

June 2009

DEPARTMENT OF
LABOR

Wage and Hour
Division Needs
Improved
Investigative
Processes and Ability
to Suspend Statute of
Limitations to Better
Protect Workers
Against Wage Theft

**This Report Is Temporarily Restricted Pending
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GAO

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Highlights of [GAO-09-629](#), a report to the Committee on Education and Labor, House of Representatives

Why GAO Did This Study

The mission of the Department of Labor's Wage and Hour Division (WHD) includes enforcing provisions of the Fair Labor Standards Act (FLSA), which is designed to ensure that millions of workers are paid the federal minimum wage and overtime. Conducting investigations based on worker complaints is WHD's priority. On March 25, 2009, GAO testified on its findings related to (1) undercover tests of WHD's complaint intake process, (2) case study examples of inadequate WHD responses to wage complaints, and (3) the effectiveness of WHD's complaint intake process, conciliations (phone calls to the employer), and other investigative tools. To test WHD's complaint intake process, GAO posed as complainants and employers in 10 different scenarios. To provide case study examples and assess effectiveness of complaint investigations, GAO used data mining and statistical sampling of closed case data for fiscal year 2007. This report summarizes the testimony ([GAO-09-458T](#)) and provides recommendations.

What GAO Recommends

Congress should consider authorizing suspension of the statute of limitations while an investigation by WHD is ongoing. GAO also recommends that Labor reassess its complaint intake and resolution processes; explore new investigative tools and interagency partnerships; and monitor its ability to handle its workload. WHD agreed with GAO's recommendations.

View [GAO-09-629](#) or [key components](#). For more information, contact Gregory D. Kutz at (202) 512-6722 or kutzg@gao.gov.

DEPARTMENT OF LABOR

Wage and Hour Division Needs Improved Investigative Processes and Ability to Suspend Statute of Limitations to Better Protect Workers Against Wage Theft

What GAO Found

GAO found that WHD frequently responded inadequately to complaints, leaving low wage workers vulnerable to wage theft and other labor law violations. Posing as fictitious complainants, GAO filed 10 common complaints with WHD district offices across the country. These tests found that WHD staff deterred fictitious callers from filing a complaint by encouraging employees to resolve the issue themselves, directing most calls to voicemail, not returning phone calls to both employees and employers, and providing conflicting or misleading information about how to file a complaint. An assessment of complaint intake processes would help ensure that WHD staff provide appropriate customer service. To hear clips of undercover calls illustrating poor customer service, see <http://www.gao.gov/media/video/gao-09-458t/>. According to WHD policies, investigators should enter all reasonable complaints into WHD's database. However, even though all of GAO's fictitious complaints alleged violations of the laws that WHD enforces, 5 of 10 complaints were not recorded in WHD's database. In addition, WHD policy in one region instructs staff not to record the investigative work done on small cases in which the employer refuses to pay, making WHD appear better at resolving these cases than it is. Reassessing its processes for recording complaints would help WHD ensure that all case information is available.

Similar to the 10 fictitious scenarios, GAO identified 20 cases affecting at least 1,160 real employees whose complaints were inadequately investigated by WHD. Five of the cases were closed based on false information provided by the employer that could have been verified by a search of public records, such as bankruptcy records, but WHD investigators do not have access to publicly available or subscription databases. In another case, the employer claimed that the company did not meet the income requirement to be covered under federal law but did not provide documentary evidence. WHD investigators do not have access to income information collected by the Internal Revenue Service and were unable to verify the employer's claim. Obtaining more research tools and implementing information sharing processes with other agencies would assist WHD in verifying employer-provided information.

GAO's overall assessment found ineffective complaint intake and investigation processes. WHD officials often told GAO that WHD lacks the resources to conduct an investigation of every complaint, allowing employers in some small cases to avoid paying back wages simply by refusing to pay. GAO found that WHD's investigations were often delayed by months or years. Monitoring the extent to which WHD staff are able to handle the volume of complaints would provide assurance that WHD has sufficient resources available. Under FLSA, the statute of limitations is 2 years from the date of the violation, meaning that every day that WHD delays an investigation, the complainant's risk of becoming ineligible to collect back wages increases. However, in several offices, backlogs prevent investigators from initiating cases within 6 months. Suspending the statute of limitations during a WHD investigation would prevent employees from losing back wages due to delays.

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Abbreviations

DBRA	Davis-Bacon and Related Acts
FLSA	Fair Labor Standards Act
FMLA	Family and Medical Leave Act
IRS	Internal Revenue Service
MSPA	Migrant and Seasonal Agricultural Worker Protection Act
PACER	Public Access to Court Electronic Records
WHD	Wage and Hour Division
WHISARD	Wage and Hour Investigative Support and Reporting Database

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United States Government Accountability Office
Washington, DC 20548

June 23, 2009

The Honorable George Miller
Chairman
Committee on Education and Labor
House of Representatives

Dear Mr. Chairman:

On March 25, 2009 we testified before the committee on findings related to our investigation of the Department of Labor's (Labor) Wage and Hour Division (WHD) processes for investigating and resolving labor complaints.¹ As we previously reported, over 100 million workers are covered under labor laws enforced by WHD, including the Fair Labor Standards Act (FLSA), the Migrant and Seasonal Agricultural Worker Protection Act, the Family and Medical Leave Act, Davis-Bacon and related acts, and other federal labor laws. By law, WHD investigators and technicians² enforce labor laws governing issues such as minimum wage, overtime pay, child labor, and family medical leave. Conducting investigations based on complaints is WHD's first priority.

WHD investigators can take actions ranging from making phone calls to the complainant's employer (known as conciliations) to taking other, more resource-intensive actions such as interviewing the employer and related witnesses, reviewing employer payroll records, and requesting copies of self audits³ conducted by the employer. Conciliations are generally limited to a single, minor violation, such as a missed paycheck or an issue affecting a single worker. A conciliation is used to resolve a complaint

¹GAO, *Department of Labor: Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft*, [GAO-09-458T](#) (Washington, D.C.: Mar. 25, 2009).

²In general, technicians focus primarily on conciliations but may also work on self-audits and limited investigations in some offices. Investigators work on non-conciliations, including full and limited investigations and self-audits, but may also work on conciliations in some offices. Unlike law enforcement officers, WHD investigators do not have arrest authority. In this report, we use the term investigator to refer to both investigators and technicians.

³In a self-audit, WHD determines which violations may exist and allows the employer under investigation to conduct its own review of records and calculate the back wages due employees.

quickly and with minimal resources on the part of WHD. Investigative work for conciliations is generally limited to a telephone conversation in which the WHD investigator explains the specific complaint against the employer, describes applicable laws, and requests that the employer comply with the law and pay any back wages due. In investigations, when WHD determines that violations have occurred and computes back wages owed to workers, it can assess back wages to be paid to the employees and can impose monetary penalties against employers with repeated or willful violations. Our testimony had findings related to (1) undercover testing of WHD's complaint intake and conciliation processes, (2) case study examples of inadequate WHD responses to complaints, and (3) the effectiveness of WHD's complaint intake process, conciliations, and other investigative tools. This report summarizes our testimony, which is reprinted in appendix I, and offers a matter for congressional consideration and makes specific recommendations to Labor for corrective actions.

To test the effectiveness of WHD's complaint intake process and conciliations, undercover GAO investigators posed both as complainants and employers. Using 10 fictitious scenarios including minimum wage, last paycheck, and overtime violations, investigators called WHD offices in Alabama, California, Florida, Maryland, and Texas posing as complainants. These field offices handled 13 percent of all cases investigated by WHD in fiscal year 2007. When WHD investigators attempted to follow up on the complaints, different undercover investigators posed as the employers and followed a variety of scripted scenarios to test how WHD investigators would respond. For more information, refer to <http://www.gao.gov/media/video/gao-09-458t/>.

To identify case studies of inadequate investigations conducted in response to actual employees' allegations of wage theft, we obtained Labor's Wage and Hour Investigative Support and Reporting Database (WHISARD) and data-mined for closed cases in which it took WHD more than one year to complete an investigation, an employer could not be located, or the case was dropped when an employer refused to pay. We analyzed WHD's WHISARD database and determined it was sufficiently reliable for purposes of our audit and investigative work. We also obtained and analyzed WHD case files, interviewed WHD officials, and reviewed publicly available data to gather additional information about these cases.

To determine the effectiveness of WHD's complaint intake process, conciliations, and other investigative tools, we used the results of our undercover tests, case studies, interviews, and discussions of the

processes with management, and two statistical samples. We selected a random statistical sample of 115 cases from 10,855 conciliations and 115 cases from 21,468 non-conciliations recorded by WHD in WHISARD that were concluded between October 1, 2006, and September 30, 2007. We obtained and reviewed WHD's case files for the selected cases and performed tests to determine whether the investigations conducted were adequate. We subsequently determined through our interviews that the population of conciliations sampled was substantially incomplete. Therefore, we were only able to project sample results to conciliations that WHD chose to enter into its database rather than the entire population of conciliations. See appendix I for more information on our methodology. In addition, we reviewed relevant laws and policies and conducted interviews with agency officials.

We conducted our forensic audit and related investigations from July 2008 through May 2009. We conducted our audit work in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. We conducted our investigative work in accordance with the standards prescribed by the Council of the Inspectors General on Integrity and Efficiency.

Undercover Tests Reveal Inadequate Investigations and Poor Complaint Intake Process

In our testimony, we stated that the results of our undercover tests illustrated flaws in WHD's responses to wage theft complaints, including delays in investigating complaints, failure to use all available enforcement tools, failure to follow up on employers who agreed to pay, an ineffective complaint intake process, and complaints not recorded in the WHD database. WHD successfully investigated 1 of our 10 fictitious cases, correctly identifying and investigating a business that had multiple complaints filed against it by our fictitious complainants.

Our undercover tests revealed that WHD's complaint intake process is time-consuming and confusing, potentially discouraging complainants from filing a complaint. Of the 115 phone calls we made directly to WHD field offices, 87 (76 percent) went directly to voicemail. While some offices have a policy of screening complainant calls using voicemail, other offices have staff who answer the phone, but may not be able to respond to all incoming calls. In one case, WHD failed to respond to seven messages from our fictitious complainant, including four messages left in a single

week. In other cases, WHD delayed over 2 weeks in responding to phone calls or failed to return phone calls from one of our fictitious employers. One of our complainants received conflicting information about how to file a complaint from two investigators in the same office, and one investigator provided misinformation about the statute of limitations in minimum wage cases. In one case, a WHD investigator lied to our undercover investigator about confirming the fictitious businesses' sales volume with the Internal Revenue Service (IRS), and did not investigate our complaint any further. WHD management told us that their investigators do not have access to IRS databases, and WHD does not have the legal authority to obtain information about a business from IRS without the owner's consent. WHD would be able to check employer-provided information against IRS records if the business owner signed an IRS consent form, however, WHD managers told us that they were unaware of this form and that investigators in the field do not use it. To hear selected audio clips of undercover calls illustrating poor customer service to our fictitious callers, refer to <http://www.gao.gov/media/video/gao-09-458t/>.

Although all of our fictitious complaints alleged violations of laws that WHD enforces, 5 of our 10 complaints were not recorded in WHD's database. These complaints were filed with four different field offices and included three complaints in which WHD performed no investigative work and two complaints in which WHD failed to record the investigative work performed. According to WHD policies, investigators should enter reasonable complaints into WHD's database and either handle them immediately as conciliations or refer them to management for possible investigation. However, several of our undercover complaints were not recorded in the database, even after the employee had spoken to an investigator or filed a written complaint. In one of these cases, WHD failed to investigate a child labor complaint alleging that underage children were operating hazardous machinery and working during school hours, and did not record the complaint in its database.⁴ The number of complaints that are not entered into WHD's database is unknown, but this problem is potentially significant.

