalties for willful failure to pay minimum wages or overtime or to maintain adequate records are rarely used. The maximum penalty for a first conviction--a fine of up to $10,000--is not considered to be severe by Department of Justice officials, and because of higher priority work, Justice is unlikely to prosecute FLSA violations. Based on the low priority given by Justice officials to FLSA violations, Labor's position of focusing on civil rather than criminal penalty remedies appears reasonable.

Although we recommended in our 1981 report that Labor compute the third year's unpaid wages for willful violations, during our current review we found that computations were being made for a 2-year period before the date of the investigation. Labor officials said it was not reasonable to spend time documenting an additional year of unpaid wages when the maximum period of recovery permitted by the statute of limitations for willful violations is 3 years from the date Labor begins legal action. Based on our review, Labor's position is valid because Labor averages about a year from the time violations are identified until it begins legal action. For example, if Labor computed the preceding 3 years' wages from the date of its investigation and spent an additional year after the investigation began until legal action was initiated, only wages from the two most recent years before the date of investigation could have been recovered.

As pointed out in our earlier report, Labor would have limited success in recovering wages for the third year before the date of investigation unless the statute of limitations was revised to stop running when Labor formally assesses violations rather than when it files suit against employers.

Our current review showed that most investigations were not updated before settlement and firms who previously violated FLSA were usually not being monitored and reinvestigated. Lack of staff (staffing has decreased since 1981) was the reason given for not monitoring and reinvestigating violators and a major reason for not updating investigations before settlement.

Regarding the specific congressional action taken since the issuance of our 1981 report, H.R. 6103--which was reported out by the House Committee on Education and Labor on September 30, 1982--addressed FLSA record-keeping violations and liquidated damages. Under this bill's provisions, employers who violated the minimum wage or overtime provisions, instead of being subject to liquidated damages, would have been liable for back wages plus interest for a first violation and three times the back wages for subsequent violations. The bill also would have provided for Labor to assess civil penalties for willful record-keeping violations. H.R. 6103 was not enacted during the 97th Congress, and as of September 16, 1985, similar legislation had not been introduced.

The absence of records continues to impair Labor's ability to determine and substantiate the amount of back wages. However, because pay records were usually not available to substantiate Labor's estimates, it is not possible to determine the extent to which back wages were actually lost. In such cases, testimonial evidence from employees is used as the basis for determining back wages.

Labor was filing suit for liquidated damages, as permitted by section 16(c) of FLSA, more often than it had during our prior review. Such suits resulted in collecting liquidated damages in some cases and appear to have resulted in increased settlements in other cases by giving Labor a larger claim from which to negotiate settlements. To some degree this increased use of section 16(c) suits may be attributed to the national office, which issued general guidance in the form of a revised litigation manual in January 1983 that suggested that such suits be considered in all cases.

The decision to seek liquidated damages was largely left to Labor's regional solicitors, however, and the extent to which they sought liquidated damages varied considerably. While there are valid reasons for deciding to seek back wages and interest

under the act's injunctive provisions (section 17)[2] rather than back wages and liquidated damages, it appeared that the regional solicitors' views on the purpose of liquidated damages were a major factor in their decisions. The regions that considered liquidated damages as a means of punishing employers sought them less often than the regions that viewed them as a means of compensating employees for delayed payment of back wages. The courts have held that FLSA's liquidated damages are intended as employee compensation rather than a penalty. We believe that Labor should routinely request liquidated damages when filing suit except when the factors in Labor's litigation manual indicate that use of the injunctive provisions is likely to result in greater benefits to employees.

FLSA COMPLIANCE STAFF

While the percentage of time Labor reported that its compliance staff spent on FLSA enforcement has not changed significantly since our prior report, the total number of compliance officers has declined. As a result, fewer staff-years have been spent on enforcing FLSA. For example, the time spent on FLSA enforcement declined from 558 staff-years in fiscal year 1981 to 474 in fiscal year 1984.

A change in Labor's statistical reporting beginning with fiscal year 1983 makes it difficult to compare the number of investigations. However, the amount of identified back wages due has decreased since our 1981 report. In fiscal year 1981, Labor reported that it had identified $127 million in back wages due. For fiscal years 1982, 1983, and 1984, the amounts identified were $130 million, $114 million, and $107 million, respectively.

There appeared to be no significant diversion of compliance officers to duties unrelated to their usual enforcement activities. Less than 2 percent of compliance officers' time was reported as being spent in unrelated program areas.

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[2]In addition to restraining FLSA violations, section 17 permits the recovery of back wages by restraining the withholding of minimum wages or overtime compensation found due by a court. Our discussion of the use of section 16(c) instead of section 17 relates only to the back wage issue. We are not questioning Labor's use of section 17 to restrain FLSA violations.

RECOMMENDATION TO THE SECRETARY OF LABOR

We recommend that the Secretary direct the Solicitor of Labor to monitor the regional solicitors to determine whether they are seeking liquidated damages in all appropriate cases.

AGENCY COMMENTS AND OUR EVALUATION

On August 28 and September 4, 1985, the Departments of Justice and Labor, respectively, commented on a draft of this report. (See apps. IV and V.)

Justice stated that part of the reason for U.S. attorneys' unwillingness to pursue prosecution of FLSA violations may be the minimal penalties involved--imprisonment can only be imposed after a second conviction. Justice said that we may wish to recommend an amendment to FLSA to permit imprisonment for a conviction when a repeat offender has been subject to a prior civil judgment.

Justice's proposal may have merit. However, the desirability of imposing imprisonment for a first conviction was not addressed in our 1981 report and, therefore, was not discussed with Labor officials and U.S. attorneys during this review. Thus, we have not analyzed the potential effect of such an amendment on Labor's ability to resolve cases without trial or the likelihood of cases with prior civil judgments being accepted for prosecution by Justice.

In our draft report we proposed that the Secretary direct the Solicitor of Labor to seek increased use of liquidated damages by (1) emphasizing in Labor's litigation manual that liquidated damages should be routinely sought unless the circumstances of a case indicated that seeking back wages under FLSA's injunctive provisions would be likely to provide greater benefits to employees and (2) monitoring the regional solicitors to determine whether they are seeking liquidated damages in all appropriate cases.

Labor stated that it concurred generally with our proposal and that its regional offices have been instructed to seek liquidated damages more routinely. Labor said it believed the litigation manual did not need revision because it sufficiently stressed the preferred status of the liquidated damages remedy

as well as setting out factors that may render liquidated damages inappropriate in specific cases.

