ADDRESSING WAGE THEFT THROUGH THE FAIR LABOR STANDARDS ACT

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By

James Tatum, B.A.

Georgetown University
Washington, D.C.
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This thesis uses a case study approach in analyzing why the Department of Labor has not been more effective at enforcing the Fair Labor Standards Act (FLSA) to prevent wage theft, and the major impediments to effective enforcement of the Act. To understand the extraordinary resource shortcomings that the department must overcome, I utilize Michael Lipsky’s analysis from Street Level Bureaucrats of the chronic resource deficiencies that often hinder agencies charged with directly serving the public. The insights of John Donahue and Richard Zeckhauser on the potential of collaborative partnerships where enforcement discretion is shared with other public, private nonprofit and private for-profit organizations provide a framework for exploring how to overcome these chronic deficiencies. Finally, using Alexander Hamilton’s and Paul Light’s standards of an effective federal service pursuing critical work to analyze the Department of Labor’s successes and failures, this thesis seeks broader insight into common challenges that federal agencies may encounter while pursuing complex missions over the long term. This study serves as a means to consider ways to address some of the chronic deficiencies of contemporary governance.

The core components that comprise the FLSA are briefly examined, along with the role of the Roosevelt Administration, especially Secretary of Labor Frances Perkins, in getting the law passed through Congress. Key congressional amendments and
judicial opinions that helped to develop the law into the set of regulations that exist today are also examined. The use of government reports and documents, transcripts of congressional hearings, and other reports from organizations involved in studying or addressing wage theft help to explore the methods pursued by the Wage and Hour Division to enforce the FLSA. These methods include conciliations, complaint-driven investigations and targeted industry investigations. The primary obstacles that prevent effective FLSA enforcement, including insufficient staff resource and poor information management, are also examined.

To overcome these challenges and resource shortages, the Labor Department must improve its case intake systems, invest in upgraded information technology systems to analyze data and ensure agency investigators have access to subscription databases that will enable them to perform their job more efficiently. However, the single greatest move the department can undertake to improve enforcement efforts and make the most of all other reforms is to increase its efforts to form partnerships with public, private nonprofit, and private for-profit partners. Following the framework of Collaborative Governance advanced by John Donahue and Richard Zeckhauser, these partnerships must empower partner organizations to use their own discretion in monitoring worksites and identifying possible FLSA violations while preserving the independent review by the government to exclusively determine when violations have occurred and when payments of back wages or financial penalties are assessed.
This thesis is dedicated to the memory of my mother, Marcia Brady Tatum, as well as to all the tipped workers who waited upon me at restaurants and coffee shops throughout my journey of research, writing, and editing.
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I wish to acknowledge the tireless contributions of my two advisers, Elizabeth and Richard Duke, who were always available with thoughtful feedback, possible complications to consider, and words of encouragement. I am forever in their debt.
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INTRODUCTION

Nearly 76 years ago, Congress passed, and President Roosevelt signed, the Fair Labor Standards Act of 1938 (FLSA). This was a remarkable achievement at the time considering the broad coalition of interests from business leaders to labor unions that either opposed the legislation or had reservations about the proposed law. However, through the leadership of President Roosevelt and his Labor Secretary Frances Perkins, the FLSA did become law, establishing a new framework of minimum standards for compensating employees that today applies to over 135 million American workers.

The FLSA greatly expanded the Department of Labor’s (DOL) authority as it established for the first time a federal minimum wage, outlined requirements for overtime pay to many non-managerial workers once they surpass 40-hours in a workweek, and implemented strict child labor restrictions. Nonetheless, three quarters of a century later, there exists an epidemic of cases where employees are not receiving the full wages to which they are legally entitled under the law. This phenomenon is called wage theft, and it is a problem affecting workers in many sectors of the economy.

What, exactly, is wage theft? One definition asserts that it, “...occurs when workers are not paid all their wages, workers are denied overtime when they should be paid it, or workers aren’t paid at all for work they’ve performed. Wage theft is when an


employer violates the law and deprives a worker of legally mandated wages.”

An estimated three million workers do not receive the full minimum wage to which they are entitled, while an additional three million workers are misclassified as independent contractors thus denying them payroll tax and potential overtime benefits that regular employees enjoy.

The problem of wage theft has been well documented through a series of studies, some of which are highlighted here. A 2008 survey of over 4,000 workers from low-wage industries in Chicago, Los Angeles and New York City, found that 68 percent of survey participants had been subject to a pay-related violation in the previously workweek. Twenty-six percent of those surveyed had not received the full minimum wage for work completed the previous week, and more than half of those affected were underpaid by more than $1 per hour. Of the survey respondents who reported working more than 40-hours the previous week, 76 percent did not receive the full overtime pay


5. Ibid., 7.


to which they were entitled. The overtime violations were worse in certain industries, including 90.2 percent of child care workers surveyed, 86 percent of stock clerks, office clerks and cashiers, and 82.7 percent of home healthcare workers.

Other studies point to similar patterns of non-compliance. A 2000 DOL survey of Nursing Homes found that 81 of 136 investigations of individual homes turned up FLSA violations, roughly a 60 percent rate of non-compliance. A 1997 DOL survey of poultry plants found only a 40 percent compliance rate. A follow up survey of 51 plants in 2000 found that all 51 were in violation of the law. A 2010 survey by the Chinese Progressive Association of 433 restaurant workers in the Chinatown neighborhood of San Francisco found that roughly 50 percent were paid less than minimum wage while 75 percent reported unpaid overtime.

Cases like this suggest the phenomenon is not limited to a few bad companies trying to subvert the law; rather this is a systemic problem. And this problem is not limited to one or two industries. Wage theft can (and does) affect farm workers who pick the crops we eat, employees at retail stores who stock and sell the goods we buy, cooks and waiters who prepare and deliver the meals served at restaurants, healthcare workers at hospitals and nursing homes caring for our loved ones, and a range of white-


13. Ibid., 12.

collar desk workers who qualify for overtime pay and other protections but have been misclassified as “exempt” under the law.

The means by which employers conduct wage theft also varies. Workers may be required to perform certain duties “off the clock” even though the law stipulates they must be paid for all hours worked.\(^\text{15}\) Some employers take illegal deductions from employee’s paychecks,\(^\text{16}\) while other employers steal worker’s tips\(^\text{17}\) or notify workers at the end of a job that they will not be paid at all.\(^\text{18}\) U.S. Representative George Miller (D-CA) then serving as Chairman of the House Committee on Education and Labor introduced a 2008 Congressional hearing looking at the Department of Labor’s enforcement of wage and hour laws with his own summary of common violations:

> There are many ways an unscrupulous employer can cheat a worker out of the wages he or she earns. Employers might pay less than the minimum wage, refuse to pay overtime when employees work more than 40-hours a week, or require employees to work off the clock. And, some employers never pay their employees at all. Simply put, this is theft, and it is illegal.\(^\text{19}\)

Considering wage theft is illegal, the question then becomes: why has the practice become so widespread? As this thesis will explore, the DOL has struggled to enforce compliance with the law. A 2008 report from the Government Accountability

\(^\text{15}\) Bernhardt et all, \textit{Broken Laws, Unprotected Workers}, 22.
\(^\text{16}\) Bobo, \textit{Wage Theft in America}, 30-32.
\(^\text{17}\) Bernhardt et all, \textit{Broken Laws, Unprotected Workers}, 23.
\(^\text{18}\) Bobo, \textit{Wage Theft in America}, 34-35.
Office (GAO) looking at FLSA enforcement actions found that they “. . .decreased by more than a third, from approximately 47,000 in 1997 to just under 30,000 in 2007.”

This situation did not arise over night. As this thesis will make clear, the problems are complex but originate from insufficient agency resources. The DOL budget for the division that oversees FLSA enforcement decreased 14% from 1975-2004; during the same timeframe, the number of businesses regulated by the law increased from 7.8 million to 8.3 million. The division has since hired some additional investigators and increased its efforts to enforce the law, but it continues to face a daunting task in compelling employers to comply with the FLSA, and making violations the rare exception rather than a common reality. The DOL has a long way to go to meet the lofty goals of the FLSA.

This thesis will deploy a case study approach in analyzing why the DOL has not been more effective at enforcing the law, and the major impediments to effective enforcement. To understand the extraordinary resource shortcomings that the department must overcome, this thesis will utilize Michael Lipsky’s analysis of the chronic resource deficiencies that often hinder agencies charged with directly serving the public. The insights of John Donahue and Richard Zeckhauser on the potential of collaborative partnerships where enforcement discretion is shared with other public, private nonprofit and private for-profit organizations provides a framework for


exploring how to overcome these chronic deficiencies. Finally, using Alexander Hamilton’s and Paul Light’s standards of an effective federal service pursuing critical work to analyze the Department of Labor’s successes and failures, this thesis seeks broader insight into common challenges that federal agencies may encounter while pursuing complex missions over the long term. This study shall serve as a means to consider ways to address some of the chronic deficiencies of contemporary governance.

Chapter 1 will define the primary analytical framework to be deployed in evaluating the facts of the Labor Department’s efforts to enforce the FLSA. Chapter 2 will provide more background on the Act, including who it covers, a brief history on how it came into law and developed over time and the vital developments important to understanding the enforcement challenges that exist today. Chapter 3 will draw upon Labor Department documents to examine efforts to enforce the FLSA, highlighting some key cases where the division has been successful. Chapter 4 will draw upon government reports and congressional hearings to examine the greatest barriers to FLSA enforcement, including insufficient resources and poor information management. Chapter 5 will cover the relationships with non-government organizations and state agencies that are required to make enforcement and regulation possible, and examine some cases of partnerships that could inform the Labor Department’s efforts to improve compliance. Finally, in Chapter 6 we will revisit the evidence presented in this thesis to consider whether the agency mission remains relevant to the public and the best roadmap to FLSA enforcement in the future.

Considering the abundance of wage theft cases that are being documented throughout the economy, making compliance with the law become the prevailing norm
in every industry is no simple task. But, as Professor Light himself would argue, the point of a strong, well-run government agency is that it can take on near impossible tasks in a way no other institution is equipped to handle. The success of such efforts is by no means guaranteed. After all, “it is one thing to launch a great endeavor, and quite another to produce a great achievement.”

CHAPTER 1
FRAMEWORK FOR ANALYSIS

The Labor Department is not the only agency in the Federal Government that encounters challenges in achieving its many missions. Indeed, many of the problems faced by the department in its efforts to enforce labor laws like the FLSA are increasingly common as agencies are repeatedly asked to expand their programs and missions while absorbing cuts to agency budgets and resources. This chapter will outline the three primary analytic frameworks to be utilized in assessing the DOL’s efforts to enforce the FLSA.

The analysis of Michael Lipsky in Street Level Bureaucracy: Dilemmas of the Individual in Public Service will help us understand the chronic resource deficiencies that agencies providing public services must overcome. In the effort to overcome these resource challenges, government agencies must look for creative ways to stretch the resources they have and identify community partners that can help it enforce agency directives. Towards this end, Collaborative Governance: Public Roles for Private Goals by John D. Donahue and Richard J. Zeckhauser provides a useful framework for exploring how such partnerships can be arranged and the challenges that arise when non-government partners are brought into the conversation. Finally, we will consider whether the WHD directive to address wage theft through enforcing the FLSA is worth pursuing with all the difficulties that must be overcome. For this analysis, we will draw upon A Government Ill Executed: The Decline of the Federal Service and How to Reverse It by Paul Light.
In *Street Level Bureaucracy*, Michael Lipsky examines the role that individual public officials play in shaping agency policy through the decisions they make in the daily course of performing their jobs. Lipsky observes that such officials must exercise discretion in determining how to apply agency directives to the complexities of real world scenarios. He recognizes that some directives may at times appear to require contradictory courses of action forcing the official to determine which directive is most appropriate under the circumstances.¹

In addition to facing regular decisions about what regulations to follow, government officials who directly serve the public often face a scarcity of resources relative to the public demand for their services. The two greatest resource challenges are often a lack of sufficient personnel to address the agency workload, and insufficient time for each official to adequately address each case. Individual officials may also lack important tools and information that would be helpful in performing their work.²

This shortage of agency resources is not easy to address. One possible explanation is that, as members of the public become aware agency resources have increased, they are more likely to seek resolution to their issues. In effect, the demand for services increases to meet the greater supply of staff. To some extent, an agency may be able to manage these fluctuations in demand through the decisions it makes about how to promote services and organize its personnel.³

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³. Ibid., 33-35.
It is also extremely difficult for agencies to improve their overall quality of service through allocating additional resources. Because public demand for services often surpasses what the agency can provide, hiring additional staff may diminish the backlog of cases that are not receiving attention, but it may have little or no impact on how much time each employee is able to devote to a particular case. From the end user’s perspective, the initial wait time might be reduced, but the interactions with agency officials remain largely the same. Lipsky cites the example of a school district that wants to hire additional teachers to reduce class sizes. Assuming an average class size of 30, he stipulates that increasing the number of teachers in the district by 10 percent would drop the average class size down to 27. While that represents a substantial new investment for the district, the experience of a student with 26 classmates is unlikely to differ greatly than if she had 29 classmates. In that sense, Lipsky concludes that some resource challenges may be “unresolvable” from a quality standpoint, at least in the absolute.\(^4\)

Considering the chronic resource deficiencies that government must overcome in providing services, it nonetheless becomes imperative to explore how government can partner with other institutions to enhance its own abilities to enforce public directives. Authors John Donahue and Richard Zeckhauser are fascinated by the broad spectrum of public-private relationships that are undertaken in the pursuit of public goals. In *Collaborative Governance, Private Roles for Public Goals in Turbulent Times*, they examine a specific model of collaboration that relies upon an arrangement of shared discretion between public and private partners. These are different from the common contractual relationships governments may form with private firms to outsource clearly-

\(^4\) Ibid., 36-38.
defined tasks such as providing food service at a public facility or garbage collection in a community. Donahue and Zeckhauser are interested in more sophisticated partnerships where government seeks to benefit from the unique knowledge and resources that only private industry or nonprofit community partners with the right expertise can provide.

The goal from the government’s perspective is to enhance its capacity in pursing mission objectives beyond what the agency could hope to achieve on its own. This may result in better mission outcomes, enhanced program resources, or some combination of both. ⁵

The potential benefits of such partnerships are substantial. Donahue and Zeckhauser observe that private firms are forced to compete for their survival. In so doing, these firms develop certain organizational efficiencies that government may lag behind, in that government must respond to a different set of pressures including expectations of transparency and fairness. ⁶ In addition to organizational efficiencies, private firms often have the benefit of industry knowledge that only direct experience can provide. Donahue and Zeckhauser consider a few examples, including an auto maker who possesses a more intricate appreciation of how to improve automobile safety design than the safety inspectors sent to measure performance. Likewise, a manager at a shipping port may hold a deeper understanding of how to secure that port against a possible terrorist attack than lawmakers and officials looking at security more broadly. In light of these realities, it is not always advantageous for government to specify the details for how private partners will pursue the joint-mission. In such cases, the private partner is

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⁶ Donahue and Zeckhauser, Collaborative Governance, 63.
expected to exercise production discretion, namely the use of their own judgment in how to achieve mutually agreed-upon goals.\textsuperscript{7}

Such arrangements offer significant benefits while also posing great challenges. Allowing their private for-profit and private non-profit partners to exercise production discretion can enable the government to achieve better mission outcomes. At the same time, partner firms may seek to take advantage of such relationships by funneling benefits to their friends or to themselves. Such abuses of power may take the form of payoff discretion or preference discretion.

Payoff discretion, by definition, is about controlling the flow of money. Firms may attempt to direct project funds in a manner that is advantageous to their bottom line, increases individual executives’ personal wealth or is likewise beneficial to their allies. Preference discretion, a less quantifiable concept, is an effort to influence program strategies or outcomes in a manner that benefits the partner’s personal mission or that of their close allies. Whereas payoff discretion is more often a problem in the for-profit sector, preference discretion is more prevalent when government partners with the nonprofit sector. Both represent an abuse of power, and when left unchecked can damage the credibility of collaborative partnerships and undermine their effectiveness. It therefore falls to the government when evaluating such partnerships to determine if the benefits to the public will be greater than the risks involved, and exercise due diligence to limit improper conduct.

Given the complex and evolving nature of partnerships, Donahue and Zeckhauser caution that they require a balance of careful program monitoring to ensure private...
partners are following through on their promises, as well as strategic incentives aimed at motivating program partners to pursue the public interest when a divergent path would better suit their own goals. Government must follow a continuous “cycle of collaboration” in pursuing its partnerships as outlined in Collaborative Governance.\(^8\) This cycle is comprised of four distinct steps. These steps include: (1) analyze (determine how a partnership could improve upon the status quo and the key partners to make that happen), (2) assign (determine what roles each partner will play), (3) design (consider how the various partners will work together and address unforeseen circumstances), and (4) assess (examine how the partnership is working and make adjustments as needed). The cycle repeats as necessary with the government stepping in to negotiate or dictate changes whenever circumstances warrant.\(^9\)

The government retains some control, but the arrangement is far more complex than a traditional top-down hierarchy. Donahue and Zeckhauser compare the government’s role to that of a circus ringmaster. Although each individual partner exercises independent judgment in their own performance, the government is there to establish the lineup, provide discipline and reward for individual performance, and make adjustments to the overall program as needed. “The calmly multitasking presence of the ringmaster under the big top, by tradition resplendent in top hat and tails, orchestrating a diverse tangle of activities, captures what we view as government’s key role in the world of collaboration.”\(^10\)

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8. Ibid., 223-228.
9. Ibid.
10. Ibid., 236-237.
The partnership arrangements that Donahue and Zeckhauser describe provide a possible means for government to enhance its capacity to pursue the public directions with which it is charged. A separately, but likewise important question is whether such directives are essential to the public interest? This is one of the central questions about government that Paul Light contemplates in his book *A Government Ill Executed: The Decline of the Federal Service and How to Reverse It*.