⁴In its written response to this report, WHD stated that our child labor complaint was reviewed by two assistant district directors who determined that the complaint was bogus. However, because WHD had no record of this complaint, we could not confirm WHD's account of investigative steps taken. See appendix II for more information.

Case Studies Show That WHD Inadequately Investigated Complaints

Similar to our 10 fictitious scenarios, in our testimony we identified 20 cases affecting at least 1,160 workers whose employers were inadequately investigated by WHD. We performed data mining on WHD's database to identify 20 inadequate cases closed during fiscal year 2007. For several of these cases, WHD (1) did not respond to a complainant for over a year, (2) did not verify information provided by the employer, (3) did not fully investigate businesses with repeat violations, and (4) dropped cases because the employer did not return telephone calls. Five of the cases we investigated were closed based on unverified information provided by the employer. In each case, the information could have been verified by a search of public records, such as bankruptcy records, but the case files contain no evidence that the investigators attempted to perform these searches. WHD officials told us that investigators rely on internet searches to collect information about employers and generally do not have access to other publicly available or subscription databases. Examples include:

- In November 2005, WHD received a complaint alleging that a boarding school in Montana was not paying its employees proper overtime. Over 9 months after the complaint was received, the case was assigned to an investigator and conducted as an over the phone self-audit because, according to the investigator, WHD did not have the resources to conduct an on-site investigation. The employer agreed to pay over \$200,000 in back wages to 93 employees, but WHD was subsequently unable to make contact with the business for over 5 months. In June 2007, one week before the 2-year statute of limitations on the entire back wage amount was to expire, the employer agreed to pay \$1,000 of the \$10,800 in wages due for which the statute of limitations had not yet expired. The investigator refused to accept the \$1,000, and WHD recorded the back wages computed as over \$10,800 rather than \$200,000, greatly understating the true amount owed to employees. WHD determined that the firm had begun paying overtime correctly based on statements made by the employer but did not verify the statements through document review. No further investigative action was taken and the complainant was informed of the outcome of the case.
- In another case, the complainant alleged that the company employed 15-year-old children, failed to pay its employees minimum wage, and did not properly report income to IRS. The employer claimed that the company did not meet the income requirement to be covered under federal labor law but did not provide documentary evidence. When the employer failed to return WHD's telephone calls or attend a conference with the investigator, WHD concluded the case.

WHD's Complaint Intake Process, Conciliations, and Other Investigative Tools Do Not Provide Assurance of a Timely and Thorough Response to Wage Theft Complaints

WHD's complaint intake processes, conciliations, and other investigative tools are ineffective and often prevent WHD from responding to wage theft complaints in a timely and thorough manner, leaving thousands of low wage workers vulnerable to wage theft.

As discussed above, our undercover tests showed that some WHD staff deterred callers from filing a complaint by encouraging employees to resolve the issue themselves, directing most calls to voicemail, not returning phone calls to both employees and employers, accepting only written complaints at some offices, and providing conflicting or misleading information about how to file a complaint. We also found that WHD does not have a consistent process for documenting and tracking complaints, resulting in situations where WHD investigators lose track of the complaints they have received.

WHD's conciliation process is ineffective because in many cases, if the employer does not immediately agree to pay, WHD does not investigate complaints further or compel payment. When an employer refuses to pay, investigators may recommend that the case be elevated to a full investigation, but several WHD District Directors and field staff told us WHD lacks the resources to conduct an investigation of every complaint and focuses resources on investigating complaints affecting large numbers of employees or resulting in large dollar amounts of back wage collections. WHD investigators are allowed to close conciliations when the employer denies the allegations, and WHD policy does not require that investigators review employer records in conciliations. In one case study, the employee stated that he thought the business was going bankrupt. As a result, WHD closed the case; however, we used a publicly available online database, Public Access to Court Electronic Records, to determine that the employer had never filed for bankruptcy. WHD management told us that the agency does not provide training on how to use public document searches and investigators do not have access to databases containing this information. In addition, WHD's poor record-keeping makes WHD appear better at resolving conciliations than it actually is. For example, WHD's southeast region, which handled 57 percent of conciliations recorded by WHD in fiscal year 2007, has a policy of not recording investigative work performed on unsuccessful conciliations in the database. WHD staff told us that if employers do not agree to pay back wages, cannot be located, or do not answer the telephone, the conciliation work performed will not be

recorded in the database,⁵ making it appear as though these offices are able to resolve nearly all conciliations successfully. Inflated conciliation success rates are problematic for WHD management, which uses this information to determine the effectiveness of WHD's investigative efforts. Without information on the outcomes of failed conciliations, WHD cannot identify employers showing a pattern of violations.

Finally, we found WHD's processes for handling investigations and other non-conciliations were frequently ineffective because of significant delays. For example, 5.2 percent of the investigations in our statistical sample were not initiated until over 6 months after the complaint was received, and 6.6 percent took more than one year to complete.⁶ See page 26 of appendix I for more information on the methodology of our sample. Timely completion of investigations by WHD is important because the statute of limitations for recovery of wages under the FLSA is 2 years from the date of the employer's failure to pay the correct wages.⁷ FLSA, unlike some other laws, does not permit the suspension of the statute of limitations during a federal investigation.⁸ Specifically, this means that every day that WHD delays an investigation, the complainant's risk of becoming ineligible to collect back wages increases. Labor has not sought additional authority to suspend the statute of limitations during an investigation, yet in several district offices, a large backlog prevents

⁵In some offices with this policy, the complaint that the conciliation was based on would be recorded in WHD's database. However, the complaint would appear as though it had never been investigated, because the investigative work and the outcome of the conciliation would not be recorded in the database. Other offices do not enter the complaint into the database.

⁶Because we followed a probability procedure based on random selections, our sample is only one of a large number of samples that we might have drawn. Since each sample could have provided different estimates, we express our confidence in the precision of our particular sample's results as a 95 percent confidence interval (e.g., plus or minus 5 percentage points). This is the interval that would contain the actual population value for 95 percent of the samples we could have drawn. The 95 percent confidence interval surrounding our sample of inadequate investigations ranges from 206 to 1,195 failures in the population.

⁷The statute of limitations for recovery of wages in an individual civil action under FLSA and the Davis Bacon Act is 2 years from the employer's failure to pay the correct wages. 29 U.S.C. § 255. For willful violations, in which the employer knew its actions were illegal or acted recklessly in determining the legality of its actions, the statute of limitations is 3 years. Federal courts have enforced the statute of limitations even if Labor is investigating a complaint. *Shandelman v. Schuman*, 92 F. Supp. 334 (E.D.Pa. 1950).

⁸For example, the Clayton Antitrust Act suspends the statute of limitations for private lawsuits when the government begins a criminal or civil antitrust action. 15 U.S.C. § 16(i)

investigators from initiating cases within 6 months. One office we visited has a backlog of 7 to 8 months, while another office has a backlog of 13 months. Additionally, our analysis of WHD's database shows that one district office did not initiate an investigation of 12 percent of complaints until over one year after the complaint was received, including a child labor complaint affecting over 50 minors. Once complaints were recorded in WHD's database and assigned as a case to an investigator, they were often adequately investigated. One example of a successful investigation involved a complaint alleging that a firm was not paying proper overtime. The case was assigned to an investigator the same day it was filed in April 2007. The WHD investigator reviewed payroll records to determine that the firm owed the complainant back wages. The case was concluded within 3 months when the investigator obtained a copy of the complainant's cashed check, proving that he had been paid his gross back wages of \$184.

In response to our testimony, the Secretary of Labor announced on March 25, 2009, that WHD would hire an additional 250 investigators to "reinvigorate the work of this important agency, which has suffered a loss of experienced personnel over the last several years."

Conclusions

Our work clearly shows that Labor has left thousands of actual victims of wage theft who sought federal government assistance with nowhere to turn. Our work has shown that when WHD adequately investigates and follows through on cases it is often successful. However, far too often many of America's most vulnerable workers find themselves dealing with an agency concerned about resource limitations, with ineffective processes, without certain tools necessary to perform effective investigations, and unable to address all allegations of wage theft and other labor law violations within the 2-year statute of limitations. While an influx of new staff may help address some of these problems, without a careful assessment of WHD's workload and processes, unscrupulous employers will continue taking advantage of our country's low wage workers.

Matter for Congressional Consideration

Our work documented several cases in which the employees' right to file a private lawsuit was constrained by WHD's delays, resulting in hundreds of thousands of dollars of identified wage theft going uncollected. Therefore, Congress may wish to consider authorizing suspension of the statute of limitations while an investigation by WHD is ongoing.

Recommendations for Executive Action

We recommend that the Secretary of Labor direct the Administrator of WHD to take the following five actions to improve processes for recording and responding to wage theft complaints:

- The Administrator should reassess current policies and processes and revise them as appropriate to better ensure that relevant case information is recorded in WHD's database, including all complaints alleging applicable labor law violations regardless of whether the complaint was substantiated, and all investigative work performed on conciliations, regardless of whether the conciliation was successfully resolved.
- To provide assurance that WHD personnel interacting with complainants and employers appropriately capture and investigate allegations of labor law violations, and provide appropriate customer service, the Administrator should conduct an assessment of WHD's complaint intake and resolution processes and revise them as appropriate.
- To improve the efficiency and effectiveness of WHD personnel handling wage theft complaints, the Administrator should explore providing more automated research tools to WHD personnel that would allow them to identify key information used in investigating complaints such as bankruptcy filings, annual sales estimates for businesses, and information on additional names and locations of businesses and individuals under investigation.
- To assist in the verification of information provided by employers under investigation, the Administrator should explore gaining access to information maintained by IRS and other agencies as needed through voluntary consent from businesses being investigated.
- To provide assurance that WHD has adequate human capital and resources available to investigate wage theft complaints, the Administrator should monitor the extent to which new investigators and existing staff are able to handle the volume of wage theft complaints, and if inadequate, what additional resources may be needed.

Agency Comments and Our Evaluation

We received written comments on a draft of this report from the Acting Assistant Secretary for Employment Standards (see appendix II). Labor concurred with our recommendations and provided additional clarifying information. Labor noted that unlike investigations, conciliations do not result in any determination of whether a violation occurred, but provide a chance to assist more employees than WHD could otherwise assist through more time-consuming investigations. Labor also stated that staff

balance a variety of factors, including office workload, when determining whether to investigate a complaint, refer the employee to another organization or advise the employee of the right to file a private lawsuit.

Labor provided additional representations on one of our undercover cases, an anonymous complaint alleging that children were operating heavy machinery and working during school hours in a meat packing plant. Because WHD had no record of this call, we reported that WHD had not investigated the complaint or recorded it in its database. In its written response to this report, Labor stated that our child labor complaint was reviewed by two WHD assistant district directors who determined that the complaint was bogus because the business address was a mailbox store and the company was not listed on several business websites. WHD did not call the business directly. Because no supporting documentation was provided for this representation, we could not confirm WHD's account of investigative steps taken. See appendix II for more information. Labor also provided us technical corrections to the report which we incorporated, as appropriate. We have reprinted Labor's written comments in their entirety in appendix II.

