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MINIMUM WAGES & OVERTIME PAY

Change in Statute of Limitations Would Better Protect Employees

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**MINIMUM WAGES AND OVERTIME PAY:
CHANGE IN STATUTE OF LIMITATIONS WOULD BETTER PROTECT EMPLOYEES**

The Fair Labor Standards Act (FLSA) is the primary federal law regulating the wages and working conditions of American workers. The law requires that covered employees receive an hourly minimum wage for the first 40 hours worked each week and overtime pay for any additional hours worked. The statute of limitations in the Portal-to-Portal Act of 1947 limits the period of time employees have in which to file a lawsuit in court for violations under the FLSA to 2 years from the date a violation occurs (or 3 years for a willful violation). The Wage and Hour Division (WHD) in the Department of Labor's Employment Standards Administration is responsible for enforcing the FLSA's minimum wage and overtime provisions. WHD can request employers to waive the statute of limitations in back wage cases.

STATUTES OF LIMITATIONS IN SOME OTHER LABOR LAWS DIFFER FROM THE STATUTE APPLICABLE TO THE FLSA. The statute of limitations for the FLSA stops running only when a suit is filed in court. In contrast, the statutes of limitations for some other labor laws stop running when a complaint is filed with the appropriate regulatory agency.

WHD DISTRICT OFFICES OBTAIN WAIVERS INFREQUENTLY FOR FLSA BACK WAGE CASES. WHD district offices estimated that they obtained waivers of the statute of limitations in less than 10 percent of their fiscal year 1991 FLSA back wage cases, and most of these waivers were obtained because the employers wanted to pay back wages on an installment basis. Because Labor does not collect data on the number of cases in which waivers are needed, however, GAO was unable to determine whether the number of cases in which WHD obtained waivers was appropriate to the need for such waivers.

WAIVER DID NOT PROTECT ALL BACK WAGES OWED TO FOOD LION EMPLOYEES IN WHD'S 1986-87 INVESTIGATION. Labor obtained a waiver of the statute of limitations during its 1986-87 investigation of overtime violations at the Food Lion supermarket chain. However, three former Food Lion employees lost over \$11,800 in back wages because their claims expired under the statute of limitations before the waiver was signed.

LABOR'S OVERALL BACK WAGE RECOVERY RATES MAY BE OVERSTATED. Labor may be overstating the percentage of back wages employers agree to pay because of inaccuracies in its data for the amounts of back wages owed ("findings"). GAO found in the Food Lion case that Labor recorded the amount the employer agreed to pay, \$300,000, rather than the amount WHD investigators calculated as the back wages owed, \$1.2 million, as the findings. There may be other inaccuracies in the amounts entered as findings in the management information system Labor uses to compute its recovery rates.

GAO recommends that the Congress amend the Portal-to-Portal Act so that the statute of limitations for the FLSA stops running (1) when a complaint is filed with Labor for employees who file complaints or (2) at the date Labor notifies an employer of the start of its investigation for other employees found by Labor to be owed back wages. GAO also recommends that Labor (1) assess the extent of inaccuracies in the amounts entered as findings in its management information system and (2) take appropriate action to correct problems that it identifies.

Mr. Chairman and Members of the Subcommittee:

I am testifying today about the statute of limitations governing the Fair Labor Standards Act (FLSA). Specifically, you asked us to provide additional information about the statute of limitations, the extent to which Labor obtains waivers of this statute in FLSA back wage cases, and the impact of the statute of limitations on the employer's liability for back wages in Labor's 1986-87 investigation of the Food Lion, Inc., supermarket chain.

You requested this analysis as a follow-up to our testimony in March 1992 on statutory provisions and agency tracking systems for minimum wages and overtime pay.¹ My statement summarizes the content of our report, Minimum Wages and Overtime Pay: Change in Statute of Limitations Would Better Protect Employees (GAO/HRD-92-144), which we are issuing today.