The instructions referred to by Labor are in an August 20, 1985, memorandum from the Deputy Solicitor for Regional Operations to the regional solicitors' offices. The memorandum states that Labor agrees generally that liquidated damages should always be sought except where one or more of the factors cited in the litigation manual support an affirmative determination that seeking such damages would be inappropriate. The regional offices are instructed to take whatever steps may be necessary to assure that liquidated damages are sought, as appropriate, in future FLSA actions.

We believe that the instructions to the regional solicitors' offices adequately emphasize that liquidated damages should be routinely sought. As a result, we did not include in the final report our proposal regarding the need to emphasize the use of liquidated damages as a means to compensate employees for delayed payment of wages in Labor's litigation manual.

Labor's comments did not address monitoring the regional solicitors to determine whether they are seeking liquidated damages in all appropriate cases. We believe monitoring is needed to determine the extent of compliance with the instructions.

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As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 3 days from its issue date. At that time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,

Richard L. Fogel
Director

Contents

ILLUSTRATIONS

ABBREVIATIONS

FLSA	Fair Labor Standards Act
GAO	General Accounting Office
RSOL	regional solicitor of Labor
WHD	Wage and Hour Division

ACTIONS TAKEN ON PRIOR RECOMMENDATIONS

BACKGROUND

The Fair Labor Standards Act (FLSA), enacted in 1938 and amended several times, sets standards for pay for employees of firms engaged in interstate and foreign commerce.[1] While some employees, such as professionals, are excluded from the minimum wage or overtime provisions, FLSA generally requires that employees be paid (1) a minimum hourly wage, which has been $3.35 since January 1, 1981, and (2) at least 1-1/2 times their regular rate of pay for overtime work (i.e., work in excess of 40 hours in a workweek).

Employers must keep records of wages, hours, and employment practices, including (1) personal employee information, such as name and address; (2) an employee's regular rate of pay and hours worked; and (3) amounts of regular and overtime pay.

The Department of Labor's Wage and Hour Division (WHD), in its Employment Standards Administration, is primarily responsible for administering and enforcing FLSA, and the Office of the Solicitor provides legal assistance. Labor's administrative and enforcement officials and Office of the Solicitor attorneys are located in Washington, D.C., and offices throughout the United States.

WHD's compliance officers have authority to investigate and gather data on wages, hours, and other employment conditions or practices to determine compliance with FLSA. Most FLSA investigations result from employee complaints. In addition to identifying FLSA violations, compliance officers must estimate back wages--the wages that should have been paid to comply with FLSA's minimum wage or overtime provisions but were not. These officers seek voluntary payment by employers of back wages to affected employees.

Labor has no authority to assess penalties against employers found violating FLSA's minimum wage and overtime

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[1]A February 19, 1985, Supreme Court decision, Garcia v. San Antonio Metropolitan Transit Authority et al., extended FLSA coverage to millions of state and local government employees by overruling a 1976 Supreme Court decision, National League of Cities v. Usery. The 1976 decision held that FLSA coverage could not be applied constitutionally to the traditional governmental functions of state and local governments.

provisions or require them to pay back wages. However, using FLSA civil sanctions, Labor may (1) sue for back wages and an equal amount in liquidated damages on behalf of employees under section 16(c) of FLSA, (2) seek an injunction against future FLSA violations and recovery of back wages and interest under section 17, or (3) file a combination suit under both sections. The Office of the Solicitor is responsible for initiating legal action against employers or settling cases that are not resolved by WHD. Employees may sue employers under section 16(b) of the act to recover back wages and liquidated damages, unless Labor has already initiated legal action for back wages. Criminal actions may be brought against employers under section 16(a) by the Department of Justice, upon the recommendation of Labor's Office of the Solicitor, for willful violations of the act, including those related to minimum wage, overtime, and record-keeping provisions.

Labor's statistics on FLSA investigations show that, for each fiscal year from 1980 through 1984, at least 405,546 employees were due back wages and $107 million in estimated back wages was due. According to Labor, back wages restored (wages employers agree or are ordered to pay) to employees during 1980 through 1984 averaged about two-thirds of the back wages due identified during those years.[2]

In May 1981, we reported that noncompliance with FLSA's minimum wage, overtime, and record-keeping provisions was a serious and continuing problem and that employers who violated these provisions were often not penalized. We also reported that Labor was not seeking the maximum compensation permitted for employees who were due back wages. We recommended several legislative and administrative changes to strengthen Labor's enforcement program and increase the recovery of back wages.

Our prior findings and recommendations and the status of actions on the recommendations are discussed in more detail below.

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[2]Back wages repaid to employees may be less than wages reported as restored because Labor considers wages as restored if the employer made a valid effort to restore them even if the employee did not receive the wages. For example, an employer may be unable to restore wages because a former employee due back wages cannot be located. A May 1984 report by Labor's Inspector General estimated that about 95 percent of the restorations for fiscal year 1982 were actually made.

CRIMINAL PROSECUTIONS UNLIKELY

In our prior review we found that Labor had rarely sought criminal penalties against willful violators of FLSA because Labor officials believed that the Department of Justice would not prosecute such cases and that filing criminal suits would reduce Labor's ability to recover back wages by delaying resolution of the back wage question. During that review we advised Labor that five of seven U.S. attorneys we interviewed stated they would be willing to criminally prosecute FLSA cases if such cases were referred by Labor officials, and that by coordinating criminal and civil suits, delays in recovering unpaid wages could be minimized. We recommended that Labor make more use of FLSA's criminal sanctions for willful minimum wage and overtime violations, after consulting with Department of Justice officials to coordinate criminal and civil litigation strategies. Labor disagreed with our recommendation, stating that the regional solicitors of Labor (RSOLs) believed that their resources were better devoted to seeking civil remedies (under sections 16(c) and/or 17 of FLSA).

During our current review we followed up on two criminal suits that Labor's Boston regional office had sent to U.S. attorneys for action at the time of our prior review. We found that the U.S. attorneys did not attempt to prosecute either case. One case was put aside in favor of a bankruptcy fraud case involving the same employer. However, after 2 years of investigation, the U.S. attorney decided that there was not enough evidence to prosecute for bankruptcy fraud. The other case, which was referred by Labor in December 1980, was declined for prosecution by the U.S. attorney in May 1984. An assistant U.S. attorney told us that the case had gotten too old and should have been handled more expeditiously by his office.