Light undertakes a frank assessment of the core problems plaguing the federal government and preventing it from living up to many of its lofty missions. He sees a federal government that is still capable of accomplishing extraordinary feats, but that is often prevented from achieving its potential by administrative hurdles like an unaccountable chain of command, a politicized confirmation process for political appointees that often results in delays and leadership vacancies, and an ever-changing series of reforms designed to improve performance that rarely remain in place long enough to have much of an impact.¹¹ At the same time, the mandate for what missions the federal government should undertake and the rights it should enforce have grown to include “an agenda of staggering reach that would barely keep pace with the resources for faithful execution.”¹²

One of the first questions Light seeks to resolve is whether the federal service is still capable of undertaking “missions that matter.”¹³ He draws inspiration from the

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¹². Ibid., 2.

¹³. Ibid., 20.
writings of Alexander Hamilton in the Federalist Papers, where Hamilton argued for a strong central government capable of meeting the complex needs of the nation by undertaking “extensive and arduous enterprises.”

Light acknowledges near the beginning of his analysis that some missions will hold greater importance than others, and that, following the events of September 11, 2001, national security took on enhanced national importance and became a greater national priority than many domestic programs including the Labor Department.

To evaluate the significance of a mission, Light defines three central criteria. These criteria include: (1) the difficulty to undertake the mission, (2) the importance to the public interest, and (3) the success of the government in pursuing the mission. Light stipulates that only after considering all three criteria can we reach an informed judgment as the relative importance of a particular mission as compared to other priorities. Only then can we determine if a mission is truly essential to the national interest. This question, guided by Light’s own analysis that was itself inspired by Alexander Hamilton, will provide the primary lens for evaluating the DOL’s efforts to enforce the FLSA and ensure that workers receive the wages to which they are entitled under the law.

In this chapter, we have defined the central framework that will be used to evaluate the Labor Department’s efforts to address wage theft. Drawing upon Michael Lipsky’s *Street Level Bureaucracy* will enable us to interpret the resource challenges that Labor must overcome in seeking to enforce labor laws including the FLSA. The model

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16. Ibid., 38.
for “Collaborative Governance” advocated by John Donahue and Richard Zeckhauser provides a framework for understanding how the department might address these chronic challenges. Finally, Paul Light’s criteria for determining the relative importance of a mission will provide the framework for exploring how enforcing the FLSA is an essential priority that relates to the ideal of upholding the promise of the American Dream. In the next chapter, we will examine the central tenants of the FLSA, its origins and evolution over time.
CHAPTER 2

THE FAIR LABOR STANDARDS ACT:
ORIGINS, EVOLUTION AND RELEVANCE TODAY

When the FLSA became law in 1938, the Roosevelt Administration and its allies saw it as an important tool to advance the principle of a fair day’s pay for a fair day’s work. But passage of the Act had been far from a certainty, and advocates of the legislation had to fail on multiple occasions before Congress ultimately sent a bill to the President. The law that did finally take effect was more limited in scope than its strongest champions would have preferred, and it was through the subsequent congressional amendments and interpretation by the courts that the Act gained much of the regulatory authority it now possesses.

This chapter will cover the basic framework of the FLSA as it exists today. Next, the origins of the law, including some of the efforts to establish a minimum wage and restrict hours in a workweek that preceded this groundbreaking legislation, will likewise be considered. Finally, this chapter will highlight the evolution of the Act, including its expansion to cover new sectors of the economy like nurses and farm workers, and preview some of the recent efforts to clarify regulations and bring the law into alignment with present day realities.

The FLSA encompasses four primary components. It establishes the framework for a federal minimum wage, essentially a minimum compensation standard to which all eligible employees are entitled. Since 2009 this has been set at $7.25 per hour. To discourage companies from overworking their employees and encourage business to hire new staff, the law implements a 40-hour workweek and requires that eligible employees
who work beyond 40 hours shall receive one-and-a-half times their regular hourly rate for each additional hour worked, more commonly known as “time-and-a-half.” Third, the act requires that businesses maintain certain records of the hours their employees work to help track and assist with compliance, including but not limited to the employee’s name, address, regular hourly pay rate, total paycheck deductions, total wages for each pay period, and date of payments made. Finally, the law restricts and regulates child labor with limited exceptions in the agricultural industries. Regulating child labor is an important component of the law and indeed helped to win support in Congress for the original Act. For the purposes of this study on efforts to prevent wage theft, the focus will be on the minimum wage and overtime provisions of the law.

There are many exceptions and variations to coverage that exist from one industry to another. For example, Congress granted hospitals the flexibility to negotiate a 14-day work period of 80 hours with their employees in lieu of the traditional 40 hour workweek. This exception requires that hospital employees shall either receive overtime pay for any shifts worked longer than eight hours in a row, or any hours worked beyond the cap of eighty in a two-week period, depending upon whichever measure results in greater pay for the employee. Conversely, employees who regularly receive more than $30 a month in tips such as waiters or bell hops may be paid a lower base rate of no less than $2.13 per hour provided the employer can prove that the employee in question earns at least the

2. Ibid.
minimum wage after tips are factored into their wages. The table in Figure 1.A provides additional examples of exceptions to FLSA minimum wage and overtime requirements.

Table 1-A
Examples of current exceptions under the Fair Labor Standards Act

<table>
<thead>
<tr>
<th>Employees exempt from both minimum wage and overtime payments</th>
<th>Employees exempt from overtime pay requirements but covered by minimum wage</th>
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<tbody>
<tr>
<td>Executive, administrative, and professional employees classified as &quot;exempt&quot; under DOL regulations</td>
<td>Some retail or service employees who earn commission.</td>
</tr>
<tr>
<td>Some small newspapers and switchboard operators of small telephone companies</td>
<td>Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations</td>
</tr>
<tr>
<td>Seamen employed on foreign vessels</td>
<td>Motion picture theater staff</td>
</tr>
<tr>
<td>Newspaper delivery workers</td>
<td>Domestic service workers who reside in their employers' residences</td>
</tr>
<tr>
<td>Farm workers employed on small farms</td>
<td>Farmworkers</td>
</tr>
</tbody>
</table>


To enforce these regulations and help the public make sense of them, Congress established a Wage and Hour Division (WHD) within the Labor Department. The division is overseen by an Administrator, appointed by the President and confirmed by the U.S. Senate, who is responsible for managing staff and overseeing agency work. Today, the agency has seen its mission expand to include other legislation like the Family Medical Leave Act, The Davis Bacon Act, and The Migrant and Seasonal Agricultural

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Worker Protection Act (MSPA), but enforcing the FLSA remains a core focus of the WHD mission.

The FLSA was groundbreaking for establishing a minimum wage at the federal level, but it was not the first attempt at regulating hours for workers. Many states had sought to restrict work hours, primarily geared towards protecting women and children. A ten hour workday had become common for trades in the eastern United States by 1840, and following the Civil War organized labor made securing the eight hour workday its new focus. Beginning in the early twentieth century, several states passed laws to restrict child labor and implement minimum wages, either through an across-the-board minimum rate or by establishing wage boards to set rates from one industry to another. These laws were repeatedly struck down by the courts as unconstitutional in a series of rulings between 1923 and 1937.

As efforts to implement wage and hour regulations stalled at the state level, the Roosevelt Administration moved to pick up the debate at the federal level. Probably no one person did more to champion the creation and passage of the FLSA than President Roosevelt’s Secretary of Labor, Frances Perkins. Historian Jonathan Grossman noted that before she agreed to take the job of Labor Secretary, Perkins informed Roosevelt that she


would use the position to advocate for a minimum wage, seek to limit the number of hours in a workweek and to end child labor.  

Pursuing legislation to regulate the wages and hours to which workers would be entitled was no simple task. The judicial system, including the Supreme Court, had a history of ruling against minimum wage laws. Indeed the Roosevelt Administration originally planned to delay action on a bill and focus on championing its controversial legislation to expand the Supreme Court with the goal of creating a Supreme Court more favorable to Administration initiatives. The Administration changed tactics after a series of 1937 court rulings more favorable to labor. The State of Washington successfully implemented a minimum wage after the state court upheld the legislation in a March 29, 1937 ruling on *West Coast Hotel Company v. Parrish*. This victory prompted many States to renew their pursuit of minimum wage laws. The Supreme Court, in turn, upheld the Railway Labor Act and the National Labor Relations Act. Soon thereafter, the Administration began their campaign for a labor standards bill.

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President Roosevelt decided the bill should also include restrictions on child labor as such restrictions were popular with Members of Congress at the time. He sent a bill to Congress on May 24, 1937. Along with the bill, Roosevelt included a statement to Congress where he outlined his rationale for the necessity of its passage:

Our Nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. A serf-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' wages or stretching workers' hours.

Representative William Connery and Senator Hugo Black introduced similar versions of the legislation in both the House (H.R. 7200) and Senate (S. 2475), that would have empowered a new Fair Labor Standards Board to determine when wages needed to be raised and where they should be set industry by industry so as to allow the new system to evolve gradually. The Black-Connery bills were reviewed in a joint-hearing by the House Committee on Labor and the Senate Committee on Education and Labor. The joint committee heard extensive testimony from labor leaders and business leaders alike, totaling over twelve hundred pages in the official record from June 2 to June 22, 1937. The bill also enjoyed support from the general public and had the bill


16. Ibid., 467.

17. US Department of Labor website “Maximum Struggle: Congress Round 1.”
come to a vote in both Houses it likely would have passed that year. The bill did pass in the Senate, but was blocked by Republicans and some conservative Democrats in the Rules Committee of the House of Representatives and thereby prevented from receiving a vote before the end of the Congressional session.  

The fact that Democrats were divided on whether to support the measure illustrates the strength of the coalition that opposed taking action. Business leaders largely opposed the bill, as did Republicans and a faction of conservative Southern Democrats. Even labor leaders were split over what action the government should take, with many concerned that a new federal minimum wage would, in practice, prevent labor leaders from negotiating wages above the set federal rate effectively creating a wage cap. President William Green of the American Federation of Labor (AFL) initially endorsed the legislation provided that it was limited to workers not currently represented in collective-bargaining and would not override any new agreements reached through collective-bargaining in the future, even if the federally established rates were greater than those negotiated through bargaining. Some labor leaders favored the creation of a new labor standards board while others came to opposed it altogether. By the time the bill

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was blocked in the House rules committee, it had undergone so many modifications that support for the measure was largely exhausted.\textsuperscript{22}

President Roosevelt sought to regain momentum by calling a special session of Congress in 1937. The President tried to inspire Congressional action by linking the bill to addressing the nation’s economic depression, arguing that raising wages, limiting hours worked and eliminating the exploitation of child labor would benefit those citizens facing the worst economic hardship. The session was ultimately unsuccessful in producing a bill, leading some experts at the time to conclude that support for a bill had collapsed and no action was possible.\textsuperscript{23}

Unwilling to concede defeat, Roosevelt and his Administration persisted in their efforts. Secretary Perkins advocated a greatly weakened version of the legislation as the Administration sought to gain support.\textsuperscript{24} The President applied pressure to Members of Congress who had relied on his popularity to get elected in 1936, while Secretary Perkins sent a delegate to Congress to work out revisions that would address Congressional concerns and build support for passage.\textsuperscript{25} The effort for passage gained further momentum when supporters of the legislation won special elections in Florida and Alabama, leading many previously reluctant members of Congress to fall in line. The

\textsuperscript{22} Samuel, “Troubled Passage: The Labor Movement and the FLSA,” 34-35.

\textsuperscript{23} Grossman, \textit{The Department of Labor}, 47.

\textsuperscript{24} Ibid.

\textsuperscript{25} US Department of Labor website, “Maximum Struggle: Congress the Final Round.”
President signed the FLSA on June 25, 1938. The law became effective October 24, 1938.

At the time it became law, the FLSA applied to a limited segment of the workforce covering roughly 11 million workers in a labor force that include roughly 33 million nonsupervisory workers who might have been included in a more robust law. Major segments of the workforce not covered at the time included farmworkers, domestic workers, and many retail and service employees. The law’s main statues were designed to phase in over time. The workweek was initially defined as 45 hours before the overtime provisions for time-and-a-half pay would take effect, phasing down to a 40-hour week over 3 years.

Likewise, the new federal minimum wage followed a step pattern, beginning at $0.25 the first year, rising to $0.30 the second year and then following different schedules from one industry to another so long as they all reached a $0.40 minimum wage by July 17, 1944. The Act also banned the employment of children in all covered fields not tied to agriculture, effectively banned the employment of most 16 year olds as well. By establishing these fundamental precedents, the law enabled Congress to come back and gradually add to the law over time. Indeed, while reflecting on the first four decades of


27. US Department of Labor website, “Maximum Struggle: Congress the Final Round.”


the law’s existence, two former labor department officials argued that the main accomplishment of the FLSA in that time was to create a framework for enforcement while Congress and the Courts would apply that framework to new segments of the workforce over time.32

Not long after the new law had taken effect, opponents sought to get the Act stricken down through the courts. The matter came before the Supreme Court in United States vs. Darby Lumber Company33 where a majority ruled that Congress, under its Commerce clause authority to regulate interstate commerce, was within its rights to create a federal minimum wage and a forty hour workweek. Congress was authorized to “prohibit the interstate shipment of goods produced by employees whose wages did not meet the standards established by the act. The Court also held that the production of goods, at least some of which were intended for shipment across State lines, is related sufficiently to interstate commerce as to be within the power of Congress to regulate.”34

Throughout the twentieth century, Congress frequently revisited the FLSA expanding its coverage to include more sectors of the workforce and clarifying, revising, or repealing previous exceptions contained within the law. Air transportation workers were added in 1949, while public schools, nursing homes, laundries, construction workers and some agricultural workers on large farms were added in 1966.35 Congress


35. US Department of Labor, Wage and Hour Division, “History of Changes to the Minimum
also created an enterprise standard in 1961 for retail and service businesses engaged to any degree in interstate commerce that the Act would apply to if the business surpassed $1 million in annual sales. This standard was lowered to $250,000 in annual sales in 1969. By 1979, the Act had expanded to cover roughly 54 million workers.

Congress made significant changes to the law in 1979. In addition to implementing a gradual increase to the minimum wage to reach $3.35 by January 1, 1981 and gradually lowering the tip wage credit allowance from fifty percent to forty percent of the minimum wage, the amendment created a special waiver allowing children ages ten to eleven to hand harvest crops in an agricultural setting within limited circumstances. The amendments also eliminated exceptions to the overtime regulations that had previously been applied to the hotel, motel and restaurant industries. The enterprise threshold to determine which businesses were covered by the law was set to gradually rise to $362,500 by 1981 to account for inflation. Congress would later further adjust this threshold to $500,000 in 1989 and expand it to apply to non-retail businesses as well, effectively creating an across the board threshold.

The minimum wage itself was likewise raised over time, with Congress often implementing gradual multi-step increases to phase in over a series of years. In 1949

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Congress raised the minimum wage to $0.75 while empowering the Secretary of Labor to supervise payments of back wages and bring lawsuits to help facilitate wage recovery.\textsuperscript{40} The minimum wage hit $2.00 per hour in 1974, $3.10 in 1980, and $4.25 in 1991. The most recent changes were passed in 2007 when the rate gradually increased from $5.85 as of July 24, 2007 to the current rate of $7.25 which took effect on July 24, 2009.\textsuperscript{41}

The Supreme Court also played a role in clarifying the interpretation of the law, often ruling in favor of expanding the definition of employee to cover more workers. In the 1945 case \textit{A. H. Phillips Inc. vs. Walling},\textsuperscript{42} the Supreme Court clarified the FLSA exception for retail businesses. The case involved a chain of local grocery stores in Massachusetts and Connecticut that shared a central warehouse facility. The Court found that because the employees at the warehouse were engaged in interstate commerce, all employees of the grocery chain were covered under the law which, Justice Murphy argued in the majority opinion, was intended to exempt only truly local small businesses.\textsuperscript{43}

In another case, \textit{Rutherford Ford Corp. v. McComb},\textsuperscript{44} the Court began to clarify the definition of what constitutes an employee beyond the longstanding common law

\begin{itemize}
\item \textsuperscript{40} Elder and Miller, “The Fair Labor Standards Act: changes of four decades,” 12.
\item \textsuperscript{41} US Department of Labor, “History of Changes to the Minimum Wage,” 1-2.
\end{itemize}
concept of a master and servant. The case involved a meat boner who had been hired as an independent contractor, given freedom to set his own hours and hire other employees out of his own wages which were based on the amount of work performed. The Court determined he should be classified as an employee and subject to the Act’s regulations as much of his work mirrored that of a regular employee and he was essential to the operation of the business.\footnote{Elder and Miller, “The Fair Labor Standards Act: changes of four decades,” 14.}

Likewise, in \textit{Overnight Motor Transportation Company v. Missel}\textsuperscript{46}, the Court struck down an alternative pay arrangement for an office clerk at a trucking company who was asked to work an irregular schedule up to eighty hours per week. The company maintained that the employee’s salary exceeded the minimum wage plus all overtime that would have been due under the law and therefore it was not required to differentiate between regular and overtime hours. The Court found that one of Congress’ goals for the legislation had been to discourage companies from expecting employee overtime and encourage the hiring of additional workers, and as such simply meeting the minimum financial requirements was insufficient to comply with the law.\footnote{Overnight Motor Transportation Company v. Missel 315 U.S. 572 (1942) cited in Waltman, “Supreme Court Activism in Economic Policy,” 70.}

The Department of Labor faced enforcement challenges with the new law from the early days of its implementation. Between 1939 and 1948, the Department found 3.2 million employees were paid less than the minimum wage, not fully compensated for overtime, or both, totaling over $135 million in wages owed.\footnote{Overnight Motor Transportation Company v. Missel 315 U.S. 572 (1942) cited in Waltman, “Supreme Court Activism in Economic Policy,” 70.} A 1965 Department of

\footnotetext[45]{Elder and Miller, “The Fair Labor Standards Act: changes of four decades,” 14.}
Labor survey estimated that, were the Department to conduct a full audit of all businesses covered by the law in a single year, roughly 1.8 million workers would likely be owed back wages totaling $300 million. A more recent accounting of the challenges the Department of Labor must address in attempting to enforce the law will be covered in more detail in Chapters 3 and 4.