As agreed with your office, unless you publicly release its contents earlier we plan no further distribution of this report until 30 days from the date of this letter. The report is available at no charge on the GAO Web site at <http://www.gao.gov>. If you have any questions concerning this report, please contact Gregory D. Kutz at (202) 512-6722 or kutzg@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix III.



Gregory D. Kutz
Managing Director
Forensic Audits and Special Investigations

Appendix I: Testimony on Flaws in Wage and Hour Division's Complaint Intake and Investigative Processes

GAO

United States Government Accountability Office

Testimony

Before the Committee on Education and Labor, House of Representatives

For Release on Delivery
Expected at 10:00 a.m. EST
Wednesday, March 25, 2009

DEPARTMENT OF LABOR

Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft

Statement of Gregory D. Kutz, Managing Director
Forensic Audits and Special Investigations

Jonathan T. Meyer, Assistant Director
Forensic Audits and Special Investigations



GAO-09-458T

Appendix I: Testimony on Flaws in Wage and Hour Division's Complaint Intake and Investigative Processes

March 25, 2009



Highlights of [GAO-09-458T](#), a testimony before the Committee on Education and Labor, House of Representatives

Why GAO Did This Study

The mission of the Department of Labor's Wage and Hour Division (WHD) includes enforcing provisions of the Fair Labor Standards Act, which is designed to ensure that millions of workers are paid the federal minimum wage and overtime. Conducting investigations based on worker complaints is WHD's priority. According to WHD, investigations range from comprehensive investigations to conciliations, which consist primarily of phone calls to a complainant's employer.

In July 2008, GAO testified on 15 case studies where WHD failed to investigate complaints. This testimony highlights the findings of a follow-up investigation performed at the Committee's request. Specifically, GAO was asked to (1) test WHD's complaint intake process in an undercover capacity, (2) provide additional case study examples of inadequate WHD responses to complaints, and (3) assess the effectiveness of WHD's complaint intake process, conciliations, and other investigative tools.

To test WHD's complaint intake process, GAO posed as complainants and employers in 10 different scenarios. To provide case study examples and assess effectiveness of investigations, GAO used data mining and statistical sampling of closed case data for fiscal year 2007. GAO plans to issue a follow-up report with recommendations concerning resource needs and the recording of complaints. GAO also confirmed key findings with WHD officials.

To view the full product, including the scope and methodology, click on [GAO-09-458T](#). For more information, contact Gregory D. Kutz at (202) 512-6722 or kutzg@gao.gov.

DEPARTMENT OF LABOR

Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft

What GAO Found

GAO found that WHD frequently responded inadequately to complaints, leaving low wage workers vulnerable to wage theft. Posing as fictitious complainants, GAO filed 10 common complaints with WHD district offices across the country. The undercover tests revealed sluggish response times, a poor complaint intake process, and failed conciliation attempts, among other problems. In one case, a WHD investigator lied about investigative work performed and did not investigate GAO's fictitious complaint. At the end of the undercover tests, GAO was still waiting for WHD to begin investigating three cases—a delay of nearly 5, 4, and 2 months, respectively. The table below provides additional examples of inadequate WHD responses to GAO's fictitious complaints.

WHD Response to Fictitious Complaints Submitted by GAO

Employee/location	Complaint	Result
Receptionist/Virginia	Employee was not paid minimum wage.	<ul style="list-style-type: none"> GAO's fictitious employer agreed that she had failed to pay the minimum wage but refused to pay back wages due. WHD investigator accepted the refusal without question and informed the fictitious employee of his right to file a lawsuit. When the fictitious employee asked why WHD could not offer more help, the investigator told the employee to contact his Congressman to request more resources for WHD.
Meat Packer/California	Children using heavy machinery.	<ul style="list-style-type: none"> WHD claims that among complaints, child labor complaints are its top priority, but 4 months after GAO left an anonymous child labor complaint, WHD had not conducted any investigative work. Complaint was never recorded in WHD's database.
House Painter/Texas	Employee did not receive last paycheck.	<ul style="list-style-type: none"> GAO's fictitious employer told the WHD investigator he would pay, but failed to fax proof of payment to WHD as requested. Investigator never confirmed payment and closed the case as "agreed to pay." After 3 weeks, GAO's fictitious employee called back and reported that he hadn't been paid. The WHD investigator contacted the employer and, when asked, stated "there is no penalty" for failure to pay. The fictitious employer refused to pay, and WHD informed the fictitious employee of his right to take private action. Complaint was recorded as "agreed to pay" in WHD's database.

Source: GAO.

Similar to the 10 fictitious scenarios, GAO identified 20 cases affecting at least 1,160 real employees whose employers were inadequately investigated. For example, GAO found cases where it took over a year for WHD to respond to a complaint, cases closed based on unverified information provided by the employer, and cases dropped when the employer did not return phone calls.

GAO's overall assessment of the WHD complaint intake, conciliation, and investigation processes found an ineffective system that discourages wage theft complaints. With respect to conciliations, GAO found that WHD does not fully investigate these types of complaints or compel employers to pay. In addition, a WHD policy instructed many offices not to record unsuccessful conciliations in its database, making WHD appear better at resolving conciliations than it actually is. WHD's investigations were frequently delayed by months or years, but once complaints were recorded in WHD's database and assigned as a case to an investigator, they were often adequately investigated.

United States Government Accountability Office

**Appendix I: Testimony on Flaws in Wage and
Hour Division's Complaint Intake and
Investigative Processes**

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to discuss findings related to our investigation of the Department of Labor's (Labor) Wage and Hour Division (WHD) processes for investigating and resolving wage theft complaints. In a hearing held in July 2008 before this committee, we testified that WHD had inadequately responded to complaints from low wage workers who alleged that employers failed to pay the federal minimum wage and required overtime¹. Specifically, we found cases where WHD inappropriately rejected complaints based on incorrect information provided by employers, failed to make adequate attempts to locate employers, did not thoroughly investigate and resolve complaints, and delayed the initiation of investigations for over a year. We also reported that WHD's investigation database contained thousands of cases with characteristics similar to cases identified in our testimony. At the request of this committee, subsequent to the hearing, we performed additional audit and investigative work to determine the magnitude of these issues. This testimony reflects findings from the work we have performed since July 2008. We plan to issue a report containing recommendations to Labor to improve their complaint intake and investigation processes.

As we previously reported, over 100 million workers are covered under labor laws enforced by WHD, including the Fair Labor Standards Act (FLSA), the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), the Family and Medical Leave Act (FMLA), the Davis Bacon and Related Acts (DBRA), and other federal labor laws. By law, WHD investigators and technicians² enforce labor laws governing issues such as minimum wage, overtime pay, child labor, and family medical leave. WHD uses a number of strategies including investigations and partnerships with external groups – such as states, foreign consulates, and employee and employer associations. However, conducting investigations based on complaints is WHD's first priority.

¹ GAO, *Department of Labor: Case Studies from Ongoing Work Show Examples in Which Wage and Hour Division Did Not Adequately Pursue Labor Violations*, [GAO-08-973T](#), (Washington, D.C.: July 15, 2008).

² In general, technicians focus primarily on conciliations but may also work on self-audits and limited investigations in some offices. Investigators work on non-conciliations, including full and limited investigations and self-audits, but may also work on conciliations in some offices. Unlike law enforcement officers, WHD investigators do not have arrest authority. In this report, we use the term investigator to refer to both investigators and technicians.

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WHD investigators can take actions ranging from making phone calls to the complainant's employer (known as conciliations) to taking other, more resource-intensive actions such as interviewing the employer and related witnesses, reviewing employer payroll records, and requesting copies of self audits³ conducted by the employer. In this report, we refer to these more in-depth investigations collectively as non-conciliations.

Conciliations are generally limited to a single, minor violation, such as a missed paycheck, or an issue affecting a single worker. A conciliation is used to resolve a complaint quickly and with minimal resources on the part of WHD. Investigative work for conciliations is generally limited to a telephone conversation in which the WHD investigator explains the specific complaint against the employer, describes applicable laws, and requests that the employer comply with the law and pay any back wages due. WHD staff generally do not visit the employer's establishment or verify information provided by the employer. When WHD determines that violations have occurred and computes back wages owed to workers, it can assess back wages to be paid to the employees and can impose civil money penalties against employers with repeated or willful violations. If an employer signs an agreement to pay back wages and/or civil money penalties but reneges on their commitment, WHD can refer the case to the Department of Treasury for debt collection or to Labor's Office of the Solicitor for litigation. If the employer has not agreed to pay, WHD can only refer the case to the Solicitor for litigation. According to the Solicitor's office, it considers various factors including the merits of the case, number of employees affected, difficulties of proof and whether the employer is in current compliance, when deciding whether to litigate a case.

Today's testimony summarizes the results of our forensic audit and investigative work reviewing investigations conducted by WHD. As requested, this testimony will highlight our findings related to (1) undercover testing of WHD's complaint intake and conciliation processes, (2) additional case study examples of inadequate WHD responses to complaints, and (3) the effectiveness of WHD's complaint intake process, conciliations, and other investigative tools.

³ In a self-audit, WHD determines which violations may exist and allows the employer under investigation to conduct its own review of records and calculate the back wages due to employees.

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To test the effectiveness of WHD's complaint intake process and conciliations, undercover GAO investigators posed both as complainants and employers. Using 10 fictitious scenarios including minimum wage, last paycheck, and overtime violations, investigators called WHD offices in Alabama, California, Florida, Maryland, and Texas posing as complainants. These field offices handled 13 percent of all cases investigated by WHD in fiscal year 2007. When WHD investigators attempted to follow up on the complaints, different undercover investigators posed as the employers and followed a variety of scripted scenarios to test how WHD investigators would respond. Complaints and employer responses to the WHD investigations were based on actual situations we encountered in our work. For more information, see <http://www.gao.gov/media/video/gao-09-458t/>.

To identify case studies of inadequate investigations conducted in response to actual employees' allegations of wage theft, we obtained Labor's Wage and Hour Investigative Support and Reporting Database (WHISARD) and data-mined for closed cases in which it took WHD more than one year to complete an investigation, an employer could not be located, or the case was dropped when an employer refused to pay. We analyzed WHD's WHISARD database and determined it was sufficiently reliable for purposes of our audit and investigative work. We also obtained and analyzed WHD case files, interviewed WHD officials, and reviewed publicly available data to gather additional information about these cases.

To determine the effectiveness of WHD's complaint intake process, conciliations, and other investigative tools, we used the results of our undercover tests, case studies, interviews and walk-throughs of the processes with management, and two statistical samples. We selected a random statistical sample of 115 cases from 10,855 conciliations and 115 cases from 21,468 non-conciliations recorded by WHD in WHISARD that were concluded between October 1, 2006 and September 30, 2007. We obtained and reviewed WHD's case files for the selected cases and performed tests to determine whether the investigations conducted were adequate. Inadequate cases were those in which WHD did not initiate an investigation within 6 months, did not complete investigative work within one year, did not contact the employer, did not correctly determine coverage under federal law, did not review employer records, did not assess back wages when violations were identified, or did not refer cases to Labor's Office of the Solicitor, when appropriate. We subsequently determined through our interviews that the population of conciliations sampled was substantially incomplete. Therefore, we were only able to

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project sample results to conciliations that WHD chose to enter into their database rather than the entire population of conciliations.

We conducted our forensic audit and related investigations from July 2008 through March 2009. We conducted our audit work in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. We conducted our investigative work in accordance with the standards prescribed by the President's Council on Integrity and Efficiency.