In August 1983, at our request, the national Office of the Solicitor polled all its regions and found that, with the exception of the two cases referred to above, no criminal suits for FLSA violations had been filed during the past 5 years.[3] During our current review, however, we found that the Chicago RSOL was preparing a case for review by a U.S. attorney to determine whether it warranted criminal prosecution. In March

[3]In November 1983, an employer in Connecticut pleaded guilty to violating FLSA. The case, which also involved social security fraud, resulted from a joint investigation by the Department of Health and Human Services, the Immigration and Naturalization Service, and Labor's Office of the Inspector General.

1985, the deputy solicitor in Chicago told us that the U.S. attorney had accepted the case, which had gone to the grand jury. He said the Chicago RSOL is considering referring another case for criminal prosecution.

We discussed the criminal prosecution of FLSA violators with officials of (1) the Department of Justice's Criminal Division in Washington, D.C., and (2) the offices of U.S. attorneys in Maine and Massachusetts, which were involved with the two cases referred by Labor's Boston region. They said that although the most serious cases should be considered for criminal prosecution, Justice is generally unable to handle FLSA cases because of its heavy workload of higher priority cases, such as narcotics cases.

Justice officials consider FLSA to be a minor factor when viewed in the context of the Department's overall workload. The Deputy Assistant Attorney General for the Criminal Division in Washington, D.C., said that he could understand U.S. attorneys' reluctance to prosecute FLSA cases because they had a low priority in comparison to others.

In fact, FLSA litigation is given little priority in activities planned by U.S. attorneys. Each U.S. attorney is required to set up a Law Enforcement Coordinating Committee, consisting of federal, state, and local authorities, to develop a plan that establishes the district's law enforcement priorities. According to the assistant U.S. attorney in charge of the criminal division in Massachusetts, FLSA is not a consideration in this plan. He said that criminal referrals under FLSA are extremely rare and violations of FLSA are in the same category as other regulatory-type offenses, such as adulterating meats or overloading trucks, which Justice almost never prosecutes. According to the U.S. attorney in Maine, statistics showed that Maine had the second highest increase in criminal cases nationwide. He said that prosecution of FLSA violations is a low priority in that state.

The Justice officials we met with generally favored increased civil enforcement of FLSA, not only because of their limited resources to litigate criminal referrals, but also because they believed that existing civil sanctions are more severe than the criminal penalties. The maximum penalty for the first criminal offense is a $10,000 fine. Imprisonment is not an option until the employer's second conviction, and the maximum sentence is 6 months.

Because Justice gives FLSA criminal violations low priority, Labor's view that its resources are better spent on civil remedies is reasonable.

WAGE RECOVERIES LIMITED BY STATUTE

In 1981 we reported that considerable time usually passed from the date compliance officers started their investigations to the date RSOLs filed suit against employers. As a result, back wages were lost due to the statute of limitations. The statute has the effect of limiting recoveries to 2 years before the start of legal action except that, for willful underpayments, the period is 3 years.

The statute of limitations is tolled (stops running) in section 16(c) suits when the complaint is filed for persons named as plaintiffs in the complaint. If additional employees due back wages are identified, the statute does not toll until their names are added as plaintiffs. Section 17 of the act does not require that employees be named in the complaint to toll the statute. However, while back wages and interest can be awarded in section 17 actions, liquidated damages cannot.

We recommended that the Congress (1) give Labor authority to formally assess a violation of the act as well as the amount of illegally withheld back wages, including interest, and (2) amend the statute of limitations so that it tolls when Labor formally assesses a violation.

In this review, there was about 1 year between the date FLSA violations were identified and the date Labor filed suit and the statute of limitations tolled. Delays in tolling the statute contributed to reduced settlements in 11 of the 53 cases we reviewed.

RSOLs in Boston and Dallas said that (1) compliance officers need time to summarize their findings and discuss them with employers, (2) other regional enforcement officials usually try to negotiate settlements before referring cases for litigation, and (3) attorneys must prepare legal analyses and may have discussions with employers before filing suit.

RSOLs in Atlanta, Dallas, Kansas City, and San Francisco told us that the requirement that employees be identified to toll the statute in section 16(c) suits presents problems. For example, the RSOL in Atlanta said that naming employees is an

obstacle, especially in large cases. She said that Labor may not know the names of all affected employees when suit is filed or some employees may be reluctant to cooperate. Suits may be amended to add names, but some back wages attributable to individuals not originally named in the suits have been lost.

In 1981 we recommended that Labor compute the third year's back wages in willful violation cases. In making our recommendation we noted that Labor would have only limited success in recovering the third year's back wages until legislative changes to stop the running of the statute of limitations and strengthen enforcement authority were adopted.

During this review we found that back wage computations were still usually made for only 2 years before the time of the investigation. Only 5 of the 53 Boston, Chicago, and Dallas cases in our sample had back wage computations that exceeded 2 years. RSOL officials in Boston, Chicago, and Dallas told us that they generally allege willfulness, which has been liberally interpreted by the courts in civil suits, to establish a 3-year recovery period. This period protects the back wages identified for the 2-year period and allows a year for the time between when violations are identified and when the case is filed. (The cases we reviewed averaged about a year from the time violations were identified until Labor began legal action.) While enforcement officials in the above three regions gave several reasons for not computing back wages for 3 years, they were primarily concerned about using resources efficiently. They said it was not reasonable to spend time documenting an additional year of back wages when some or all of the claim for the additional year will be lost due to the statute of limitations.

We agree that extending investigations to 3 years would generally not be worthwhile because of the statute.

UPDATE INVESTIGATIONS AND REINVESTIGATIONS

In our prior report, we stated that Labor did not routinely investigate to determine whether any back wages were illegally withheld between the date an investigation ends and the date an employer agrees to comply. Also, Labor did not have a program to follow up on employers with a history of violations to assure that proper wages were paid. We recommended that Labor (1) update investigations before settling cases to assure that employers have come into compliance and calculate any additional

back wages and (2) establish a program to systematically monitor and reinvestigate firms found in violation of FLSA.

Labor agreed with both recommendations and stated that investigations were, in many cases, updated at the time of settlement and firms were scheduled for reinvestigation when there was doubt concerning future compliance. However, Labor said that more resources would be required to effectively implement the two recommendations and that other demands, such as a backlog of complaints, created a drain on resources that precluded regular reinvestigations.

During our current review we found that investigations were still not updated routinely. Labor did not update investigations before settlement in 42 of the 53 cases in our sample. In some cases updating was not warranted or feasible. For example, several employers had gone out of business. However, in other cases, such as eight cases involving firms that had violated FLSA one or more times, updating appeared warranted.

