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Report to the Chairman, Committee on Labor and Human Resources, U.S. Senate

June 1988

THE FAIR LABOR STANDARDS ACT

Extending the Act to State and Local Government Employees

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GAO

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Washington, D.C. 20548

Human Resources Division

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June 29, 1988

The Honorable Edward M. Kennedy
Chairman, Committee on Labor
and Human Resources
United States Senate

Dear Mr. Chairman:

This report is in response to your request and later discussions with your office that we review the steps taken by the Department of Labor to implement the Supreme Court's February 1985 Garcia decision concerning the Fair Labor Standards Act (FLSA). This decision and the FLSA Amendments of 1985 extended FLSA to additional state and local government employees.

FLSA, which is administered by Labor's Wage and Hour Division (WHD), sets minimum wage and overtime pay standards for employees of firms engaged in interstate and foreign commerce. WHD administers FLSA through its Washington headquarters staff as well as its enforcement staff, composed mainly of compliance officers in the field—10 regional offices, 64 area offices, and 244 field stations throughout the United States. Most of the WHD compliance officers' enforcement efforts involve investigating employees' complaints of employers' alleged violations of FLSA. To recover back wages due employees, Labor can initiate legal action against employers who violate FLSA; Labor can also seek an injunction to restrain employers from future violations.

We agreed to focus our review on (1) the initial steps and actions WHD took to implement the Garcia decision and the 1985 amendments and (2) WHD's progress in its implementation and enforcement efforts.

Our review was done from November 1987 to March 1988, primarily at Labor's Washington headquarters. Here we (1) examined WHD's technical assistance efforts, policies, regulations, and reports on FLSA enforcement activities, discussing them with WHD officials, and (2) spoke with officials in selected state and local government employer and employee organizations to obtain their views on the effectiveness of Labor's implementation and the impact of the Garcia decision and the 1985 amendments.

WHD's Initial Actions to Implement the Decision and 1985 FLSA Amendments

WHD's initial efforts to implement the Garcia decision and the 1985 amendments are summarized below:

- WHD initiated a nationwide program to provide technical assistance to state and local government employers and employees. The program included sending pertinent information on FLSA to about 83,000 state and local government agencies; establishing a toll-free telephone number to provide assistance; and notifying seven major organizations, representing state and local government employers, of the assistance program and the toll-free line.
- WHD published proposed regulations implementing the 1985 amendments in April 1986, and, after receiving and analyzing 165 sets of comments, issued the final regulations, which became effective February 17, 1987.
- WHD (1) established new investigative policies to guide staff in the field in reviewing state and local government employees' complaints alleging noncompliance with FLSA and (2) held training programs on the application of FLSA for WHD staff in the field and for state and local government personnel.
- WHD received the 10 additional compliance officer full-time equivalent positions Labor had requested in fiscal year 1987 to handle the new responsibilities under the Garcia decision and the 1985 amendments.

WHD's Implementation Progress

The steps in WHD's implementation program are summarized below:

- During fiscal years 1985 through 1987, WHD received 2,105 (17 of these were prior to 1985) state and local government employees' complaints; WHD investigated, conciliated, or closed 1,612 of the complaints. The complaint backlog, as of September 30, 1987, was 493.
- On the basis of WHD's investigations, state and local government employers with alleged FLSA violations agreed to pay employees back wages due, totaling $4.2 million from 1985 through 1987.
- Since Garcia, WHD has issued several hundred opinion letters to state and local government employees, employers, and the public. These letters represent WHD's opinions on the applicability of FLSA—particularly the 1985 amendments—to specific situations.

Labor officials believe their investigative policies have been effective and that state and local government employing agencies generally are complying with FLSA. WHD has little data, however, to support this view.

In our discussions with employee and employer organizations, we obtained generally positive views on (1) Labor's implementation of Garcia and the 1985 amendments and (2) state and local governments' compliance with FLSA. But two unions and one employer organization expressed dissatisfaction with the timeliness and adequacy of WHD's responses to requests for opinion letters on the correct interpretation of FLSA. WHD officials have proposed steps to address these issues.