**Undercover Tests
Reveal Inadequate
Investigations and
Poor Complaint
Intake Process**

The results of our undercover tests 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. For example, WHD failed to investigate a child labor complaint alleging that underage children were operating hazardous machinery and working during school hours. In another case, a WHD investigator lied to our undercover investigator about confirming the fictitious businesses' sales volume with the Internal Revenue Service (IRS), and did not investigate our complaint any further. WHD successfully investigated 1 of our 10 fictitious cases, correctly identifying and investigating a business that had multiple complaints filed against it by our fictitious complainants. Five of our 10 complaints were not recorded in WHD's database and 2 of 10 were recorded as successfully paid when in fact the fictitious complainants reported to WHD they had not been paid. To hear selected audio clips of these undercover calls, go to <http://www.gao.gov/media/video/gao-09-458t/>. Table 1 provides a summary of the 10 complaints that we filed or attempted to file with WHD.

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Table 1: Results of Undercover Testing

Complainant	Location	Complaint	Result
1 Dry Cleaners Clerk	Birmingham, AL	Employee did not receive last paycheck.	Fictitious employer refused to pay and WHD did not record the failed conciliation in the database. <ul style="list-style-type: none"> WHD attempted to conciliate the case, but never recorded the work done in the database. WHD did not inform the employee of the result of the conciliation.
2 Meat Packer	Modesto, CA	Underage children working during school hours on heavy machinery.	WHD failed to investigate a complaint alleging that children were working too many hours under hazardous conditions. <ul style="list-style-type: none"> WHD claims that child labor complaints are its top priority, but 4 months after we left an anonymous child labor complaint, WHD had not conducted any investigative work. Complaint was never recorded in the database.
3 Siding Installer	Montebello, CA	Two separate complaints filed by employees who did not receive their last paycheck.	WHD successfully identified our fictitious employer with repeat violations and attempted to make a site visit to the fictitious employer when he failed to return phone calls. <ul style="list-style-type: none"> WHD accepted two complaints about the same business. One investigator working on the first complaint took 5 weeks to contact the fictitious employer but another investigator working on the second complaint contacted the fictitious employer immediately. When our fictitious employer refused to pay in both cases, WHD correctly determined that the problem affected multiple employees and opened an investigation. Investigator made multiple attempts to contact the fictitious employer after he stopped returning phone calls, including making a site visit to the bogus address. The case was appropriately closed when the fictitious employer could not be located.
4 Laundromat Clerk	Monterey Park, CA	Employee was a Spanish-speaking, illegal immigrant paid less than minimum wage for over a year.	WHD delayed investigating the complaint and inaccurately recorded that the fictitious employee received back wages. <ul style="list-style-type: none"> Two weeks after we first contacted WHD, a Spanish-speaking investigator called our fictitious employee. 5 weeks after the complaint was faxed to WHD, an investigator contacted our fictitious employer, who eventually agreed to pay. The fictitious employee called WHD to report that she hadn't been paid, but the complaint was recorded as "agreed to pay" in WHD's database.

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Complainant	Location	Complaint	Result
5 Convenience Store Clerk	Miami, FL	Employee did not receive last paycheck.	<p>WHD did not return phone calls and failed to record our complaint in their database.</p> <ul style="list-style-type: none"> • WHD failed to return seven messages from our fictitious employee attempting to file a complaint. • In two cases during regular business hours, calls were routed to a voicemail message stating that the office was closed. • Complaint was never recorded in the database.
6 Dishwasher	Miami, FL	Employee did not receive overtime for an average of 4 hours per week for 19 weeks.	<p>The WHD office's large backlog prevented it from investigating our case in a timely manner.</p> <ul style="list-style-type: none"> • Investigator told our fictitious employee that it would take "8 to 10 months" to begin investigating his complaint. • WHD failed to return four calls over 4 consecutive months from our fictitious employee attempting to determine the status of his complaint. • Complaint was never recorded in the database.
7 Janitor	Frederick, MD	Employee was not paid minimum wage.	<p>WHD failed to record initial complaint and never returned calls from our fictitious employer.</p> <ul style="list-style-type: none"> • WHD investigator accepted the complaint but did not attempt to contact our fictitious employer to initiate a conciliation. • Between September 24, 2008 and January 12, 2009, WHD failed to return four calls from our fictitious employee attempting to determine the status of his complaint. • When the fictitious employee reached the same investigator, she had no record of his initial call and suggested the employee look for another job before filing a complaint against his employer. • Investigator finally accepted the complaint and left a message for the fictitious employer, but did not return his two subsequent calls. • Complaint was never recorded in the database.

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Complainant	Location	Complaint	Result
8 House Painter	Dallas, TX	Employee did not receive last paycheck.	<p>WHD inaccurately recorded that our fictitious employee received back wages.</p> <ul style="list-style-type: none"> • Our fictitious employer told the WHD investigator he would pay, but failed to fax proof of payment to WHD as requested. WHD investigator never followed up to confirm payment and closed the case as "agreed to pay." • After 3 weeks, our fictitious employee called back and reported that he hadn't been paid. The WHD investigator contacted our fictitious employer and, when asked, stated "there is no penalty" for failure to pay. • After our fictitious employer refused to pay, WHD informed our fictitious employee of his right to take private action. • Complaint was still recorded as "agreed to pay" in WHD's database despite WHD's knowledge that the fictitious employer had failed to pay the back wages.
9 Lawn Mower	Dallas, TX	Employee was not paid minimum wage.	<p>Investigator lied to our fictitious employee about investigative work performed and did not investigate the complaint.</p> <ul style="list-style-type: none"> • Investigator told the fictitious employee that WHD had no jurisdiction because the gross revenues of the fictitious employer did not meet the minimum standard for coverage, even though the fictitious employee stated that his boss had told him the company's gross revenues were three times greater than the minimum standard. • Investigator claimed that he had obtained information on the fictitious employer's revenue from an IRS database. • However, our fictitious employer had never filed taxes, WHD officials told us they do not have access to IRS databases, and the case file shows that no contact was made with the IRS. • We referred information related to this case to Labor's Office of the Inspector General for further investigation.

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Complainant	Location	Complaint	Result
10 Receptionist	Clifton, VA	Employee was not paid minimum wage.	<p>WHD readily accepted our fictitious employer's refusal to pay and stated they could not assist the fictitious employee further.</p> <ul style="list-style-type: none"> • WHD investigator accepted this complaint and promptly called our fictitious employer. • Our fictitious employer agreed that she had failed to pay the minimum wage but refused to pay back wages due. • WHD investigator accepted the refusal without question and informed our fictitious employee of his right to file a lawsuit. • When our fictitious employee asked why WHD could not offer more help, the WHD investigator said she was "bound by the laws I'm able to enforce, the money the Congress gives us" and told our fictitious employee to contact his Congressman to request more resources for WHD.

Source: GAO.

We identified numerous problems with the WHD response to our undercover wage theft complaints. Key areas where WHD failed to take appropriate action include delays in investigating complaints, complaints not recorded in the WHD database, failure to use available enforcement tools, failure to follow up on employers who agreed to pay, and a poor complaint intake process.

Delays Investigating Complaints. WHD took more than a month to begin investigating five of our fictitious complaints, including three that were never investigated. In one case, the fictitious complainant spoke to an investigator who said she would contact the employer. During the next 4 months, the complainant left four messages asking about the status of his case. When he reached the investigator, she had taken no action on the complaint, did not recall speaking with him and had not entered the complaint in the WHD database.

Complaints Not Recorded in Database. Five of our complaints were never recorded in WHD's database. These complaints were filed with four different field offices and included three complaints in which WHD performed no investigative work and two complaints in which WHD failed to record the investigative work performed. For example, we left a message at one WHD office alleging that underage children were working at a meat packing plant during school hours and operating heavy machinery, such as meat grinders and circular saws. With respect to complaints, WHD policy states that those involving hazardous conditions

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and child labor are its top priority, but a review of WHD records at the end of our work showed that the case was not investigated or entered into WHD's database. In another case, an investigator spoke to the fictitious employer, who refused to pay the complainant the back wages due. The investigator closed the conciliation without entering the case information or outcome into WHD's database. This is consistent with the WHD Southeast regional policy of not recording the investigative work performed on unsuccessful conciliations. The effect of not recording unsuccessful conciliations is to make the conciliation success rate for the regional office appear better than it actually is. The number of complaints that are not entered into WHD's database is unknown, but this problem is potentially significant since 5 out of our 10 bogus complaints were not recorded in the database.

Failure to Use All Enforcement Tools. According to WHD staff, WHD lacks the resources to use all enforcement tools in conciliations where the employer refuses to pay. According to WHD policy, when an employer refuses to pay, the investigator may recommend to WHD management that the case be elevated to a full investigation. However, only one of our three fictitious employers who refused to pay was placed under investigation. In one case, our fictitious employer refused to pay and the investigator accepted this refusal without question, informing the complainant that he could file a private lawsuit to recover the \$262 due to him. When the complainant asked why WHD couldn't provide him more assistance, the investigator replied, "I've done what I can do, I've asked her to pay you and she can't...I can't wring blood from a stone," and then suggested the complainant contact his Congressman to ask for more resources for WHD to do their work. According to WHD policy and interviews with staff, WHD doesn't have the resources to conduct an investigation of every complaint and prefers to investigate complaints affecting large numbers of employees or resulting in large dollar amounts of back wages. One district director told us that conciliations result from "a mistake" on the part of the employer and he does not like his investigators spending time on them. However, when WHD cannot obtain back wages in a conciliation and decides not to pursue an investigation, the employee's only recourse is to file private litigation. Low wage workers may be unable to afford attorney's fees or may be unwilling to argue their own case in small claims court, leaving them with no other options to obtain their back wages.

Failure to Follow Up on Employers Who Agree to Pay. In 2 of our cases, the fictitious employer agreed to pay the back wages due and WHD recorded the conciliation as successful, even when the complainant notified the investigator that he had not been paid. In both cases, the

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investigator told the employer he was required to submit proof of payment, but only one of the investigators followed up when the employer failed to provide the required proof. The complainant in both cases later contacted the investigator to report he had not been paid. The investigator attempted to negotiate with both fictitious employers, but did not update the case entry in WHD's database to indicate that the complainant never received back wages, making it appear as though both cases were successfully resolved. These two cases cast doubt on whether complainants whose conciliations are marked "agreed to pay" in the WHD database actually received their back wages.

Poor Complaint Intake Process. We found that WHD's complaint intake process is time-consuming and confusing, potentially discouraging complainants from filing a complaint. Of the 115 phone calls we made directly to WHD field offices, 87 (76 percent) went directly to voicemail. While some offices have a policy of screening complainant calls using voicemail, other offices have staff who answer the phone, but may not be able to respond to all incoming calls. In one case, WHD failed to respond to seven messages from our fictitious complainant, including four messages left in a single week. In other cases, WHD delayed over 2 weeks in responding to phone calls or failed to return phone calls from one of our fictitious employers. At least two WHD offices have no voice mailbox for the office's main phone number, preventing complainants from leaving a message when the office is closed or investigators are unavailable to take calls. One of our complainants received conflicting information about how to file a complaint from two investigators in the same office, and one investigator provided misinformation about the statute of limitations in minimum wage cases. At one office, investigators told our fictitious employee that they only accept complaints in writing by mail or fax, a requirement that delays the start of a case and is potentially discouraging to complainants. In addition, an investigator lied about contacting IRS to determine the annual sales for our fictitious employer, and then told our complainant that his employer was not covered by the FLSA. FLSA applies to employees of enterprises that have at least \$500,000 in annual sales or

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business⁴. Our complainant in this case told the investigator that his employer had sales of \$1.5 million in 2007, but the investigator claimed that he had obtained information about the business from an IRS database showing that the fictitious business did not meet the gross revenue threshold for coverage under federal law. Our fictitious business had not filed tax returns and WHD officials told us that their investigators do not have access to IRS databases. A review of the case file also shows that no information from the IRS was reviewed by the investigator. Information related to this case was referred to Labor's Office of the Inspector General for further investigation.

