Just Pay:

Improving Wage and Hour Enforcement at the United States Department of Labor

By the **National Employment Law Project** for the ***Just Pay Working Group***

NELP
National Employment Law Project

Just Pay Working Group

Mary Bauer
Legal Director
Southern Poverty Law Center
Montgomery, AL

Jules Bernstein
Bernstein & Lipsett
Washington, D.C.

David Borgen
Goldstein, Demchak, Baller,
Borgen & Dardarian
Oakland, CA

Deborah Chalfie
Deputy Director for Policy,
Change to Win
Washington, DC

Nick Clark
General Counsel, UFCW
Washington, DC

Ross Eisenbrey
Economic Policy Institute
Washington, DC

Monica Gallagher
Washington, D.C.

Lilia Garcia
Maintenance Cooperation
Trust Fund
Los Angeles, CA

Terri Gerstein
Deputy Commissioner
New York State
Department of Labor

Janet Herold
Associate General Counsel
Service Employees
International Union
La Crescenta, CA

Jennifer Hill
Florida Immigrant
Advocacy Coalition
Miami, FL

Melissa Josephs
Director of Equal Opportunity Policy
Women Employed
Chicago, IL

Adam Klein
Outten & Golden
New York, NY

Jim Leonard
Arlington, Virginia

Bill Lurye
Associate General Counsel
AFL-CIO
Washington, D.C.

Greg McGillivary
Woodley & McGillivary
Washington, DC

Victor Narro
Project Director
UCLA Downtown Labor Center
Los Angeles CA

Chris Newman
Legal Programs Director
NDLON
Los Angeles, CA

Kerry O'Brien
CASA of Maryland
Senior Manager, Legal Program
Silver Spring, MD

Jose Oliva
Policy Coordinator
Restaurant Opportunities
Centers United
Chicago, IL

Ai-Jen Poo
Domestic Workers United
National Domestic
Workers Alliance
New York, NY

Cathy Ruckelshaus
Legal Co-Director
National Employment Law Project
New York, NY

Ilana Scherl
Oxfam America
Gulf Coast Field Rep. Worker
& Immigrant Rights

Rebecca Smith
Immigrant Worker
Project Director NELP
Olympia, WA

Ted Smukler
Public Policy Director
Interfaith Worker Justice
Chicago, IL

David Weil
Professor of Economics
Boston University School
of Management
Boston, MA

Bruce Goldstein
Farmworker Justice
Washington, DC

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Contents

Executive Summary

Too many workers in the United States are not paid for their work, earning below the minimum wage in industries that are at the heart of our economy. Employers in retail, janitorial, hospitality, construction, home care, agriculture and trucking offer subpar wages and then do not pay for overtime hours worked. A national survey of workers in New York, Los Angeles and Chicago found that 26 percent of workers were paid less than the minimum wage, and an astonishing 75 percent were not paid overtime pay in the previous week.

Workers are reluctant to complain for fear of losing their jobs, a dire result in today's tight labor market. And, the U.S. Department of Labor, the federal agency charged with ensuring fair pay and accepting worker complaints, recently was described as ineffective in a series of Government Accountability Office (GAO) reports chronicling the agency's inaction in the years leading up to the current administration. This lack of a public enforcement actor in the U.S. Department of Labor (DOL) has perpetuated workplace lawlessness and has hurt law-abiding businesses, workers and our economy.

In 2009, NELP convened the *Just Pay Working Group*, a national gathering of worker centers, unions, state and local public enforcement officials, legal services, academics and private bar experts on fair pay issues. The goal of the working group was to draw on the members' expertise to develop a comprehensive set of reform proposals for the U.S. DOL's Wage and Hour Division (WHD) and its attorneys in the Office of the Solicitor (SOL). The topic was wage and hour issues: failure to pay minimum wage or overtime pay for extra hours; unlawful deductions from wages; off-the-clock work; and exclusions from fair pay laws, among others. Our aim is to urge the WHD to re-enlist its powerful tools already in hand, re-energize its resources and expertise and reach out to stakeholders in touch with workers in key sectors with persistent violations. By engaging in a credible and coherent enforcement approach, the agency can send a strong message to employers that a new sheriff is indeed back in town.

The recommendations developed by the *Just Pay Working Group* present our concrete agenda for "smart enforcement" at the DOL. Within four subareas, we divide our recommendations into shorter-term "priorities" and longer-term goals. The proposals focus most on enforcing our already-strong existing law and regulations, but include some rulemaking and legislative reform suggestions.

A few overarching themes emerge from our policy proposals. First, the DOL must aim to rebalance workplaces by shoring up labor standards in those sectors where the norm is to underpay and cheat workers. This requires a full development of national enforcement priorities and strategic tools to achieve those goals. Second, DOL must implement a triage system for individual worker complaints so it does not get bogged down in individual claims with little impact beyond the individual worker. Third, in developing priorities and targets for strategic enforcement, DOL should consult with and draw on the expertise of worker advocates

and focus on industries with a large number of workers likely to have a high incidence of wage and hour violations. Fourth, the secretary should use publicity to increase the public's awareness about the rampant problem of underpayments and to enhance the deterrent effect of enforcement activities. Finally, DOL must gather and retain data on complaints, audits and investigations, use that information to constantly refine and improve its effectiveness, and report using clear measures of success on all of its enforcement activities.

The four areas of recommendations and their priority goals are stated below.

1. Discretionary Enforcement and Strategic Initiatives

The WHD cannot rely on worker complaints to drive its enforcement programs. It has important capacity to engage in affirmative efforts to target high-violation industries and to protect the more vulnerable workers who may not come forward. This discretion lies at the heart of the agency's potential for a new and credible enforcement scheme. Key highlights from this set of recommendations are:

1. **Develop national enforcement priorities and proactively target employers in high-violation industries** to send a strong signal that core workplace protections will be vigorously enforced.
2. **Seek all remedies available when negotiating claims,** including liquidated damages, three years of damages when violations are willful, injunctive relief for future monitoring, worksite-wide relief for all impacted workers and civil money penalties.
3. **Revise the Memorandum of Understanding (MOU) with Immigration and Customs Enforcement (ICE) to clearly cover all of the WHD's investigations,** regardless of how they are initiated, and seek protective U visas for victims of wage theft.
4. **Target subcontracting and misclassification of employees as "independent contractors"** across several industries.
5. **Prioritize retaliation instances** by immediately protecting employees and pursuing all remedies, including injunctive relief, when employers retaliate against workers.

Longer-term proposals in this area include coordinating enforcement efforts across multiple WHD districts, ceasing the issuance of opinion letters specific to ongoing litigation and pursuing strategic litigation in cases involving contested legal questions to clarify the agency's position.

2. Claims Administration and Organization

Because the WHD is the front-line agency underpaid workers encounter, the WHD must revamp its complaint and individual worker-interaction processes. It can accomplish this by focusing on three primary areas:

1. **Draw on worker advocates' and state enforcers' expertise to align national enforcement priorities** with decisions around which claims to pursue aggressively.
2. **Develop a triage system to identify priority complaints** and allocate enforcement resources in line with these priorities.
3. **Establish new training and instruction opportunities** for all staff, including encouraging collaborations between senior and junior staff.

Longer-term proposals in this subgroup include enacting a policy in the WHD to toll the statute of limitations while worker complaints are pending, updating the USDOL website and Field Operations Handbook to reflect the new procedures and key reforms, and improving communications with workers with limited English proficiency and other workers facing barriers to enforcing their rights.

3. Consultation with Workers' Advocates and Stakeholders

The WHD and the SOL cannot tackle the nation's employment law violations alone. Armed with strategic targeting, developed in part by consultation with community stakeholders, the agencies should leverage all available resources to help stem the tide of workplace violations. These stakeholders include worker centers, state agencies, unions and responsible employers who can provide the "eyes and ears" in the regions to target and impact rampant violators. Priority proposals in this subarea are:

1. **Build relationships with stakeholders** to reach out to impacted communities and target enforcement, drawing upon models from the states.
2. **Establish task forces to coordinate enforcement efforts** across divisions within the DOL and across other federal and state enforcement agencies.
3. **Inform claimants of opportunities to pursue claims with skilled private attorneys,** when appropriate.