As requested, we did not obtain written comments from Labor on this report. However, Labor officials were given an opportunity to review a draft, and their comments have been included where appropriate. As arranged with your office, unless its contents are announced earlier, we plan no further distribution of this report until 30 days from its issue date. At that time, we will send copies to the Secretary of Labor and other interested parties and make copies available to others on request.

Sincerely yours,

Janet L. Shikles

Janet L. Shikles
Associate Director

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Abbreviations

FLSA	Fair Labor Standards Act
FTE	full-time equivalent
WHD	Wage and Hour Division

The Fair Labor Standards Act: Extending the Act to State and Local Government Employees

Introduction

The Department of Labor administers the Fair Labor Standards Act (FLSA), enacted in 1938 and amended several times, which covers employees of firms engaged in interstate and foreign commerce. FLSA sets standards for minimum wage, overtime pay, and recordkeeping; covered employers are required to follow these standards. The act exempts executive, administrative, and professional employees, however, from both the minimum wage and overtime provisions.

The original FLSA specifically excluded state and local governments and their employees from its coverage. In a series of amendments, beginning in 1966, the Congress extended the provisions of FLSA to various types of public employees. This series of broadening amendments culminated in 1974, when the Congress amended FLSA by extending the maximum wage and overtime pay provisions to virtually all state and local government employees. On June 24, 1976, the Supreme Court, in National League of Cities v. Usery, 426 U.S. 833 (1976), ruled that (1) the 1974 amendments were unconstitutional and (2) the minimum wage and overtime pay provisions of FLSA were not constitutionally applicable to the integral and traditional governmental functions of states and their political subdivisions, such as providing fire and police protection. The Court's decision did not affect state and local government employees engaged in activities that were nontraditional functions of government, such as alcoholic beverage stores and off-track betting corporations.

A legal controversy arose after the Usery decision when WHD, in September 1979, made a determination that publicly operated local mass transit systems were considered nontraditional and thus subject to FLSA's requirements. The San Antonio Metropolitan Transit Authority challenged the determination and filed suit in federal district court in November 1979, asserting it was unconstitutional to enforce FLSA against a city-owned bus system. Also in November 1979, Joe G. Garcia, vice president of the San Antonio local of the Amalgamated Transit Union and an employee of the San Antonio Transit Authority, filed suit under FLSA, seeking back wages he asserted were due under the act. In addition, in February 1980, Labor filed a counterclaim against the San Antonio Transit Authority on behalf of the bus system's employees, seeking back pay and injunctive relief from further violations of the act.

The Supreme Court eventually heard the cases, and on February 19, 1985, in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), overturned the Usery decision, ruling that the Congress does have the authority to apply the FLSA minimum wage and overtime pay requirements to state and local governments' employees who are

engaged in traditional governmental activities. As a result, state and local units of government were required, among other things, to compensate with cash wages rather than compensatory time off those government employees in traditional activities (except those specifically excluded, such as professional employees) who work overtime.

The decision evoked concern by state and local government administrators, taxpayers, union officials, and the Congress about the fiscal impact of the decision on state and local government units. Some state and local employer organizations, such as the National Public Employer Labor Relations Association, estimated the cost of complying with the decision to be somewhere between $1 to $3 billion annually. Consequently, on November 14, 1985, the Congress enacted the FLSA Amendments of 1985 to, among other things, allow covered state and local employees to receive compensatory time off under certain conditions in lieu of cash compensation for overtime. As a result of the Garcia decision and the 1985 amendments, Labor estimated that (1) approximately 7.7 million state and local employees in about 83,000 government units are covered under FLSA and (2) wages for state and local government employees would increase by an estimated $612 million annually.

FLSA Enforcement

Labor's Wage and Hour Division (WHD) in Washington, D.C., within the Employment Standards Administration, is responsible for enforcing FLSA. WHD's Branch of Fair Labor Standards Enforcement, in the Division of Fair Labor Standards Operations, is primarily responsible for administering the Garcia decision and the 1985 amendments. Labor's administrative and enforcement officials are located in Washington headquarters, 10 Employment Standards Administration regional offices, 64 WHD area offices, and 244 field stations throughout the United States.