Advocates for strong enforcement of the FLSA often criticize the Labor Department for not doing enough to punish repeat offenders and promote compliance. Indeed, while the phenomenon of wage theft has become better documented through a series of studies illuminating the breadth and complexity of the problem as well as the extent to which the Labor Department has been unsuccessful in inspiring widespread compliance, the Department itself has a long history of taking a less aggressive approach to enforcement. Former Labor Department historian Jonathan Grossman argued that the department had always approached its enforcement of the law from an educational rather than a punitive standpoint. Grossman pointed to the department’s extensive public information program distributing pamphlets and circulars and staffing field offices and stations around the country to educate business owners on their obligations under the law. Today, the Department maintains updated versions of these programs while extending its outreach to the internet posting compliance guidelines and agency rulings on its website at www.dol.gov/whd.

50. Ibid., 196.
The Department has also made various attempts within its regulatory authority to update regulations that impact how the law is enforced, including the treatment of white collar workers in computer-based office jobs, many of whom receive a fixed salary and are classified as exempt from the wage and overtime regulations. In *A Measured Approach: Employment and Labor Law During the George W. Bush Years*, authors William Kilberg, Jason Schwartz and Joshua Chadwick argue that multiple Presidential administrations considered updating and clarifying the regulations for exemption, but while there was widespread agreement that changes needed to be made, opinions differed greatly on what those changes should be resulting in decades of government inertia. The authors contend that in clarifying the white collar regulations, the George W. Bush Administration preserved the law’s coverage in the core industries the law was designed to cover while raising the minimum salary threshold required for exemption.51

However, the Bush Administration revisions proved controversial, and opposition to the updated regulations was nonetheless fierce. The Department of Labor received 75,280 comments on its proposed revisions many of them critical.52 After the Administration ultimately enacted its reforms, AFL-CIO President John Sweeney issued a statement that "The [George W.] Bush Administration staunchly opposed legislation which would


preserve overtime pay for all workers and instead pressed forward with eliminating overtime pay for a huge swath of middle-class workers, many who make as little as $23,600 a year.\textsuperscript{53}

The Obama Administration has likewise sought to clarify enforcement of the law with the Department of Labor’s new Misclassification Initiative. The initiative was launched at the direction of the Middle Class Task Force chaired by Vice-President Biden, and seeks to cut down on the number of cases where employees are wrongly classified as independent contractors thereby denying them certain protections under the law.\textsuperscript{54} The Obama Administration’s Misclassification Initiative will be covered and evaluated in more detail in Chapter 5.

Throughout its history, the FLSA has been a work in progress. If not for the persistence of its strongest advocates, it may never have become law as earlier attempts to implement minimum wages at the state level were largely unsuccessful as were the first few attempts to pass the legislation in Congress. The original law provided more of a rough sketch for the enforcement infrastructure Congress and the courts would enhance over time. Policy makers, labor advocates and business leaders continue to debate the proper balance of enforcement that penalizes the worst offenders including those racking up repeat offenses while practicing lenience and striving to better educate business owners who are trying their best to comply with the law. This would be a difficult confluence of demands for an efficient Labor Department well equipped to perform its


\textsuperscript{54} US Department of Labor, Wage and Hour Division, “Employee Misclassification as Independent Contractors,” Wage and Hour Division website, accessed June 15, 2013, \texttt{http://www.dol.gov/whd/workers/misclassification/}.
mission. Unfortunately, as the following chapters will make clear, the Labor Department faces many challenges of its own in attempting to enforce the law.
CHAPTER 3
ENFORCEMENT APPARATUS AT THE WAGE AND HOUR DIVISION

Having defined the problem of wage theft and the basic regulation and evolution of the FLSA, it is likewise important to understand the enforcement mechanisms utilized by the Labor Department to address and prevent wage theft. The next three chapters will focus on the efforts of the department to enforce compliance with the FLSA and the challenges that arise in this pursuit. This chapter will draw upon agency documents and reports to cover some of the department’s key successes in recent years and what these successes can teach us about the agency’s limitations. Chapter 4 will focus more explicitly on the systemic shortcomings that plague the agency’s efforts, considering some of the underlying causes that prevent the department from achieving widespread compliance with the law. Chapter 5 will look at the role of partnerships with state agencies and non-government organizations in creating a better system for enforcement, and the promise such “Collaborative Governance” provides as well as the inherent challenges that accompany such arrangements.

Responsibility for enforcing the FLSA lies within the Wage and Hour Division (WHD) of the Department of Labor (DOL), a division that was created by the act itself for that very purpose. The Mission Statement of the WHD reads as follows:

The Wage and Hour mission is to promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation's workforce. The WHD enforces Federal minimum wage, overtime pay, recordkeeping, and child labor requirements of the Fair Labor Standards Act. WHD also enforces the Migrant and Seasonal Agricultural Worker Protection Act, the Employee Polygraph Protection Act, the Family and Medical Leave Act, wage garnishment provisions of the Consumer Credit

1. Donahue and Zeckhauser, Collaborative Governance, 24.
Protection Act, and a number of employment standards and worker protections as provided in several immigration related statutes. Additionally, WHD administers and enforces the prevailing wage requirements of the Davis Bacon Act and the Service Contract Act and other statutes applicable to Federal contracts for construction and for the provision of goods and services.²

The WHD utilizes a variety of enforcement mechanisms to promote compliance with the FLSA. The primary methods of investigating possible violations include: (1) responding to workers complaints, and (2) conducting targeted investigations to ascertain the extent of violations within a given industry. While the agency strives to achieve a balance between the two methods, budget constraints have gradually tipped the scales towards complaint-driven inquiries at the expense of targeted industry investigations over time as the agency devotes more resources in its efforts to keep up with worker complaints.

Similarly, when following up on worker complaints, the WHD utilizes several methods of response: conciliations, limited investigations and full investigations. The most common approach is the conciliation method. Conciliations are “intended to resolve a single issue affecting one or a few workers with a minimum expenditure of resources.”³ Unlike an investigation, a conciliation does not attempt to determine the facts of the case, confirm whether a violation occurred or follow up to ensure payments are made. There


are no interviews, site inspections, or formal review of records. Conciliations are often limited to brief phone conversations, and the WHD leaves the burden with the employee to follow up with the agency in the event an employer promises to pay back wages and does not follow through. The WHD estimates that this minimalist approach provides agency staff “with the chance to secure back wages on behalf of approximately 12,000 workers every year. It has a higher rate of return in terms of the number of workers helped per enforcement hour expended than any of the other tools used by WHD.” At the same time, as the next chapter will make clear, the conciliation method is not always effective at resolving the cases on which it is deployed.

The WHD maintains a national office in Washington, DC, five regional offices for the Northeast, Southeast, Midwest, Southwest, and West, and 54 district offices that are spread throughout the states and federal territories. All field workers must undergo a training program consisting of classroom and field work before they are allowed to conduct any investigations. The agency also maintains a strategic planning process to consults staff from all offices when developing its enforcement strategies and priorities, including tailoring specific strategies to regional conditions.

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5. Ibid., 47.


The WHD pays particular attention to cases involving low-paid, low-skilled workers who are among the most vulnerable to wage theft. Around the start of the 21st century, WHD elected to prioritize three low-wage industries that were experiencing extensive FLSA violations: garment manufacturing, long-term healthcare, and agriculture. The agency has since expanded its investigations on behalf of low-wage workers to encompass 33 industries ranging from food service and hospitality jobs to construction and day care.⁹

The poultry processing industry provides a good example of both the Wage and Hour Division’s abilities to investigate wage theft and restore back wages to workers as well as the limitations of these efforts. Kim Bobo, the Executive Director of Interfaith Workers Justice (IWJ), recounts a 1996 IWJ investigation into a North Carolina poultry plant in her book *Wage Theft in America: Why Millions of Workers are Not Getting Paid and What We Can Do About It*. The IWJ team interviewed workers who reported cases of being officially clocked out before they were allowed to stop working, not receiving overtime pay when they worked past 40-hours, and not being paid for time spent donning and doffing mandated safety and protective gear.¹⁰ The IWJ staff held a press conference to share their findings, to which Labor Secretary Robert Reich responded by announcing the department would conduct a compliance investigation in the poultry industry.¹¹

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11. Ibid.
The Labor Department began its first investigation in 1997, a collaboration between the WHD and the Occupational Safety and Health Administration to measure compliance with federal wage and safety regulations.\(^\text{12}\) The department sampled 51 poultry plants from around the country.\(^\text{13}\) The survey found a compliance rate among the plants investigated of less than 40 percent, with failure to pay overtime one of the most common violations.\(^\text{14}\) The department initiated a follow up survey of 51 additional plants in 2000.\(^\text{15}\) That study revealed wage violations at all of the plants surveyed; of the workers employed by those plants, 65 percent did not receive overtime pay to which they were entitled while 35 percent were subject to illegal paycheck deductions. The survey findings prompted a coalition of religious leaders led by the National Interfaith Committee for Workers Justice to draft a joint letter to the Labor Department urging it to provide strict oversight on the industry ensuring that poultry processors complied with applicable laws and workers received the back wages they were owed.\(^\text{16}\)

The Department of Labor filed lawsuits against four major poultry processors over a dispute as to whether their employees should receive overtime pay. The four companies included Tysons Foods, Sanderson Farms, Continental Grain Company, and


\(^\text{15}\) Tim Wheeler, “Poultry workers battle for back pay.”

Three of the four companies named in the lawsuits ultimately worked out agreements with the Labor Department, while Tyson Foods and the department went through several years and rounds of litigation before the matter was resolved. First, in 2000 Continental Grain Company agreed to comply with all relevant laws and pay $148,106 to 37 workers for past violations. That same year Purdue Farms reached the first of two agreements, requiring it to pay over $300,000 to 177 workers in North Carolina.

A subsequent agreement in 2002 between Purdue Farms and the Labor Department awarded back wages to over 25,000 workers totaling over $10 million.

Sanderson Farms reached a settlement in 2002 agreeing to pay over 500 workers total back pay and interest in excess of $450,000. The Department also reached a major agreement with yet another company, George’s Processing, in 2006, securing $1.24 million for 5,000 employees.


19. US Department of Labor, WHD Press Release 00-203.


22. Bobo, Wage Theft in America, 12.
Meanwhile, Tyson Foods was less amenable to reaching a settlement, choosing instead to fight the Labor Department in several rounds of litigation. In 2002, the Department filed a new case against Tysons, this one focused on the company’s failure to pay employees for time donning and doffing protective safety gear. The case was resolved in 2009 following an initial mistrial when the second jury sided with the government finding that Tyson Foods was responsible for paying back wages. The company also faced a series of private lawsuits, which resulted in a 2010 court injunction. The company agreed to a settlement to pay its employees for all hours worked and restore $500,000 in previously unpaid overtime to roughly 3,000 workers at one of its plants in Alabama. That same year, the Labor Department worked out a settlement with Pilgrim’s Pride Corp., the largest poultry processor in the United States, securing over a million dollars in back wages for 798 employees based out of Dallas.

The WHD gained further support for its enforcement efforts with a ruling from the United States Supreme Court in *IBP v. Alvarez*. In a unanimous ruling, the court

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determined that not only should workers in meat and poultry processing plants be paid for time spent donning and doffing protective gear, which the ruling deemed a principle activity of work, but the workers are also entitled to compensation for the time spent walking to and from the processing facility in their protective gear. More generally, the Supreme Court found that workers should be compensated for a full day’s work extending from the first principle activity undertaken through the last. Some workers are also eligible for time spent on location before they begin their first principle work activity of the day, provided they are required to report to the site at a specific time.  

The Labor Department investigation of the poultry industry illustrates several common trends that emerge when analyzing the efforts of the WHD to enforce compliance with the FLSA. Clearly, the division was able to secure millions of dollars in back wages to benefit thousands of workers directly. By securing agreements from the companies found to be in violation that they will comply with regulations in the future, the department can likewise help improve conditions for other workers in the industry. 

Those benefits notwithstanding, this investigation illustrates many of the challenges the WHD encounters in attempting to enforce compliance with the law. For starters, the division did not begin its investigation until after it was made aware of industry violations by a third-party, in this case the investigators at IWJ. In fact, the recent history of the agency has been that the majority of cases initiated are complaint-driven. Targeted investigations represented a mere 23 percent of enforcement efforts in

2007, down from 30 percent in 2000 and 60 percent in 1968.\textsuperscript{29} On the one hand, an agency responding to complaints that are brought to its attention is certainly a desirable component of effective government. At the same time, as critics point out, an agency that relies upon industry insiders and worker advocates to blow the whistle on abuses may not be receiving the full picture of where problems are most prevalent so that it can make the best use of limited resources.

Furthermore, this investigation highlights the limitations inherent in the department’s efforts to enforce the law. The WHD informing the poultry processors that they were in violation of the law was not sufficient to inspire industry compliance. Instead, the division had to rely on the assistance of the judicial system and the binding effect of a court ruling in order to secure agreements that back wages would be restored. Even after the agency secures a court-ruling that a company must comply with the law, it has few enforcement mechanisms to ensure the company makes good on its commitment.

Additionally, the investigation points towards the general vulnerability of low-wage workers who are among the most susceptible to experiencing wage theft. The fact that recent immigrants make up a disproportionate percentage of the low-wage workforce – a 2009 report that surveyed low-wage workers found that only 30 percent had been born in the United States\textsuperscript{30} – feeds into the problem as recent immigrants may have fewer rights depending on their residency status and may not be informed of the protections that


\textsuperscript{30} Annette Bernhardt, et all, Broker Laws, Unprotected Workers, Table 2.1, 15.
do apply to them. Nonetheless, U.S. born workers in the low-wage sector are also vulnerable to wage theft and may also lack information about their basic rights under the law and what to do when those rights are violated.

Finally, the poultry investigation highlights the problem of recidivism, wherein companies previously cited for wage theft continue to violate the law. Critics allege this is a byproduct of a weak enforcement structure. So long as companies do not expect to face penalties much greater than the wages they would have owed anyway, they have little incentive not to attempt underpaying wages.

The garment industry provides another instructive example of WHD enforcement challenges and the strategies they deploy. The manufacturing of clothing, especially clothing for women, is a highly competitive and fractured industry comprising many contractors and sub-contractors who often may have as few as 25-35 workers in a shop. These contractors compete for jobs to oversee the final assembly of precut fabrics supplied by the clothing manufacturer. These jobs require a low-level of skill to perform, and new employees can learn the technique and achieve normal levels of output in mere months, meaning the workers are easily replaced. Furthermore, these jobs are often filled by recent immigrants who have limited skills and few options, resulting in a supply of potential labor that meets or exceeds the available demand.31

The combination of a large supply of available workers and low-skill demands for the available jobs means that contractors can offer minimal compensation and still find

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employees willing to work. At the same time, the relative simplicity of the work involved makes it difficult for contractors to distinguish themselves from one another and allows clothing manufacturers to drive down prices in bidding, creating thinner profit margins for contractors who in turn look to limit their own costs. The net result, too often, is that contractors find ways to underpay employees for the wages to which they are entitled. The 2009 survey of workers in low-wage occupations found that nearly 70 percent of workers in the garment and sewing industry reported cases of not being compensated for overtime worked.

Despite that high percentage of worker-reported violations, the garment industry also provides some hope for how WHD can adapt to changing market conditions within an industry and improve industry compliance. For many years, WHD focused its efforts on investigating garment industry contractors since that is where wage violations were likely to occur. Meanwhile, the industry underwent a transformation in how it conducted business, adopting new technologies to make production more efficient. Whereas the old model had been to place large garment orders for each desired product, new systems allowed for closer tracking of actual sales allowing stores to replenish products more regularly as supply became low. This new trend, known as “lean-retailing” in the industry, replaced the old bulk orders with a series of regular, small targeted orders.