4. Strengthen Worker Protections

While the WHD and the SOL can make great strides by pursuing more strategic enforcement of existing laws and rules, stronger worker protections are sorely needed in some targeted areas. Current regulations interpret minimum wage and overtime exemptions too broadly for home health care workers and some white-collar workers. And other statutory and regulatory requirements have failed to keep up with the realities of our modern economy.

These proposals include:

1. **End the unfair exclusion of home health care workers** from basic minimum wage and overtime protections.
2. **Update recordkeeping requirements** to provide greater transparency for workers and for the WHD and the SOL.
3. **Close loopholes that improperly define and disadvantage white-collar workers.**

Longer-term proposals in this area include: amending the agency's fluctuating workweek analysis in instances where there is no employer-employee agreement, clarifying when the retaliation protections apply to workers, issuing guidance on independent contractors and subcontracting and an updated tip notice rule.

The Stakes Are High

Without revitalizing the WHD, workers and their families will continue to lose millions of dollars. *Broken Laws, Unprotected Workers,* a survey of workers, found that workers in New York, Chicago and Los Angeles lose an average of $56.4 million *per week*. Communities also lose out on the wage income—when workers earn less, there is less money circulating in the local economy.

Governments, too, lose out on billions of dollars in payroll and tax revenues. The culture of lawlessness that pervades too many jobs discourages law-abiding firms struggling to compete, and encourages more wage chiseling by employers, which washes out the floor and undercuts higher-paying jobs up the ladder.

Today's DOL has a once-in-a-generation opportunity to modernize its enforcement efforts for a credible and comprehensive approach. The WHD and the SOL are in the process of hiring hundreds of new investigators and lawyers to help relieve the burden on its existing staff. Equally important, the DOL's new leadership has expressed a desire to place a new emphasis on strategic enforcement that squarely attacks the "wage theft" that has marked low-wage industries.

The proposals in *Just Pay: Improving Wage and Hour Enforcement at the United States Department of Labor* would bring us closer to the goal of fair-paying jobs for all.

Introduction

Our nation's workers too often are cheated out of their hard-earned wages. In a growing number of industries, employers have institutionalized the practice of flouting basic workplace protections like the minimum wage and overtime pay. In the last year alone, workers have recovered tens of millions of dollars in unpaid wages from their employers in a range of industries. For example, Staples Inc. paid $42 million in illegally underpaid wages to its assistant store managers,[1] New Jersey truck delivery drivers settled an overtime case for $2 million,[2] Walmart settled an unpaid wages case for $35 million in Washington State,[3] and New York carwash workers received $3.5 million in unpaid overtime.[4] In *Broken Laws, Unprotected Workers,* researchers measured the prevalence of workplace violations across low-wage industries in Chicago, Los Angeles and New York, and found an astonishing 26 percent of surveyed workers were paid less than the minimum wage in the preceding week, and 76 percent were not paid properly for their overtime hours.[5] Today's sweatshops have spread well beyond the apparel industry, with subpar jobs becoming the norm across broad swaths of our economy, especially in the low-wage service sectors in which millions of workers—many of them women, immigrants and people of color—today spend their careers.

Meanwhile, for much of the last decade, workers went without an active partner in the United States Department of Labor (DOL). It's Wage and Hour Division (WHD) and Office of the Solicitor (SOL) are the lead federal bodies charged with maintaining the wage floor by enforcing core wage and hour protections. In a series of harshly critical reports, the U.S. Government Accountability Office (GAO) found in recent years that the DOL has failed to aggressively enforce these basic workplace laws.[6] According to the GAO, from 1997 to 2007, the number of WHD enforcement actions decreased by more than a third, and the DOL failed to use its own commissioned studies to target persistent violators.[7] A performance audit conducted by the GAO showed that assessing the effectiveness of WHD enforcement was nearly impossible due to the agency's lack of measures and data. At some level these failures should come as no surprise, given the increase in covered workplaces (up 112 percent between 1975 and 2004) and a decrease in staff investigators (down 14 percent over the same period).[8] But this resource mismatch has been exacerbated by DOL's failure to pursue a proactive, strategic approach to enforcement, and to modernize its systems in light of broad structural changes in our labor markets. As a result, the agency has failed to send the signals needed to change the culture of rampant lawbreaking across many industries.

The WHD must return to its mission of protecting our nation's workers. Doing so requires the WHD to overhaul its enforcement to respond to the 21st century economy. The WHD is the central player in restoring the wage floor. Efforts of private litigants and underfunded state agencies, while important and often significant, are necessarily piecemeal and cannot provide the coherence needed to tackle the deeply entrenched wage violations across too many industries. The vast superiority of the WHD's resources, its geographic reach and its decades of experience give it the potential to be a potent arbiter of workplace conditions. In

consultation with groups on the ground, it can change the culture of lawlessness in many of our country's important growth sectors, restore balance in the workplaces and drive our economy upward.

Today's DOL has a once-in-a-generation opportunity to modernize its enforcement systems. The WHD and the SOL are in the process of hiring hundreds of new investigators and lawyers to help relieve the burden on its existing staff. Equally important, the DOL's new leadership has expressed a desire to place a new emphasis on strategic enforcement that squarely attacks the "wage theft" that now pervades low-wage industries.

The recommendations, developed by the *Just Pay Working Group*—advocates, worker centers, academics, private lawyers, labor unions and state labor department officials—present our concrete agenda for "smart enforcement" at the DOL. Each subarea is divided into shorter-term "priorities" and longer-term additional recommendations. The proposals focus most on enforcing existing law and regulations, but also include a select few rulemaking and legislative reform suggestions. The focus is on wage and hour protections: minimum wage and overtime pay, off-the-clock work, improper deductions and proper classification of covered employees, among others.

A few overarching themes emerge from this policy agenda. First, the DOL must aim to restore the balance in workplaces where it has become the norm to underpay and cheat workers. Second, the DOL must implement a tiered triage system for individual worker complaints so it does not get bogged down in small claims with little impact beyond the individual worker. Third, in developing priorities and targets for strategic enforcement, the DOL should consult with and draw on the expertise of workers' advocates and focus on industries with large numbers of workers and high incidences of wage and hour violations. These targets and priorities may vary by region across the country. Fourth, the secretary should use publicity to increase the public's awareness of the rampant problem of underpayments to enhance the deterrent effect of strong enforcement. Finally, the DOL must gather and maintain data on complaints, audits and investigations, use that data to constantly review and improve its systems, establish clear benchmarks for measuring its success and report regularly on its performance.

Without reanimating the WHD, working families will continue to lose billions of dollars each year in illegally withheld wages. *Broken Laws, Unprotected Workers* found that workers in New York, Chicago and Los Angeles alone lose an average of $56.4 million *per week* through wage violations.[9] These underpayments also rob communities of the consumer spending power they need to sustain growth and create jobs, because when workers earn less, there is less money circulating in the local economy. Governments lose out on payroll and tax revenues.[10] Finally, the culture of lawlessness that pervades too many workplaces puts law-abiding firms at an unfair disadvantage, increases pressure on all employers to cut pay to compete and erodes pay for better-paying positions up the job ladder.

1. Discretionary Enforcement and Strategic Initiatives

WHD recently has over-relied on individual worker complaints to drive its enforcement activities, and even that aspect of its enforcement has come under intense scrutiny and criticism by the GAO,[11] as described below in Section 2. Because rarely if ever will there be sufficient resources allocated to wage and hour enforcement, WHD should use "smart enforcement" strategies and take a multipronged, affirmative approach to the problems of rampant, unchecked underpayments.

Our nation's individual complaint-driven system for wage and hour claims only reflects the universe of workers who have been able to overcome barriers to enforcement and file a claim with the WHD. Many more workers are deterred from contacting the WHD because they fear retaliation and other employer reprisals. Other workers may not know and understand the specifics of their minimum wage and overtime rights, or may not know they can pursue claims at the WHD.

Given this worker reticence, WHD should target high-violation industries, consult with groups on the ground with knowledge of problem jobs and employ all of its enforcement tools without waiting for individual complaints. In order to tackle this problem effectively, the WHD and the SOL must take affirmative steps to send a signal to employers that violations will be taken seriously, whether or not affected workers complain.