In response to your request, we

- examined the legislative history of the Portal-to-Portal Act, which contains the statute of limitations for the FLSA, to determine why it stops the running of the statute of limitations only when a case is filed in court, and compared the Portal-to-Portal Act statute of limitations with the statutes of limitations for some other labor laws;
- surveyed all 60 district offices of the Department of Labor's Wage and Hour Division (WHD) to obtain estimates of the extent to which they obtained waivers of the statute of limitations in fiscal year 1991 FLSA back wage cases; and
- completed a case study of Labor's 1986-87 investigation of Food Lion by examining the case files and conducting interviews with Labor and Food Lion officials.

Our major points are as follows:

- The legislative history of the Portal-to-Portal Act contains no discussion regarding when the statute of limitations for the FLSA should stop running. The statute of limitations the Portal-to-Portal Act establishes for the FLSA stops running only when a complaint is filed in court. In contrast, the statutes of limitations for some other labor laws stop running

¹Minimum Wages and Overtime Pay: Concerns About Statutory Provisions and Agency Tracking Systems (GAO/HRD-92-21, Mar. 25, 1992).

when a complaint is filed with the appropriate regulatory agency.

- Although WHD can request that employers waive the statute of limitations in FLSA back wage cases, WHD district offices do not obtain waivers in many such cases. District officials estimated that employers agreed to waive the statute of limitations in about 2,300 (which is less than 10 percent) of their fiscal year 1991 FLSA back wage cases. Because Labor does not collect data on the number of cases in which waivers are needed, we were unable to determine whether the number of cases in which WHD obtained waivers was appropriate to the need for such waivers.

Even when WHD obtains a waiver of the statute of limitations, employees' back wages are not completely protected because some of the waivers used by WHD can be revoked by employers with 20 or 30 days' notice and some can expire before employers have paid any or all back wages owed.

- The 1986-87 Food Lion case illustrates how an employer's liability for back wages can be reduced because of the running of the statute of limitations. In Labor's initial investigation, three former employees lost over \$11,800 in back wages because their claims expired under the statute of limitations.

We also found that Labor may be overstating the percentage of back wages employers agree to pay. In our Food Lion case study, the amounts entered into WHD's management information system led to a substantial overstatement of the percentage of back wages Food Lion agreed to pay in relation to the amount of back wages WHD calculated was owed. Interviews with WHD officials and Labor's comments on our draft report suggest that this may have happened in other cases as well.

BACKGROUND

The FLSA is the primary federal law regulating the wages and working conditions of American workers. The law requires that covered employees receive a minimum wage of \$4.25 an hour for up to 40 hours a week. For all hours worked over 40 a week, the law also requires an hourly payment equal to 1-1/2 times the employee's regular hourly wage.

The Wage and Hour Division, in the Department of Labor's Employment Standards Administration, is responsible for enforcing the FLSA's minimum wage and overtime provisions. WHD has 10 regional offices that oversee the operations of 60 district offices nationwide. WHD investigates most cases

in response to complaints from employees or their representatives. During these investigations, when WHD identifies other employees of the company who are owed back wages, these additional employees are included in the investigations although they did not file complaints with Labor. WHD also conducts "directed" investigations, initiated by WHD rather than by complaints from employees, in which employees who are owed back wages may be identified.

According to Labor officials, in fiscal year 1991, an average of 10 months elapsed from the time an employee filed a complaint with WHD until the investigation was completed and the complaint resolved. Included in the 10 months was a period of 4 to 6 months (according to Labor officials) from the date an employee filed a claim to the date WHD started its investigation.

The Portal-to-Portal Act contains a statute of limitations that applies to the FLSA, the Walsh-Healey Act, and the Davis-Bacon Act. For a FLSA minimum wage and overtime violation, the statute of limitations in the Portal-to-Portal Act limits the period of time an employee has in which to file suit in court to 2 years (or 3 years for a willful violation) from the date a violation occurs. To be in willful violation of the FLSA, an employer must either know its actions are in violation of the FLSA or be in reckless disregard of the FLSA's requirements.