FLSA enforcement is carried out primarily by compliance officers who undertake two types of compliance actions—conciliations and investigations:

- Conciliations typically are initiated as a result of an employee complaint, involve only one employee, and generally take only a few hours to complete. When conducting conciliations, the compliance officers generally do not visit the employers' premises or review the employers' records.
- Investigations are more detailed and take an average of 20 hours to complete. An investigation is initiated as a result of (1) an employee

complaint or (2) WHD's targeting, in its annual operating plan, specific industries or those in geographical areas that are suspected of violating the act. An investigation includes an on-site visit by a compliance officer who reviews the employer's records, interviews employees, and computes any back wages due.

Using authority under FLSA to bring civil actions for violations of minimum wage and overtime requirements, Labor, on behalf of employees, may (1) sue employers for back wages as well as for an equal amount in liquidated damages or (2) seek an injunction restraining employers from future FLSA violations and the recovery of back wages and interest. Labor may also do both.

Objectives, Scope, and Methodology

We agreed, on the basis of the Chairman's request and later discussions with the Committee's office, to focus our review on the (1) initial steps and actions WHD took to implement the Garcia decision and the 1985 amendments and (2) progress made by WHD in its implementation and enforcement efforts.

We did our work primarily at WHD's Washington headquarters, where we (1) reviewed FLSA enforcement policies, procedures, practices, and regulations and (2) examined reports and statements prepared by WHD and others on the financial impact of the Garcia decision and the 1985 amendments on state and local governments. In addition, we obtained information on WHD's technical assistance efforts, staff training programs, staff resources, and investigative policies established to assure state and local governments' compliance with FLSA. We also analyzed various WHD reports for fiscal years 1985-87 to obtain information on (1) complaints received, conciliated, and investigated, as well as those in inventory or a backlog; (2) back wages found due employees and agreed to be paid by employers; and (3) opinion letters requested and issued.

We discussed the legislative history of the 1985 FLSA amendments and WHD's implementation efforts with WHD officials. We also obtained the views of officials in selected state and local government employee and employer organizations on Labor's implementation of the Garcia decision and the 1985 amendments as well as their impact. Our review was done from November 1987 to March 1988 in accordance with generally accepted government auditing standards.

WHD's Initial Actions to Implement the Decision and 1985 FLSA Amendments

WHD's initial efforts to implement the Garcia decision and the 1985 amendments involved establishing a technical assistance program, issuing regulations, establishing investigative policies, providing staff training, and adding compliance officer positions to carry out enforcement activities.

Technical Assistance Program Established

In March 1985, WHD's deputy administrator sent the WHD assistant regional administrators a memorandum directing the field offices to initiate a technical assistance program for state and local government employers and employees on FLSA. In early August 1985, WHD established a toll-free telephone line in Washington headquarters, staffed by WHD compliance officers, to respond to calls from state and local government employers and employees seeking information on FLSA.

In addition, in August 1985, WHD wrote to seven major organizations that represent state and local employers, alerting them to the availability of the toll-free line. The letter stated that the technical assistance provided by this line would enable officials of state and local governments to help assure that their payroll and personnel systems would be in compliance with FLSA.

From August 1985 until the toll-free line was discontinued in May 1986, 7,283 calls were logged. A WHD analysis showed most of the calls concerned requests for basic information on FLSA, the Garcia decision, and WHD's policies. WHD discontinued the toll-free line because the majority of the incoming calls received by that time were for questions that (1) could be readily answered by WHD field staff or (2) could not be answered until final regulations implementing the 1985 amendments were issued.

For state and local governments and organizations, WHD personnel also held meetings, as well as made speeches and mailed information, in order to explain the effects of the Garcia decision and the 1985 FLSA amendments. In September 1985, for example, WHD (1) mailed to about 83,000 state and local government agencies a notice concerning the decision and (2) distributed to public employees and employers about 75,000 copies of a WHD publication entitled State and Local Government Employees Under the Fair Labor Standards Act. WHD, in February 1987, also mailed 3,000 copies of its final regulations to people requesting copies.