WHD successfully investigated a business that had multiple complaints filed against it by our fictitious complainants. WHD identified two separate conciliations ongoing against the same fictitious business, both originating from complaints filed by our fictitious complainants. These conciliations were combined into an investigation, the correct procedure for handling complaints affecting multiple employees. The investigator continued the investigation after the fictitious employer claimed that the business had filed for bankruptcy and attempted to visit the business when the employer stopped returning phone calls. The investigator did not use public records to verify that the employer had filed for bankruptcy, but otherwise made reasonable efforts to locate and investigate the business.

**Case Studies Show
That WHD
Inadequately
Investigated
Complaints**

Similar to our 10 fictitious scenarios, we identified 20 cases affecting at least 1,160 workers whose employers were inadequately investigated by WHD. We performed data mining on the WHISARD database to identify 20 inadequate cases closed during fiscal year 2007. For several of these cases, WHD (1) did not respond to a complainant for over a year, (2) did not verify information provided by the employer, (3) did not fully investigate businesses with repeat violations, and (4) dropped cases because the employer did not return telephone calls. Ten of these case studies are

⁴ The protections of the Fair Labor Standards Act apply to employees engaged in interstate commerce or in the production of goods for interstate commerce. The act also applies to all employees of an enterprise that has at least \$500,000 in annual sales or business and has employees engaged in interstate commerce or in the production of goods for interstate commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for interstate commerce by any person. 29 U.S.C. § 203. Even though an enterprise may have separate locations, it is considered a single enterprise for the \$500,000 coverage determination if related activities are performed through unified operation or common control by any person or persons for a common business purpose.

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presented in appendix II. Table 2 provides a summary of 10 case studies closed by WHD between October 1, 2006 and September 31, 2007.

Table 2: Case Studies of Inadequate WHD Investigations

Case	Type of business/ complainant occupation	Type of alleged violation(s)	Employer location	WHD actions, conclusions, and additional details
1	Garment Manufacturer/Garment Workers	Minimum Wage and Overtime (FLSA)	Whittier, CA	<ul style="list-style-type: none"> Two former employees alleged that the firm was not paying minimum wage and overtime to employees. One WHD investigator visited establishment and took surveillance photographs but did not speak with the employer. Almost 2 months later, another WHD investigator visited the establishment and found that the employer had vacated the premises. A realty broker informed WHD that he believed the employer had closed, not relocated, causing WHD to close the case. Using public data, we confirmed that the employer was still active as of January 2009 and made contact with an employee of the firm who told us that the employer had moved from the location WHD visited.
2	Fuel Tank /Mechanic	Overtime (FLSA)	Fort Lauderdale, FL	<ul style="list-style-type: none"> Complainant alleged he was due over \$525 in overtime back wages, but commented to WHD that he thought his employer was filing for bankruptcy. WHD dropped the case stating that the employer declared bankruptcy. The employee was informed of his right to file a private lawsuit to recover back wages. WHD received a fax from this employer after the case had been concluded stating that the employee had been paid \$245 in per diem, however the documentation did not support that the overtime back wages were paid; no further investigative action was taken. Bankruptcy court records show that the employer had not filed for bankruptcy and we confirmed that the employer was still in business in December 2008.
3	Restaurant/ Waitress	Minimum Wage (FLSA)	Hollywood, FL	<ul style="list-style-type: none"> Employee alleged she was owed minimum wage for 145 hours of work. Employer stated that wages were due by the previous owner, but did provide proof to substantiate or return subsequent telephone calls. WHD dropped the case and advised the employee of her right to file private litigation.

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Case	Type of business/ complainant occupation	Type of alleged violation(s)	Employer location	WHD actions, conclusions, and additional details
4	County Sheriff's Office /Corrections Officer	Minimum Wage (FLSA)	Key West, FL	<ul style="list-style-type: none"> • WHD attempted to contact the employer two times over a period of 2 days to discuss allegations. • Case was dropped when no one from the employer, which was a Sheriff's office, returned WHD's telephone calls. • WHD informed the complainant that private litigation could be filed in order to recover back wages.
5	Construction Contractor /Day Laborer	Minimum Wage and Overtime(FLSA)	Miami, FL	<ul style="list-style-type: none"> • Employer denied knowing employee and stated that the employee worked for a subcontractor, but refused to provide name of the company. • WHD closed the case, recorded that the employer was in compliance with labor laws, and informed the individual who filed the complaint on behalf of the employee of his right to file a civil lawsuit. • Employee filed a civil suit, during which the employer agreed he owed back wages. • The court ruled that the employee was due \$1,500, the same amount cited in the original complaint to WHD.
6	Construction/ Anonymous	Child Labor/ Minimum Wage (FLSA)	Baltimore, MD	<ul style="list-style-type: none"> • The complainant alleged that the company employed 15 year old children, failed to pay its employees minimum wage, and did not properly report income to the Internal Revenue Service. • The employer alleged that the company did not meet the income requirement to be covered under federal labor law, but did not provide documentary evidence. • The employer failed to return WHD's telephone calls or attend the site of the initial conference. • WHD concluded this case with no further investigative action.

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Case	Type of business/ complainant occupation	Type of alleged violation(s)	Employer location	WHD actions, conclusions, and additional details
7	Lawn Care Service/ Laborer	Minimum Wage and Overtime (FLSA)	Lakeview, MI	<ul style="list-style-type: none"> WHD attempted to set up a meeting with the company, but it was postponed so the owner could go deer hunting. Subsequent calls from WHD were not answered. Almost 8 months later, WHD conducted an announced site visit and closed the case, citing that the employer appeared to be out of business because no employees were on site during the visit and phone calls were unanswered. Public records show that the employer later signed and submitted an annual statement 2 months after the case was closed and we successfully contacted the employer in November 2008, who confirmed they were located at the same address visited by WHD.
8	Boarding School / Teen Counselor	Overtime (FLSA)	Thompson Falls, MT	<ul style="list-style-type: none"> Investigator assigned to case over 9 months after complaint was received. Complaint handled as a self audit, allowing the employer to review its own records for the alleged violations. WHD determined that the employer had begun paying correct overtime based on the employer's verbal statements; no updated records were reviewed. The employer found that it owed over \$200,000 to 93 employees, but delayed until the statute of limitations had almost expired before offering to pay a total of only \$1,000 in back wages. WHD did not accept this amount, closed the case, and informed the complainant of the outcome.

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Case	Type of business/ complainant occupation	Type of alleged violation(s)	Employer location	WHD actions, conclusions, and additional details
9	Ambulance Service Company / Paramedic	Overtime (FLSA)	Pawhuska, OK	<ul style="list-style-type: none"> Employer refused to comply with the law throughout WHD's investigation and took months to produce payroll records. WHD determined that over \$66,000 in back wages was due to 21 employees and stated in the case file that this estimate was "probably low." The employer generally agreed with WHD's findings and agreed to pay back wages, but then later refused to respond to WHD or change payroll practices. Over one year after the employer's agreement to pay, WHD decided not to pursue litigation in part, because the case was considered "significantly old." Employees were notified of their right to file private litigation in order to recover back wages.
10	Restaurant/ Waitress	Child Labor/Minimum Wage/Overtime (FLSA)	Lawrenceburg, TN	<ul style="list-style-type: none"> Case assigned to an investigator over 22 months after the complaint was received. WHD determined that the restaurant and related enterprises owed approximately \$230,000 to 438 employees for minimum wage and overtime violations, and for depositing a percentage of employee tips into a business account. Employer agreed to pay back wages for minimum wage and overtime violations, but did not agree to pay back the collected tips. WHD did not accept partial back wage offer and closed the case with no collection of back wages.

Source: GAO analysis.

- Case Study 1: Two garment factory workers filed complaints alleging that their former employer did not pay minimum wage and overtime to its workers. In early August 2006, an employee of the company informed WHD that the company was forcing employees to sign a document stating that they had been paid in compliance with the law before they could receive their paychecks. One of the complainants also confirmed to the WHD investigator that the employer was distributing this document. The next day, an investigator traveled to the establishment to conduct surveillance. The investigator took pictures of the establishment and did not speak with anyone from the company. No additional investigative work was done on this case until almost 2 months later when another investigator visited the establishment and found that the company had vacated the premises. A realty broker at the site informed the investigator

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that he did not believe the firm had relocated. As a result, WHD closed the investigation. Using publicly available information, we found that the business was active as of January 2009 and located at a different address approximately 3 miles away from its old location. We contacted the factory and spoke with an employee, who told us that the business had moved from the address WHD visited.

- Case Study 4: In July 2007, WHD received a complaint from a former corrections officer who alleged that a county Sheriff's office did not pay \$766 in minimum wage. The WHD investigator assigned to work on this case made two calls to the Sheriff's office over a period of 2 days. Two days after the second call, WHD dropped this case because no one from the employer had returned the calls. WHD did not make additional efforts to contact the employer or validate the allegations. WHD informed the complainant that private litigation could be filed in order to recover back wages. We successfully contacted the Sheriff's office in November 2008.
- Case Study 5: In May 2007, a non-profit community worker center contacted WHD on behalf of a day laborer alleging that his employer owed him \$1,500 for the previous three pay periods. WHD contacted the employer, who stated that the complainant was actually an employee of a subcontractor, but refused to provide the name of the subcontractor. WHD closed the case without verifying the employer's statements and informed the community worker center of the employee's right to file private litigation. WHD's case file indicates that no violations were found and the employer was in compliance with applicable labor laws. According to the Executive Director of the worker center, approximately 2 weeks later, WHD contacted him and claimed that the employer in the complaint had agreed to pay the back wages. When the employer did not pay, the complainant sued the employer in small claims court. During the course of the lawsuit the employer admitted that he owed the employee back wages. The court ruled that the employer owed the employee \$1,500 for unpaid wages, the same amount in the original complaint to WHD.
- Case Study 8: In November 2005, WHD's Salt Lake City District Office received a complaint alleging that a boarding school in Montana was not paying its employees proper overtime. Over 9 months after the complaint was received, the case was assigned to an investigator and conducted as an over the phone self-audit⁵. According to the investigator assigned to the case, WHD was unable to conduct a full investigation because the boarding school was located over 600 miles from Salt Lake City and WHD did not have the resources to conduct an on-site investigation. The employer's self-audit found that 93 employees were due over \$200,000 in

⁵ Self-audits allow the employers under investigation to conduct their own review of records and calculate the back wages due to employees.