Seeing an opportunity to apply pressure on the industry to comply with the law, WHD opted to invoke a rarely-used provision of the FLSA known as the hot-cargo provision. This provision allows WHD to confiscate goods that are manufactured in violation of the law. Since the lean-retailing model requires quick delivery of new orders to maintain store inventories, the garment companies faced potentially significant loss of profits if their products were embargoed indefinitely. This created an incentive for the companies to negotiate with WHD and work out binding agreements to enforce the law with their contractors and implement regular monitoring procedures.35

As the 2009 survey results show, wage violations remain a problem in the industry. However, there is evidence that these monitoring programs have improved overall industry compliance. A 2005 WHD survey of garment industry compliance found that compliance in the Los Angeles area had improved 14 percent since 1994 while New York City saw its compliance rate rise 32 percent since 1997.36 Although wage theft remains a problem in the industry, the hot-cargo initiative may provide some evidence that a more aggressive enforcement strategy could result in better compliance with the law.

The WHD seeks to deploy a range of tactics to enforce the FLSA. Michael Lipsky would certainly recognize both the pragmatic necessity of the conciliation method as well as its many shortcomings. A review of a case that does not attempt to establish facts, determine fault, or ensure the payment of any back wages owned simply does not constitute an adequate case review. At the same time, as the following chapter will make

35. Ibid., 29-30.

clear, it is preferable to give a case some attention than the many cases that receive no attention at all.

Applying more resources to targeted investigations in high priority industries is another tool the WHD can utilize to promote compliance. It was through the targeted investigation of the poultry industry that the cases against major poultry processors were built. Targeted investigations can also serve notice of the need to comply with the law to all employers in an industry regardless of whether their particular firm is audited.

The strategic pursuit of lawsuits, particularly against large companies that influence the practices of competitors in their industry and have a history of past violations is another important tool. By following their due diligence, the Labor Department was able to secure back wages for thousands of workers in the poultry industry. However, it would be far more efficient if the WHD could apply strict penalties for companies that repeatedly violate the law and create a real financial incentive for compliance, instead of relying upon the courts to initiate binding agreements.

Finally, the case study of the garment workers in New York provides evidence of what a strong enforcement system with the potential for financial penalties can make possible. Faced with the prospect of not being able to meet client orders, manufacturers were willing to sign agreements to police their own subcontractors and take steps to ensure labor laws were observed in the manufacturing process. The results are not perfect, but they are a clear improvement.

Unfortunately, for all of the WHD’s successes, there are numerous cases where the agency has failed to enforce the law. This failure stems primarily from a lack of necessary resources including better information management and access to records than
the agency maintains at present. The following chapter will explore the extent of these problems in more detail.
CHAPTER 4

CHALLENGES ENFORCING THE FAIR LABOR STANDARDS ACT

Paul Light observes that “Simply put, it is one thing to give the federal service missions that matter, and quite another to provide the resources to faithfully execute the laws.”¹ Indeed, reversing the widespread phenomenon of wage theft would be difficult under the best of circumstances where an effective agency had the necessary resources and knowledge to respond to violations and provide an effective deterrent to breaking the law. Unfortunately, as the following chapter will make clear, the recent history of the WHD raises many questions about the agency’s ability to enforce the law.

This chapter will primarily draw upon government reports and transcripts of congressional hearings to explore the major deficiencies in the WHD enforcement apparatus. We will begin with the story of Jeffrey Steele, a contractor who participated in the efforts to rebuild New Orleans following the devastation of Hurricane Katrina. We will then explore how Steele’s story is symptomatic of greater challenges that the many wage and hour violations that occurred during the storm cleanup efforts. Next, we will turn our attention to a series of government reports and congressional hearings that demonstrate such challenges are not a regional problem but exist on a systemic, national level. Finally, we will seek to make sense of these complex challenges by grouping them into three categories: insufficient agency resources, poor information management, and difficulties with enforcing the existing regulations made all the more complicated by a lack of adequate resources and information.

¹. Light, A Government Ill Executed, 23.
Like many Americans, Jeffrey Steele wanted to do his part to help New Orleans recover following Hurricane Katrina. Prior to beginning his service in New Orleans, Mr. Steele earned a degree in environmental justice from Clark College in Atlanta, GA, and held a variety of jobs around the city including running a homeless shelter for men at night. At the shelter he met some displaced New Orleans residents which inspired him to relocate temporarily to the Big Easy and help rebuild the city. He responded to a series of flyers posted around Atlanta, GA that were recruiting workers for New Orleans with an advertised compensation of $10 an hour plus free room and board.\(^2\)

Jeffery Steele would go on to work for several different subcontractors around New Orleans, in often brutal conditions. He was expected to work long days, frequently 16-18 hours straight, without any days off, little food to eat, and tight living quarters to share with as many as 40-60 men.\(^3\) Steele would later recount his experience in his June 26, 2007 testimony before Congress:

I went to New Orleans to be part of history. I did the dirty and hard work that was needed, and yet I was taken advantage of by contractor after contractor who crammed workers into filthy living space, provided almost nothing to eat, offered practically no safety precautions, no equipment, and paid us late, and much less than the little that they had promised.\(^4\)

In his first three months, Steele received roughly $2,000 of the $17,000 in wages that he earned.\(^5\) After several attempts to obtain the back wages he was owed, Jeffrey


\(^3\) Adequacy of Labor Law Enforcement in New Orleans, Hearing, 8.

\(^4\) Ibid.

\(^5\) Ibid, 9.
Steele filed a complaint with the Wage and Hour Division (WHD) in September 2006. For several months, he received no response to his complaint despite following up with the agency on several occasions. Mr. Steele received his first contact from an investigator five months after filing his case, but there was not much to report at the time. A month and a half later he was contacted by another investigator who asked him some basic questions about his case, questions that Congressman Dennis Kucinich would later note during a congressional hearing that she should have been able to look up herself. Mr. Steele provided the investigator the information he had and she said she would file his claim. He followed up with her a month later for an update and she said she would get back to him.

Six-days before he was scheduled to appear as a witness before Congress in June 2007, Jeffrey Steele received a phone call from a WHD supervisor. To Mr. Steele, the conversation felt like an interrogation where he was considered at fault more than an effort to assist with his case. The supervisor ended the call by telling him to call her when he had more information. The department called him back two months later in August, again asking what information he could provide. Mr. Steele again shared the contact information he had for the jobs he had performed. By the time he showed up in New


8. Ibid.
Orleans for a second Congressional hearing in October 2007, he still had heard nothing further from the department about the status of his case or payment of back wages.⁹

Mr. Steele’s story was not unique in the wake of efforts to recover from the hurricane. At the June 26, 2007 hearing, Ted Smukler, the Director of Public Policy for Interfaith Worker Justice (IWJ), testified that IWJ conducted its own survey of 218 workers who had worked in New Orleans in the year following Katrina. Of the workers they surveyed, 47 percent reported not receiving all the pay to which they were entitled; for those workers who worked more than 40 hours in a week, 55 percent reported that they did not receive time-and-a-half pay for any overtime hours worked. Fifty-eight percent of workers surveyed reported being exposed to dangerous substances on the job including mold, contaminated water and asbestos. All 218 workers surveyed were unaware they could contact the Department of Labor (DOL) for assistance.¹⁰

Mr. Smukler preceded to outline four major concerns that his organization wanted to highlight about WHD enforcement practices drawing from the experience of workers in New Orleans. First, IWJ highlighted a series of Executive Orders from the Bush administration that had suspended certain wage, workplace safety, affirmative-action and employer documentation regulations. IWJ was concerned these Executive Orders had created a lawless rebuilding process where workers were easily exploited.¹¹ Second, the DOL lacked both a strategic plan to handle the crisis and the resources that would have

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been necessary to see such a plan through to fruition. Smukler noted that WHD investigations in New Orleans actually dropped by 37 percent in the year following Hurricane Katrina.\textsuperscript{12} Third, IWJ cited concern that the majority of WHD’s resources in New Orleans were allocated to responding to worker complaints as opposed to the agency initiating targeted investigations on its own to determine where the worst abuses were taking place. Finally, IWJ was concerned that the division was not aggressive enough in pursuing available penalties against companies found to be in violation of the law to send a message that breaking the law had real consequences.\textsuperscript{13}

In order to get out in front of all the concerns that Smukler and the IWJ raised, the division would have had to overcome many challenges to secure back wages for underpaid workers in New Orleans. Operating in a post natural disaster recovery area presents many logistical challenges, including compromised local infrastructure. The WHD New Orleans staff had to abandon their local office for several months during which they were distributed to various locations around the country.\textsuperscript{14} Many of the workers who descended on New Orleans to help rebuild the city were immigrants. Some came on work visas, including the H2-B Visa program over which the Department of Labor believed it had limited regulatory authority.\textsuperscript{15} Many immigrants were also reluctant to report work abuses for fear of deportation, or were simply unaware they had a right

\textsuperscript{12} Ibid.

\textsuperscript{13} Ibid., 11.


\textsuperscript{15} Evaluating the Labor Department in New Orleans, \textit{Hearing}, 6-7.
and means to seek recourse for nonpayment. The WHD also had to contend with statute of limits on the cases it could pursue, which for Fair Labor Standards cases run two to three years from the time of the violation.

One significant barrier to assessing the efforts of the New Orleans Wage and Hour staff in addressing worker complaints is that the WHD staff did not keep records of all complaints they received. Although WHD staff made judgment calls as to which cases fell under their jurisdiction and attempted to refer worker complaints they determined they could not pursue to other authorities where appropriate, the office kept no record of cases turned town or referred elsewhere meaning there was no way to assess whether investigators made the right call. In her opening statement before the House Committee on Government Oversight, Jennifer Rosenbaum, a staff attorney for the Immigrant Justice Project at the Southern Poverty Law Center, testified that her organization received numerous reports from workers who had been turned away after a brief phone conversation often lasting less than five minutes. She questioned the Department of Labor’s efforts to account for its case management in light of the many cases that were never recorded.

Members of Congress were likewise troubled by this selective record-keeping of cases. When asked to respond to the concerns raised by Ms. Rosenbaum, WHD


Administrator Paul DeCamp said that the agency conducts its own screening process to weed out complaints with inadequate information to launch an investigation. Cong. Dennis Kucinich (D-OH) responded that his field office in Cleveland receives 10,000 requests for constituent services each year, for which his 14 staff assign each call a number and log it regardless of whether the case is pursued. Cong. Darrell Issa (R-CA) continued the discussion, noting that it was important to have a record of all the calls investigators were handling to evaluate the job they were doing. “We have to know where the 33 people are that are so busy taking a huge amount of calls that you say aren’t worth logging or us knowing what they are about because they are not enforceable. If you could see it from our standpoint, you haven’t justified what your people are doing in light of the statistics.” WHD Administrator Paul DeCamp did not have a direct response, although he did state that the agency was focused on enforcing the law and that collecting the type of data the Members of Congress were discussing would not aid that goal.

Despite the many challenges the Labor Department had to overcome in monitoring post-Katrina reconstruction, the department did have some successes in the effort. By 2008, the WHD had conducted over 900 cases related to hurricane cleanup or construction collecting close to $12 million in compensation for roughly 15,000 employees. At the same time, there were some cases where the department was successful in securing agreements from employers to pay workers, but then the

20. Ibid., 32.
21. Ibid.
22. Ibid., 31-32.
23. Is DOL Effectively Enforcing Our Wage and Hour Laws?, Hearing, 44.
employers never followed through on their promise and WHD did not follow up to ensure that payments were completed. As such, the agency had some room for improvement even in cases where it did conduct an investigation.

While the hearings into the lack of enforcement of labor laws in New Orleans highlighted a number of problems with the methods utilized by WHD, a subsequent series of Congressional hearings and Government Accountability Office (GAO) investigations undertaken at the request of Congress would reveal the findings in New Orleans to be symptomatic of a much larger problem. Nine months after the second New Orleans hearing, the House Committee on Education and Labor held a public hearing in July 2008 to discuss the efforts of the Department of Labor to enforce wage and hour regulations on a national level. The hearings featured four expert witnesses, including worker advocate and IWJ Director Kim Bobo, Acting Administrator of the Wage and Hour Division Alexandra Passantino, and two representatives from the GAO, Anne-Marie Lasowski and Greg Kutz. The committee had requested the GAO to investigate the Labor Department’s efforts to enforce Wage and Hour laws, and the hearing largely focused on a discussion of the resulting GAO reports.

The GAO analyzed the performance of the WHD over a 10 year period from 1997-2007. The GAO report faulted the agency for failing to take full advantage of available information both for planning and carrying out its FLSA enforcement initiatives. The agency was slow to change its methods to account for new circumstances uncovered by its own agency-initiated investigations, and was consistently changing its

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own performance measures even while its long term goals remained consistent, making it difficult to evaluate how well the agency was doing in pursuing its goals.\textsuperscript{25}

To compile their report, the GAO analyzed data from the division’s Wage and Hour Investigator Support and Reporting Database (WHISARD), reviewed annual performance plans, read performance reviews conducted by third-party experts, and interviewed WHD staff.\textsuperscript{26} The GAO found that over the course of the decade WHD enforcement actions dropped from 47,000 in 1999 to 30,000 in 2007. The WHD responded that this overall decrease of enforcement actions could be attributed to conducting long-term comprehensive investigations, decreases in the number of agency investigators, and improvements to the case screening process to “eliminate those that may not result in violations.”\textsuperscript{27}

The GAO also identified 15 examples from the WHD case records where the agency fell short in its investigative efforts as a means to identify potential problems with WHD methods of enforcement.\textsuperscript{28} In one case, a gas station had failed to pay minimum wage to a cashier, and one of the co-owners admitted as much when contacted by a WHD investigator.

\begin{flushright}

\textsuperscript{26} Ibid., 1.

\textsuperscript{27} Ibid., 5.

\end{flushright}
However, the co-owner claimed that the situation could not be resolved until his partner returned in five days. After attempting unsuccessfulessly to contact the business again five days later, the investigator closed the case without citing any violations. She would later justify this action to the GAO staff by noting the co-owner had not specified how much money the business owed their cashier when she had spoken to him five days earlier. Aside from informing the cashier of his right to private litigation, the WHD took no further action in the case.  

Such an outcome was not uncommon among the case studies GAO highlighted. Out of the 15 case studies presented, 8 lacked much of an investigation making it difficult to assess if any violations had occurred while the remaining 7 cases showed evidence that workers were due back wages but the cases had been closed nonetheless without resolution. In most of these case studies, the worker initiating the case was advised to seek legal recourse once WHD determined the agency would pursue no further action on the case itself.  

The GAO followed up on its initial 2008 investigations to further assess the effectiveness of WHD at recording potential complaints. The GAO went through WHD case records to identify cases that had remained unresolved for a year or longer, including cases where the employer could not be located or ultimately refused to pay. As an  

29. Ibid.  


additional means of assessment, GAO investigators assumed the identities of both workers reporting wage and hour violations and the employers against whom the complaints were alleged. The objective was to assess how WHD investigators would respond to a variety of scenarios. The GAO staff developed 10 fictitious cases for which they attempted to get WHD staff to launch an investigation. 33 These 10 fictitious cases “illustrate flaws in WHD’s responses to wage theft complaints, including delays in investigating complaints, complaints not recorded in the WHD database, failure to use all available enforcement tools because of a lack of resources, failure to follow up on employers who agreed to pay, and a poor complaint intake process.” 34

The GAO investigators found the process of filing a complaint with WHD slow and difficult to navigate. GAO officials made 115 phone calls to WHD offices related to the 10 fictitious cases, of which 87 percent went to voicemail; in several cases the undercover GAO investigator did not receive a response for at least two weeks if the WHD ever responded to the inquiry at all. 35 GAO officials also encountered bad customer service in the form of conflicting advice regarding the same case from different WHD field investigators, incorrect guidance about the statute of limitations that applied to a particular case, and a false claim that an accused fictitious company had been


screened against an Internal Revenue Service (IRS) database when WHD managers were upfront that their investigators did not have access to IRS databases and require the consent of a company to obtain copies of its IRS records. Perhaps most significant towards the effort to establish effective, uniform enforcement of the law, out of the 10 fictitious cases submitted to WHD, half were never even recorded in the WHD database.\textsuperscript{36} The GAO returned to testify on these findings before the House Committee on Education and Labor in March 2009.

Together, the GAO investigations and corresponding hearings revealed that the WHD suffers from a number of common government challenges. To examine these challenges we will group them into three general categories: 1) the insufficient allocation of resources to meet the full demands of a complex mission; 2) flawed systems of information management that fail to take advantage of all current resources to provide government officials the best, and most complete, information available; and 3) the significant challenges that agencies encounter in attempting to enforce a statute particularly when faced with insufficient resources and flawed intelligence upon which to act. Each one of these challenges will be evaluated in more detail.

One major reason the WHD struggles to enforce compliance with the FLSA is that it simply does not have enough investigators to successfully manage all of its potential cases. Although the number of workers covered by the FLSA has accelerated rapidly in recent decades, the agency has not increased its staff of investigators to keep pace with this expansion. One scholar estimated that the FLSA applied to roughly

\textsuperscript{36} Ibid., 4.
56,648,000 in 1975.  As of 2011, the law was estimated to cover 135 million workers. The workforce covered by the FLSA more than doubled in just 36 years.