Regional officials agreed that update investigations are not routinely performed. While several reasons were given for this--including (1) the ability to update by another means (the pretrial discovery process), (2) verification that employers have come into compliance by the close of the initial investigation, and (3) difficulties in locating witnesses as cases get old--limited staff was also a major reason. The assistant regional administrator in Boston said that, because of limited resources, his office must focus on investigating the complaint backlog, rather than performing updates. The assistant regional administrator in Dallas said that, in some situations, updating back wages was an inefficient use of badly needed resources.

Regional officials also said that firms who had violated FLSA in the past were generally not being systematically monitored and reinvestigated. The assistant regional administrators in Boston and Dallas said that they lacked the resources to carry out a systematic monitoring program. The Chicago regional administrator and area office director said that some reinvestigations are done at the discretion of area office directors.

In view of decreases in compliance staff (see app. II) and the Garcia decision, which increased the number of employees covered by FLSA, it appears unlikely that Labor will be able to implement our prior recommendations to update investigations and monitor and reinvestigate firms that had violated FLSA.

RECORD-KEEPING VIOLATIONS CONTINUE

In our prior review, 55 of the 75 cases closed by RSOLs that we reviewed involved violations of FLSA's record-keeping provisions, and in 43 of the 55 cases, Labor had difficulty documenting the extent of FLSA violations because of the inadequate records. Also, a national questionnaire that was completed for us by Labor's compliance officers showed that 49 percent of the 4,022 cases with monetary findings that were closed administratively in June 1979 had record-keeping violations.

We stated that record-keeping violations often created a need for employees to help Labor determine the amount of back wages and to testify in court about employment conditions and practices. However, many employees did not provide the data Labor needed because they were no longer employed, could not be located, or were unwilling to testify. The use of the act's criminal provisions relating to record-keeping violations appeared impractical, and while Labor could obtain injunctions requiring employers to maintain records in accordance with the act, the monetary penalties for violating such injunctions were generally not significant. We recommended that the Congress give Labor the authority to assess civil money penalties for record-keeping violations and provide a formal administrative process for adjudicating appeals of assessments.

H.R. 6103, which was reported out by the House Committee on Education and Labor on September 30, 1982, authorized Labor to assess a civil penalty of up to $10,000 for willful record-keeping violations. Exceptions to penalty assessments would be adjudicated using the process established for violations of FLSA's child labor provisions in accordance with the Administrative Procedures Act.[4] H.R. 6103 was not enacted during the 97th Congress, and similar legislation was not introduced during the 98th or the 99th Congress as of September 16, 1985.

During this review we found that record-keeping violations continue to be a problem. Of the 53 cases in our sample from Boston, Chicago, and Dallas, Labor identified record-keeping

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[4]Under FLSA's child labor provisions, the Secretary of Labor assesses civil penalties for violations. An employer who takes exception to a penalty is entitled to a hearing before Labor's Office of Administrative Law Judges. An employer may challenge the Office's decision in a U.S. district court.

violations in 46 cases, including 10 cases in which there was also evidence that employers had falsified or concealed records. In 27 of the 46 cases the inadequate records affected Labor's ability to obtain the full amount of estimated back wages.

For example, one employer had overtime violations estimated at $12,533. There were no records of actual hours worked. The regional attorney noted that because Labor would have to rely on employee testimony and there were no addresses for 13 of the 19 employees involved, Labor should be prepared to settle for wages well below the original estimate. The final settlement was about $7,500. Although the statute of limitations had some impact on the settlement reached--about 3 months of the wages due four employees fell outside the statute period--it appeared that lack of records to support the wage estimate was the major reason why Labor accepted the settlement.

Lack of adequate records was a problem in 16 of the 17 liquidated damages cases we reviewed in which settlements were less than Labor's back wage estimates.

RSOL and compliance officials in Boston, Chicago, and Dallas said that employers benefit from not maintaining adequate records because, without accurate records, Labor is usually not able to substantiate its back wage estimate and employers will not have to pay all the estimated back wages. For example, the Boston area office director said that, as a result of record-keeping problems, most back wage estimates are based on employee statements, and employees may be unreliable, unlocatable, or uncooperative. The above officials said they believed civil money penalties would help deter record-keeping violations.

LIQUIDATED DAMAGES

In our 1981 report, we stated that the liquidated damages provision of FLSA was not an effective deterrent because it was not being used. Labor had not filed suit for liquidated damages in any of the 75 cases we sampled. Back wages and interest were usually sought under FLSA's injunctive provisions (section 17). The RSOLs told us that they rarely sought liquidated damages because of difficulties that prevented such cases from reaching trial. (See p. 12.)

We recommended that the Congress (1) eliminate the liquidated damages provision of FLSA and, in its place, authorize Labor to assess civil money penalties large enough to

deter minimum wage and overtime violations and (2) provide for a formal administrative process to adjudicate cases when employers appeal Labor's assessments.

The previously mentioned H.R. 6103 would have replaced the liquidated damages provision in suits filed by Labor with a provision that would make an employer who violated the minimum wage or overtime provisions liable for the back wages plus interest for a first violation and three times the back wages for subsequent violations. Labor would pay the affected employees any back wages collected plus interest. Any remaining amounts collected would be kept by the government. Employees could sue for damages equal to the amount of back wages.

Some RSOLs are making regular use of liquidated damages provision

In commenting on our 1981 report, Labor stated that it was much more common to file suit under the liquidated damages provision than it had been at the time we made our review. Our follow-up review substantiated Labor's view and showed that Labor is seeking liquidated damages more frequently and with some success in certain regions.

The cases in our follow-up review in Boston, Chicago, and Dallas showed continued infrequent use of the liquidated damages provision. Only 5 of the 53 cases involved suits for liquidated damages. Therefore, we visited three regions--Atlanta, Kansas City, and San Francisco--that, according to data provided by the national solicitor's office, had been seeking liquidated damages more often[5] and reviewed in each region a random sample of 10 cases involving suits for liquidated damages.

The RSOLs obtained liquidated damages in five cases and obtained presettlement (or prejudgment) interest--interest from the date wages should have been paid to the settlement or judgment date--in lieu of liquidated damages in three other cases.