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overtime back wages for hours worked between September 2004 and June 2005. WHD determined that the firm began paying overtime correctly in June 2006 based on statements made by the employer, but did not verify the statements through document review. After the employer's attorney initially indicated that they would agree to pay the over \$200,000 in back wages, WHD was unable to make contact with the business for over 5 months. WHD records indicate that the investigator believed that the firm was trying to find a loop hole to avoid paying back wages. In June 2007, one week before the 2-year statute of limitations on the entire back wage amount was to expire, the employer agreed to pay \$1,000 out of the \$10,800 that had not yet expired. The investigator refused to accept the \$1,000 saying that it would have been "like settling the case." WHD recorded the back wages computed as over \$10,800 rather than \$200,000, greatly understating the true amount owed to employees. WHD noted in the case file that the firm refused to pay the more than \$10,800 in back wages, but did not recommend assessing penalties because they felt the firm was not a repeat offender and there were no child labor violations. No further investigative action was taken and the complainant was informed of the outcome of the case.

- Case Study 10: In June 2003 and early 2005, WHD received complaints against two restaurants owned by the same enterprise. One complaint alleged that employees were working "off the clock" and servers were being forced to give 2.25 percent of their tips to the employer. The other complaint alleged off the clock work, illegal deductions, and minimum wage violations. This case was not assigned to an investigator until May 2005, over 22 months after the 2003 complaint was received. The WHD investigator assigned to this case stated that the delay in the case assignment was because of a backlog at the Nashville District Office that has since been resolved. WHD conducted a full investigation and found that 438 employees were due approximately \$230,000 in back wages for minimum wage and overtime violations and the required tip pool. Although tip pools are not illegal, WHD determined that the employer's tip pool was illegal because the company deposited the money into its business account. Further, the firm violated child labor laws by allowing a minor under 16 years old to work more than 3 hours on school days. The employer disagreed that the tip pool was illegal and stated that a previous WHD investigator had told him that it was acceptable. The employer agreed to pay back wages due for the minimum wage and overtime violations, but not the wages that were collected for the tip pool. WHD informed the employer that partial back wages would not be accepted and this case was closed.

Information on 10 additional case studies can be found in appendix II.

WHD's Complaint Intake Process, Conciliations, and Other Investigative Tools Do Not Provide Assurance of a Timely and Thorough Response to Wage Theft Complaints

WHD's complaint intake processes, conciliations, and other investigative tools are ineffective and often prevent WHD from responding to wage theft complaints in a timely and thorough manner, leaving thousands of low wage workers vulnerable to wage theft. Specifically, we found that WHD often fails to record complaints in its database and its poor complaint-intake process potentially discourages employees from filing complaints. For example, 5 of our 10 undercover wage theft complaints submitted to WHD were never recorded in the database, including a complaint alleging that underage children were operating hazardous machinery during school hours. WHD's conciliation process is ineffective because in many cases, if the employer does not immediately agree to pay, WHD does not investigate complaints further or compel payment. In addition, WHD's poor record-keeping makes WHD appear better at resolving conciliations than it actually is. For example, WHD's southeast region, which handled 57 percent of conciliations recorded by the agency in fiscal year 2007, has a policy of not recording unsuccessful conciliations in the WHD database. Finally, we found WHD's processes for handling investigations and other non-conciliations were frequently ineffective because of significant delays. Once complaints were recorded in WHD's database and assigned as a case to an investigator, they were often adequately investigated.

WHD's Complaint-Intake Process Is Ineffective

WHD's complaint intake process is seriously flawed, with both customer service and record-keeping issues. With respect to customer service, wage theft victims may file complaints with WHD in writing, over the phone, or in person. However, our undercover tests showed that wage theft victims can be discouraged to the extent that WHD never even accepts their complaints. We found that in their efforts to screen complaints some WHD staff actually deter callers from filing a complaint by encouraging employees to resolve the issue themselves, directing most calls to voicemail, not returning phone calls to both employees and employers, accepting only written complaints at some offices, and providing conflicting or misleading information about how to file a complaint. For example, the pre-recorded voice message at one office gives callers information on the laws WHD enforces, but when the message ends there are 23 seconds of silence before the call is directed to the voice message system that allows callers to file complaints, creating the impression that the phone call has been disconnected. WHD requires an investigator to speak with the employee before an investigation can be initiated, but a real low wage worker may not have the time to make multiple phone calls to WHD just to file a complaint and may give up when call after call is directed to voicemail and not returned. It is impossible to know how many

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complainants attempt to file a complaint but are discouraged by WHD's complaint intake process and eventually give up.

Regarding WHD's record-keeping failures, we found that WHD does not have a consistent process for documenting and tracking complaints. This has resulted in situations where WHD investigators lose track of the complaints they have received. According to WHD policies, investigators should enter complaints into WHD's database and either handle them immediately as conciliations or refer them to management for possible investigation. However, several of our undercover complaints were not recorded in the database, even after the employee had spoken to an investigator or filed a written complaint. This is particularly troubling in the case of our child labor complaint, because it raises the possibility that WHD is not recording or investigating complaints concerning the well-being and safety of the most vulnerable employees. Employees may believe that WHD is investigating their case, when in fact the information they provided over the phone or even in writing was never recorded. Since there is no record of these cases in WHD's database, it is impossible to know how many complaints are reported but never investigated.

**WHD's Conciliation
Process Is Ineffective**

According to several WHD District Directors, in conciliations where the employer refuses to pay, their offices lack the resources to investigate further or compel payment, contributing to the failures we identified in our undercover tests, case studies, and statistical sample. When an employer refuses to pay, investigators may recommend that the case be elevated to a full investigation, but several WHD District Directors and field staff told us WHD lacks the resources to conduct an investigation of every complaint and focuses resources on investigating complaints affecting large numbers of employees or resulting in large dollar amounts of back wage collections. Conducting a full investigation allows WHD to identify other violations or other affected employees, attempt to negotiate back wage payment with the employer and, if the employer continues to refuse, refer the case to the Solicitor's Office for litigation. However, in some conciliations, the employer is able to avoid paying back wages simply by refusing. While WHD informs complainants of their right to file a lawsuit against their employers to recover back wages, it is unlikely that most low wage workers have the means to hire an attorney, leaving them with little recourse to obtain their back wages.

WHD's conciliation policy also limits the actions staff may take to resolve these cases. For example, WHD staff told us that complaints handled as conciliations must be completed in under 15 days from the time the

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complaint is assigned to an investigator, and at least one office allows investigators only 10 days to resolve conciliations, which may not allow time for additional follow-up work to be performed. WHD staff in one field office told us they are limited to three unanswered telephone calls to the employer before they are required to drop the case and advise the complainant of his right to file a lawsuit to recover back wages. Staff in several field offices told us that they are not permitted to make site visits to employers for conciliations. WHD investigators are allowed to drop conciliations when the employer denies the allegations and WHD policy does not require that investigators review employer records in conciliations. In one case study, the employee stated that he thought the business was going bankrupt. WHD dropped the case stating that the employer declared bankruptcy and informed the employee of his right to file a private lawsuit to recover back wages. Bankruptcy court records show that the employer had not filed for bankruptcy, and we confirmed that the employer was still in business in December 2008. One WHD investigator told us that it is not necessary to verify bankruptcy records because conciliations are dropped when the employer refuses to pay, regardless of the reason for the refusal.

Our undercover tests and interviews with field staff also identified serious record-keeping flaws in which make WHD appear better at resolving conciliations than it actually is. For example, WHD's southeast region, which handled 57 percent of conciliations recorded by WHD in fiscal year 2007, has a policy of not recording investigative work performed on unsuccessful conciliations in the database. WHD staff told us that if employers do not agree to pay back wages, cannot be located, or do not answer the telephone, the conciliation work performed will not be recorded in the database⁶, making it appear as though these offices are able to resolve nearly all conciliations successfully. Inflated conciliation success rates are problematic for WHD management, which uses this information to determine the effectiveness of WHD's investigative efforts.

Our undercover tests and interviews with WHD staff also raise questions about the reliability of conciliation information recorded in WHD's database. As illustrated by our undercover tests, when an employer

⁶ In some offices with this policy, the complaint that the conciliation was based on would be recorded in WHD's database. However, the complaint would appear as though it had never been investigated, because the investigative work and the outcome of the conciliation would not be recorded in the database. Other offices do not enter the complaint into the database.

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initially agrees to pay in a conciliation but reneges on his promise, WHD investigators did not change the outcome of the closed case in WHISARD to show that the employee did not receive back wages. While some investigators wait for proof of payment before closing the conciliation, others told us that they close conciliations as soon as the employer agrees to pay. Even if the employee later tells the investigator that he has not been paid, investigators told us they do not change the outcome of a closed case in the WHD database. WHD publicly reports on the total back wages collected and the number of employees receiving back wages, but these statistics are overstated because an unknown number of conciliations recorded as successfully resolved in the WHD database did not actually result in the complainant receiving the back wages due.

These poor record-keeping practices represent a significant limitation of the population we used to select our statistical sample because the number of conciliations actually performed by WHD cannot be determined and conciliations recorded as successfully resolved may not have resulted in back wages for the employees. As a result, the percentage of inadequate conciliations is likely higher than the failure rate estimated in our sample. We found that 5.2 percent⁷ of conciliations in our sample were inadequately conciliated because WHD failed to verify the employer's claim that no violation occurred, closed the case after the employer did not return phone calls, or closed the case after the employer refused to pay back wages. However, we found that many of the conciliations recorded in WHD's database were adequately investigated. One example of a successful conciliation involved a complaint alleging that a firm was not paying minimum wage. The complaint was assigned to an investigator the same day it was filed in September 2007. The WHD investigator contacted the owner, who admitted the violation and agreed to pay back wages of \$1,500. The case was concluded the same day when the investigator obtained a copy of the complainant's check from the employer and spoke to the complainant, confirming that he was able to cash the check and had received his back wages.

⁷ Because we followed a probability procedure based on random selections, our sample is only one of a large number of samples that we might have drawn. Since each sample could have provided different estimates, we express our confidence in the precision of our particular sample's results as a 95 percent confidence interval (e.g., plus or minus 5 percentage points). This is the interval that would contain the actual population value for 95 percent of the samples we could have drawn. The 95 percent confidence interval surrounding our sample of inadequate investigations ranges from 206 to 1,195 failures in the population.

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WHD's Investigation and Other Non-conciliation Processes Were Often Ineffective, but Complaints Investigated Quickly Were Usually Resolved Successfully

We found WHD's process for handling investigations and other non-conciliations was frequently ineffective because of significant delays. However, once complaints were recorded in WHD's database and assigned as a case to an investigator, they were often successfully investigated. Almost 19 percent⁸ of non-conciliations in our sample were inadequately investigated, including cases that were not initiated until more than 6 months after the complaint was received, cases closed after an employer refused to pay, and cases that took over one year to complete. In addition, seven cases failed two of our tests.

Table 4: Number of Failures by Test for Sample of Non-conciliations

Reason why non-conciliation was inadequate	Percent Point Estimate	95% Confidence Interval
Cases not initiated within 6 months of complaint	5.2	[1.9, 11.1]
Case closed due to employer's refusal to pay	6.2	[2.5, 12.3]
Cases with violations found that were not referred to Labor's Office of the Solicitor for litigation	4.6	[1.5, 10.5]
Cases taking more than one year to complete	6.6	[2.8, 12.7]
Cases where WHD failed to review employer records	3.1	[.75, 8.1]
Estimate of Inadequate Non-Conciliations	18.8	[12.1, 27.1]

Source: GAO.

Six of the cases in our sample failed because they were not initiated until over 6 months after the complaint was received. According to WHD officials, non-conciliations should be initiated within 6 months of the date the complaint is filed. Timely completion of investigations by WHD is important because the statute of limitations for recovery of wages under the FLSA is 2 years from the date of the employer's failure to pay the

⁸ Because we followed a probability procedure based on random selections, our sample is only one of a large number of samples that we might have drawn. Since each sample could have provided different estimates, we express our confidence in the precision of our particular sample's results as a 95 percent confidence interval (e.g., plus or minus 5 percentage points). This is the interval that would contain the actual population value for 95 percent of the samples we could have drawn. The 95 percent confidence interval surrounding our sample of inadequate investigations ranges from 2,595 to 5,827 failures in the population.