The only action that stops the statute of limitations for the FLSA from running is filing a suit in court. Labor can file suit in court on behalf of employees, or employees may file suit without first contacting Labor. Because back wage amounts are generally small, however, there is often little incentive for attorneys to take such cases on the typical contingency fee basis. In addition, establishing that a "pattern and practice" of minimum wage or overtime violations exists in a company, as often required in this type of litigation, may be difficult for individual employees. Labor had no data on the number of individuals who file suits on their own.

Labor officials maintain that employees seldom lose back wages because of the statute of limitations. Although Labor does not track the amount of back wages that employees lose, headquarters officials gave two reasons why they believe employees seldom lose back wages because of the statute of limitations:

- Most of the time, employers agree to pay the back wages owed. Labor officials stated that WHD obtained agreements by employers to pay 81 percent of the back

wages they owed in fiscal year 1991. Labor bases this "recovery rate"² primarily on two data elements in its WHD Management Information System (WHMIS): the amount of back wages WHD determines are owed (the "findings") and the amount of back wages the employer agrees to pay.

- When employers have not yet agreed to pay back wages and employees are in danger of losing back wages because of the statute of limitations, Labor requests that the employers sign waivers of the statute of limitations. However, Labor does not collect data on how often (1) employees are in danger of losing back wages, (2) district offices ask employers to sign waivers, or (3) employers agree to sign waivers when asked to do so.

We recommended to the Congress in 1981³ that the statute of limitations for the FLSA be changed to better protect employees' back wage claims. Specifically, we recommended that the Congress amend the Portal-to-Portal Act so that its statute of limitations would stop running when Labor assesses violations at the end of an investigation instead of when a lawsuit is filed against an employer. To date, this recommendation has not been implemented.

STATUTES OF LIMITATIONS IN SOME OTHER LABOR LAWS
DIFFER FROM THE STATUTE APPLICABLE TO THE FLSA

The statute of limitations for the FLSA differs from the statutes of limitations for some other labor laws because different actions stop the running of the statutes of limitations. Under the Portal-to-Portal Act, which contains the statute of limitations for the FLSA and two other laws, the statute of limitations stops running only when a suit is filed in court; under some other labor laws, the statutes of limitations stop running when the employee files a claim

²Labor refers to this percentage as a "recovery rate" for FLSA back wage cases although the rate represents the percentage of back wages employers agree to pay rather than the amount actually paid. Labor does not track whether all back wages owed are paid to employees.

³Changes Needed to Deter Violations of Fair Labor Standards Act (GAO/HRD-81-60, May 28, 1981).

with the appropriate regulatory agency.⁴ Unless the running of the statute of limitations is stopped, the period of time an employee has in which to file suit in court for a violation decreases until the entire claim expires under the 2-year statute of limitations. Therefore, the amount of back wages employers are required to pay for a violation under the FLSA can decrease while Labor investigates cases and negotiates with employers.⁵

We recommended in 1981 that the statute of limitations for the FLSA be changed so that it stops running when WHD completes its investigations of back wage claims. This would protect employees' back wages from the running of the statute of limitations during the time that Labor negotiates with the employer and, if necessary, prepares the case for litigation. Back wages would not be protected, however, during the time that it takes Labor to start and complete its investigations of back wage claims.

WHD DISTRICT OFFICES OBTAINED
WAIVERS INFREQUENTLY

Wage and Hour district offices or Labor's regional solicitor's offices can request employers to waive the statute of limitations in FLSA back wage cases. Neither WHD nor the solicitor's offices, however, can require employers to sign waivers.

Officials in WHD's district offices estimated that employers agree to waive the statute of limitations for FLSA cases infrequently and that waivers are obtained most often in cases when employers request to pay back wages on an

⁴Some other labor laws differ from the FLSA in that they require the employee to file claims with a regulatory agency before instituting court action. However, few employees exercise their right under the FLSA to file claims directly in court. Instead, they file their complaints with Labor.