An example shows how the liquidated damages provision was being used to obtain additional compensation for employees. A bar and restaurant, which had previously violated FLSA, was cited for failing to pay the minimum wage and for paying only

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[5]The Boston RSOL reported that in 33 percent of its litigated cases, liquidated damages were sought. However, that figure was for cases pending as of July 1983.

the regular hourly rate for overtime hours worked. Labor's compliance officer was able to support the entire back wage computation using the employer's payroll records; the total back wage estimate was about $7,100. Labor filed suit under sections 16(c) and 17 of FLSA to recover the unpaid wages and an equal amount in liquidated damages and to obtain an injunction against future violations. The final settlement included an injunction and called for the employer to pay all of the back wages found due and an additional 50 percent in liquidated damages. The employer paid the amount in full.

In the remaining 22 of 30 cases, final settlement did not include either liquidated damages or presettlement interest, but there was evidence that the RSOL was sometimes able to use the section 16(c) suit as a bargaining tool to increase the back wage award. For example, in seven cases, Labor dropped its demand for liquidated damages in return for getting all of the estimated back wages due. Because of a lack of records in some cases, the back wages computed by the compliance officers had to be based on employee statements. In other cases, the firms were having financial difficulties. In a few other cases where Labor did not obtain all of the estimated back wages due, the RSOL attorneys with whom we discussed the cases believed that the final back wage award was substantially more than what could have been proven in court.

Evaluating the effectiveness of section 16(c) usage is difficult because many factors impair Labor's ability to negotiate and affect the final settlement amount. For example, in 17 of the 30 cases sampled, the settlement was less than 100 percent of Labor's back wage estimate, and the lack of adequate records was a problem in 16 of those cases. There were records to support part of the estimate in 5 cases, but there were no records in the other 11 cases. As a result of the lack of records, Labor had to depend on employee testimony to substantiate the back wage claims. This affected the settlement because, in eight cases, the employees were uncooperative, unlocatable, or unwilling to testify or they supported management's position.

Other factors that contributed to reduced settlements included the statute of limitations (four cases), employer financial problems (four cases), and inflated compliance officer estimates (six cases). The latter item appeared to be related to the record-keeping problem.

Anticipated problems in seeking liquidated damages do not appear serious

During our prior review, RSOL officials told us that the major reasons they did not pursue liquidated damages were the lengthy wait for trial required in many courts, Labor's reluctance to bring FLSA cases before a jury, the low priority FLSA cases receive in district courts, and limited resources to pursue more cases to trial. In addition to the trial-related concerns, the officials noted evidence problems due to inadequate records. Except for the evidence problems, which continue to limit the effectiveness of section 16(c) and FLSA enforcement overall, the problems cited previously in three Labor regions are not currently a significant hindrance in the three other regions we visited where the RSOLs are regularly filing suit under section 16(c).

When the RSOLs we visited in the prior review raised the above concerns, the implication was that liquidated damages could not be obtained unless the suit went to trial. However, according to the RSOLs in Atlanta, Kansas City, and San Francisco, the vast majority of section 16(c) cases are settled out of court, and as part of the settlement, some employers agree to pay liquidated damages or interest. As discussed, the major factor in determining the amount of the settlement in these cases appeared to be the difficulty of obtaining adequate evidence to support the back wages estimates.

The concerns raised during our prior review were raised by RSOLs who had little experience with the liquidated damages provision because they rarely filed suit under section 16(c). In Boston, where the frequency of filing section 16(c) suits had increased since our prior review, the RSOL was having some success in obtaining liquidated damages. The counsel for FLSA provided data showing that, from January 1982 to July 1983, the Boston office had collected liquidated damages averaging 29 percent of the back wage award in 15 cases. The 15 cases resulted in judgments or agreements to pay $180,101 in back wages and an additional $51,730 in liquidated damages.

Inconsistent application of the liquidated damages provision

After our 1981 report was issued, the national Office of the Solicitor encouraged the RSOLs to make greater use of section 16(c), but did not issue a formal directive.

APPENDIX I

In January 1983, the national office issued a revised litigation manual for all Labor attorneys. Although the manual presents factors to consider in selecting a litigation strategy, it represents general guidance rather than official policy.

The litigation manual provides that the types of monetary relief requested will vary with the nature of the case. It states that the type of relief requested is generally left to the RSOL's discretion and offers some considerations for guidance. The manual states that suits under section 16(c) should be considered in all cases. However, the manual states that seeking monetary relief under section 17 may be appropriate when (1) Labor does not know the names of a substantial number of affected employees, (2) jury dockets are badly clogged and defense counsel tends to request jury trials (there is no right to a jury trial under section 17) purely as a delaying tactic, (3) a jury would be unsympathetic to the case, (4) the employer may not be able to pay liquidated damages, and (5) a possible good-faith defense against liquidated damages is a close issue.

RSOLs differ in their use of the liquidated damages provision. In August 1983, national solicitor officials polled each region to obtain an estimate of the suits filed seeking liquidated damages as a percentage of total litigated FLSA cases. The RSOLs provided the information presented in table I.1.

The Associate Solicitor and Deputy Associate Solicitor for FLSA believed that the wide variation in the frequency of liquidated damages suits is a reflection of the differing circumstances in the regions. For example, in a low-wage area, there may be more clear-cut cases, but in an area with relatively high wages, there may be more cases involving technical violations or exemption issues which may not be considered appropriate for a section 16(c) suit due to the risk of a jury trial. In addition, they said that some regions may have a problem with naming all affected employees in the complaint because they have a higher percentage of FLSA violations involving illegal aliens or other transient employees.

There appeared to be a strong relationship between the RSOLs' views on the purpose of liquidated damages and the frequency of filing suit under section 16(c). When the RSOL's focus was on compensating employees rather than penalizing employers, section 16(c) suits were filed more frequently.

Table I.1

Regional Offices' Percentage of Liquidated Damages Suits to Total Litigated Cases

Regional office	Percentage of liquidated damages suits to total litigated cases
Atlanta	50
Boston	33
Chicago[a]	Infrequently
Dallas	10-15
Kansas City	80-85
New York[b]	67
Philadelphia	50
San Francisco	30

[a]The Chicago RSOL reported that it had been using 16(c) more often during the year preceding the poll, but did not provide a percentage.

[b]This percentage reflects use of 16(c) at the time of the poll; before that, the New York RSOL sought liquidated damages about 25 percent of the time.

Chicago and Dallas generally would not file suit for liquidated damages unless the violations were flagrant. Boston would not seek liquidated damages unless the employer had no reasonable grounds for believing it was in compliance with FLSA. Although Boston pursued liquidated damages more frequently at the time we followed up, Dallas had the lowest estimated rate of section 16(c) suits nationwide and Chicago reported that it sought liquidated damages infrequently.