Regulations on 1985 FLSA Amendments Issued

On April 18, 1986, Labor published proposed regulations to implement the 1985 amendments. After receiving and analyzing 165 sets of comments, including those from major organizations representing state and local government employee and employer organizations,[1] Labor issued the final regulations on January 16, 1987, to be effective on February 17, 1987. The regulations provide rules and policies for state and local government employers to follow concerning (1) compensatory time; (2) exemption requirements for "sporadic and occasional employment"; (3) recordkeeping; (4) fire-protection and law-enforcement employees; (5) hours of work and overtime compensation; (6) employees working two jobs or for two employers; (7) volunteers and circumstances under which volunteers are not subject to FLSA's minimum wage and overtime requirements; and (8) exclusion of elected officials, their appointees, and employees of state legislative branches.

New Investigative Policies and Staff Training

WHD's overall objective is to maximize employers' compliance with FLSA through a program that includes (1) promoting voluntary compliance and (2) resolving all legitimate complaints by direct enforcement activities. WHD received approximately 934 complaints from state and local employees between March 20 and December 23, 1985. The vast majority of the complaints concerned the nonpayment of overtime pay as required under FLSA. According to WHD officials, most of these complaints were invalidated by the 1985 amendments.

After the decision, WHD also provided its staff, as well as employees of state and local governments, with training on the new requirements under the decision. In August and September 1985, training sessions for WHD staff in the field were held at designated sites throughout the country. In addition, the Secretary of Labor, in a letter dated August 9, 1985, offered training and technical assistance on Garcia to the governors in all the 50 states. According to WHD, by October 1985, a total of 32 states had contacted Labor concerning the Secretary's offer; eventually, according to WHD officials, 5 states—North Carolina, Oklahoma, South Carolina, South Dakota, and Wyoming—entered into agreements with Labor, and training and technical assistance were then provided to the states' personnel.

[1]These included the (1) National Association of Counties; (2) National Conference of State Legislatures; (3) National Public Employer Labor Relations Association; (4) National Association of Towns and Townships; (5) American Federation of State, County and Municipal Employees; (6) National Education Association; and (7) Public Employee Department of the American Federation of Labor and Congress of Industrial Organizations.

In November 1985, the Congress enacted the 1985 amendments. Subsequently, on January 31, 1986, WHD issued new investigation policies to guide staff in the field in reviewing the complaints of state and local government employees concerning noncompliance with FLSA.

After the regulations and investigative policies to implement the 1985 amendments were published, WHD provided a new training package on the amendments for staff in the field. From July through August 1987, WHD conducted training for its compliance officers in all 10 Employment Standards Administration regions. According to WHD, the training presented the latest information and investigative techniques concerning the coverage of state and local government employees under FLSA as a result of Garcia and the 1985 amendments.

Additional Staff Allocated

In its 1987 fiscal year budget justification, Labor requested an additional 10 full-time-equivalent (FTE) compliance officer positions for WHD in order to handle the workload under Garcia. FTE positions refer to staff years as opposed to positions. The allocation of staffing for Garcia was discussed in the February 1986 House hearings on Labor's fiscal year 1987 appropriations. According to the deputy under secretary for employment standards, on the basis of the experience of previous FLSA coverage extensions, Labor projected about 10 FTE positions for compliance officers would be necessary to (1) handle the increased complaint workload and (2) provide technical assistance related to the Garcia decision and the 1985 amendments. According to WHD officials, these additional 10 positions were subsequently allocated to WHD during fiscal year 1987.

Between fiscal years 1986 and 1987, WHD reduced the staff years spent on overall FLSA enforcement from about 499 to 450. During the same period, however, according to data reported in WHD's management information system, the time compliance officers spent on enforcing Garcia and the 1985 amendments increased from 2.5 staff years in 1986 to about 8 in 1987, as shown in table I.1.

Table I.1: WHD Staff Years Spent on State and Local Government Enforcement (Fiscal Years 1986-87)

	Staff years	
FLSA enforcement	**1986**	**1987**
Conciliations	0.1	0.38
Investigations	2.4	7.69
Total	**2.5**	**8.07**

Source: WHD's Management Information System.