PRIORITIES:

1. **Develop national enforcement priorities and proactively target employers in high-violation industries** to send a strong signal that core workplace protections will be vigorously enforced.
2. **Seek all remedies available when negotiating claims,** including liquidated damages, three years of damages when violations are willful, injunctive relief for future monitoring, worksite-wide relief for all impacted workers and civil money penalties.
3. **Revise the Memorandum of Understanding (MOU) with Immigration and Customs Enforcement (ICE) to clearly cover all of the WHD's investigations,** regardless of how they are initiated, and seek protective U visas for victims of wage theft.
4. **Target subcontracting and misclassification of employees as "independent contractors"** across several industries.
5. **Prioritize retaliation instances** by immediately protecting employees and pursuing all remedies, including injunctive relief, when employers retaliate against workers.

Priority 1:

Develop national enforcement priorities and proactively target and investigate employers in high-violation industries.

WHD and the SOL's "smart enforcement" approach should include a review and updating of its national enforcement priorities, looking at both substantive problems and strategies for addressing those problems. By gathering information about persistent wage and hour violations, consulting with experts in the field and designing enforcement activities that are aimed at changing lawbreakers' tactics, the agencies can move toward a comprehensive and coherent enforcement system that sends a strong message and gets results.

The WHD should expand significantly its efforts to launch proactive investigations in its top priority areas. Unannounced investigations are a key mechanism for reaching out to workers who otherwise would not file claims and to change employer behavior at an industry-wide level. They are also a vital means of signaling to employers these core workplace protections will be enforced, even if individual workers are deterred from pursuing their claims.

The WHD should take these steps toward strategic enforcement:

- Develop a national enforcement plan, identifying substantive priorities and specific strategies for each substantive goal.
- Identify industries marked by rampant employment law violations.
  - DOL previously commissioned a study that identified approximately 30 industries with a concentration of workers at risk of violations marked by: a large number of vulnerable workers, a high percentage of workers likely to be underpaid and significant underpayments in violation of the law.
  - Invite and consult with workers' advocates and state labor standards enforcers in the regions regarding particularly egregious violators and appropriate targets.
  - Use research studies, like *Broken Laws, Unprotected Workers*,[12] a rigorous random sample survey of violations in New York, Chicago and Los Angeles, that highlight industries in need of targeted enforcement efforts.[13]
  - Industries overusing independent contractor and subcontracting schemes often signal consistent underlying violations and could be targeted.
- Within each of these targeted industries, choose key employers who are known or likely to have systemic violations for proactive investigations, compliance audits and aggressive enforcement, particularly where these enforcement actions could have ripple effects industry-wide. The WHD has used this method with substantial success in the past, as has the New York State Department of Labor more recently, for example, in the carwash industry.[14]

Priority 2:
Seek all remedies available when negotiating claims.

Employers that fail to pay proper wages must be held accountable for all of the back wages and damages available under the law. When the WHD or the SOL begins negotiating with an employer to pay an amount that does not include the liquidated and other damages available by law, employers have little incentive to comply in the future. Administrative settlements by the WHD and the SOL that do not impose available liquidated and other damages provide employers with little incentive for future compliance, since employers can rationally gamble that, if they are caught, the only cost they will incur for breaking the law is to pay the wages they would have owed in the first place.

Notwithstanding these perverse incentives, the WHD's Field Operations Handbook (FOH) instructs WHD investigators only to seek up to two years of back wages, and not liquidated damages, which are nearly universally awarded under the statute, and does not instruct them to consider whether the violations are willful and subject to a three-year statute of limitations.[15] The FOH also does not direct investigators to consider violations for the co-workers of an individual claimant. WHD should seek damages covering all impacted workers in a jobsite.

The WHD and the SOL initially should pursue all back wages and damages available to workers:

- Calculate the maximum back wages and liquidated damages available in a case from the beginning, including 100 percent liquidated damages in every case and three years of back wages when a violation is willful, for all impacted workers.
- WHD should take a negotiation position that the employer is liable for all of the back wages and liquidated damages required by law. Employers that are the most entrenched are likely to be strategic targets. Given that the WHD might refer the case to the SOL in those instances in any event, the WHD should seek all appropriate damages in pre-filing negotiations.
- WHD should not permit employer credits for meals and housing in cases where there are no records or proof of actual cost and acceptable use of such facilities. WHD should eliminate the "fair value" credit without employer evidence of actual costs, and cap the allowable actual value of meals and lodging.
- SOL should seek injunctive relief, with monitoring for future compliance, in all high-priority cases.

Priority 3:
Revise the MOU with ICE to clearly cover all of the WHD's investigations.

Regardless of their own immigration status, many workers in low-wage industries avoid entanglement with government authorities to avoid drawing excessive attention to themselves, their families and their communities. These workers will not come forward to the WHD as

claimants, nor will they cooperate as witnesses, without assurances that the agency does not collaborate with Immigration and Customs Enforcement (ICE).[16]

The USDOL currently has a Memorandum of Understanding (MOU) with ICE guaranteeing it will not share a worker's immigration status after a worker has filed a complaint with the agency.[17] However, the MOU does not guarantee the agency will not share information that is uncovered during a proactive (non-complaint-driven) investigation. While the WHD has indicated its policy is not to share this information, the MOU does not expressly forbid such sharing. Meanwhile, advocates report the current MOU and its underlying policy are not evenly followed in all of the regional offices.

In addition, DOL is designated as a certifying agency for the issuance of "U" visas, which are designed to protect victims of crimes like trafficking, and should designate the SOL and the WHD as "certifying officers." Staff should be trained to screen immigrant workers as potential victims of trafficking, in conjunction with the ICE MOU.

The WHD and the SOL should take these steps:

- Revise the MOU to expressly forbid any information-sharing about workers' immigration status, regardless of how it is discovered by the WHD or the SOL.
- Develop a protocol to train staff around the country on the substance of the MOU, and designate a point person to conduct outreach and provide information on the MOU and its application. Post the revised MOU on the DOL website and distribute it. Publicize the MOU and its contents.
- Seek protective U visas for victims of employment-related crimes, and amend interview forms to include questions related to possible criminal activity by the employer.
- Revise the Field Operations Handbook to clarify the WHD will not conduct ICE Form I-9 checks in the midst of a wage and hour investigation. Also direct investigators to ask immigrant workers about immigration-related adverse actions that their employers may have taken, including: (1) re-verifying a worker's employment authorization within 90 days after a worker makes a wage complaint; (2) interrogating a worker about immigration status/documents after a complaint about wage issues, or (3) threatening to report or reporting the worker, co-workers or the workers' family members to ICE.
- Convene an interagency task force, including all labor agencies and ICE, with a mandate to ensure ICE enforcement activities are undertaken to interfere as little as possible in the exercise of labor rights. For example, DOL should urge ICE to consult with labor agencies before undertaking enforcement activities, avoid such activities where labor violations are being investigated and cooperate with sister agencies to protect victims of trafficking and other crimes to ensure their continued presence in the United States with work authorization. This includes notifying the WHD when workers have been placed in ICE detention, and granting access to detention facilities so the WHD can interview workers with potential claims.

Priority 4:

Target subcontracting and misclassification of employees as independent contractors across several industries.

- Set up a task force on subcontracting and independent contractor abuses, to coordinate with other agencies and sharpen enforcement strategies.

- Hold subcontracting (joint) employers accountable for wage and hour violations of their subcontractors using the broad employment definitions in the FLSA and the "joint employer" regulation at 29 C.F.R. § 791.2. The WHD and the SOL should target employers with subcontractors in a wider range of industries, including construction, janitorial, retail/warehousing, security, industrial laundry, agriculture, temporary help/employee leasing firms, food services and hospitality, ensuring compliance where there are "fly-by-night" contractors unable to pay and unable or unwilling to comply with baseline wage and hour standards.

- Identify employers who misclassify workers as independent contractors and hold them accountable for employment law violations. Provide guidance to investigators who are told by an employer that a complaining worker is an independent contractor, by adding a checklist to determine employee status and revising protocols for handling claims where there is an independent contractor allegation. The guidance should note that a worker performing labor or services is presumed to be an employee absent employer proof to the contrary. The WHD also should focus on enforcing record-keeping requirements to ferret out independent contractor misclassification.