The Wage and Hour Division has not increased staff investigator capacity to meet this higher demand. In fact, the last three decades saw a decline in agency staffing up until the Obama Administration started to reverse the trend. A 2005 study by the Brennan Center for Justice at the New York University School of Law reviewed the enforcement trends for the Wage and Hour Division from 1975-2004. Authors Annette Bernhardt and Siobhán McGrath concluded that the number of division investigators fell from 921 in 1975 to 788 in 2004, a decline of 14 percent over three decades. At the same time that the number of investigators was declining, the number of workers covered by the law increased 54 percent and the worksites covered by the law increased 112 percent. Together, these trends illustrate a significant reduction of agency capacity to enforce the law in recent decades.

The same trend can be observed by analyzing the annual data from 1987-2010, as presented in Table 4-A on the following page. Although there are some years where the number of Wage and Hour investigators increased, including 1989, 1997, and 2000, the overall trend has been a decline in the number agency investigators. More recently, the Obama

37. William Norlund, The Quest for a Living Wage, Table A-1, (Westport, CT; Greenwood Press, 1997), 212.

38. Examining Regulatory and Enforcement Actions Under the FLSA, Hearing, 2.

Administration has sought to reverse these trends by hiring additional staff investigators “to restore WHD to FY2001 staffing levels.”

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<thead>
<tr>
<th>Presidential Administration</th>
<th>Year</th>
<th>Compliance Officers</th>
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<tbody>
<tr>
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<td>1987</td>
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</tr>
<tr>
<td>Reagan</td>
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<tr>
<td>Bush Sr.</td>
<td>1992</td>
<td>835</td>
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</tr>
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<tr>
<td>Clinton</td>
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<tr>
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<td>894</td>
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<tr>
<td>Obama</td>
<td>2010</td>
<td>1038</td>
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</table>

**Sources:** Data from 1987-2007 taken from House Committee on Education and Labor, *Is DOL Effectively Enforcing Our Wage and Hour Laws?*, 111th Cong., 2d sess., 2008, H. Rep. 25, Table, Number of Wage and Hour Investigators.


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One interpretation of the above table may be that, although the number of WHD investigators clearly decreased over the last few decades, the recent hires by the Obama Administration offset these declines. It is true that the agency has recently made strides at increasing capacity. Furthermore, the Administration continues to request funding for additional investigators, most recently seeking to fund 1,132 investigators in its FY 2014 budget proposal.\textsuperscript{41} However, this recent staff increase does not account for the rapidly growing number of workers covered by the FLSA, a constituency that has more than doubled within the last three decades. Employing the same number of investigators as three decades ago is problematic when those investigators face a significantly larger and ever-expanding caseload.

Furthermore, the history of the department has shown that whenever additional investigators are hired, these increased staffing levels have never been sustained permanently, and eventually the number of investigators began to decline again. Table 3-A shows some recent examples of this phenomenon where the agency added staff investigators in 1989 and 1997. In both cases, staffing levels eventually began to decline once again.

Increased staffing is not the only tool an agency can utilize to improve performance and manage a larger caseload. To some extent, the agency can seek to offset the greater workload with improved efficiencies and better data management. Unfortunately, the WHD faces great challenges to overcome in its information management systems as well.

Like many government organizations, WHD faces challenges in its efforts to obtain information. This includes the agency’s efforts to collect accurate data, access external resources essential to its mission, and effectively measure the impact of its performance. One fundamental challenge WHD must overcome to improve FLSA compliance is a flawed case intake process that results in incomplete data collection. Just as the hearings on New Orleans revealed that not all cases brought to the WHDs attention were recorded in their system, the same practice holds true throughout the agency’s regional offices. The field office handbook grants investigators discretion to determine if a complaint rises to the level of warranting entry into the agency’s database. Indeed, the GAO found in their 2008 report that the handbook even empowers district managers to reject cases judged to involve probable violations of the law based solely on limits to agency staff and travel resources at the time.

The flawed intake process has significant ramifications for the ability of the agency to review its practices. As both Rep. Kucinich and Rep. Issa noted in their questioning of WHD Administrator Paul DeCamp during the June 2007 hearing on New Orleans, there is no way for the public or the agency to evaluate the effectiveness of the investigators at screening calls if there is no record made of the calls judged to be insufficient to warrant initiating a case file. When, Acting Director Passantino was questioned about this methodology the following year he stated that the agency relies on

42. Is DOL Effectively Enforcing Our Wage and Hour Laws?, Hearing, 21.
the expertise and training of their field staff to make the right call. Education and Labor Chairman George Miller replied that the agency had no way to verify performance or compare the use of discretion in different field offices around the country.\(^{45}\) He proceeded to question how a worker calling the WHD with a complaint would react to hearing that the agency would not take the case due to a lack of resources.\(^{46}\)

The GAO found that not only does the WHD fail to record all cases brought to their attention, the agency lacks a consistent process for documenting its cases, including confirming case resolution and actions taken to follow up on unresolved violations.\(^{47}\) The GAO discovered that the WHD is also inconsistent in how it tracks backlogs of workers complaints, with different regional offices each adopting their own methods. The national office does not monitor regional office backlogs and therefore cannot factor this information into their annual planning process.\(^{48}\) Such inconsistencies also mean that the WHD is not in compliance with regulations established under the Government Performance and Result Act (GPRA).\(^{49}\) WHD also reduced the number of meetings they held with partner organizations like worker advocacy groups, relying more on second hand accounts from their regional offices.\(^{50}\)

\(^{45}\) Is DOL Effectively Enforcing Our Wage and Hour Laws?, Hearing, 22.

\(^{46}\) Ibid., 23.


\(^{48}\) Ibid., 14.

\(^{49}\) Is DOL Effectively Enforcing Our Wage and Hour Laws?, Hearing, 7.

\(^{50}\) US Government Accountability Office, Better Use of Available Resources and Consistent Reporting Could Improve Compliance, 14.
Smart deployment of technology remains another challenge for the agency. The 2009 GAO report highlighted 20 cases from the WHD database where employers had clearly been inadequately investigated to the detriment of roughly 1,160 workers whom the cases affected. These cases included examples where WHD took over a year to respond to worker complaints, failed to verify the employer’s side of the story, did not continue to follow up with employers who had not returned calls, and did not fully investigate businesses with a known history of repeat violations. Whereas WHD officials could have quickly verified case details through various subscription-databases and public records, WHD managers admitted that their investigators lacked accesses to many of these resources and must rely on less-efficient general internet searches to verify most information.  

The agency also fails to make use of information stored in its own systems. Although, the WHD tracks collection of back wages and penalties in its accounting system, this information is not shared with enforcement staff and the agency does not make full use of such records to evaluate its performance. Furthermore, the GAO found that WHD was slow to incorporate the lessons of its own industry studies into its planning process. Instead, the agency followed similar enforcement patterns year to year relying on its historical enforcement data (primarily consisting of cases initiated by worker complaints) and staff input instead of its own more comprehensive industry

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52. Ibid., 5.

surveys. For example, from 2005-2007 agriculture continued to represent 16 percent of agency cases despite not being named on the national list of 33 priority industries found to have high rates of minimum wage and overtime violations that were discussed in the previous chapter.54

One wrinkle is that not all industries are evenly distributed around the country. Whereas the garment industry is a huge source of violations, it is largely concentrated in a few states making it impractical for many regional offices to play much of a role in enforcement.55 Still, WHD should be able to take these regional conditions into consideration and come up with more targeted enforcement strategies. From 2004-2007, WHD investigations of the top nine industries from the list of thirty-three priority industries rose a mere two percent.56 The agency could also do a better job making sure its regional managers are familiar with the details of the industry surveys, as many managers admitted they had limited knowledge of report findings and in many cases had never seen a full copy of the study.57

Yet another challenge arises from the efforts of the WHD to measure agency performance. In their 2008 report, the GAO concluded that it simply was not possible to measure how effectively the WHD had improved compliance with the FLSA based on available information as the WHD has frequently changed performance measures. Between 1997-2007, roughly 90 percent of WHD performance measures were in effect

54. Ibid., 15-16.
55. Ibid., 16.
56. Ibid.
57. Ibid., 17.
for two years or less. The agency reported on 131 different measures during that time of which only 6 made the annual performance report in more than one year.\(^{58}\) Agency staff told the GAO that some performance criteria were eliminated once they were met while others were judged by staff to be the wrong measures. In some cases, data used in the performance measures was determined to be unreliable. Other measures were found to be unrelated or no longer relevant to the WHD’s activities or beyond the ability of the agency to address through its actions.\(^{59}\)

In his 2008 testimony, Acting Director Passantino stated that the department had three long term goals: “to improve compliance in low-wage industries, to decrease employer recidivism and to improve complaint management.”\(^{60}\) While he acknowledged the agency made adjustments to its performance measures each year, these measures were all designed to support these three agency goals.\(^{61}\) As a matter of comparison, such changes in performance measures are not unprecedented among agencies striving to comply with the GPRA regulations. Other agencies within the Department of Labor itself also changed criteria frequently in the early years of the program as managers sought to identify the best measures of performance through trial and error.\(^{62}\) Nonetheless, such

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58. Ibid., 19.

59. Ibid., 20.

60. Is DOL Effectively Enforcing Our Wage and Hour Laws?, Hearing, 43.

61. Ibid.

variation in performance measures does interfere with the effort to draw meaningful comparisons in annual performance.

Notwithstanding the shortcomings in agency staffing levels and access to pertinent information that could assist investigators in pursuing their cases, the WHD is expected to enforce the FLSA within budget and resource constraints and while maintaining its other enforcement obligations. To make the most of its limited resources, the WHD utilizes various methods of responding to complaints with some cases receiving a greater allocation of resources than others. As mentioned in the previous chapter, one of the most common techniques is the conciliation method.

By design, the conciliation method is intended to offer quick resolution to simple cases affecting just one or a few workers. When undertaking conciliations, WHD staff “do not interview other workers, do not make on-site inspections, and do not review payroll records, all of which are characteristic of an investigation.”  

The agency reported in 2008 that it was deploying the method in roughly 50 percent of its cases while requiring only 5 percent of the enforcement time undertaken by agency staff to complete.  When responding to the GAO’s July 2009 report to Congress, the WHD noted that the conciliation model recovers wages for more than 12,000 workers each year.  This method is used to help so many workers precisely because it requires limited resources to implement.


64. Is DOL Effectively Enforcing Our Wage and Hour Laws?, Hearing, 27.

However, not all conciliation efforts are successful. In one example, a boarding school in Montana was accused of failing to pay full overtime wages to its employees. Nine months passed before the case was assigned to a WHD investigator, who contacted the school administration by phone, a move the investigator would later justify by citing a lack of agency resources to support an in-person investigation. The boarding school agreed to pay 93 employees over $200,000 in back wages. However, the school failed to return subsequent phone calls from the WHD investigator until the two-year statute of limitations for most of the promised back wages had expired. With only $10,800 of the original $200,000 not yet expired, the school now offered to pay $1,000 in back wages. The investigator refused the compromise, but recorded the back wages sought at the $10,800 level rather than the original total of more than $200,000 that had been promised. The WHD investigator also determined the school was now paying proper back wages based solely on statements made over the phone and did not request any proof of documentation despite the employer’s ongoing record of noncompliance.\(^66\)

Unfortunately, the boarding school case is not an isolated example but rather illustrative of a problem with the conciliation model: as the GAO itself concluded, the WHD fails to follow through and ensure companies pay the back wages they have pledged to honor.\(^67\) When invited to respond to this report, the WHD noted that a conciliation case was distinct from a full investigation in that it did not attempt to establish the facts of a case but rather sought to offer quick resolution to isolated cases.


\(^{67}\) Ibid., 6.
problems affecting just a few workers with minimum use of agency resources. The WHD acknowledged that the success of the conciliation method requires the workers who filed the original complaint to return and notify the agency if they have not received the restitution that they were promised from their company.

Such a system of self-reporting is only effective if the agency then has the resources to respond when circumstances warrant a full investigation. Furthermore, the agency fails to record all conciliations it initiates. The GAO noted in its 2009 report to Congress that the WHD southeast regional office had a policy in place of not recording unsuccessful conciliations in its records. This one office was responsible for 57 percent of WHD’s conciliation efforts in fiscal year 2007, making this failure to record cases a significant variable in the agency records of its enforcement efforts. When not all cases are entered into the system, it is not possible to determine the actual rate of conciliation success. So while the GAO determined that 95 percent of the conciliations that are entered in the system did receive an adequate investigation, this data is compromised since there could be thousands of cases not recorded in the system and there is no way to know for sure.

Even in cases where WHD does initiate investigations more extensive than a conciliation, they are not always effective in their case management. Close to 19 percent


69. Ibid.


71. GAO’s Undercover Investigation: Wage Theft of America’s Vulnerable Workers, Hearing 8.
of the non-conciliation cases GAO examined in their 2009 report were determined to have received a less than satisfactory response. Delay in initiating an investigation was a common problem, with some cases waiting six months or more before any action was taken. There were also examples of cases that took over a year to complete. The GAO observed that since the statute of limitations for most FLSA cases is two years, it is imperative these cases be initiated and completed within that timeframe.\(^72\)

Many WHD offices must manage a large backlog of cases making it difficult to pursue all of them in a timely manner. The GAO found one case where a district officer sent a letter to a worker six months after he filed a complaint for unpaid overtime. The letter asked the worker to inform WHD if he planned to pursue his case through private litigation. After not receiving a response, the agency sent a follow up letter stating he had nine business days to respond or his case would be closed, and then proceeded to close his case the same day the second letter was sent.\(^73\) Cases closed after an employer refused to pay back wages were another common problem, while a less frequent but likewise worrisome trend were cases where the WHD staff did not go through employer records during their inspection.\(^74\) One positive finding was that cases pursued by WHD and entered into their WHISARD database often had a successful outcome; however, the agency is also selective in which cases it records in its system.\(^75\) In practice, agency staff


\(^{73}\) Ibid., 23.

\(^{74}\) Ibid., 22.

\(^{75}\) Ibid., 24.
could determine which cases will ultimately be reflected in their department statistics by screening out cases they deem unfavorable for resolution.

Over time as agency resources have become scarcer, a larger percentage of enforcement activity has shifted towards investigating worker complaints rather than initiating industry investigations to gauge overall compliance rates. Certainly, the agency should respond to the complaints of workers who believe their rights have been violated, but on its own this is an insufficient model for effective enforcement. In a 2010 DOL-commissioned report *Improving Workplace Compliance Through Strategic Enforcement*, principal investigator David Weil of Boston University tracked the percentage of WHD FLSA cases that were complaint-driven over the previous decade (Figure 4-B).76

<table>
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<tr>
<th>Presidential Administration</th>
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<th>Percent of WHD FLSA Cases That Are Complaint-Driven</th>
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<td>1999</td>
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<td>Clinton</td>
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<td>Bush</td>
<td>2001</td>
<td>42.50%</td>
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<td>Bush</td>
<td>2003</td>
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<td>Bush</td>
<td>2004</td>
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<tr>
<td>Bush</td>
<td>2008</td>
<td>40.00%</td>
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Weil found that complaint-driven investigations not only represent the majority of enforcement actions over the previous ten years, but they were increasing as a percentage of total cases over time. While Weil observed that it is important for an agency to respond to public requests, he was concerned about the public directing such a large percentage of WHD enforcement resources noting that “complaints do not always lead WHD to the right place—in terms of finding serious violations and the most vulnerable workers or in terms of maximizing chances that the expenditure of WHD resources will lead to increasing, sustained compliance.”

IWJ Director Kim Bobo raised similar concerns in her 2008 testimony before Congress. She observed that a complaint-driven process would have limited deterrence on employers intent on breaking the law, “because employers will (rightly) gamble that only a small percentage of workers will have the courage to complain, given a tight labor market. In contrast, if entire industries are investigated, back wages collected and meaningful penalties levied, the industries known to steal wages will be challenged to change their business practices.” Bobo called upon the WHD to split its enforcement resources evenly between following up on worker complaints and more targeted industry investigations.

Clearly, the Department of Labor must overcome significant challenges to achieve better FLSA compliance. Generally, the agency has seen its own staffing resources decline over time even while the workforce covered by the laws it enforces has

77. Ibid., 8.


79. Ibid.
expanded. Investigators lack crucial information and third-party data tools that could significantly simplify case investigations and improve enforcement efforts, while the agency is struggling to identify its own enforcement measures.

Consequently, while the agency has had some significant successes and benefitted many workers, many others have seen their complaints go unanswered. This is a reality Michael Lipsky would find all too familiar. The WHD investigator attempting to manage a large caseload is symptomatic of the classic challenges facing Street-Level Bureaucrats present in many government agencies. Lipsky raises an example that public defenders are often forced to go to trial with little or no time to interview their clients in advance.⁸⁰ Such circumstances make it extremely difficult to represent a client well. The WHD official interviewing a business owner over the phone with no access to public records and only limited interaction with the worker filing the complaint faces a similar problem.

Lipsky’s analysis of the challenges that arise in attempting to improving quality of agency performance are likewise relevant to the WHD. Considering the backlog of cases that do not receive attention, the exact number of which is not known since not all cases are recorded in the system, as well as the desire of managers to show that their division is closing cases, the likely outcome of hiring more investigators would be to increase the number of cases it services. This would be a positive development unto itself, however it would not necessarily mean additional time devoted to individual cases. As such, the agency could significantly increase the number of investigators it employs without necessarily impacting the quality of case review.