In addition to the above, WHD's Branch of Fair Labor Standards Enforcement, at headquarters, also spent time on Garcia and the 1985 amendments. In 1986 and 1987, the branch had a professional staff of six or seven; according to the division director, between 60 and 70 percent of staff time was devoted to these activities. In addition, during 1987 and 1988, WHD staff in the field and staff from other WHD headquarters units were detailed to the branch to assist in FLSA enforcement, including Garcia and the 1985 amendments.

WHD's budget request for Garcia for fiscal year 1988 was discussed in the February 1987 House hearings. According to the deputy under secretary for employment standards, Labor believed the workload created by the Garcia decision could be handled with the staffing projected for WHD in the 1988 budget. WHD did not request or receive added staff resources in fiscal year 1988 to handle the agency's responsibilities under the Garcia decision and the 1985 amendments.

WHD's Implementation Progress

Since the passage of the 1985 amendments, WHD's FLSA enforcement program has involved responding to a steadily increasing number of complaints from employees of state and local governments and requests for opinion letters.

Complaints Received and Investigated or Conciliated

From reports prepared by WHD, information on WHD's compliance actions on the complaints of state and local government employees for fiscal years 1985 through 1987 is presented in table I.2.

Table I.2: WHD Compliance Actions on State and Local Government Employees' Complaints (Fiscal Years 1985-87)

	Fiscal years		
Complaint status	**1985**	**1986**	**1987**
Pending as of Oct. 1	17	130	367
Received	169	903	1,016
Subtotal	**186**	**1,033**	**1,383**
WHD actions:[a]			
Conciliated	22	91	303
Investigated	29	417	516
Administratively closed[b]	5	158	71
Subtotal	**56**	**666**	**890**
Total (pending as of Sept. 30)	**130**	**367**	**493**

Source: WHD Management Information System

[a]In addition to WHD's actions on complaints, its data showed about 143 investigations as well as 1 conciliation, initiated by WHD during fiscal years 1985-87 for state and local government employees.

[b]Represents cases closed or dropped by WHD after an investigation determined, among other things, that (1) there was no violation of FLSA, (2) the employer was not covered, or (3) WHD had no jurisdiction.

As shown in table I.2, in fiscal year 1985, WHD received 169 complaints and conciliated or investigated 51. By fiscal year 1987, the complaints received had increased to 1,016, while conciliations and investigations completed had increased to 819.

In addition, between fiscal years 1985 and 1987, the number of FLSA complaints pending, as of September 30, in WHD's inventory increased by 363, from 130 to 493, as shown in table I.2. Despite this, Labor officials believe that the increased workload due to the complaints of state and local government employees has not been a problem and has had a minimal effect on WHD. Its reports show that the inventory of FLSA complaints declined from 25,567 at the end of fiscal year 1985 to 22,320 at the end of 1987.

After the investigations and conciliations are completed, WHD staff in the field negotiate with the employers on payment of the back wages found due. Some employers may refuse to pay all or any part of such wages. According to Labor, the difference between the amounts found due employees and the amounts employers agreed to pay is attributed largely to those cases (1) in which employers refused to pay employees and (2) Labor found unsuitable for litigation.

As shown in table I.3, in fiscal years 1985-87, the back wages found due state and local government employees were $5.1 million, while employers agreed to pay $4.2 million.

Table I.3: WHD Findings of Back Wages Due State and Local Government Employees (Fiscal Years 1985-87)

	Back wages[a]	
Fiscal year	Found due	Agreed to pay
1985	$30,500	$29,160
1986	1,447,160	1,364,230
1987	3,647,200	2,841,880
Total	**$5,124,860**	**$4,235,270**

[a]Includes back wages from complaints as well as WHD-directed investigations.

WHD's Opinion Letters

Opinion letters represent WHD's responses to requests from employers, employees, or others for clarification or interpretation of various FLSA provisions that have applicability to specific situations, such as the Garcia decision and the 1985 amendments. For example, an opinion letter issued by WHD on October 22, 1987, discussed the proper method of compensating law enforcement employees under the 1985 amendments to the act's overtime provisions.