- Expand current information-sharing agreements within the DOL (e.g., OSHA, the WHD and unemployment insurance officials) and with state unemployment insurance departments to include other state and federal tax and workers' compensation enforcement agencies. The IRS and state revenue departments have developed an information-sharing policy to combat independent misclassification that can be a useful model. States including California, Illinois, New York, Ohio and others have interagency task forces to study, target and combat independent contractor abuses.[18]

Note: *Any such federal agreement to share information cannot include the Immigration and Customs Enforcement agency (ICE), to prevent a chilling of worker participation.*

- Expand the use of hot goods remedies to enhance subcontractor accountability in a broader range of industries beyond garment firms, to include retail/warehousing, for instance, and to include claims involving independent contractor misclassification. Distribute materials on the hot goods provision to all of the WHD's and the SOL's field offices and to national officials.[19]

- Require ongoing monitoring agreements after hot goods seizures and other enforcement actions, building on successful models USDOL has used in the garment industry. Require employers and their subcontractors to submit periodic payroll information to the DOL, and expressly retain the right to interview workers and inspect payroll on an ongoing basis during the monitoring period and provide for expedited remedies where there are violations. Require the employer to bear the cost of third-party monitoring, and use court-supervised monitoring.[20]

Priority 5:

Prioritize retaliation cases by immediately and aggressively protecting employees, including seeking injunctive relief.

As discussed above, employer retaliation is a powerful deterrent to workers seeking to enforce their rights under wage and hour laws. Not only does retaliation adversely impact the workers who are directly affected, but it also sends a strong message to co-workers that they complain at their peril. It also significantly hampers the WHD's enforcement if employers think they have license to retaliate against workers who file claims.

It is therefore critical that the WHD and the SOL take efforts to protect workers from retaliation, including by pursuing injunctive relief and all remedies available.

Both the WHD and the SOL should make full use of their legal authority to prioritize claims of retaliation:

- Create a strike force or other action plan for the WHD to preserve workers' jobs where possible, or to seek the immediate reinstatement of workers who have faced retaliation without waiting for the SOL's involvement:
  - For example, some state labor departments and attorneys general immediately call a retaliating employer, demanding immediate reinstatement of the worker and explaining the possible liability faced by the employer.
  - WHD should send a pre-emptive notice to employers who are the subject of complaints, informing them of the anti-retaliation provisions of the FLSA and adverse consequences of violating those rules.
- Develop a fast-track protocol for the SOL to institute proceedings seeking emergency injunctive relief for retaliation claims that the WHD cannot easily resolve. This will send a message to other workers that it is safe to come forward and be a witness, and to employers that retaliation will not be tolerated.
- Pursue opportunities for coordinating with other DOL agencies (in particular OSHA) in retaliation instances.

Additional Recommendations:

- Review the Main Office/District Office (MODO)[21] protocol to coordinate enforcement across multiple WHD districts:
  - Ensure enforcement decisions about multidistrict, employer-wide investigations, settlement agreements or voluntary compliance agreements—are made in consultation with central leadership, not by any single regional office.
  - Review the adequacy of the WHISARD system and make appropriate revisions to support multidistrict enforcement efforts by providing information on common employer, brand, management and other linkages between workplaces as well as the home offices of those organizations.

- Consider a more thorough review and restructuring of the MODO protocol to account for new trends in the organization of low-wage industries. For example, keep track of agricultural employers that use the same farm labor contractor, in order to show a joint employment relationship; common management companies and branded establishments or service companies working for major regional or national customers; and franchises.

- Cease issuing opinion letters to trade associations and to individuals actively engaged in litigation on the topic requested, to avoid improper influence on either side of ongoing litigation. WHD should send out a form letter to every entity requesting an opinion letter, asking the requestor to attest that the requestor is not involved in active litigation around the subject matter of the letter.

- Allow professional associations and advocacy organizations to seek guidance, including opinion letters, on legal questions so that cutting-edge issues (like the fluctuating work week, currently in active litigation around the country) can be addressed by the WHD and the SOL.

- The SOL should pursue strategic litigation in cases involving contested legal questions to clear up confusion and establish precedents in line with the agency's position.[22]

- Seek criminal sanctions (in concert with the Department of Justice) against strategically targeted employers, individual principals who commit violations or industries with persistent or egregious violations, along with a strong educational campaign to send a deterrence message. States like New York effectively have leveraged criminal targets in high-priority areas, like fraud in independent contractor cases. Any criminal actions should include full back wages and liquidated damages as restitution for workers.

2. Claims Administration and Organization

The WHD remains the front-line access point for workers seeking to recover unpaid wages—and for many workers who will not be able to get an attorney to assist them in their claims, the WHD is one of their only options. GAO reports in 2008 and 2009 focused attention on the WHD's complaint processes, highlighting the difficulties workers face when trying to submit claims for unpaid wages.[23] While effectively handling individual complaints is but one aspect of a comprehensive and credible enforcement scheme, the WHD must address this most basic component, and communicate clearly with the public what it can and cannot do with individual complaints.

More than a thousand investigators and attorneys are stationed in DOL offices around the country, but enforcement capacity remains inadequate to the task. Each of these investigators and attorneys is charged with protecting a growing number of workers.[24] In addition, many low-wage workers suffering wage-and-hour violations are non-English-speaking immigrants, and fear employer reprisals. This means the WHD faces significant obstacles to ensuring real accessibility for immigrant workers.

The WHD receives tens of thousands of complaints each year from workers claiming unpaid wages. But its enforcement has lagged over time. In 1998, the WHD pursued claims filed by more than 35,000 workers and initiated an additional 16,262.[25] By 2007, the agency pursued only 22,374 workers' complaints (more than one-third fewer than 1998), and initiated only 7,210 claims on its own (fewer than half of 1998's claims).[26] Over that same period, the agency lost 22 percent of its investigators, dropping from 942 in 1998 to 732 in 2007.

Because the WHD cannot fully investigate all individual complaints and has limited resources, it must use its resources with an eye toward engendering greater compliance with wage and hour laws. To this end, it should develop a tiered triage system to sort worker complaints into high-, medium- and low-priority levels, based on strategic national enforcement priorities, with accompanying resources applied to each category. The agencies must arm investigators and other staff with the resources, training and support they require to carry out their jobs.

PRIORITIES:

1. Draw on worker advocates' and state enforcers' expertise to **align national enforcement priorities** with decisions around which claims to pursue aggressively.
2. **Develop a triage system to identify priority complaints** and allocate enforcement resources in line with these priorities.
3. **Establish new training and instruction opportunities** for all staff, including encouraging collaborations between senior and junior staff.

Priority 1:
Align national enforcement priorities with claims handling.

To guide its claims-driven enforcement activity, the WHD and the SOL regularly should review and update priorities. The WHD's Field Operations Handbook publishes enforcement priorities to determine which cases warrant further investigation for both the WHD and the SOL,[27] and the agencies should revisit these criteria to reflect economic and workforce trends, reports from the field and geographic differences, taking into account any state agency resources:

- Draw on the expertise of key stakeholders who have on-the-ground experience with violations to develop basic enforcement priorities that are applicable nationwide, with specific regional variation as appropriate. These stakeholders include the agency's regional leaders, worker center networks, labor unions, state enforcement agencies, national policy experts and "high-road" employer groups who support leveling the playing field for responsible employers.
- Prioritize claims-based activity based on the following criteria:
  - whether the claim presents opportunities to pursue strategic enforcement initiatives, as described in Section I, above, including: whether the claim presents an opportunity for a high-profile and high-impact enforcement action in industries or geographic areas targeted for more intense enforcement, whether the claim involves employer subcontracting or independent contractor misclassification, whether the violation is likely to affect vulnerable populations like immigrant workers who are concentrated in subpar jobs and who would not otherwise complain directly, and others;
  - the seriousness of the violation, based on: the number of workers affected, the amount of back wages and damages at stake, the establishment's history of violations (if any), whether it involves a large national employer, claims involving minors, claims involving trafficking or other egregious violations;
  - the potential to collaborate with worker centers and other stakeholders to reach out to low-wage workers, and to identify high-impact claims involving lower-dollar values or smaller employers, for example, involving day laborers, agricultural employees or domestic workers (See Section 3, below); and
  - whether retaliation has been threatened or has occurred.
- Compile and analyze data generated from the WHISARD case-tracking database, information on employer and workplace characteristics from other data sources, and from calls to the national information hot line to identify trends in violations that will inform enforcement, building upon DOL-commissioned studies[28] and the GAO report recommendations, as appropriate.
- Publicize these enforcement priorities broadly in the media and on the website, and not just in the Field Operations Handbook.
- Reassess and report on these priorities regularly, measured against changes in claim activity tracked by WHISARD, and other tools.