Addressing these problems will not be easy, and the agency simply cannot do it on its own. To achieve better FLSA compliance, the Labor Department must continue to develop and cultivate strong partnerships with other agencies and organizations. Such collaborations bring challenges of their own, but are essential to a more successful compliance model as the Labor Department simply does not have the resources to achieve better compliance with the law on its own. Chapter 5 will explore these partnerships in more detail.
CHAPTER 5
FORMING STRATEGIC PARTNERSHIPS TO IMPROVE COMPLIANCE

When government undertakes complex missions, it often finds it cannot achieve meaningful results all on its own. While the federal government has an essential role to play in leading enforcement of labor laws, the reality is that there are a number of other organizations that are also involved in the effort. The Department of Labor recognizes this reality, and many of its current initiatives are designed to take advantage of strategic partnerships to improve compliance with the law.

This chapter will begin by presenting the primary non-governmental organizations that have a role to play in monitoring wage theft and key activities they have undertaken in this pursuit. Next, this chapter will examine a partnership model embraced by researchers Janice Fine and Jennifer Gordon that provides one blueprint for how “Collaborative Governance” could be adapted to the mission of enforcing the FLSA. Finally, drawing upon the Donahue and Zeckhauser framework we will examine some partnership case studies that illustrate how pursuing strong partnerships that share program discretion with nonprofits, for-profit organizations and government agencies could enhance WHD program enforcement as well as challenges that may emerge.

A sustainable model of FLSA enforcement requires direct engagement of the groups that bear witness to wage theft on a regular basis. Such a successful partnership must begin by identifying the correct partners. Historically, labor unions have been an important institution for helping to monitor workplaces and ensure regulations are followed. Unions are an important source of information, as they can alert authorities

1. Donahue and Zeckhauser, Collaborative Governance, 24.
when violations occur at member job sites while also providing insights into the general practices of industries where their members are concentrated. They also have an inherent interest in protecting worker rights, particularly for their members.

It is worth noting that some unions have taken it upon themselves to initiate partnerships with community organizations intended to educate workers about their rights and promote enforcement of wage and hour laws. Such partnerships may largely bypass state government agencies and the WHD in favor of alternative paths to promote enforcement including litigation and public education campaigns. A prime example is the Wage and Hour Project of the Service Employees International Union (SEIU) where union officials draw upon intelligence from agency staff to identify major violations and then pursuing cases through litigation.  

However, union membership has been on the decline for decades, despite polls showing a majority of Americans would join a union if given the opportunity, and researchers have noted a correlation between declining union rates and decreased enforcement of workplace regulations.  

Given the declining presence of unions in the American workforce, workers have had to look elsewhere for assistance. Workers subjected to wage theft have increasingly sought help from other nonprofit organizations including worker centers.

Although modern worker centers have largely arisen in the 21st century, IWJ Director Kim Bobo maintains they share a common heritage with many 20th century community organizations including immigrant settlement houses of the early 20th century.

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3. Ibid., 384.
century, the Catholic labor schools that arose in the mid-20th century, and the farm worker service centers like the National Farm Worker Ministry that began operations in 1920. These centers have arisen partly in response to the growing problem of wage theft to provide direct support to low-wage workers whom the DOL and a weakened Labor Movement have been unable to assist. By 2008, there were nearly 200 worker centers in the United States. Professor Hector Cordero-Guzman of Baruch College has studied the modern worker center phenomenon:

As a direct response to the increasing challenges faced by marginalized low-wage workers over the past decade—including deteriorating wages, difficult working conditions and a number of occupational safety and health hazards—immigrant workers have increasingly organized and brought their challenges to worker centers and related nonprofit organizations. These efforts have shaped an ongoing set of strategies, campaigns, organizations, and networks that have sought to assist in the development of comprehensive organizational and civil society infrastructures that can more effectively articulate workers concerns, address labor law violations, and directly provide the kinds of services and programs that are needed to increase economic opportunities for low-wage workers.

These worker centers are filling a need in providing services to the low-wage worker community. While appearing before Congress in 2008, Bobo noted that worker centers were generally reluctant to refer cases to the Department of Labor at the time knowing that the case would likely drag on and the government might not follow through. In some cases worker centers have approached employers directly to help workers recover back wages or assisted with private lawsuits, but Bobo stated the

preferable outcome would be a stronger Labor Department able to enforce the law. The AFL-CIO has also initiated closer partnerships with worker centers in recent years, recognizing the two movements share common objectives.

There are a number of other community and religious organizations that today play a role in helping low-wage workers understand their rights under the law. Kim Bobo testified that such activities may fall outside the organization’s primary mission, but because the organizations are already heavily involved in promoting the worker’s welfare it becomes a natural extension to ensure they are receiving wages they are owed. Under the Obama Administration, the Labor Department has made efforts to strengthen partnerships with community organizations including workers groups, for which Bobo applauds the government while noting there is more work to be done.

How then, might the government engage these various organizations in a community policing effort to protect against wage theft? Researchers Janice Fine and Jennifer Gordon provide one blueprint. Together, they have advocated for a partnership model that utilizes a variation of tripartism to build the enforcement framework. Whereas tripartism traditionally represents collaboration among labor unions, business, and

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government, Fine and Gordon extend the definition to include worker centers as equal partners in the arrangement.\textsuperscript{10}

Fine and Gordon outlined their proposal in \textit{Politics and Society} wherein they cite a long history of WHD partnering with both employer organizations and some worker advocacy groups, while acknowledging that such arrangements are often short-term and focused on specific campaigns rather than sustained policy initiatives. They recommend building upon such partnerships to make them more permanent and official in terms of clearly defining the breakdown of responsibilities, thereby increasing the channels available to workers who need to file complaints regarding possible violations. They argue their proposal has roots in the debate that led up to the passage of the FLSA in that some of the law’s original advocates envisioned an active role for labor and business representatives to review and set industry-specific minimum wages rather than Congress establishing a uniform federal minimum wage.\textsuperscript{11}

The purpose of any government partnership must be to improve agency performance and, ultimately, serve the public interest beyond what the agency could manage on its own. Donahue and Zeckhauser embrace this principle with their concept of collaborative governance, where government agencies collaborate with nonprofit and private sector partners in pursuit of public goals to improve outcomes, increase the resources available for mission support, or often both. Successful collaborations can


greatly enhance the ability of government to fulfill public needs, but there are complications and tradeoffs to making such partnerships work. Aside from the logistical challenges of coordinating with multiple partners, each partner also has its own objectives and motivations to consider, which may not always align with the other project participants or the needs of the public.

As such, participating partners may be tempted to take advantage of their special relationship with the government to incur favors, either from the government itself or from other organizations requiring government approval to move forward on projects. Avoiding abuses of payoff or preference discretion altogether is unrealistic, just as abuses can arise within traditional government itself. However, it is important that an agency looking to enter into a partnership with parties of interest to the regulatory issue at hand must establish oversight to protect against actual abuses of power as well as the perception such abuses are occurring even when there is no hard evidence to that effect. Toward this end, Donahue and Zeckhauser note that “Successful collaboration requires three sets of perceptions and motivations—those of the government, of the private collaborator, and (in most cases) of the relevant public.”

The following three case studies present various configurations of collaborative governance at work. Each case presents a slightly different division of roles. However, at the core of each arrangement the government retains final authority over the enforcement of labor laws while the various partners serve to help screen potential abuses and flag cases for the government inspectors to investigate. These cases help illustrate the potential of such partnerships to greatly enhance the Labor Department’s enforcement

12. Donahue and Zuckhauser, Collaborative Governance , 192.
capacity and react more intelligently to conditions on the ground while avoiding the abuses that can arise through payoff discretion or preference discretion.

The first case study in community partnerships comes out of the Labor Department’s efforts to educate populations that historically have proven difficult to reach, in particular immigrant populations coming into the United States to work in low-wage industries. Alexander Passantino described the initiative in his 2008 testimony before the House Committee on Education and Labor.13 Many of these workers are often unaware of the rights afforded to them under labor laws, and as such do not realize when those rights have been violated. By partnering with agencies and community organizations that do have frequent contact with immigrant populations, including the consulates for Mexico and several countries from Central and South America, the WHD sought to educate immigrant populations about their rights and how to pursue action when those rights are violated. Initially, the WHD targeted communities with large Hispanic and Asian populations, including Houston and Dallas. One prime example, and the focus of this case study, is the Justice and Equality in the Workplace (JEWP) program in Houston, TX. Launched in 2001, The JEWP initiative brought together state, federal and local entities to share information and resources to “educate Spanish-speaking low-wage workers and their employers about the law.”14

Kim Bobo also highlighted the JEWP program in Wage Theft in America.15 She credited Betty Campbell, a WHD regional official at the time, with envisioning the

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program and working with then-WHD Administrator Tammy McCutcheon. This partnership brought together the efforts of several Labor Department divisions including WHD, the Office of Safety and Health Administration (OSHA), and the U.S. Equal Employment Opportunity Commission (EEOC), along with foreign consulates, state and local agencies, religious and community organizations, unions and worker advocates. The partner organizations and agencies worked together on educational outreach programs, including distributing materials printed in Spanish, holding public forums and launching a local telephone hotline that workers could call to ask questions and receive assistance. The Department of Labor promoted the program as a successful partnership and sought to replicate it with similar community partnerships around the country.\(^{16}\)

In 2003, the Department announced that the JEWP partnership had helped more than 1,900 workers recover $1.3 million in back wages in the first two years with almost 70 percent of hotline callers being referred to a DOL agency with jurisdiction over their complaint.\(^{17}\) Betty Campbell received a promotion and moved to Dallas, TX where she sought to replicate the program’s success. Unfortunately, the JEWP program in Houston became disorganized following her departure and other leadership changes among the community partners. As a result, the program nearly disappeared altogether. When IWJ opened a worker center in Houston in the mid-2000’s, the IWJ staff discovered the program hotline which appeared on advertisements around town was no longer staffed

\(^{16}\) Bobo, *Wage Theft in America*, 163-164.

when the number was dialed. The new IWJ worker center negotiated to take over the hotline, and the partnership was ultimately able to continue. Still, Bobo notes that this story emphasizes the importance of having a long-term leadership plan in place for similar programs to thrive long after the initial excitement that accompanies a new program launch. ¹⁸ Donahue and Zeckhauser make a similar point when they characterize successful partnerships as an ongoing relationship that must be managed and monitored to remain successful. ¹⁹

The JEWP program is a classic example of a Donahue and Zeckhauser model for a collaborative partnership that provides vital information to support government resources. Government officials were able to utilize community expertise to determine effective methods for disseminating information in the targeted low-income Hispanic community. Telephone operators were able to help workers with complaints locate the appropriate agency, including the WHD for wage and hour violations, thereby helping workers navigate a complex maze of regulations and the agencies charged with enforcing each one to help workers and investigator to connect and determine if a violation had occurred.

At the same time, this case illustrates one of the core challenges with forming collaborative partnerships: a partnership can expand a government agency’s resources to pursue a mission, however the partnership also requires resources to maintain itself. These resources in turn must come at the expense of other agency objectives, making it all the more important that the partnership produce a return on investment for the public.

¹⁸. Bobo, Wage Theft in America, 164.

¹⁹. Donahue and Zuckhauser, Collaborative Governance, 223.
Likewise, for a partnership to continue beyond the initial efforts of the official responsible for getting it started, it must have both institutional buy-in as to the worth of continuing the partnership and a clear plan for leadership succession. In the case of the JEWP initiative, the Labor Department continues to view it as a success in reaching out to the Hispanic community in Houston such that the Obama Administration renewed the partnership in 2012. Yet, the program nearly ended following the departure of its original visionary, and if not for the Houston workers center volunteering to help fill the leadership void, the program probably would have ceased to exist.

It is also worth noting that of the three case studies presented in this chapter, this one presents a more limited role for non-government partners to play. Each partner plays a vital role in disseminating information, deciding the best means to disseminate that information, and utilize discretion when determining if a case should be forwarded to the authorities and which office has jurisdiction. However, the formal investigation is left up to the authorities. Community partners can help point government officials in the direction of a potential violation, but the arrangement is dependent upon government officials to follow through.

Another example of partnerships in action comes from researchers Fine and Gordon who highlight several cases where relationships between local government, business and worker representatives have strengthened enforcement efforts as examples of how federal policy could evolve. In one case study they address two partnerships in

Los Angeles where government officials have taken the unusual step of formally
deputizing private citizens to assist the government with enforcing wage laws.\textsuperscript{21} The
origins of the program grew out of an agreement between the Los Angeles Unified
School District (LAUSD) and local building trade unions. Officials on both sides were
concerned that district construction projects did not always adhere to local wage and hour
laws including the payment of a prevailing industry wage. As the executive secretary for
the local building and construction trades council explained it to Fine and Gordon, school
officials agreed to establish an internal program to enforce compliance with wage and
hour laws, and in exchange the building trades unions agreed to never strike over issues
related to jobs.

First, the Los Angeles Unified School District (LAUSD) initiated a Labor
Compliance Program in 1996 where representatives of the building trades were trained as
work preservation volunteers (WPVs) to ensure they understood the law and how it
pertained to work sites. These WPVs were issued badges and business cards and became
official liaisons to the government inspectors. Specifically, the arrangement authorizes
the representatives “to conduct labor compliance site visits, interview workers on District
property, participate in Job Walk/Start meetings, and assist with audits, hearings, and
review conferences.”\textsuperscript{22}


\textsuperscript{22} Los Angeles Unified School District (LAUSD) Facilities Service Division, Joint Compliance
Monitoring Program Los Angeles Unified School District & All Work Preservation Groups Rules of
Engagement (Fiscal Year 2012-13), 1, accessed Oct 7, 2013,
The Los Angeles Board of Public Works (LABPW) launched a similar program in 2004. Fine and Gordon note that in both examples, the worker representatives are not making the determination of whether a violation has occurred or what penalties, if any, will be assessed – such actions are still reserved for government officials. Rather, the labor representatives assist with gathering intelligence on potential violations, including assisting workers with completing wage complaint forms that government inspectors can then use to judge the merits of an individual case.

Whereas some government officials were initially skeptical of the model and particularly concerned that labor representatives would use their enhanced role to advance union causes including attempting to organize non-union workplaces, such fears have not materialized. Local inspectors have also come to view program participants as valuable assets for expanding coverage, particularly for monitoring weekend job sites and reaching out to workers that do not speak English. One longtime official who acknowledged he had been skeptical of the program at first cited one underpayment case where the collaboration of the worker representatives had enabled him to expand his investigation from the initial two workers to twelve and strengthen his overall investigation.23

Fine and Gordon are encouraged by several program developments while acknowledging the program has some challenges. On the positive side, they point to the fact the program has become an ongoing fixture in local law instead of a one-time project tied to a particular administration and at risk of cancellation. They also champion the

extra step of deputizing worker representatives as a vital program component, noting that the construction industry has other examples of monitoring programs where company officials can simply deny the inspector access. Under the Los Angeles model, company officials cannot refuse access to deputized inspectors. Finally, they note that beyond merely increasing the local government’s capacity to monitor worksites, this program also benefits from the insider knowledge worker representatives possess over how their industry operates. Their biggest concern with the program is that it has yet to produce firm evidence of improved industry compliance. Local officials believe they are doing a better job of catching misconduct, but even if that is true the data does not indicate a clear reduction in violations. One possible reason they cite is reluctance on the part of government investigators to pursue the maximum penalties allowed under California law including debarment. Economic incentives designed to discourage violations are only effective if the regulated companies believe the penalties may be enforced. A secondary concern is that historically building trades unions have underrepresented or excluded minorities including African-Americans making outreach to such groups more difficult. The Los Angeles trades unions have taken steps to address this discrepancy, but underrepresentation remains a reality.  

Applying the Donahue and Zeckhauser framework for Collaborative Governance to this case raises some additional concerns to be addressed. While Donahue and Zeckhauser would applaud the use of worker representatives to augment agency investigators, they might object to the fact that workers are formally deputized. It is important to note that the Los Angeles investigators retain the final authority to determine

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24. Ibid., 564-565.
if any violations have occurred and what, if any, penalties, will be assessed. However, a successful partnership requires more than a clear delineation of roles and a review structure to protect against preference discretion, both of which are components built into the Los Angeles programs. A successful partnership must also pass the test of public perception. It is here that the Los Angeles cases prove problematic. The act of deputizing union members and worker representatives is likely to raise charges of bias regardless of whether such claims are warranted.

This case relates closely to a case covered by Donahue and Zeckhauser in Collaborative Governance.25 In that case, the Occupational Safety and Health Administration (OSHA) faces a similar challenge with trying to stretch agency resources to investigate worksites and enforce workplace safety regulations. Out of necessity, OSHA safety rules were written in general language to apply to a range of workplace environments meaning that the specific regulations did not always fit well with workplace conditions. Likewise, because the agency was stretched thin with its enforcement efforts, some worksites might go decades without receiving an onsite inspection. The Cooperative Compliance Program launched in the mid-1990s attempted to address these shortcomings by encouraging individual firms to create and enforce their own safety programs. OSHA staff consulted participating companies on setting up their programs and then performed occasional audits to ensure program compliance. One safety manager at a paper company stated that the company had been able to address certain problems a government investigator would not have noticed. However, some companies objected to perceived coercion in that they would be subject to traditional

inspectors if they did not participate in the voluntary program. Working with the U.S. Chamber of Commerce, these companies were able to file a lawsuit and have the program shut down on procedural grounds.²⁶

The OSHA case illustrates what can happen when a positive partnership is perceived to overstep its boundaries. While the Los Angeles partnerships have clearly been a positive development for enforcing compliance in that community, such a program of deputizing non-government individuals would likely yield pushback if something similar were attempted at the federal level. Finn and Gordon concede their models would require modification to gain enough political support to be enacted at the federal level, but maintain that cases like Los Angeles illustrate the potential impact of expanding federal partnerships.²⁷

The path to exploring meaningful partnerships that can build upon the WHD’s resources and help it enforce FLSA compliance is not limited to partners in the nonprofit and for-profit sectors. The WHD must also partner with other federal and state agencies engaged in workplace safety and labor laws. One primary example of such a partnership in action is the Employee Misclassification Initiative. The protections of the FLSA only apply to workers who have been classified as employees; however, there are a range of different employment categories under the law including independent contractors who operate as their own business and contract out their services to other firms. When workers who meet the general criteria to be considered an employee are misclassified as independent contractors, those workers “are being deprived of overtime premiums and

²⁶ Donahue and Zuckhauser, Collaborative Governance, 107-110.

minimum wages forced to pay taxes their employers are legally obligated to pay and are left with no recourse if they are injured or discriminated against in the workplace.”