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correct wages.⁹ Specifically, this means that every day that WHD delays an investigation, the complainant's risk of becoming ineligible to collect back wages increases. In one of our sample cases, WHD sent a letter to a complainant 6 months after his overtime complaint was filed stating that, because of a backlog, no action had been taken on his behalf. The letter requested that the complainant inform WHD within 2 business days of whether he intended to take private action. The case file shows no indication that the complainant responded to WHD. One month later, WHD assigned the complaint to an investigator and sent the complainant another letter stating that if he did not respond within 9 business days, the case would be closed. WHD closed the case on the same day the letter was sent.

Our case studies discussed above and in appendix II also include examples of complaints not investigated for over a year, cases closed based on unverified information provided by the employer, businesses with repeat violations that were not fully investigated, and cases dropped because the employer did not return telephone calls. For example, in one case study, WHD found that 21 employees were due at least \$66,000 in back wages for overtime violations. Throughout the investigation, the employer was uncooperative and resisted providing payroll records to WHD. At the end of the investigation, the firm agreed with WHD's findings and promised to pay back wages, but then stopped responding to WHD. The employees were never paid back wages and over a year later, the Solicitor's Office decided not to pursue litigation or any other action in part because the case was considered "significantly old."

The failures we identified resulted, in part, from the large backlog of cases in several WHD offices, investigators' failure to compel cooperation from employers, and a lack of certain tools that would facilitate verification of employer statements. In several district offices, a large backlog prevents investigators from initiating cases within 6 months. One office we visited has a backlog of 7 to 8 months, while another office has a backlog of 13 months. Additionally, our analysis of WHD's database shows that one district office did not initiate an investigation of 12 percent of complaints

⁹ The statute of limitations for recovery of wages under FLSA and the Davis Bacon Act is 2 years from the employer's failure to pay the correct wages. 29 U.S.C. § 255. For willful violations, in which the employer knew its actions were illegal or acted recklessly in determining the legality of its actions, the statute of limitations is 3 years. Federal courts have enforced the statute of limitations even if Labor is investigating a complaint. *Shandelman v. Schuman*, 92 F. Supp. 334 (E.D.Pa. 1950).

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until over one year after the complaint was received, including a child labor complaint affecting over 50 minors. Because the statute of limitations to collect back wages under FLSA is 2 years, WHD is placing complainants at risk of collecting only a fraction of the back wages they would have been able to collect at the time of the complaint. WHD also failed to compel records and other information from employers. While WHD Regional Administrators are legally able to issue subpoenas, WHD has not extended this ability to individual investigators, who therefore depend on employers to provide records and other documentation voluntarily. In cases where public records are available to verify employer statements, WHD investigators do not have certain tools that would facilitate access to these documents. For example, we used a publicly-available online database, Public Access to Court Electronic Records (PACER), to determine that an employer who claimed to have filed for bankruptcy had not actually done so. However, there is no evidence in the case file that the WHD investigator performed this check. WHD officials told us that its investigators do not receive training on how to use public document searches and do not have access to databases containing this information such as PACER.

We found that, once complaints were recorded in WHD's database and assigned as a case to an investigator in a timely manner, they were often successfully investigated. As discussed above, WHD does not record all complaints in its database and discourages employees from filing complaints, some of which may be significant labor violations suitable for investigation. In addition, many cases are delayed months before WHD initiates an investigation. However, our sample identified many cases that were adequately investigated once they were assigned to an investigator. Specifically, 81.2 percent of the non-conciliations in our sample were adequately investigated. One example of a successful investigation involved a complaint alleging that a firm was not paying proper overtime was assigned to an investigator the same day it was filed in April 2007. The WHD investigator reviewed payroll records to determine that the firm owed the complainant back wages. The case was concluded within 3 months when the investigator obtained a copy of the complainant's cashed check, proving that he had been paid his gross back wages of \$184.

Conclusions

This investigation clearly shows that the Department of Labor has left thousands of actual victims of wage theft who sought federal government assistance with nowhere to turn. Our work has shown that when WHD adequately investigates and follows through on cases they are often successful; however, far too often many of America's most vulnerable

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workers find themselves dealing with an agency concerned about resource limitations, with ineffective processes, and without certain tools necessary to perform timely and effective investigations of wage theft complaints. Unfortunately, far too often the result is unscrupulous employers taking advantage of our country's low wage workers.

Mr. Chairman and Members of the Committee, this concludes our statement. We would be pleased to answer any questions that you or other members of the committee may have at this time.

**Contacts and
Acknowledgments**

For further information about this testimony, please contact Gregory D. Kutz at (202) 512-6722 or kutzg@gao.gov or Jonathan Meyer at (214) 777-5766 or meyerj@gao.gov. Individuals making key contributions to this testimony included Erika Axelson, Christopher Backley, Carl Barden, Shafee Carnegie, Randall Cole, Merton Hill, Jennifer Huffman, Barbara Lewis, Jeffery McDermott, Andrew McIntosh, Sandra Moore, Andrew O'Connell, Gloria Proa, Robert Rodgers, Ramon Rodriguez, Sidney Schwartz, Kira Self, and Daniel Silva. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this testimony.

Appendix I: Scope and Methodology

To review the effectiveness of WHD's complaint intake and conciliation processes, GAO investigators attempted to file 11 complaints about 10 fictitious businesses to WHD district offices in Baltimore, Maryland; Birmingham, Alabama; Dallas, Texas; Miami, Florida; San Jose, California; and West Covina, California. These field offices handle 13 percent of all cases investigated by WHD. The complaints we filed with WHD included minimum wage, last paycheck, overtime, and child labor violations. GAO investigators obtained undercover addresses and phone numbers to pose as both complainants and employers in these scenarios.

As part of our overall assessment of the effectiveness of investigations conducted by WHD, we obtained and analyzed WHD's Wage and Hour Investigative Support and Reporting Database (WHISARD), which contained 32,323 cases concluded between October 1, 2006 and September 30, 2007. We analyzed WHD's WHISARD database and determined it was sufficiently reliable for purposes of our audit and investigative work. We analyzed a random probability sample of 115 conciliations and 115 non-conciliations to contribute to our overall assessment of whether WHD's processes for investigating complaints are effective. Because we followed a probability procedure based on random selections, our samples are only one of a large number of samples that we might have drawn. Since each sample could have provided different estimates, we express our confidence in the precision of the particular sample's results as a 95 percent confidence interval (e.g., plus or minus 5 percentage points). This is the interval that would contain the actual population value for 95 percent of the samples we could have drawn.

To determine whether an investigation was inadequate, we reviewed case files and confirmed details of selected cases with the investigator or technician assigned to the case. In our sample tests, conciliations were determined to be inadequate if WHD did not successfully initiate investigative work within 3 months or did not complete investigative work within 6 months. Non-conciliations were determined to be inadequate if WHD did not successfully initiate investigative work within 6 months, did not complete investigative work within 1 year or did not refer cases in which the employer refused to pay to Labor's Office of the Solicitor. Both conciliations and non-conciliations were determined to be inadequate if WHD did not contact the employer, did not correctly determine coverage under federal law, did not review employer records, or did not compute and assess back wages when appropriate.

We gathered additional information about WHD policies and procedures by reviewing training materials and the WHD Field Operations Handbook,

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conducting walk-throughs of investigative processes with management and interviewing WHD officials. We gathered information about district office policies and individual cases by conducting site visits at the Miami and Tampa, Florida district offices, and conducting telephone interviews with technicians, investigators and district directors in 23 field offices and headquarters officials in Washington, D.C. We also spoke with Labor's Office of the Solicitor in Dallas, Texas and Washington, D.C. To identify macro-level data on WHD complaints, we analyzed data for cases closed between October 1, 2006 and September 30, 2007 by region, district office and case outcome.

To identify case studies of inadequate WHD responses to complaints, we data-mined WHISARD to identify closed cases in which a significant delay occurred in responding to a complaint (cases taking more than 6 months to initiate or 1 year to complete), an employer could not be located, or the case was dropped when an employer refused to pay. We obtained and analyzed WHD case files, interviewed WHD officials, and reviewed publicly available data from online databases and the Department of Treasury's Financial Crimes Enforcement Network to gather additional information about these cases. We also interviewed complainants who contacted GAO directly or were referred to us by labor advocacy groups to gather information about WHD's investigation of their complaints.

Appendix II: Additional Case Studies of Inadequate WHD Investigations

Table 5 provides a summary of ten additional case studies of inadequate Wage and Hour Division (WHD) investigations. These case studies include instances where WHD dropped cases after (1) employers refused to cooperate with an investigation, (2) WHD identified a violation but failed to force employers to pay employees their owed wages, and (3) an employer alleged it was bankrupt when in fact the employer was not.

Table 5: Additional Case Studies of Inadequate WHD Investigations

Case	Type of business/employee occupation	Type of alleged violation	Employer location	WHD actions, conclusions, and additional details
11	Employment Agency/ Carpenter	Minimum Wage (FLSA)	Hollywood, FL	<ul style="list-style-type: none"> Complainant alleged he was not paid minimum wage. WHD attempted to contact the employer to substantiate the claim, but the employer did not return WHD's calls. Case was closed and the employee was informed of his right to file private litigation. We were able to make contact with the employer in February 2009.
12	Telemarketing / Telemarketer	Minimum Wage (FLSA)	Wellington, FL	<ul style="list-style-type: none"> Employer would not make a commitment to WHD to pay \$937 in back wages. WHD closed the case and recorded that the employer was in compliance with labor laws.
13	Plumbing/ Plumber	Minimum Wage (FLSA)	Alpharetta, GA	<ul style="list-style-type: none"> Employer admitted owing wages but refused to pay because the employee had been involved in a vehicular accident in a company vehicle. WHD requested that employer comply with labor laws in the future, but employer refused. The WHD investigator stated that the case was closed and the employee was informed of his right to file a private lawsuit.
14	Drywall Sub-Contractor/ N/A ¹	Failure to Overtime (FLSA)	Biloxi, MS	<ul style="list-style-type: none"> Employer admitted to WHD that employees were not paid overtime and he did not know how much they were paid per hour. One employee told the investigator that the employees had been threatened and another source informed the investigator that the employer had threatened employees with a machete so they would lie during WHD interviews, but the investigator still determined that the employer's violations did not appear to

¹ This case was a directed investigation into the business based on a tip received from a competitor, not the complaint of a single worker.