Priority 2:

Develop a three-level triage system for complaints and allocate resources according to enforcement priorities.

The WHD receives tens of thousands of claims each year. A simple "First In, First Out" approach to claims-processing can result in an elevation of low-priority cases with limited impact and a de-emphasis on ones that involve critical issues or have a broader influence. And as the GAO reported, many complaints, regardless of their strategic worth, have been handled poorly by the WHD.

Even with a much-needed boost in staff and resources, the WHD receives far more claims each year than it can investigate adequately. Meanwhile, the SOL only can litigate a fraction of those claims, given the resources required to file a claim in federal court. Experience suggests that if the agencies' results improve, this problem will only be exacerbated, as more worker centers and other advocates begin to refer claims to the USDOL. It is important, then, for the WHD to clearly communicate its claims process and prioritization systems to workers and the general public. In this way, the WHD will not merely triage incoming claims, but will focus on maximizing its claims-based enforcement efforts to ensure basic labor standards are maintained.

In short, the WHD and the SOL simply cannot pursue each valid claim, especially if they want to preserve some resources for strategic enforcement efforts (as outlined in Section 1, above). The agencies must take active steps to focus their enforcement activities on the most strategic targets:

- Revise the WHD's intake and screening processes to ensure incoming claims are properly categorized and prioritized into high-, medium- and low-priority levels based on national enforcement priorities.

For a model, see Appendix: Model Priorities.

- Treat low-value and low-impact claims with an abridged or summary process to avoid expending significant resources on them. If they cannot be resolved with minimal investigation—for example, a phone call and a letter—the worker should be informed promptly that the WHD is unable to pursue the claim, and directed to other enforcement options in clear and understandable language.

- Improve communications with workers in the claims process by simplifying complaint procedures and explaining them clearly and publicly on the agency's website, providing a downloadable claim form. Provide an emergency contact in cases of retaliation, and update workers on the status of investigations at regular intervals. Clearly notify workers on complaint forms that filing a complaint does not stop the clock running on the statute of limitations for bringing a private claim (until this is changed; see below).

- Identify activities that can be phased out because they are not effective enough to justify the resources they require; for example, providing time-consuming "compliance assistance" to employers by speaking at trade association meetings and events, replacing these with Web-based materials.

- Refer claims to experienced private wage and hour attorneys via bar associations in a timely manner, when appropriate, which can free up the enforcement resources of both the WHD and the SOL. (See Recommendations in Section 3, below.)
- Educate legislators, government oversight officials, workers' advocates and members of the public on these new enforcement priorities. For example, the GAO should be educated about the agency's new goals and the rationale behind them, so that a decision by the WHD not to pursue a claim is understood in the context of strategic enforcement and not considered a failure.

Priority 3:
Establish new training and instruction opportunities.

Our nation's low-wage workforce has expanded and changed substantially in recent decades. And while the WHD and the SOL are hiring much-needed new staff, they will require even more enforcement resources in the longer term. Meanwhile, as we discuss throughout this document, their policies and procedures must be updated to keep up with changing workplaces.

The agency's existing staffing challenges will be exacerbated in the short term as experienced staff members are charged with training the new investigators and attorneys who are coming on board across the regions in coming weeks and months. In addition, experienced staff will need time and the opportunity to become familiar with new policies and procedures.

The WHD and the SOL should take this opportunity to establish new training and instructional opportunities for all investigators:

- Design comprehensive training seminars led by a combination of experienced investigators and knowledgeable outside experts (including workers' advocates) to cover a variety of topics, including:
  - new policies adopted as a part of the agency's overall reform agenda;
  - the basics of investigation practices, existing wage and hour laws and making efficient and strategic use of the division's information system (WHISARD);
  - online resources that can be helpful in identifying employers and assets in collections;
  - advanced techniques, like workplace investigation practices and industry-specific protocols for gathering information;
  - research on the persistence of wage and hour violations in low-wage industries, including industry structure and employer behavior that can enhance violations; and
  - area demographics (including immigrant populations), high-violation industries and workplace practices.
- Identify outside leadership development programs and short-term shadowing opportunities with other agencies both inside (OSHA, MSHA) and outside (EPA, DOJ) DOL to help build skills and prepare for career paths.

- Encourage collaborative problem-solving through peer review and regular supervision sessions where senior investigators can work with more junior investigators. These sessions provide an opportunity for leadership development as more experienced investigators have the chance to share their expertise and develop advanced skills.

Additional Recommendations:

- Require WHD investigators to seek tolling agreements with employers while a claim is being investigated. Tolling should apply automatically when the employer failed to post Fair Labor Standards Act notices, as required under current law, and the WHD should so inform employers and workers.
- Accept complaints where only the workers' testimony is available as to hours worked, where the employer has failed to keep records. Keep the burden on the employer to disprove the employee's hours worked testimony, in accordance with the U.S. Supreme Court ruling in *Anderson v. Mt. Clemons Pottery*.
- Create and update written materials to reflect new policies and investigation practices implemented by the WHD and the SOL, including: memos with key policy reforms, materials for training seminars and updates to the Field Operations Handbook.
- Improve communications with workers with limited English proficiency (LEP) by tracking workers' primary spoken language, continuing targeted efforts to recruit multilingual investigators and utilizing skilled interpreters (when necessary) rather than relying on workers' family or children to translate.[29]
- Permit workers to amend their pending complaints with new violations without losing their original filing date; the two- or three-year "look back" period.
- Address logistical barriers that make it difficult for workers to pursue their claims:
  - implement outreach tools like public service announcements, billboards, articles in ethnic newspapers and advertising on mass transit to publicize the extent of the wage justice problem and the means to address it at the WHD;
  - build relationships with community groups and worker centers who can help the WHD reach out to workers in low-wage industries (see Section 3, below);
  - implement alternative schedules for field offices—including investigators who can conduct intake interviews during evening and weekend hours, and seek out neutral spaces in which to conduct initial interviews and follow up with workers;
  - make staffing allocation decisions based on whether there are state and local wage enforcement agencies in the area, and provide greater resources to areas of greatest need; and
  - ensure workers can physically access agency offices, allowing them to use alternative forms of identification.

3. Consultation with Workers' Advocates and Stakeholders

Given the scope of the violations it faces, the WHD and the SOL lack sufficient resources to track and tackle the nation's employment law violations alone. Armed with strategic targeting, developed in part by consultation with community stakeholders, the agencies should leverage all available resources to help stem the tide of workplace violations.

Across the country, workers' advocates and other stakeholders ranging from worker centers and labor unions to employment lawyers and state labor departments have substantial expertise about violations in our nation's workplaces. Responsible employers have begun coming together to advocate for a level playing field to ensure playing by the rules does not put them at a competitive disadvantage. Both the WHD and the SOL can gain by building relationships with these constituents to ensure federal enforcement resources are being used strategically and efficiently.

PRIORITIES:

1. **Build relationships with stakeholders** to reach out to impacted communities and target enforcement, drawing upon models from the states.
2. **Establish task forces to coordinate enforcement efforts** across divisions within the DOL and across other federal and state enforcement agencies.
3. **Inform claimants of opportunities to pursue claims with skilled private attorneys,** when appropriate.

Priority 1:
Build relationships with advocates and other stakeholders.

As described above, the WHD and the SOL will benefit by targeting their enforcement efforts and priorities with an eye on local industries and workplaces around the country. They can heighten the impact by reaching out to diverse communities affected by minimum wage and overtime violations to spread an understanding of the agencies' labor standards enforcement activities and to rebuild trust in government enforcement as a viable path for workers.

The WHD and the SOL cannot achieve these goals alone. They need to work together with a wide range of stakeholders, including worker centers and other workplace experts, legal aid lawyers, state enforcement officials, labor unions and responsible employers, all of whom can help the agencies better understand high-violation industries and build relationships with impacted communities.