Atlanta, Kansas City, and San Francisco were more frequently filing suit under section 16(c). Kansas City sought damages most frequently--in 80 to 85 percent of its litigated cases. The Kansas City RSOL said that his policy was to always file suit under section 16(c) unless there was a good reason not to do so (e.g., in a case that involves a complicated issue, such as a technical exemption). He believed that, because the purpose of the liquidated damages provision is to compensate employees for delayed payment of wages, it should be standard practice to seek damages. The Atlanta RSOL, whose philosophy was similar to that expressed in Kansas City, filed suit under

section 16(c) less frequently than Kansas City but more often than most other regions.

The estimated frequency of liquidated damages suits in San Francisco was 30 percent. This RSOL gave greater consideration to the employer's intent to comply with FLSA in determining whether to seek damages. The RSOL told us that the usual grounds for section 16(c) suits in San Francisco include employers having prior violations or falsifying records to intentionally circumvent the act. He characterized liquidated damages as a penalty against employers--although the end result of the recovery procedure is to compensate employees--and believed that 16(c) suits are not appropriate in some cases, such as a first offender who inadvertently violated FLSA.

Case law supports the propriety of seeking liquidated damages as compensation for employees. In 1942, the Supreme Court held that employees were entitled to liquidated damages regardless of an employer's intentions. The Portal-to-Portal Act of 1947 later gave an employer the opportunity to establish a good-faith defense and thereby attempt to reduce or eliminate the liquidated damages assessment. However, the fact that there may be some evidence of an employer's good-faith effort to comply with FLSA does not preclude an assessment of liquidated damages.

Our sample of 53 closed cases from the Boston, Chicago, and Dallas RSOLs showed that presettlement interest was always requested in actions filed when liquidated damages were not requested. However, it was obtained as part of the final settlement in only 2 of the 38 cases involved.[6] In one case, the Labor attorney negotiated interest as part of the settlement agreement, and in the other, the court awarded interest in a default judgment.

In explaining the infrequent recovery of presettlement interest, RSOLs in Boston, Chicago, and Dallas told us that the interest is used as a negotiating tool to maximize the back wage recovery. The lack of success can be partly attributed to the fact that the RSOLs encounter the same problems that affect the settlements in liquidated damages cases.

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[6]Back wages were not sought in legal actions filed in 10 of our 53 sample cases. Of the 43 cases in which back wages were sought, liquidated damages were requested in 5, and interest, but no liquidated damages, was requested in 38. Liquidated damages were obtained in 1 of the 5 cases.

Conclusions

In our 1981 report, we concluded that the section 16(c) liquidated damages provision was not an effective deterrent because it was not being used. We recommended that the Congress eliminate the provision and replace it with civil money penalties for minimum wage and overtime violations that would be adjudicated by administrative law judges. We also recommended that the Congress authorize Labor to formally assess a violation of FLSA as well as the amount of illegally withheld back wages due and the related interest. Such action has not been adopted by the Congress.

Our follow-up review showed that some RSOLs are regularly filing suit under section 16(c) and are sometimes successful in obtaining liquidated damages. In other cases the RSOLs have apparently used liquidated damages as a negotiating tool to maximize the recovery of back wages.

We believe that, while employers' good faith should be considered in negotiating settlements, some regions are giving the employers' intent too much weight in deciding whether to sue under the liquidated damages provision, which is primarily designed to recompense employees rather than to punish employers. We realize that employers may not be required to pay liquidated damages in all cases, depending upon the court's discretion. However, most cases are settled out of court, and the issue of liquidated damages is usually determined in negotiations between Labor and the employer. Also, based on the cases we reviewed, the regions were less successful in obtaining interest in section 17 cases than they were in obtaining liquidated damages or interest in lieu of liquidated damages in section 16(c) cases.

Several factors, such as poor records and the statute of limitations, can contribute to a reduced settlement in FLSA suits. By seeking back wages plus an equal amount in liquidated damages, Labor can establish a much higher negotiating base and thus can mitigate the impact of these factors on the final settlement amount.

We believe that the RSOLs, when they decide to take legal action, should routinely seek monetary relief under section 16(c). The factors cited in the litigation manual for deciding whether to seek back wages and liquidated damages under section 16(c) or back wages and interest under section 17 have merit. However, action is needed to help ensure that RSOLs seek liquidated damages unless the factors clearly indicate that a

section 17 action is more likely to result in greater benefits to employees who are due back wages.

In our draft report, we proposed that the Secretary of Labor direct the Solicitor of Labor to seek increased use of liquidated damages by:

--Emphasizing in the Labor litigation manual that the section 16(c) liquidated damages provision is intended to compensate employees for delayed payment of wages. Therefore, liquidated damages should be routinely sought unless the circumstances of a case indicate that seeking back wages and interest under FLSA's section 17 injunctive provisions is likely to provide greater benefits to employees.

--Monitoring the RSOLs to determine whether they are seeking liquidated damages in all appropriate cases.

As previously noted, Labor, on August 20, 1985, instructed its regional solicitors' offices to seek liquidated damages unless the factors in the litigation manual indicate that doing so would be inappropriate. As a result of this action, we no longer believe it is necessary to revise the litigation manual. However, we believe that Labor should monitor the regional solicitors' offices to determine the extent of compliance with the August instructions.

Recommendation to the Secretary of Labor

We recommend that the Secretary direct the Solicitor of Labor to monitor the regional solicitors to determine whether they are seeking liquidated damages in all appropriate cases.

COMPLIANCE OFFICER STAFFING AND WORKLOAD

The Subcommittee requested that we determine how reductions in compliance officer staffing and the assignment of additional duties unrelated to wage and hour enforcement since the time of our 1981 report had affected enforcement of FLSA's wage and hour requirements.

Compliance officers spend time on various activities, including (1) the enforcement of FLSA; (2) the enforcement of other Labor-administered laws, such as the Davis-Bacon Act (which regulates the wages paid on federal or federally funded construction projects); and (3) nonenforcement activities, such as technical assistance, training, and leave. Table II.1, based on reports prepared by Labor, presents for fiscal years 1980-84 the total full-time equivalent compliance officer staff-years, excluding supervisory and clerical personnel; the time spent on FLSA enforcement, other enforcement, and nonenforcement activities; the number of FLSA investigations; and the amount of back wages identified annually.

Although total compliance officer staff-years have decreased, the percentage of time spent on FLSA investigations has remained relatively constant. According to the Director of Fair Labor Standards Policies and Procedures, the decrease in investigations in fiscal year 1983 was attributable to (1) a new reporting format that eliminated some duplicate reporting of investigations from the system; (2) a 1982 reduction-in-force that affected the number of investigations that could be completed in 1983; and (3) the hiring in 1983 of about 100 new compliance officers, who spent considerable time in training.