To determine whether a worker should be classified as an employee, and therefore entitled to the legal protections under the FLSA, the Department administers a standard known as the Economic Realities Test, which the DOL describes in the following manner:

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

1) The extent to which the services rendered are an integral part of the principal's business.
2) The permanency of the relationship.
3) The amount of the alleged contractor's investment in facilities and equipment.
4) The nature and degree of control by the principal.
5) The alleged contractor's opportunities for profit and loss.
6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7) The degree of independent business organization and operation.

The DOL also identifies certain factors that are irrelevant to determining employment status. These include the existence (or lack thereof) of an employment agreement, timing and method of payment, any certifications or licenses the contractor


may hold from a state or municipality, and the location where the job occurs.\textsuperscript{30} The Department of Professional Employees at the AFL-CIO, which has an interest to pursue a strong interpretation of the law that benefits employees, provides its own definition of the Economic Realities Test:

Determining economic reality demands common sense judgments. An employee who only invests time in an enterprise and who sells his or her services to only one “customer,” the employer, is economically dependent upon that work. An independent contractor is in business for him or herself, invests in his or her own equipment and supplies, and has a broad customer base.\textsuperscript{31}

The full extent of employee misclassification is not known. However past surveys have provided evidence the problem could be quite substantial. A 2000 survey by the Department of Labor found that between 10-30\% of U.S. companies had misclassified employees as independent contractors.\textsuperscript{32} Subsequent studies at the state level have likewise found significant rates of noncompliance. A 2006 survey in Illinois found that close to 20\% of surveyed employers had misclassified employees, an increase from similar surveys in previous years.\textsuperscript{33} Aside from impacting the affected workers, misclassifications also interferes with federal and state government efforts to collect full taxes on the misclassified wages.

The initiative to address employee misclassification provides one example of a partnership arrangement between various federal and state agencies to collaborate in

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30. Ibid.
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pursuing their individual missions with a broader focus on advancing the larger public interest. The Labor Department has taken the position that the act of misclassifying an employee as an independent contractor does not, in and of itself, directly violate any of the labor laws it is charged with enforcing. However, misclassifying employees does trigger tax penalties from the IRS. By working together and sharing information about potential misclassification cases, the government can ensure that workers receive the full pay and benefits to which they are entitled and the government is able to collect the prescribed taxes from both employer and employee. The benefits to the government in revenue are potentially quite substantial. In 2009, the Treasury Inspector General for Tax Administration issued a report estimating that misclassification had cost the government $54 billion in underreported employment tax, and an additional $15 billion from uncollected FICA and Unemployment Insurance taxes.

The Obama Administration has made addressing misclassification a major initiative under the Department of Labor at the direction of the Middle Class Task Force chaired by Vice-President Biden. The Department has entered into Memorandums of Understanding (MOUs) to collaborate on enforcement with both the Internal Revenue Service (IRS) and 14 state labor departments, with some state agreements also including other federal agencies like the Employee Benefits Security Administration. The IRS-DOL agreement, signed in September 2011, is designed “to enable both agencies to

34. Leveling the Playing Field: Protecting Workers and Businesses affected by Misclassification, Statement of Seth D. Harris, Testimony, 3.

35. Ibid., 55

leverage existing resources and send a consistent message to employers about their duties to properly pay their employees and to pay employment taxes.”

These agreements are starting to show tangible results. The Labor Department reported that in the roughly 16 months that followed the September 2011 launch of the misclassification initiative, the agency collected around $9.5 million in back wages benefitting more than 11,400 workers who had previously been misclassified. The Department is also planning direct outreach to workers through a worker classification survey intended both to measure the working public’s knowledge of relevant employment laws as well as learn about individual worker’s employment experiences that may or may not represent cases of misclassification.

Advocates for strong Labor Department enforcement of the FLSA generally champion the Misclassification Initiative. Legislation has been introduced at both the federal and state level to create stronger regulations and standards for the practice of hiring independent contractors. Unions are one constituency that favors strong penalties for misclassification, since employees are eligible to organize for collective bargaining whereas independent contractors are not afforded the same rights.


However, the partnership has also encountered its share of critics. Testifying before the House Committee on Education and the Workforce, attorney David Fortney, a partner at Fortney & Scott, contrasted the different approaches the IRS and the WHD had taken to correcting misclassification. The IRS initiated a Voluntary Classification Settlement Program (VCSP) for employers who met certain conditions to voluntarily correct past misclassification of workers as independent contractors by reclassifying them as employees for the purposes of future tax payments. In exchange for the voluntary reclassification, employers would pay a reduced tax rate that slightly exceeds one percent on the employee’s wages from the most recent tax year as opposed to the ten percent employers usually pay on employee wages, and avoid liability for interest payments, penalties, or the possibility of an audit for past misclassification. The IRS also provides feedback on the criteria it uses to determine employee status as a means to help companies make the same assessment. The Labor Department, by comparison, does not provide the same service, noting that under the Obama Administration the Department has not issued any Opinion Letters offering guidance on how to achieve compliance in complicated situations.\(^{40}\)

Another problem that Fortney highlights is that the IRS and the DOL have different criteria for determining what constitutes an independent contractor under the laws that they enforce. He notes that the IRS-DOL MOU does not offer guidance on how to account for this difference in criteria, and that consequently the IRS could determine a worker was properly classified while DOL could determine the worker was

misclassified.\textsuperscript{41} Supporters of the DOL Misclassification initiative counter that such classification discrepancies are rare in practice and the problem is receiving more attention than it warrants. Nonetheless, this problem represents one of the challenges that arise when two agencies with different goals attempt to work together.

The DOL-IRS partnership also serves as an example of what can happen when two agencies approach a partnership with different goals. From the IRS perspective, while they would like to recover back taxes it is acceptable in some cases to get employees properly classified and ensure revenue streams going forward even if that means writing off some past losses. Either way, the money will go to support the federal government and it is better to obtain some revenue than none at all. The Labor Department, however, has to make a different calculation as the agency is attempting to recover back wages on behalf of workers. Whereas the federal government can depend on receiving some revenue stream each year, the workers who had wages stolen in 2012 may be different than the workers who have had wages stolen in 2013, and a failure to obtain back wages for workers is a more significant liability to the individual worker than the modest revenue loss to the federal government.

In this sense, from the IRS perspective, the Labor Department could exercise preference discretion by targeting businesses that participate in the IRS VCSP program to recover back wages for the employees who were previously misclassified. This would create a disincentive for companies to enter the VCSP program, thereby undercutting the IRS goal of getting more businesses classified correctly to pay the appropriate taxes. It is no surprise, then, that the IRS would want to restrict DOL access to VCSP records to

\textsuperscript{41} Ibid., 9-10.
ensure employers that voluntarily entering the program would not set themselves up for future liabilities.

Notwithstanding these challenges, the program does offer clear benefits to both agencies by providing access to additional information and resources that neither agency would have otherwise. The Labor Department benefits by gaining access to tax records that may quickly determine when an employee was misclassified as an independent contractor, allowing the agency to take action. The IRS in turn, benefits collecting the additional payroll taxes for workers re-classified as employees. Both agencies benefit from the additional resources provided by their partner, making it possible to pursue a more comprehensive enforcement strategy.

The collaboration between the IRS, DOL and all associated state and local partners represents an instructive case study in how government can better pursue its mission when it partners with other agencies and organizations working on similar missions. It is not, strictly speaking, an example of collaborative governance in the way that Donahue and Zeckhauser define it given that the principle collaborators are all government agencies. Still, it provides an instructive example of the benefits that can be achieved when two or more partners share discretion for the design and implementation of an enforcement program, as well as the many challenges that can arise.

When looking to design stronger partnerships with private, for-profit and government partners in the future, the DOL must draw lessons from the efforts of other agencies to share program management and decision-making with community partners in order to help the WHD inform its own collaborative efforts. Fortunately, there is a growing track record of successful with public, private and nonprofit sector partners.
One example of a partnership that should inform the DOL in its future efforts to form and strengthen collaborations is the Prescription Drug User Fee Act (PDUFA) of 1992. Donahue and Zeckhauser examine the PDUFA, a program of the Food and Drug Administration (FDA) to shorten wait times for conducting safety reviews of new drugs, as an example of a program that evolved over time, was initially considered a great success until some unforeseen complications arose, underwent amendments to address public concerns and today remains an example of a partnership that has yielded mostly positive results for the public, government and industry alike.

Before this partnership was formed, the FDA was struggling to overcome resource challenges similar to those encountered by the WHD. As demand for agency services outpaced agency budget and staffing levels, the FDA was having difficulty keeping up with its public mandate to provide timely-yet-thorough safety reviews of new medicines that drug companies were eager to bring to market. The official regulations targeted a six-month timeframe to complete reviews of new drugs, whereas in practice the agency was so backlogged it often would not even initiate its review until a year or more had passed from the initial request. The agency needed more resources to shorten review times, but additional federal funds proved elusive with public focus largely on reducing the federal deficit.⁴²

To address this problem, the FDA, under the leadership of a new administrator David Kessler, developed a partnership with the drug companies in 1992 seeking expedited review times to collaborate on expanding agency resources. The drug companies would pay a fee when requesting review of a new drug which the FDA would

⁴² Donahue and Zeckhauser, Collaborative Governance, 194-195.
collect and allocate towards its drug safety review budget. With increased resources at their disposal, the FDA committed to maintain a quicker review standard, one year for most applications and six months for priority ones. The agreement also specified that the FDA would maintain public funding for new drug inspections at the same nominal rate as when the program began to ensure that fees paid by drug companies would always expand program funding instead of substituting for public dollars. The FDA retained control over its safety review process and right to request additional information, while drug companies held discretion over the timing and content of their applications.\textsuperscript{43}

Donahue and Zeckhauser note that the resulting partnership exceeded performance expectations from the beginning and was largely considered an unqualified success for roughly a decade until unforeseen complications began to emerge. In 1994, the first year that performance results were measured, the FDA completed 95 percent of its reviews within the target timeframe, far exceeding the initial threshold of 55 percent the agreement had set. The FDA reduced average performance times by more than 40 percent within the initial decade. The program was performing as intended to the apparent benefit of all parties involved, and was re-enacted by Congress in 1997 with only minor adjustments.\textsuperscript{44}

Although the program largely performed as intended, the pledge not to reduce federal funding to ensure that drug company payments enhanced rather than replaced existing new drug review funding did yield one side effect no one had predicted. The FDA saw its overall budget decrease over time. Yet, the new drug review program could

\textsuperscript{43} Ibid., 195-197.

\textsuperscript{44} Ibid., 195-196.
not absorb any of these cuts or else the agency would lose the right to collect application fees from drug companies as well as to spend the fees already collected. The result, as Donahue and Zeckhauser observe, was that over time the agency gradually shifted resources away from reviewing drugs after they were released into the market to the benefit of drugs that had not yet been released. This was significant because often long-term side effects do not surface in pre-release drug trials, and it is only through continued monitoring that the full effects and risks of a drug compound can be understood.45

One prominent example of this problem was the drug Vioxx, a strong painkiller developed by Merck to treat chronic and severe pain conditions like arthritis. The drug was widely embraced by doctors and patients following its release, recording $2.5 billion in sales in 2003.46 Over time, however, the drug was determined to pose increased cardiovascular risks, including risk of heart attack, particularly among patients taking it for 18 months or longer. Merck ultimately opted to remove the drug from the market, but not before both the company and the FDA faced public criticism for the case.47 One FDA official from the Office of Drug Safety testifying before Congress stated that in its present configuration, the FDA could not prevent a similar event from occurring in the future.48

Cases like the Vioxx retraction certainly did damage to the reputation of the FDA, in particular damaging the reputation of the agency’s partnership with drug companies.

45. Ibid., 198-200.


47. Donahue and Zeckhauser, Collaborative Governance, 199-200.

48. Ibid., 201.
Some questioned whether the FDA was truly independent in its reviews, or whether the FDA felt pressure to approve drugs in reviews paid for the company seeking approval. Donahue and Zeckhauser argue that no hard evidence ever emerged showing that the FDA jeopardized safety in expediting its public reviews. However, the damage to the public perception of the program was a real problem, as was the insufficient resources for reviewing drugs already on the market. Congress had already taken steps to address the imbalance in funding between pre-release and post-release drug review before the Vioxx case even came to light. Beginning in 2002, the FDA was permitted to use some of the application fees it collected for pre-market reviews. Congress enhanced these provisions in 2007, increasing fees and allowing the FDA to utilize more discretion in dividing funds between reviews of new drugs and those already on the market. The drug industry agreed to the new conditions, having come to recognize the overall value of the program as well as the need to alleviate public concerns over how funds were used. Donahue and Zeckhauser conclude that the program as it now exists may still present some challenges, but remains a “positive innovation” and an example of how “collaborative governance” can provide a net positive in serving the public interest.49

In addition to providing an effective-if-imperfect example of public-private partnerships in action, the PDUFA can also serve as an instructive case study for the WHD to reference in designing future partnerships. In many respects, this partnership proved to be an overwhelming success. The government identified a key shortage of agency resources to review new drug applications, and pursued a creative arrangement that allowed the FDA the capacity to hire additional staff. This initial step was successful

49. Ibid., 200-201.
because all parties viewed it largely beneficial. The government gained additional
resources to pursue its mission while retaining independent regulatory authority to review
applications. The drug companies were promised shorter review times for the drugs they
developed shortening the time they had to wait before new drugs began to turn a profit.
The public also benefitted from the expedited approval of new drugs to the market
increasing the choices available to them and their doctors for treating various conditions.

Similarly, new partnerships undertaken by the WHD will be most successful
when viewed as beneficial by workers, employers and the public alike. Certainly,
employers who set out to violate the law are unlikely to favor such partnerships – or
indeed any efforts to improve FLSA enforcement. However, employers who comply with
the law would prefer that their competitors be held to the same standard so they are not
competing against firms who save payroll expenses by underpaying wages. Likewise,
employers who violate the law unknowingly could benefit from partnerships that pro-
actively engage employers to help educate them about their responsibilities before
violations are discovered.

The greatest challenges emerged in the form of unforeseen economic incentives
that led the FDA to favor pre-market drug testing at the expense of monitoring drugs that
had already been approved so as to remain eligible to collect drug company fees. The
FDA and Congress, in keeping with the principles of the cycle of collaboration Donahue
and Zeckhauser embrace, assessed the program and made adjustments over time to
alleviate these concerns. In the strictest sense, this problem may not affect the WHD
considering that its partnerships are more geared towards helping officials educate the
public and identify violations. However, the agency could face a similar problem if it
begins to focus resources in fields where strong partnerships exist at the expense of industries where partnerships prove more difficult to arrange but violations are likewise prevalent. The resulting damage to public perception of the agency demonstrating favor to its partner organizations could mirror the charges the FDA encountered that its review decisions were influenced by the companies paying the bills.

Authors Donahue and Zeckhauser provide an effective model for how government can partner with other levels of government, private firms and nonprofit organizations to enforce labor regulations through an arrangement of shared discretion that benefits from a more efficient distribution of responsibilities capitalizing on each partner’s strengths. Fine and Gordon provide a similar vision in observing that WHD has a history of partnering with both business and worker organizations while arguing that such arrangements could be strengthened, extended to include worker centers and made more permanent. In order to effectively address the problem of wage theft, the Labor Department must continue to develop and pursue these partnerships.

The cases presented in this chapter demonstrate the range of discretion that can be allocated among program partners. The JEWP program in Houston required little discretion on the part of program participants. Program volunteers needed to determine which department at DOL a worker should contact to investigate his or her complaint, but the actual case evaluation was left to the government investigators. The Employee Misclassification initiative, by contrast, serves as a case where program discretion is more evenly shared among program participants as all parties work to determine the proper classification of an employee. The two programs with the Los Angeles Unified School District and the Los Angeles Board of Public Works provide the strongest role for
partners in terms of evaluating which cases are brought to the attention of government officials; however, the government retains the final determination on whether a violation has occurred and what penalties will be implemented. The FDA partnership with drug companies illustrate the advantages of designing a partnership that is largely viewed as beneficial to all parties involved.