The WHD and the SOL should take concrete steps toward building these relationships:

- Draw upon existing models that the WHD and other state enforcement agencies have used to build formal relationships with stakeholders, both regionally and at the national level:
  - designate staff to act as liaisons to immigrant worker groups,[30] attend events and act as a resource;
  - convene task forces on specific problems (like independent contractors) or industries, inviting workers' advocates and stakeholders to share information and participate in other appropriate ways;
  - confer with advocates to design specialized intake forms to provide more detailed referrals for lower-priority cases that DOL will not handle; and
  - use community-safeguarding models that designate certain stakeholders to educate the community about the agencies' priorities and policies, especially in underserved areas.
- Consult with stakeholders to collect information on targeted industries, sectors and communities. Advocates can share their on-the-ground expertise about affected industries, workplaces, sectors and communities, which will provide insights to help inform national and regional enforcement priorities.
- Draw upon advocates to help identify high-impact claims that will result in strategic enforcement, including egregious, systemic or other high-profile violations that would send an important deterrent message but that otherwise may fall through the complaint system.

Priority 2:
Establish task forces to coordinate enforcement efforts.

The WHD and the SOL have a long history of working together to enforce the minimum wage and overtime requirements in the FLSA. By working with other divisions of USDOL, other federal agencies like the IRS and state labor departments, they can enforce more strategically.

To this end, the WHD and the SOL should take concrete steps to:

- Establish intra-agency task forces of USDOL divisions that target workers in high-violation industries, including the WHD, the SOL, OSHA and other divisions as appropriate, and participate in existing state-level task forces on wage and hour enforcement.
- Convene and participate in federal agency task forces on independent contractor misclassification, and others, as appropriate.
- Coordinate WHD and SOL efforts with state labor departments on an ongoing basis to harmonize enforcement priorities and maximize impact and resource allocation.

Priority 3:

Inform claimants of opportunities to pursue claims with skilled private attorneys, including non-profit attorneys.

When the WHD decides not to pursue an investigation, it sends "Section 16(b)" form letters informing workers of their right to pursue claims in court. But many workers lack an understanding of how to proceed, even if they have a claim that could attract private counsel.

The WHD's Western Region had a private-bar referral program in the 1990s, through which it trained and then maintained a list of private attorneys with wage and hour experience. Existing bar associations now have established wage and hour practitioner lists that obviate the need for training and maintenance of a list. Some regions of the Equal Employment Opportunity Commission (EEOC) also maintain lists of private attorneys for individual charging parties who are seeking counsel.[31]

The WHD and the SOL should implement a similar system of referrals, which represent a win-win proposition for the agency, helping workers recover their back wages while removing lower-priority cases from its overburdened docket:

- Collaborate in each region with private attorneys, local bar associations, workers' centers and unions and professional associations like the National Employment Lawyers Association to identify attorneys or bar associations to accept referrals and to understand the types of claims that private attorneys in the region are most likely to pursue.
- Redraft the WHD's current Section 16(b) form letter to provide more detail in plain and understandable language on the aggrieved employee's rights, how to pursue an action and referrals to private attorneys or bar associations. Make special effort to ensure workers are given sufficient notice regarding the statute of limitations so the workers are able to seek private counsel in a timely fashion.
- Revise the FOH, which currently states the investigator "should avoid any action which may be interpreted as suggesting to employees that resort be had to the courts under Secs. 16(b) or (c)."[32]
- Ensure the agency gets credit toward its Government Performance Results Act goals for the claims it refers to private attorneys, so there is no disincentive to refer cases that could be pursued using outside resources.

4. Strengthen Worker Protections

While the WHD and the SOL can make great strides by pursuing more strategic enforcement of existing laws and rules, stronger worker protections are sorely needed in some targeted areas. Current regulations interpret minimum wage and overtime exemptions too broadly for home health care workers and some white-collar workers. And other statutory and regulatory requirements have failed to keep up with the realities of our modern economy.

The WHD and the SOL have the opportunity to reform federal regulations and champion legislation that will re-establish the ground rules that ensure a strong economy.

PRIORITIES:

1. **End the unfair exclusion of home health care workers** from basic minimum wage and overtime protections.
2. **Update recordkeeping requirements** to provide greater transparency for workers and for the WHD and the SOL.
3. **Close loopholes that improperly define and disadvantage white-collar workers.**

Priority 1:
End the unfair exclusion of home health care workers.

The FLSA exempts workers who provide "companionship services for individuals who (because of age or infirmity) are unable to care for themselves," and allows the DOL to define the scope of this exemption.[33] But the current regulations have drawn this exemption far more broadly than Congress intended. The regulations even exclude agency-employed workers who previously were covered under the FLSA's "enterprise coverage." As a result, most home health care workers are exempt from basic minimum wage and overtime protections, depressing wages in this rapidly expanding industry.

In early 2001, USDOL proposed a regulation that would redefine the scope of companionship care. But the proposed rule was rescinded soon thereafter by the incoming administration. The WHD should take steps to resume the rulemaking process immediately:

- Modernize the 2001 proposed regulations by narrowing the companionship exemption to those workers employed solely by a householder to provide "fellowship" and "protection," [34] as outlined in a separate policy update available from NELP.

Priority 2:
Update recordkeeping requirements.

The FLSA requires employers to "make, keep, and preserve" records of employees' "wages, hours, and other conditions and practices employment," and to "make such reports" as the WHD's regulations require as "necessary or appropriate" for its enforcement efforts.[35] But employees seldom have access to their records, a glaring obstacle to effective enforcement. Meanwhile, recordkeeping requirements have not kept up with changing workplaces and trends in employment arrangements, including increasing employer misclassification of employees as independent contractors.

The WHD and the SOL should take steps to update the FLSA's outdated recordkeeping requirements:

- Revise current recordkeeping regulations at 29 C.F.R. Part 516 to require employers to disclose to workers at each pay period their hours worked and wages earned during each workweek. Revise the FOH to instruct investigators to toll the statute of limitations for all periods in which workers did not receive this wages and hours information while the DOL process is pending.
- Support federal legislation that would enhance recordkeeping requirements for firms engaging the services of independent contractors, providing for a private right of action for workers to enforce their rights under these recordkeeping rules.
- Require employers of live-in workers to keep records of hours, and apply the *Mt. Clemons Pottery* standard if they do not.

Priority 3:
Close loopholes that improperly define and disadvantage white-collar workers.

White-collar workers are entirely exempt from the FLSA if they work in a "bona fide executive, administrative, or professional capacity."[36] In 2004, USDOL overhauled regulations that define this exemption, including requirements that a worker must be paid a minimum salary on a weekly basis and that the worker must have a "primary duty" related to executive, administrative or professional capacity. But the regulations did not require workers to spend a majority of their time pursuing that "primary duty" as long as it was their most important duty.[37] This subjective determination created a major loophole for employers of "white-collar" workers.

The WHD and the SOL should tighten the exemptions for white-collar workers:

- Substantially raise the minimum "salary level" that a worker must earn weekly to be considered a white-collar executive, administrative or professional worker who is therefore exempt (currently $455/week), and adjust it for inflation so that it keeps up with the cost of living. (See 29 C.F.R. § 541.600.)
- Revise 29 C.F.R. § 541.700 to ensure workers are not exempt unless they spend a majority of their time performing an exempt "primary duty." Amend 29 C.F.R. § 541.106 to ensure

workers cannot be exempt if they carry out their primary exempt duties concurrently with a non-exempt duty.

- Narrow 29 C.F.R. § 541.100 to reflect that bona fide executives must have some authority over hiring, firing, advancement or promotion, and not the broad catch-all category of "any other change of employment status."
- Adopt a regulation to clarify that a salaried worker's hourly wage is based on a 40-hour workweek regardless of how many overtime hours are worked.[38]
- Reverse or withdraw Opinion Letter 31 (Sept. 8, 2006), which improperly finds loan officers who function as mortgage processors to be exempt administrative workers.