In fiscal year 1984, Labor planned to have the full-time equivalent of 929 compliance officers and spend 535 staff-years on direct FLSA enforcement. However, it actually had the full-time equivalent of 895 staff-years and spent 474 staff-years on direct FLSA enforcement because (1) compliance officers were not hired fast enough as existing staff left and (2) time spent on nonenforcement activities (primarily leave and training) and enforcement activities other than FLSA was greater than planned.

Table II.1

Compliance Officer Activity

	Fiscal year				
	1980	1981	1982	1983	1984
Compliance officer staff-years					
FLSA enforcement	587	558	516	468	474
Other enforcement	135	130	102	113	124
Total enforcement	722	688	618	581	598
Nonenforcement	376	328	309	313	297
Total compliance officer staff-years	1,098	1,016	927	894	895
Percent of compliance officer time					
FLSA enforcement	54	55	56	52	53
Other enforcement	12	13	11	13	14
Total enforcement	66	68	67	65	67
Nonenforcement	34	32	33	35	33
Total compliance officer time	100	100	100	100	100
Number of FLSA investigations	76,377	71,195	75,195	64,053	64,155
FLSA back wages identified (in millions)	$111	$127	$130	$114	$107

APPENDIX II

There appears to have been no significant diversion of compliance officers to duties unrelated to their usual enforcement activities. Compliance officers sometimes provide assistance in other program areas, such as supervising the rerunning of union elections for Labor's Office of Labor-Management Standards. However, during fiscal years 1982, 1983, and 1984, less than 2 percent of the compliance officers' time was reported as being spent in these unrelated program areas.

The Garcia decision has significantly expanded FLSA coverage. The Assistant Administrator of WHD's Office of Program Operations advised us that nearly all of an estimated 13 million state and local government employees are now covered by FLSA as a result of the Garcia decision. However, FLSA provides exemptions from the minimum wage and overtime provisions for certain types of employees, such as teachers and other professionals. He estimated that about 7 million state and local government employees are now covered by FLSA's minimum wage and overtime provisions.

After the Garcia decision, WHD instructed its field offices that, while they should be receptive to complaints involving state and local government employers, no investigations of such complaints were to be scheduled. Copies of the complaints were to be sent to WHD's national office. On May 30, 1985, a wage and hour analyst in WHD told us that WHD had received about 160 such complaints.

On June 14, 1985, Labor decided that FLSA investigations could be conducted immediately for most jobs that Labor had previously determined were "nontraditional" government functions, such as operating alcoholic beverage stores. Other investigations would not be scheduled until October 15, 1985, to allow government bodies to adjust their compensation systems to meet FLSA requirements.

OBJECTIVES, SCOPE, AND METHODOLOGY

We made this review to determine what actions had been taken on the recommendations made in our May 28, 1981, report Changes Needed to Deter Violations of Fair Labor Standards Act (HRD-81-60). At the request of the Chairman, Subcommittee on Labor Standards, House Committee on Education and Labor, we also examined the impact of staff reductions and the assignment of other duties to remaining staff on FLSA enforcement. We made our review at (1) WHD, within the Employment Standards Administration in Labor's headquarters in Washington, D.C.; (2) the Office of the Solicitor's Division of Fair Labor Standards in Washington, D.C.; (3) 6 of the 8 RSOL offices (Atlanta, Boston, Chicago, Dallas, Kansas City, and San Francisco); and (4) 3 of WHD's 10 regional offices (Boston, Chicago, and Dallas) as well as one area office in each of the three cities. We met with officials of the Department of Justice Criminal Division in Washington, D.C., and the Office of the U.S. Attorney in Maine and Massachusetts. We also reviewed legislative proposals to amend FLSA.

We met with officials from WHD and the Division of Fair Labor Standards within the Office of the Solicitor to discuss the problems we had noted in our 1981 report, any changes in administrative policy or procedures, and the current status of FLSA enforcement. We also discussed FLSA litigation policies and strategies with Solicitor officials.

Within WHD, we met with the Deputy Administrator; the Assistant Administrator, Office of Program Operations; and other WHD officials. Our discussions within the Office of the Solicitor included the Associate Solicitor and Deputy Associate Solicitor for FLSA.

We initially performed our fieldwork primarily in the same three Labor regions covered in our 1981 report--Boston, Chicago, and Dallas. The major reason for selecting the same regions was to compare our findings with those of our prior review.

Generally, the ultimate impact of the problems we identified previously was most evident in the cases submitted for litigation. Therefore, we focused the follow-up review on selected cases the RSOL closed and supplemented our case analyses by discussing major issues with Labor officials.

At the initial RSOLs visited, we interviewed the regional solicitor and deputy solicitor in Chicago and the regional solicitor, deputy solicitor, and counsel for FLSA in both Boston

and Dallas. Our discussions with regional officials included the assistant regional administrators for WHD and their deputies in Boston and Dallas and the Employment Standards Administration regional administrator and the assistant regional administrator for WHD in Chicago. At the area office level, we spoke to the area office director in Boston, the area office director and a compliance officer in Chicago, and the assistant area office director in Dallas.

To follow up on previously identified problems, we reviewed a random sample of 10 percent of the cases closed at each RSOL in Boston, Chicago, and Dallas. Our samples were selected from cases resolved during the 15-month period from October 1, 1981, to December 31, 1982. Our sample of 53 cases consisted of 24 of the 243 cases closed in Boston, 14 of the 138 cases closed in Chicago, and 15 of the 154 cases closed in Dallas. Our sample results are not projectable nationwide or within the selected regions.

Through the case review, our goal was to determine whether previously identified problems remained and whether Labor had changed its policies or procedures. In our interviews with Labor officials, we obtained comments on each area, including the current status and changes in policies and procedures.

We later expanded our work on section 16(c) (liquidated damages) suits because officials from the national Office of the Solicitor provided data that showed that some other RSOLs were seeking liquidated damages more frequently than we found in our 53 sample cases for Boston, Chicago, and Dallas.

The additional audit work was performed at the RSOLs in Atlanta, Kansas City, and San Francisco. We selected these three offices because they all had significant experience with section 16(c) suits; they estimated that 16(c) suits represented from 30 to 85 percent of their total litigated cases.