⁵For example, employees work for a company from the beginning of January 1990 to the end of December 1991 and are not paid for all of their overtime work. They file a claim with WHD in January 1992 for the back wages owed. If WHD started an investigation in May and completed it in December 1992 but did not obtain a waiver for the period under investigation, the employees could lose 50 percent of their back wages because their claim for the violations in 1990 would have expired under the statute of limitations by the time WHD completed its investigation.

installment basis. WHD officials estimated that they obtained waivers of the statute of limitations in about 2,300 (less than 10 percent) of their fiscal year 1991 FLSA back wage cases. Since Labor does not collect data on the number of cases in which waivers are needed, we were unable to determine whether the number of cases in which WHD obtained waivers was appropriate to the need for such waivers. The WHD officials further estimated that in most of the cases which employers agreed to waive the statute of limitations, about 2,100 (90 percent) of the cases in which employers signed waivers, they did so because they wanted to pay back wages on an installment basis.

Obtaining waivers of the statute of limitations does not guarantee that employees will be protected from losing back wages as a result of their claims expiring under the statute of limitations. Some of the waivers used by the district offices we surveyed can be revoked by employers at any time with 20 or 30 days' notice and others can expire before employers have paid any or all of the back wages owed.

Guidance provided by WHD's Field Operations Handbook requires that waivers be requested "in any case in which protection against the operation of the statute of limitations is considered necessary," but it does not specify particular circumstances when waivers should be requested and no standard waiver form is provided. WHD has, however, drafted significantly expanded guidance as part of its revision of one chapter in the Field Operations Handbook. As of September 17, 1992, the draft was being reviewed within the Department of Labor and WHD expected that it would be issued soon.

WAIVER DID NOT PROTECT ALL BACK WAGES OWED TO
FOOD LION EMPLOYEES IN WHD'S 1986-87 INVESTIGATION

In WHD's 1986-87 investigation of overtime violations at the Food Lion supermarket chain, three Food Lion employees lost back wages because their claims expired under the statute of limitations. WHD began investigating one Food Lion store in early 1986, after receiving complaints in August 1984 from current and former Food Lion employees about unpaid overtime hours they had worked. Because WHD did not start an investigation of these claims until February 1986 and did not obtain a waiver of the statute of limitations for the initial period investigated, three former Food Lion employees lost over \$11,800 in back wages.

In March 1986, WHD expanded its investigation to include six additional Food Lion stores. The expanded investigation covered the 2-year period from October 1, 1984, to September 30, 1986. In May 1987, Food Lion agreed to waive the

statute of limitations for the entire 2-year period investigated. Since WHD obtained a waiver of the statute of limitations, none of the employees involved in the expanded investigation lost back wages because of the statute of limitations. If Food Lion had not signed the waiver, however, the company's potential liability for the 2-year period WHD investigated, calculated by WHD to be approximately \$1.2 million, could have been reduced under the statute of limitations by 30 percent at the time the waiver was signed (assuming an even distribution of the wages over the 2-year period investigated, since 7 months of the total 24 months allowed under the statute had expired as of May 1987).

Food Lion, however, paid less than 25 percent of the \$1.2 million in back wages WHD investigators determined was owed. Labor settled the case for \$300,000, which was divided among 171 current and former employees.

Labor's regional solicitor's office and WHD officials told us they settled the case without filing suit in court because, while Labor was investigating the case and negotiating with Food Lion, two similar cases filed by four individual Food Lion employees were decided in the company's favor. In these two cases, the appeals court ruled that the employer had not allowed uncompensated overtime work since the evidence did not establish that (1) the employer had actual knowledge of the work or (2) there was a pattern or practice of employer acquiescence in such work. The court that decided the two cases in favor of Food Lion was the same one that would have heard the appeal, had Labor filed suit. Therefore, Labor decided to settle its case rather than proceed with litigation that would have been time-consuming and costly, with an uncertain outcome.⁶

LABOR'S OVERALL BACK WAGE
RECOVERY RATES MAY BE OVERSTATED

Labor may be overstating the percentage of back wages employers agree to pay. In our Food Lion case study, the amounts entered in WHD's management information system led to a substantial overstatement for this case; information

⁶Other complaints have been brought against Food Lion since this settlement. Two employees won a suit against Food Lion on the issue of uncompensated overtime (Tew v. Food Lion). That case was won in district court and upheld upon appeal to the same court that would have decided the case from the 1986-87 investigation. In addition, Labor is currently reviewing complaints from 238 current and former Food Lion employees involving 127 stores.

obtained from Labor officials indicates that overstatements may have been made in other cases as well.