Additional Recommendations (Rulemaking):

- Clarify in 29 C.F.R. § 778.114 that the FLSA forbids the use of the "fluctuating workweek" method of overtime compensation unless the employer and worker have a mutual understanding that a worker's weekly wage is fixed and does not vary due to bonuses or premiums such as nightshift differentials, working more than eight hours in one day, working on otherwise off-duty time, working in less desirable situations or failing to work a minimum number of hours.[39]
- Enact a regulation or issue an Administrator's letter clarifying that an employee need not complain to USDOL or another government agency for the retaliation protections of 29 U.S.C. § 215(a) to apply. Workers should be protected whether they complain to an employer, a state or federal enforcement agency, a union or a third party like a lawyer. Even if they did not complain, workers should be protected when their employers think they have complained and act on that basis.
- Review regulations and procedures related to the H-2B program, including the treatment of recruiting, passport and visa fees, the wage levels and the employer certification process. Affirm that the WHD has the power to enforce H-2B contracts.
- Modernize the outdated joint employer regulation, at 29 C.F.R. §791.2, to codify the test for multiple (joint) employers found in the U.S. Supreme Court case *Rutherford Food v. McComb* and to provide modern-day examples of such joint employer relationships as in janitorial, construction and the temporary help or leasing industries.[40]
- Issue guidance on the misclassification of employees as independent contractors, starting with an acknowledgement of the FLSA's broad statutory definition of "employee," and identification of the leading Supreme Court test for finding employee status. Clarify that employers must keep records of all "employees," and give examples of particularly persistent independent contractor abuses, including those found in construction, janitorial, home health care and other industries.
- Enact a rule clarifying that tips always remain the property of the worker, and that service charges are tips if they are understood by the customer to be tips. Enact new regulatory language that ensures workers get a detailed notice and explanation of an employer's intent to take the tip credit, consistent with 29 U.S.C. § 203(m).

Appendix: Model Priorities

- Reaffirm in regulations that meals must be voluntary and not coerced—and actually taken—in order to be credited toward an employer's minimum wage requirement.
- Reinstate previous WHD policy regarding compensability of time spent donning and doffing clothing and equipment on the job, to bring into compliance with recent Supreme Court decisions, by withdrawing opinion letters FLSA2002-2 and FLSA2007-10.
- Clarify in 29 C.F.R. § 553.23 that an employer may provide a public employee with compensatory time off in lieu of overtime pay only if the worker or a representative has mutually agreed to accept it before performance of work.[41] Clarify in 29 C.F.R. § 553.25 that public employers must grant requests to use compensatory time with reasonable notice by the employee as long as another employee is available to perform the work, regardless of whether that employee would have to be paid overtime.
- Update 29 C.F.R. § 785.47 to reflect that new advances in technology (such as computerized pay systems) significantly narrow the time that may be disregarded as *"de minimis"* and non-compensable, especially if the time is regular or recurring (for example, five minutes every shift). Employers should not be allowed to arbitrarily disregard hours worked that are regular and recurring.

Additional Recommendations (Legislation):

- Play an active role in the development and passage of comprehensive immigration reform measures that protect the wages and working conditions of both current and future members of the nation's labor market, regardless of their immigration status.
- Promote legislation to toll the statute of limitations for all similarly situated employees as of the date an investigation is opened (through an employee notice or complaint or proactive investigation).
- Support legislation to increase the statutory minimum wage and the minimum wage for tipped workers.[42]
- Back efforts to narrow the Federal Motor Carrier Act so it does not exempt workers in jobs that go well beyond long-haul truckers.
- Support amending 29 U.S.C. § 216(b) to permit Rule 23 (non-opt-in) representative class actions.

- Implement the 2002 child labor recommendations of the National Institute on Safety and Health, and amend the civil penalty regulations (29 C.F.R. Part 579) to reflect amendments made by a rider to the Genetic Information Non-discrimination Act that raise the maximum penalty to $50,000 where the violation of a child labor provision results in death or serious injury (doubled to $100,000 in the case of a repeat or willful violation). Support amendments to the FLSA that would improve the protections for children working in the fields so they are essentially the same as for all other working children.

Endnotes

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2 Eric Ortiz, "Raymour & Flanigan drivers get $2M. for OT," Press of Atlantic City, July 8, 2009, http://www.pressofatlanticcity.com.

3 Gene Johnson, "Wal-Mart settles lawsuit by Washington workers for $35M," July 22, 2009, The Associated Press, http://seattletimes.nwsource.com/html/localnews/2009518030_apwawalmartsettlement.html.

4 Libby Nelson, "Car Wash Chain to Pay $3.4 Million in Back Wages," *The New York Times* blog, June 30, 2009, http://cityroom.blogs.nytimes.com.

5 Annette Bernhardt, Ruth Milkman, Nik Theodore, et. al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities,* 2009, http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1.

6 *See, e.g.,* U.S. Government Accountability Office, *Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low-Wage Workers Vulnerable to Wage Theft,* GAO-09-458T, March 25, 2009.

7 U.S. Government Accountability Office, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance,* GAO-08-962T, July 15, 2008, at p. 1.

8 *See* Annette Bernhardt and Siobhán McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975–2004,* September 2005, http://www.nelp.org/page/-/EJP/Trends%20in%20Wage%20and%20Hour%20Enforcement.pdf.

9 *Broken Laws* report at p. 6.

10 *See, e.g., See* Fiscal Policy Institute, "New York State Workers Compensation: How Big is the Shortfall?" (January 2007); Michael Kelsay, James Sturgeon, Kelly Pinkham, "The Economic Costs of Employee Misclassification in the State of Illinois" (Dept of Economics: University of Missouri-Kansas City: December 2006); Peter Fisher *et al,* "Nonstandard Jobs, Substandard Benefits", Iowa Policy Project (July 2005); Francois Carre, J.W. McCormack, "The Social and Economic Cost of Employee Misclassification in Construction (Labor and Worklife Program, Harvard Law School and Harvard School of Public Health: December 2004); State of New Jersey, Commission of Investigation, "Contract Labor: The Making of an Underground Economy" (September 1997).

11 *See, e.g.,* U.S. Government Accountability Office, *Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low-Wage Workers Vulnerable to Wage Theft,* GAO-09-458T, March 25, 2009; U.S. Government Accountability Office, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance,* GAO-08-962T, July 15, 2008.

12 Annette Bernhardt, Ruth Milkman, Nik Theodore, et. al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities,* 2009, http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1. See also Workers Defense Project, *Building Austin, Building Injustice,* 2009, http://www.buildaustin.org/Building%20_Austn_Report.pdf; Annette Bernhardt, Siobhán McGrath and James DeFilippis, *Unregulated Work in the Global City,* 2007, http://www.nelp.org/globalcity/; Domestic Workers United & DataCenter, *Home is Where the Work Is: Inside New York's Domestic Work Industry,* 2006, http://www.datacenter.org/reports/homeiswheretheworkis.pdf; Make the Road by Walking and Retail, Wholesale, and Department Store Union, *Street of Shame: Retail Stores on Knickerbocker Avenue 2-3,* 2005, http://www.maketheroad.org/publications/reports/mrbw_streetshameeng_may05.pdf; Restaurant Opportunities Center of New York and the New York City Restaurant Coalition, *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry 14,* 2005, http://www.urbanjustice.org/pdf/publications/BKDFinalReport.pdf; Abel Valenzuela Jr. and Edward Meléndez, *Day Labor in New York: Findings from the New York Day Labor Survey ii,* 2003. *For more information, see* Siobhán McGrath, *A Survey of Literature Estimating the Prevalence of Employment and Labor Law Violations in the U.S.,* 2005, http://www.nelp.org/page/-/EJP/Lit%20Survey%20of%20Violations.pdf.

13 The WHD's previous "salad bowl," poultry, garment and health care initiatives provide useful models of industry targeting.

14 *See* U.S. Department of Labor, *1999–2000 Report on Initiatives,* 2001 (on file with authors); New York State Department of Labor, "Labor Department Investigation of New York's Car Wash Industry Uncovers Nearly $6.6 Million in Unpaid Wages," Aug. 15, 2008, http://www.labor.state.ny.us/pressreleases/2008/August15_2008.htm.

15 We have reviewed the Fair Labor Standards Act, 29 U.S.C. § 216(c), including its legislative history and the relevant case law, and conclude the statute does not prohibit the WHD from seeking full remedies—including liquidated damages. Contact NELP for further background.