WHD has no record showing the total number of requests received and opinion letters issued relating to the Garcia decision and the 1985 amendments. The director of WHD's Division of Fair Labor Standards Operations estimated that since the Garcia decision, WHD has received about 1,000 requests for opinion letters. The division's latest report, dated February 22, 1988, stated that from June 1, 1987, to February 17, 1988, 225 new requests for opinion letters had been received; 114 had been issued. The current inventory was 206 unanswered requests, of which 95 were received before June 1, 1987.

According to the director, the delay in responding to requests has been caused primarily by (1) lack of sufficient staff, particularly staff knowledgeable about FLSA provisions related to Garcia issues and experienced in drafting opinion letters and (2) WHD officials' delays in making policy decisions on certain FLSA issues applicable to Garcia. He said that his office has proposed certain steps to WHD to help reduce the backlog, including (1) detailing to the division experienced WHD staff from headquarters to help prepare the letters and field staff to assist in carrying out the division's other FLSA responsibilities and (2) requesting additional professional and clerical staff.

Views on WHD's Enforcement Efforts

Labor officials believe that (1) WHD's enforcement efforts underlying its investigative policies for Garcia have been effective and (2) there is a high level of compliance by state and local government employers with FLSA requirements. WHD has little data, however, to support this view. Moreover, the director of the Division of Fair Labor Standards Operations believes that the large number of requests for opinion letters on Garcia may be an indication that some state and local government employers may not be fully complying with the FLSA requirements.

We contacted representatives of the following major organizations of state and local governments and their employees, namely, the (1) National League of Cities, (2) National Conference of State Legislatures, (3) National Public Employer Labor Relations Association, (4) United States Conference of Mayors, (5) American Federation of State, County and Municipal Employees, (6) Amalgamated Transit Union, (7) International Association of Fire Fighters, and (8) Public Employee Department of the American Federation of Labor and Congress of Industrial Organizations. The Public Employee Department represents 32 national and international affiliated unions with about 4 million federal, state, and local government employees.

We obtained generally positive views from the employee and employer organizations we spoke to on the effectiveness of Labor's implementation of Garcia and the 1985 amendments. The executive director of the Public Employee Department stated that in its view (1) Labor's initial efforts to implement Garcia and its current efforts to enforce the decision and 1985 FLSA amendments were very good and (2) the state and local governments that have collective bargaining agreements with affiliated unions (currently 26 states permit such agreements) are generally complying with the new requirements of FLSA. He said his organization has received few complaints about lack of compliance, although some concerns have been raised by affiliated unions, particularly the fire fighters' union.

Representatives of the International Association of Fire Fighters expressed general satisfaction with the compliance by most state and local governments, but they were not satisfied with WHD's current efforts in handling requests for opinion letters. According to a union representative, WHD's responses to requests for opinion letters were not timely, and some responses were based on insufficient data and inadequate investigation of the points in question.

The representative of the Amalgamated Transit Union also expressed satisfaction with state and local governments' compliance. He said, however, his organization does not have confidence in Labor because Labor has too few resources to effectively enforce the act or promptly respond to complaints. According to him and a representative of a fire fighters' union, their unions prefer to (1) handle complaints through the collective bargaining process or (2) obtain rulings and interpretations of FLSA provisions through court litigation. In addition, the representative of the National League of Cities said her organization had problems with Labor's opinion letters not being definitive in some cases.

We also sought to obtain information from Labor and employer and employee groups on the economic impact of the application of FLSA to traditional state and local government functions. Despite the significant projected financial impact of the Garcia decision and the 1985 amendments (estimated in 1987 at $612 million), Labor officials believe that state and local governments have coped well with the decision and the amendments. However, Labor has no data on the actual costs of implementation to state and local governments. None of the employer or employee organizations we contacted had information on the actual financial impact of the Garcia decision and the 1985 amendments.

Finally, both the Public Employee Department's representative and an executive director (who represents the United States Conference of Mayors as well as the National Public Employer Relations Association) reported that collaborative efforts to manage implementation of Garcia and the 1985 amendments have led to significant improvements in cooperation between employee and employer organizations. A State and Local Government Labor-Management Committee was established in December 1985; it is made up of representatives from 11 employee organizations and 8 employer organizations concerned with labor-management cooperation in state and local governments. The committee meets monthly to discuss labor-management issues of mutual concern.

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