Each partnership presents a set of challenges to overcome. With the JEWP program, it was difficult to sustain program momentum beyond the departure of the partnership founder; however the program has since adjusted and continues to thrive to this day. In the case of the Misclassification Initiative, there is an ongoing tension with competing agency objectives even while all partners acknowledge that all of them benefit from working together. The Los Angeles programs have clearly won community support, yet compliance remains a significant problem in the construction industry and it is unclear what, if any, impact the partnerships have had to improve compliance. The FDA drug review program had to overcome some unforeseen complications with the program design, but the agency made adjustments and the program continues to be a success.

Such challenges do not represent a reason to abandon collaborative partnerships; rather, it is the combination of strengthened partnerships with more dedicated agency resources to support successful outcomes that will allow for the highest level of compliance. Chapter 6 will revisit the cumulative evidence presented in this thesis and make the case for duel investments in greater Labor Department resources as well as the collaborative partnerships required to enhance and compliment such investments. The chapter will also evaluate some of the specific proposals that have been made towards achieve these ends, and consider their chances for implementation.
CHAPTER 6
WHY ENFORCING THE FAIR LABOR STANDARDS ACT SERVES THE PUBLIC INTEREST

In this thesis we have examined why the DOL has not been more effective at enforcing the FLSA, and the major impediments that interfere with effective enforcement as a means to understand some of the common challenges in contemporary governance. Michael Lipsky’s insights on common problems encountered by agencies that directly interact with the public provided context for the resource challenges WHD must overcome. The promise of addressing some of these problems through a system of collaborative partnerships with shared program discretion was explored through the framework of Collaborative Governance advocated by John Donahue and Richard Zeckhauser. This thesis also outlined the core components of the FLSA including minimum wage and overtime protections, and examined how the FLSA overcame resistance to become law and then gradually expanded over time.

This thesis outlined the primary methodology that WHD follows to enforce the FLSA, including conciliations, complaint-driven investigations, and targeted industry investigations. It covered some of the cases where the WHD has been effective in achieving results while also noting the limits of this success. The systemic challenges that inhibit effective FLSA enforcement include insufficient agency resources, poor information management, and the complexities of attempting to enforce the law with insufficient resources and a lack of relevant information. The principle nongovernment organizations that are involved in FLSA enforcement were examined, along with the potential of forming partnerships with these organizations following the Donahue and
Zeckhauser model for Collaborative Governance to help the WHD overcome its resource limitations while also recognizing such partnerships present new management challenges of their own.

All of these steps are important to understand the impact of the FLSA, the challenges with enforcing the law, and the possibility of overcoming these challenges through new approaches to management and governance. However, a fundamental question remains. Why is it important that the FLSA be enforced?

To consider this question, we return to the analysis of Paul Light who himself took inspiration from the writings of Alexander Hamilton to define a framework for a strong and effective central government capable of undertaking complex challenges to serve the needs of the nation. In contemplating whether a particular agency directive rises to the level of a “mission that matters,” Light observed that some directives are more important to the national interest than others. He proceeded to define criteria for determining the relative importance of a particular mission, reasoning that “important, difficult, and successful endeavors are more likely to constitute missions that matter than endeavors that are less important, difficult, and successful.” The challenge of this chapter is to evaluate the efforts of the DOL to address wage theft through enforcing the FLSA from the standpoint of the mission’s difficulty, success of the endeavor and prospects for greater success in the future, and ultimately the relevance to the public interest of enforcing the law.

2. Ibid., 29.
The question of measuring success as it relates to enforcing the FLSA is complex. The agency has had some extraordinary successes helping workers recover back wages. In many respects, the agency is successfully pursuing its mission to assist workers and ensure employers comply with the FLSA. The workers who receive back wages as a result of WHD actions are made better off than if they received no restitution for experiencing wage theft. This is particularly true for workers in low-wage industries where small increases in pay can have a disproportionally high impact on their financial welfare.

The investigation and subsequent litigation of the poultry industry provides a prominent example of this principle in effect. When Purdue Farms agreed to pay $10 million in back wages to 25 thousand workers, this settlement represented a significant restitution of back wages as well as the commitment of the company to pay workers the appropriate wages going forward. Likewise, settlements with other poultry processors also represent an acknowledgment of past wrongs and stated commitment to follow the law in the future.

The garment industry in New York provides another example of a clear success for the agency. Government officials correctly ascertained that the movement of clothing retailers towards a lean-retailing model where smaller stocks were maintained and more frequent product orders were placed created increased pressure on the clothing suppliers to deliver orders on time. By utilizing the hot-cargo provision of the FLSA to seize garments manufactured by subcontractors underpaying their workers, the government was able to gain an upper hand in negotiations with the clothing distributors.

and work out agreements for the distributors to self-monitor their subcontractors. The agency was therefore successful in working out a system for better enforcement and improved compliance rates that placed much of the burden on companies to monitor their own subcontractors and ensure the law was observed. This case also presents an example of how a stricter regulatory framework that educates companies about their responsibilities while ultimately placing the burden on them to observe the law may improve compliance rates in other industries as well.

The WHD’s efforts to form partnerships with public, private for-profit and private non-profit partners likewise point to the success of the law. The JEWP program in Houston is one prominent example of a collaborative partnership focused primarily on educating the public about their rights and helping workers who may be victims of labor violations including wage theft file complaints with the appropriate government agencies. The government helped recover more than $1.3 million in back wages for 1,900 workers in just the first two years alone.

The Obama Administration’s Misclassification Initiative is another example of a partnership with clear success at enhancing enforcement of the FLSA. In the first 16 months, the program helped collect $9.5 million in back wages to the benefit of 11,400 workers who had been misclassified. The related IRS program to encourage employers to correct their employee classification without fear of past tax penalties may be less

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5. Department of Labor, OSHA website, “Labor Department Launches Hispanic Worker Protection Program: Consulates of Mexico, El Salvador To Help Educate Workers.”

helpful from the standpoint of helping employees who have been misclassified recover back wages, but it will help ensure that less employees are misclassified in the future.

Notwithstanding these many examples of successful enforcement, the fact remains that 76 years after the FLSA was first ratified, non-compliance with the law remains a significant problem. This problem cuts across multiple industries, impacting low-wage workers, tipped workers, and white-collar professionals alike. It is difficult to argue that the law has been an overwhelming success when industry-specific and regional surveys frequently show high noncompliance rates, including 47 percent of the 218 workers interviewed in the Hurricane Katrina cleanup efforts in New Orleans, 68 percent of 4,000 low-wage workers surveyed in Chicago, Los Angeles and New York in 2008, and 75 percent of the 433 restaurant workers surveyed in the Chinatown neighborhood of San Francisco in 2010.

Granted, such high rates of violations are often concentrated in low-wage industries known to be problematic where workers may not be aware of their rights, many fear repercussions for seeking to enforce their rights such as deportation or termination from employment, and may not have access to or be aware of support systems that can help them obtain back wages. Nonetheless, the WHD must do a better job of enforcing the FLSA to compel more frequent compliance from industries with a track record of violations if it is to draw on the legacy of Alexander Hamilton and achieve Paul Light’s vision of a strong and effective federal government.


The WHD must also do a better job with following up on all of the cases brought to its attention in a timely manner. As the GAO reported, some workers have to wait over six months before a review of their case is initiated; once a review of a case does begin, it may take over a year to reach resolution.10 Other cases receive no action and may not be entered into the system at all. Such bureaucratic delays do not represent an efficient federal service prepared to assist wage theft victims with recovering back wages. For a low-wage worker living paycheck to paycheck, these delays in payment of back wages are significant. They could mean the difference between paying bills on time or being assessed penalties for late payment simply because they were not paid what they earned in a timely manner.

It is also difficult to ascertain the extent to which the WHD is effective in enforcing the law so long as the agency has a history of being selective in determining which public inquiries are recorded in the WHD tracking and enforcement system.11 Rep. Kucinich and Rep. Issa were correct in their assessment during the New Orleans hearings that the ability to review such agency protocols is essential for the public to be able to reach an informed opinion about agency performance.12 Such data inconsistencies undermine efforts to evaluate WHD enforcement, either by reviewing the judgments of WHD officials regarding which cases will be pursued or in attempting to measure improvements to caseload management over time.

11. Ibid., 24.
Returning, then, to the question of mission success, the WHD has achieved some significant victories in restoring wages to workers and increasing compliance rates in target industries. At the same time, the agency has been unable to compel widespread compliance with the FLSA in several industries with vulnerable workers, fails to adequately address all of the cases brought to its attention, and cannot provide a complete accounting to the number of cases it opted not to pursue because many of those cases were never recorded in the agency database. In light of these significant challenges, is it possible for the agency to overcome these impediments and improve its performance?

Regarding Light’s second measure that a “mission that matters” is difficult to undertake, the DOL must overcome great challenges in attempting to enforce the law. The greatest obstacle is the shortage of resources to most effectively enforce the FLSA. The agency simply does not have enough investigators to ensure all cases are investigated. Furthermore, many of the cases that are reviewed either through a conciliation or an investigation do not receive adequate attention to ensure successful closure. The efforts by the Obama Administration to hire additional investigators and restore previous staffing levels are a step in the right direction, but simply do not make up for the fact the law has expanded from covering close to 57 million workers in 1975\(^{13}\) to an estimated 135 million workers by 2011\(^{14}\) while seeing no real growth in the number of investigators during that time. Even allowing for improved efficiencies through advanced technology making it possible for one investigator to handle more

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cases, the WHD would need to significantly increase its pool of investigators simply to restore its level of customer service to 1975 levels. At present, the political momentum required for appropriating such a significant staff increase does not appear to exist.

Another problem, as Michael Lipsky observes, is that such staffing shortages are never easy for an agency that interacts directly with the public to overcome. The WHD needs significantly more investigators to help with enforcing the law. However, applying the logic of Lipsky’s analysis on the unresolvable resource dilemma, in the event that a significant number of additional investigators are ever hired, the likely effect will be to increase the number of cases that get moderate to superficial treatment rather than to significantly improve the attention devoted to each case. To be clear, if such efforts, imperfect as they may be, resulted in higher compliance rates and more back wages awarded to workers who are victims of wage theft, that would still represent a significant improvement in enforcement. Nonetheless, to be truly effective at enforcing the law, the agency must also do a better job of following up on cases to ensure that back wages owed are actually paid, and that requires devoting more time to some of its cases than its present practices allow. That is unlikely to occur through the hiring of additional investigators alone.

A solution that provides the real potential to improve case handling and ensure proper follow up is the strategic development of new partnerships that embrace the Collaborative Governance model. By enlisting the assistance of public, private for-profit and private non-profit partners in disseminating information about the law, identifying possible violations for WHD to investigate and following up to ensure workers receive any back wages to which it is determined they are entitled, the government can share
responsibility for enforcement while retaining its independence to investigate and make the final judgment on whether violations have occurred. Many of the experts who testified before Congress called for the agency to pursue increased partnerships. For example, IWJ Director Kim Bobo made the connection that police officers looking to improve public safety often rely on the support of community members to help monitor activity in their neighborhood and identify the criminals breaking the law for the police to prosecute. The WHD can benefit from a similar model to enlist community partners in identifying likely FLSA violations.15

Such partnerships certainly provide complications of their own. Partnerships may be easier to organize in some communities and industries than others, meaning that they may not always provide a practical solution. While program partners would be selected based on a shared interest in enforcing the law, they will also have other motivations and interests that must be considered. The program design must account for these interests to ensure the government maintains fair enforcement of the law without allowing its partners undue influence over its decisions. Furthermore, WHD investigators may feel pressure to devote more attention to cases where the worker has an outside partner advocating for resolution at the expense of workers with no one to advocate for them. This could lead the WHD away from pursuing cases in fields where violations are far more common but the workers lack an outside champion advocating for them. It could also lead to the impression that the WHD was more interested in

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helping its partners than enforcing the law fairly for all. If such favoritism is ever perceived by the public to be widespread, it could create a legitimacy problem for the WHD.

Still, the primary question Donahue and Zeckhauser identify for assessing whether to pursue a Collaborative Governance partnership is whether the public interest is better served with the partnership than without it. From this standpoint, the answer is an unequivocal yes. Pursuing new partnerships will enable WHD to help more workers and better inform the public, including employers, about the law. The agency must take steps to ensure it devotes resources where they are needed most and not simply where it receives the most– or the loudest – complaints.

The WHD can also make significant improvements to its enforcement efforts by improving its intake process for collecting and analyzing information about cases. The Just Pay Working Group and the National Employment Law Project recommended adopting a triage system for prioritizing cases by grouping them into three tiers of response levels. This will help the WHD identify cases it absolutely must pursue while referring others to state wage and hour agencies or private litigation. The WHD must also implement systems for recording all cases it receives into its systems in at least a limited capacity to help Labor Department management and the public assess case review protocols and provide a more accurate accounting of how many cases are not being serviced.

The WHD also needs to overhaul its information technology management systems to make better use of the data it collects. The Obama Administration agrees with this principle and identified pursuing such upgrades as a priority in their 2014 funding request to Congress. “WHD’s requested increase would allow the agency to make critical improvements that would fundamentally enhance the day-to-day operations of the agency and WHD’s ability to provide effective customer service to both employees and employers.” Investing in better systems will help WHD investigators make more informed decisions about how to most effectively pursue cases to improve overall compliance with the FLSA and help the Administration assess agency performance.

The information challenges facing the WHD are not limited to the methods it follows for collecting, analyzing and following up on information; the agency staff also requires better access to public databases and analytic tools that could help the agency more efficiently manage its caseload. The GAO noted that WHD investigators lack many of the public subscription-based information resources that would enable them to more efficiently perform their job. Therefore, some strategic investments in better information resources could also significantly improve the WHD’s response times, case evaluation and information analysis.


18. US Department of Labor, FY 2014 Congressional Budget Justification, WHD, 14-16.

Another enforcement mechanism that could improve compliance would be to implement strong monetary penalties for violating the law and create a real financial incentive for employers to comply. Such financial penalties will undoubtedly encounter resistance, both from the employers who would have to pay them and those Members of Congress who are skeptical of increased government regulation as a tool for public policy. However, targeting such fines at employers who repeatedly violate the law even after such violations are brought to their attention should help the agency to win public support for increased penalties and answer many of the concerns raised by critics.

All of these improvements could help the WHD approach the difficult mission of addressing wage theft through the FLSA, and move the agency towards the model of strong, effective enforcement championed by Paul Light. But, the greatest contribution to improving enforcement, the one that could help the agency take advantage of all the other reforms considered in this chapter, is the promise of establishing new and improved partnerships with public, private for-profit and private non-profit partners. Such arrangements will be imperfect and introduce new management challenges of their own. However, the public need to enforce the FLSA is greater than the challenges that will arise from introducing more partners into the enforcement strategy, so long as the WHD is able to maintain independence and discretion in determining when violations occur.

The final consideration Light presents for determining whether a mission is truly essential is the extent to which the public interest depends upon mission success. In regards to the minimum wage that the FLSA helped to create, the public response to this question is an overwhelming, “yes.” A November 2013 Gallup Poll found that 76
percent of respondents not only embraced the minimum wage but supported raising it to $9 an hour, including 58 percent of Republicans, 76 percent of Independents, and 91 percent of Democrats. The same poll found that 69 percent of respondents supported automatic increases to the minimum wage in the future that would be tied to inflation, though this support was more divided along party lines with 71 percent of Independents and 92 percent of Democrats favoring compared to 43 percent of Republicans. 20

These results were slightly higher than a March 2013 Gallup Poll which found that 71 percent of Americans favored raising the minimum wage, including 91 percent of Democrats, 68 percent of Independents and 50 percent of Republicans. 21 Both polls are slightly lower than the peak support measured in similar surveys conducted in 1996, 1999 and 2000 which found that 81 to 83 percent of Americans favored a raise to the minimum wage. 22 By any of these measures, the American public has endorsed the policy of a minimum wage and the underlying principle of a fair day’s pay for a fair day’s work.

One of the central tenants of American identity is the idea is that if you work hard, play by the rules and effectively perform your job then you will reap the rewards of your efforts. This is the classic American Dream. The commitment of an employer to hire an employee represents an arrangement where both parties agree on a level of compensation the employee will receive for services performed and the nature of work


22. Ibid.
to be undertaken. By overwhelmingly embracing the idea of a minimum wage, Americans have made a value commitment that no worker who performs their job will receive compensation below a minimum threshold. When employers underpay their employees and fail to meet that threshold, they are violating the very ideal of what the American Dream represents. Enforcing the FLSA is therefore essential to preserving the idea of the American Dream and ensuring that all Americans have the opportunity to reap the rewards of their hard labor.

Consequently, it is imperative that the WHD find new means to improve FLSA compliance. The proposed reforms explored in this thesis are essential to this endeavor. Better enforcement begins with improved information systems and protocols, stronger penalties for employers who repeatedly violate the law, and a pro-enforcement partnership model drawing upon the insights of Donahue and Zeckhauser to bring together the strengths of public, private for-profit and private non-profit partners while preserving the independence of the WHD to determine FLSA violations. The WHD needs to follow the advice of Donahue and Zeckhauser to constantly monitor its program activities and make adjustments as needed. There are also many reports and recommendations that Congress and the WHD can review in designing the most effective strategies and deployment of resources to ensure widespread compliance with the FLSA.

The challenges the agency must overcome to improve enforcement are real. The efforts of the WHD to ensure FLSA compliance may never be finished. However, by improving agency analytical resources and embracing a pro-enforcement model for refining and expanding community partnerships while retaining authority to interpret the
law, the agency can improve compliance with the FLSA and help preserve the promise of the American Dream for future generations.
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