16 *See, e.g.,* Rebecca Smith, Ana Avendaño and Julie Martínez Ortega, *Iced Out: How Immigration Enforcement has Interfered with Workers' Rights,* 2009, http://www.nelp.org/page/-/Justice/ICED_OUT.pdf?nocdn=1.

17 *See* Memorandum of Understanding Between the Immigration and Naturalization Service Department of Justice and the Employment Standards Administration Department of Labor, Nov. 23, 1998, http://www.dol.gov/whd/whatsnew/mou/nov98mou.htm.

18 *See, e.g.,* Catherine K. Ruckelshaus, *NELP Summary of Independent Contractor Reforms: New State Activity,* July 2009, http://www.nelp.org/page/file/66d3e2a74c11e14779_ln4mvyonn.pdf.

19 *See* James B. Leonard, *Hot Goods Temporary Restraining Orders Under the Fair Labor Standards Act in the Agricultural Sector of the Economy,* April 2000, (on file with authors).

20 Numerous non-profit groups have a strong record of monitoring, including the Maintenance Cooperation Trust Fund (MCTF) in California and the Workers Rights Consortium (WRC) in Washington, D.C. These partners can be useful to share best practices, develop appropriate models and monitor the employer under the agency's guidance.

21 The WHD's MODO protocol is intended to control how the agency coordinates enforcement across multiple WHD districts—both to ensure consistency and to uncover systemic violations. The MODO protocol considers the employer's main office (MO) location to assign primary responsibility to the district office (DO) covering that geographical area. *See* FOH Ch. 61 (Multi-Unit Enterprise Procedures).

Multidistrict coordination is vital to spotting nationwide systemic problems and to ensure the strategic use of agency resources. Unfortunately, some employers have used the MODO protocol to enter into weak national agreements with district offices. For example, a 2005 report by the Department of Labor's Office of Inspector General (OIG) found that WHD entered into a nationwide settlement agreement with Wal-Mart that "may adversely impact WHD's authority to conduct future investigations and issue citations or penalty assessments, and potentially restricts information to the public." *See* U.S. Department of Labor, Office of Inspector General, *Agreement with Wal-Mart Indicates Need for Stronger Guidance and Procedures Regarding Settlement Agreements,* Oct. 31, 2005, available at http://www.oig.dol.gov/public/reports/oa/2006/04-06-001-04-420.pdf. The report further describes how the MODO protocol was used to negotiate the agreement, which it found was not adequately reviewed by WHD or reviewed at all by SOL, resulting in an agreement that Wal-Mart be notified 15 days in advance of *any* audit. *Id.* at 4–5, 12–13, 15–16. Indeed, employer-side lawyers are taking notice of the possibility of advantageous arrangements and are encouraging employers to build relationships with their MODO-designated district office avoid to aggressive investigation practices and even civil money penalties in the future. *See, e.g.,* Salvador Simao, "Part III: Creating a Plan with Your MODO," *Wage & Hour Counsel,* April 6, 2009, at http://www.wageandhourcounsel.com/2009/04/articles/federal/part-iii-creating-a-plan-with-your-modo/.

22 Examples include: independent contractors, multiple, or joint employer liability, guest worker programs (e.g., deducting travel and recruiting expenses where it will result in the worker receiving less than minimum wage during their first week of employment), compliance issues arising in certain high-violation sectors, or with specific employers, white-collar regulation abuses, the fluctuating workweek rules (including the inappropriateness of retroactively applying the FWW formula to workers improperly classified as exempt), retaliation remedies for workers, tip credits (e.g., that it is unlawful for an employer to retain any portion of a workers' tips), public employee entitlement to compensatory time on the dates requested by the employee, motor carrier exemption and others.

[23] *See, e.g.,* U.S. Government Accountability Office, *Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low-Wage Workers Vulnerable to Wage Theft,* GAO-09-458T, March 25, 2009; U.S. Government Accountability Office, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance,* GAO-08-962T, July 15, 2008.

[24] *See* Annette Bernhardt and Siobhán McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975–2004,* September 2005, http://www.nelp.org/page/-/EJP/Trends%20in%20Wage%20and%20Hour%20Enforcement.pdf.

[25] U.S. Government Accountability Office, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance,* GAO-08-962T, July 15, 2008.

[26] *Id.*

[27] *See* Field Operations Handbook § 51a01, and at Ch. 80.

[28] Cite to David Weil's studies, http://smgnet.bu.edu/mgmt_new/profiles/weildavid.html.

[29] Few public sections of the Field Operations Handbook directly address accessibility for persons with limited English proficiency. But at least one section on home worker investigations advises investigators that "Children in the home can often interpret… when interviewing the home worker who speaks no English." FOH § 62e14(c). Monolingual investigators should anticipate the need to utilize skilled interpreters or, if necessary, telephonic translation services, rather than relying on family members who are not skilled at accurately translating technical questions and answers.

[30] For example, in 2007, the New York State Department of Labor launched a Bureau of Immigrant Workers' Rights to conduct outreach to community groups, legislators, non-profit organizations and employers to build relationships, inform them of their rights and responsibilities and accept incoming claims. The bureau also participates in internal agency policymaking, often with input from advocates, to ensure the agency's programs are accessible to immigrants and persons with limited English proficiency.

[31] *See* Paul Igasaki and Paul Steven Miller, *Priority Charge Handling Task Force/Litigation Task Force Report,* 1998, http://archive.eeoc.gov/abouteeoc/task_reports/pchlit-1.html.

[32] *See* FOH § 52d02.

[33] 29 U.S.C. § 213(a)(15).

[34] NELP has proposed regulatory language making these modifications, which can be provided upon request.

[35] 29 U.S.C. § 211(c).

[36] 29 U.S.C. § 213(a)(1) (exempting these workers both from minimum wage and maximum hours requirements).

[37] 29 C.F.R. § 541.700(a).

[38] *See Giles v. City of New York,* 41 F. Supp. 2d 308, 317 (S.D.N.Y 1999) ("There is a rebuttable presumption that a weekly salary covers 40 hours; the employer can rebut the presumption by showing an employer-employee agreement that the salary cover a different number of hours"). *See also Rosso v. PI Management Associates, L.L.C.,* Not Reported in F.Supp.2d, 2005 WL 3535060 (S.D.N.Y. 2005); *Jacobsen v. Stop & Shop Supermarket Co.,* No. 02 Civ. 5915, 2003 WL 21136308, at *3 (S.D.N.Y. May 15, 2003).

[39] *See, e.g., O'Brien v. Town of Agawam,* 350 F.3d 279, 289-90 (nighttime shift differential, extra pay for hours worked beyond eight in a day and on otherwise off-duty time); *Heder v. City of Two Rivers,* 295 F.3d 777, 780 (pay docked for working less than minimum number of hours); *Ayers v. SGS Control Servs.,* No. 03 Civ. 9077 RMB, 2007 WL 646326, at *10 (S.D.N.Y. Feb. 27, 2007) (sea pay and day-off pay).

[40] Court cases applying the FLSA to multiple employers often conflate the appropriate statutory definitions of "employer" and misapply multifactor tests with little guidance from the DOL. The leading U.S. Supreme Court case on joint employment, *Rutherford Food v. McComb,* should be codified, and the regulations should correct Circuit Court opinions in the 11th Circuit claiming that if an employer subcontracts out for "business purposes," it doesn't "count" as an indicator of an employment relationship.

[41] No agreement or understanding is required for employees hired prior to April 15, 1986, who do not have a representative, if their employer had a regular practice of granting compensatory time off in lieu of overtime pay effective on that date. 29 U.S.C. § 207(o).

[42] *See* Rajesh D. Nayak and Paul K. Sonn, *Restoring the Minimum Wage for America's Tipped Workers,* August 2009, http://www.nelp.org/tippedworkers2009/.

NELP
National Employment Law Project

National Office:
75 Maiden Lane, Suite 601
New York, NY 10038
Phone 212 285 3025
Fax 212 285 3044

Washington Office:
1333 H Street, N.W., Suite 300, East Tower
Washington, DC 20005
Phone 202 533 2585
Fax 202 775 0819

www.nelp.org

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