Labor's statistics for its 1986-87 investigation of Food Lion show a 100 percent recovery rate even though the amount the company agreed to pay was less than 25 percent of WHD's findings. Based on extensive investigative efforts as well as analysis of the data obtained in its investigation, WHD compliance officers calculated that Food Lion owed about \$1.2 million in back wages (for the period of October 1, 1984, through September 30, 1986) to employees of the seven stores investigated. Even though Food Lion claimed the amount of WHD's findings should be reduced, the company did not provide additional documentation to support its claim. Food Lion offered to settle the case for \$300,000 and WHD accepted the offer based on the recommendation of the regional solicitor's office. WHD recorded the \$300,000 Food Lion agreed to pay, however, as both the findings and the amount the company agreed to pay in its management information system.

The amounts employers agree to pay may have been entered into WHMIS as findings in other cases. Our discussions with other WHD officials suggested that this practice may have been widespread. In addition, Labor acknowledged, in its comments on our draft report, that in the past, back wage agreed-to-pay amounts may have been recorded as findings when the total findings for a case exceeded \$250,000.

CONCLUSIONS

Employees' claims for back wages under the FLSA could be protected more effectively if the statute of limitations for the FLSA stopped running at an earlier point. This applies to both employees who file claims for back wages with Labor as well as employees for whom WHD determines back wages are owed during its investigations. Based on the additional analysis done in this study, we believe the statute of limitations should stop running earlier than at the end of WHD's investigation, which we had previously recommended.

Changing the statute of limitations for the FLSA so that it stops running when an employee contacts Labor with a complaint, would provide the same protection for claimants as in some other labor laws, under which the statutes of limitations stop running when an employee contacts the

appropriate regulatory agency.⁷ The statute of limitations can now continue to run during the time it takes Labor to begin an investigation, complete it, negotiate with an employer, and obtain payment--which can take several months. Making this change would protect the back wages of claimants during the time it takes Labor to start and complete its investigations as well as after this time.

To protect employees who Labor determines are owed back wages but have not filed complaints, another time to stop the statute of limitations from running is needed. We believe the statute of limitations should stop running as of the date Labor notifies the employer that it will be starting an investigation.

Labor cites a recovery rate of 81 percent--calculated from its management information system--as one reason to believe that employees seldom lose back wages as a result of the statute of limitations. If, however, that statistic overstates the extent to which employees receive the back wages owed to them, then there is even more reason to consider changing the statute. Because we did not anticipate the kind of error we found in the Food Lion case, assessing the accuracy of information entered into WHMIS in other cases was outside the scope of this study. Determining whether the problem we found is occurring in other cases would require a comparison of case file data to information in WHD's computerized database.

RECOMMENDATIONS TO THE CONGRESS

We recommend that the Congress amend the Portal-to-Portal Act so that the statute of limitations for the FLSA stops running (1) when a complaint is filed with Labor (for employees who file complaints) or (2) at the date Labor notifies an employer of the start of its investigation (for employees who do not file complaints but are found by Labor to be owed back wages).

RECOMMENDATIONS TO THE SECRETARY OF LABOR

We recommend that the Secretary of Labor (1) assess the extent of inaccuracies in the amounts entered as back wages owed to employees (findings) in WHMIS and (2) take appropriate action to correct problems that it identifies.

⁷In complaint-initiated FLSA cases, WHD would establish the relevant time period for each employee, based on the date each employee filed a claim with Labor. WHD would no longer use one time period, as it does now, to calculate back wages for all employees in an investigation.

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This concludes my prepared statement. I will be glad to
answer any questions you may have.

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