To obtain more information on the use of the section 16(c) liquidated damages provision, we selected a random sample of 10 cases for review at each RSOL. Because the RSOL computer system was not programmed to generate data based on the specific legal action filed in court, we manually determined, with the assistance of each RSOL, each universe of liquidated damages cases from an FLSA closed-case printout for the sample period, which included cases closed during the 18-month period ended June 30, 1983. The universe of section 16(c) cases identified for the sample period was 34 in Atlanta, 74 in Kansas City, and 25 in San Francisco.

The case review was supplemented with interviews of cognizant RSOL officials to resolve questions and to obtain general policy and views on section 16(c) actions. We spoke to the regional solicitor and the deputy solicitor in Kansas City and San Francisco and the regional solicitor and counsel for FLSA in Atlanta. To follow up on specific cases, we met with the attorneys responsible for litigation. The results of our sample are not statistically projectable.

Within the Department of Justice, we interviewed (1) the Deputy Assistant Attorney General and an attorney from the Criminal Division at the Department's Washington, D.C., headquarters; (2) the Assistant U.S. Attorney in charge of the Criminal Division from the Office of the U.S. Attorney in Massachusetts; and (3) the U.S. Attorney and an Assistant U.S. Attorney from the Office of the U.S. Attorney in Maine. We obtained their views on the prosecution of criminal cases under FLSA, the status of referrals from Labor, and suggestions for improving the litigation process.

To examine the impact of the changes in WHD compliance officer staffing and workload, we analyzed the WHD management and staffing reports covering fiscal years 1980-84. We did not verify the data in these reports.

We computed the percentage of full-time equivalent staff years devoted to FLSA enforcement and to other activities, obtained information on assigned duties, and reviewed data on the number of investigations and amounts of back wages identified. Because the way Labor reported compliance officer time changed somewhat during the 5-year period, we made adjustments to the data shown in WHD's compliance officer staffing report (currently called the QR&A Assistance Report) for consistency. For example, time spent on wage surveys for government contracts was included in enforcement time (not FLSA enforcement) until fiscal year 1983, when it was reported as nonenforcement time. We included wage survey time in nonenforcement time for the entire 5-year period. Our adjustments generally involved small numbers of staff-years and for FLSA enforcement time, involved only 1 staff-year.

We also reviewed legislative proposals to amend FLSA during the 97th and 98th Congresses and the 99th Congress through September 16, 1985. Our review of legislation was primarily focused on H.R. 6103 and its legislative history because H.R. 6103 was the only legislation we identified that addressed the problems discussed in our 1981 report.

Our work was performed in accordance with generally accepted government auditing standards.

APPENDIX IV

U.S. Department of Justice

Washington, D.C. 20530

August 28, 1985

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

Dear Mr. Anderson:

This letter responds to your request to the Attorney General for the comments of the Department of Justice on your draft report to the Chairman of the House Subcommittee on Labor Standards, Committee on Education and Labor, entitled "The Department of Labor's Enforcement of the Fair Labor Standards Act." The report is a follow-up review of corrective actions taken by the Department of Labor on recommendations contained in a 1981 General Accounting Office (GAO) report. The 1981 report provided recommendations to improve enforcement of the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act (FLSA).

The Department's comments are limited to GAO's continuing observation that United States Attorneys are reluctant to devote significant resources to the prosecution of FLSA criminal offenses under 29 U.S.C. § 216(a). In its comments to the 1981 GAO report, the Justice Department implied that federal prosecutors may be reluctant to utilize § 216(a) because an initial criminal violation is punishable only by a fine of $10,000. Terms of imprisonment of up to 6 months can only be imposed after a second conviction (See enclosure). Because of limited prosecutive and judicial resources, United States Attorneys' offices may have been unwilling to pursue initial criminal prosecution in part because of the minimal penalties involved. Thus, the failure to pursue the initial criminal prosecution has not only been a problem in itself, but the absence of an initial conviction has consequently foreclosed the possibility of imposition of the more severe criminal penalties appropriately applicable to repeat violators. GAO may wish to recommend in its report to the Congress an amendment to the FLSA allowing a term of imprisonment for convictions under § 216(a) when a repeat offender has been subject to a prior civil judgment in an action brought by the Secretary of Labor under the Act.

We appreciate the opportunity to provide comments on the report while in draft form. Should you have any questions concerning our comments, please feel free to contact me.

Sincerely,

W. Lawrence Wallace
Assistant Attorney General
for Administration

Enclosure

GAO note: The enclosure, which is not included in this report, is a copy of the Department of Justice's comments on our May 28, 1981, report.

APPENDIX V

U.S. Department of Labor

Deputy Under Secretary for
Employment Standards
Washington, D.C. 20210

SEP - 4 1985

Mr. Richard L. Fogel
Director
Human Resources Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

In reply to your letter to the Secretary of Labor, dated July 23, 1985, requesting comments on the draft GAO report entitled: "The Department of Labor's Enforcement of the Fair Labor Standards Act", the Department's response is enclosed.

The Department appreciates the opportunity to comment on this report.

Sincerely,

Susan R. Meisinger
Deputy Under Secretary

Enclosure

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

The Department of Labor's Enforcement of the
Fair Labor Standards Act

GAO Recommendation

"We recommend that the Secretary direct the Solicitor of Labor to seek increased use of liquidated damages by

--emphasizing in the Labor litigation manual that the section 16(c) liquidated damages provision is intended to compensate employees for delayed payment of wages. Therefore, liquidated damages should be routinely sought unless the circumstances of a case indicate that seeking back wages and interest under FLSA's section 17 injunctive provisions is likely to provide greater benefits to employees.

--monitoring the regional solicitors to determine whether they are seeking liquidated damages in all appropriate cases."

Response

The Department concurs generally with the thrust of the recommendation.

Comment

The Department concurs that Regional Solicitors be instructed to utilize more routinely the liquidated damages remedy under Section 16(c) of the Fair Labor Standards Act (FLSA) in enforcement actions. The Deputy Solicitor for Regional Operations has issued instructions to the regional offices to implement this policy. The Department does not agree with the proposed revision of the Litigation Manual. It is viewed that the Manual in its present form sufficiently stresses the preferred status of the Section 16(c) remedy, as well as setting out factors which may render it inappropriate in specific cases.

Additional Comments

It was noted that, on page 20 of Appendix II and page 21 of Appendix III, reference is made to the "Office of Fair Labor Standards". The name of this organization has been changed to "Office of Program Operations".

GAO note: Page references in this appendix have been changed to correspond to page numbers in the final report.

(201650)

UNITED STATES
GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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