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Case	Type of business/employee occupation	Type of alleged violation	Employer location	WHD actions, conclusions, and additional details
				<ul style="list-style-type: none"> be willful. Employer told WHD he did not keep payroll records, but his attorney later said he had reviewed employer payroll records. Through information from the employer's pay register, WHD determined that over \$150,000 was due to 191 employees, but the employer's attorney stated that the firm would be put out of business if the back wages were paid. WHD agreed to reduce back wages as an administrative settlement to resolve the case and the employer agreed to pay \$78,228.
15	Trucking/ Truck Drivers	Minimum Wage (FLSA)	Doniphan, NE	<ul style="list-style-type: none"> WHD received 4 complaints against a trucking company over a 7 month period. The first three conciliations found that the employee's allegations were substantiated and the employer agreed to pay back wages. WHD treated each complaint as a conciliation, cases generally set up when a single employee is affected, even after violations were found in the first three cases.
16	Sewing Contractor/ Worker	Minimum Wage (FLSA)	Passaic, NJ	<ul style="list-style-type: none"> Complainant alleged 10 employees were due back wages for 3 to 7 weeks of work. Employer failed to provide WHD payroll records for any of its employees. WHD found that the complainant was owed over \$800 in back wages, but did not calculate back wages for any other employees. During the limited investigation, the employer stated it had filed for Chapter 7 bankruptcy three days earlier and was no longer in business. WHD closed the case and the complainant was notified of his right to file private litigation. Our review of bankruptcy court documents showed no record of the employer filing for Chapter 7 bankruptcy.
17	Construction/Anonymous Complaint	Overtime (FLSA)	Brooklyn, NY	<ul style="list-style-type: none"> A 2006 complainant alleged that the firm did not pay its employees overtime. The employer had annual sales of over \$2 million in 2005. WHD visited the employer's address and found a residence, but did not speak with anyone. Complainant provided construction site locations, but WHD did not visit these addresses until almost 6 months after the complaint was recorded by WHD.

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Case	Type of business/employee occupation	Type of alleged violation	Employer location	WHD actions, conclusions, and additional details
18	Security Service/ Security Guard	Overtime (FLSA)	Del City, OK	<ul style="list-style-type: none"> WHD's case file states that the employer's accountant did not want WHD to visit the work site and hung up on the investigator. WHD investigator closed the case because he was not able to gather information. WHD was unable to determine coverage under federal law on three previous self-audits of this company. In the fourth case, it was determined that the employer failed to pay over \$47,000 in overtime due to 98 employees. The employer agreed to pay the unpaid wages, but did not submit back wage payment evidence to WHD. The back wages due were submitted for debt collection, however the case file contains no information on whether any wages were subsequently collected.
19	Gas Station/ Manager	Overtime (FLSA)	Ooltewah, TN	<ul style="list-style-type: none"> Employee contacted WHD alleging that the employer did not pay overtime. Employee was notified that WHD had a very large backlog and was provided contact information for three attorney referral services. No investigative actions were conducted until over five months later, when WHD contacted the complainant. The complainant stated that a new owner had purchased the business approximately two weeks earlier. WHD did not calculate the back wages due to the complainant, recorded that the employer was out of business, and recommended that the case be closed with no further action.
20	Foundation Repair/ Foreman	Overtime (FLSA)	Houston, TX	<ul style="list-style-type: none"> Investigation took nearly 2 years to complete. WHD believed that overtime violations and employees working off the clock were systemic practices at over 20 of the firm's locations. The employer disagreed with WHD and insisted that he had not violated labor laws. WHD estimated that the enterprise owed over \$6 million in back wages; according to the investigator assigned to this case, a precise amount could not be computed because the employer refused to provide required payroll documentation. WHD rejected the employer's offer to pay \$50,000 in back wages, but later attempted to

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Case	Type of business/employee occupation	Type of alleged violation	Employer location	WHD actions, conclusions, and additional details
				<p>settle with the employer by reducing back wages. No settlement was reached.</p> <ul style="list-style-type: none"> WHD had found the same violations approximately 20 months prior to this investigation, but the employer would not agree to pay back wages or comply with labor laws at that time. WHD determined that the employer had a good faith defense for continuing the same pay practices because he had not been provided a formal letter stating the outcome of the previous investigation. WHD did not refer this case for litigation because of the erosion of the 2-year statute of limitations and did not recommend that the employer pay penalties for its violations. WHD determined that the firm had come into compliance at all locations nationwide based solely on the employer's verbal statements; no supporting documentation was reviewed. WHD sent letters to the affected employees informing them that the employer had refused to pay and notifying them of their right to file private litigation.

Source: GAO analysis.

**Appendix I: Testimony on Flaws in Wage and
Hour Division's Complaint Intake and
Investigative Processes**

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**Appendix I: Testimony on Flaws in Wage and
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Appendix II: Comments from the Department of Labor

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington, D.C. 20210



JUN 08 2009

Mr. Gregory D. Kutz
Managing Director
Forensic Audits and Special Investigations
U. S. Government Accountability Office
Washington, D.C. 20548

Dear Mr. Kutz:

Thank you for the opportunity to respond to the Government Accountability Office (GAO) audit report entitled *"Department of Labor: Wage and Hour Division Needs Improved Investigative Processes and Ability to Suspend Statute of Limitations to Better Protect Workers Against Wage Theft"* (GAO-09-629). The summary results of the audit were also presented in your testimony before the U. S. House of Representatives, Committee on Education and Labor on March 25, 2009.

The testimony and report focus on the results of ten (10) undercover calls alleging violations of laws enforced by the Wage and Hour Division (WHD) and a review of concluded case files, including conciliations and investigations. You cited inadequacies in 20 of the 230 concluded case files (115 conciliations and 115 investigations) that you reviewed. Your report reveals serious problems with several key aspects of our program. We agree with your recommendations and have already begun implementing them. In this response, we discuss each of your recommendations and the ways in which we are taking action to address the problems you have identified.

We want to emphasize that we are not taking issue with the standards by which you judged the adequacy of the investigation process, the effectiveness of the complaint intake process, or the use of the conciliation tool. However, we want to take this opportunity to add some perspective to the findings. We think this is important in order to arrive at an accurate appraisal of the agency's overall mission and effectiveness.

First, the report identifies several differences between a "conciliation" of an alleged violation and an "investigation." It does not, however, point out the single most important difference between the two methods of addressing alleged violations and the significance of the conciliation tool. Unlike an "investigation," a "conciliation" involves no finding of facts. In attempting to conciliate a complaint, a WHD investigator or technician makes no determination that a violation has actually occurred and makes no attempt to refute or disprove an employer's dispute of the alleged violation. WHD does not routinely take action to obtain proof of payment in a conciliation and, instead, relies on the complainant to come back to WHD if he or she does not receive the promised

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payment. WHD investigators (or in the case of many conciliations, WHD technicians) 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 process is intended to resolve a single issue affecting one or a few workers with a minimum expenditure of resources. WHD managers make resource allocation determinations every day. The conciliation technique provides those district managers 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. Many workers would have far fewer opportunities to secure Federal assistance if WHD did not attempt to conciliate the single issue or single employee complaints that it receives each year.

WHD managers have a responsibility to decide whether to expand unsuccessful attempts to conciliate an alleged violation to a full or limited investigation or to simply notify an employee of his or her "private right of action" under section 16(b) of the Fair Labor Standards Act (FLSA). There are a number of factors that must be weighed when deciding to broaden an unsuccessful conciliation effort to an investigation. They would include, among others, a past history of violations by the employer, a pattern of prior conciliations, and a suggestion that the alleged violation may be systemic. Ultimately, however, the decision is often governed by the particular office's available resources, *e.g.*, the number and skill level of the investigators and technicians on board, the complaint backlog, the balance of cases involving statutes other than the FLSA, and the need to conduct directed cases in industries and among worker populations where complaints are rare yet violations are known to exist. WHD district office managers decide each day whether certain complaints will be investigated by the agency. If, in their judgment, the workers have a better opportunity to recover their back wages in a timely manner through other means, then the office managers will often refer the complainant to the State or to legal aid societies, or advise the complainant of his or her right to pursue private legal action to collect any back wage that may be due them. In all cases, complaints are to be acknowledged by letter explaining that there may be delays in investigating the allegations and that the employee has the right under section 16(b) of FLSA to file suit for back wages, liquidated damages, court costs, and legal fees.

Secondly, as you point out, WHD district offices, managers, and investigators are responsible for enforcing the labor standards provisions of the Family and Medical Leave Act, the Migrant and Seasonal Agricultural Worker Protection Act, the H-2A and H-1B programs of the Immigration and Nationality Act, the Davis-Bacon Act, the Service Contract Act, as well as the special minimum wage and child labor provisions of the FLSA. Investigations in some of these program areas, such as the H-1B, government contracts, and the FLSA special minimum wage programs are extensive and time-consuming. These cases simply take longer to investigate and longer to resolve than the standard FLSA wage payment case. Offices that have a high concentration of investigations in these equally important program areas may likewise refer FLSA complaints of non- or under-payments to State agencies that have comparable or more protective minimum wage and overtime statutes.

In the agricultural industry and in child labor cases, the safety of workers—not just their pay—is paramount, but very few farm workers and few teens file complaints with WHD. Complaints are a priority for WHD, but regional and district offices must balance their complaint workloads with an effective and aggressive directed, *i.e.*, non-complaint, enforcement program in many industries to ensure that these vulnerable workers are employed safely and legally. The report does not provide a complete perspective of how these other statutory priorities affect the resource allocation decisions made by WHD managers. We believe it is necessary and important to point out that, even with the much needed infusion of additional investigators and other field staff, WHD will never be in a position to investigate every complaint, will still have to rely on conciliations or similar tools to resolve limited allegations of minor non-compliance, and will be unsuccessful in resolving some conciliations and some investigations. WHD national, regional, and district office managers and WHD investigators and technicians will continue to make difficult decisions in attempting to protect the rights of as many workers as possible. Congress, recognizing that WHD may not be able to investigate and resolve all complaints, included the FLSA provisions in section 16(b) to give individuals the right to file lawsuits on their own behalf.

The handling of some of the fictitious complaints and the case examples cited in the report and the testimony demonstrated significant shortcomings in WHD's program, and WHD leadership takes the findings seriously. As a third point of clarification, however, it is important to examine the context of the examples given to gain an understanding of the actions taken or not taken. The full picture of efforts made to investigate or address allegations of violations often cannot be obtained from reviewing the database records or the physical case file. One of the scenarios cited in the report, in the Committee hearing, and in the media surrounding the hearing concerned an alleged child labor violation in a California meatpacking plant. This fictitious complaint was not recorded in the agency's database, and the testimony, the draft report, and many media reports assumed that WHD "failed to investigate" those allegations. WHD's subsequent examination of the facts and background, however, revealed the following:

- On Wednesday, October 28, 2008, the Sacramento district office management team received an email notice from the then-San Jose assistant district director forwarding a written summary of an anonymous message retrieved from voice mail by an investigator in the San Jose field office.
- The investigator had retrieved the message that same day. According to the email, the anonymous caller had alleged that minors 15 and 16 years of age were working during school hours, cutting and grinding meat, and doing jobs using heavy equipment. In the voice mail message, the caller identified the employer as CP&D Meats in Modesto, California.
- Using the Internet, the investigator identified a CP&D Meats located at 819 W. Roseburg Ave., #141, Modesto, CA 95350, telephone 209-433-0455. The physical address, however, was found and confirmed to be a private mail box center.

- Before forwarding the information to the San Jose assistant district director, the investigator also checked in the California business portal, Hoovers, Dun & Bradstreet, Yahoo, and other Web sites only to find that there was no other publicly available information on CP&D Meats.
- Upon receipt of the email from the San Jose assistant district director forwarding the investigator's preliminary research, the Sacramento assistant district directors examined Reference USA and other Internet sources to try to locate CP&D Meats. The office identified six meat companies in the Modesto area from Reference USA, but no CP&D Meats. In the interim, an investigator was put on standby ready to go to the establishment to conduct an investigation once the physical location was identified. The only location that the office could find, however, was the mail box center.
- Both district office assistant district directors analyzed the complaint, which involved an anonymous caller, a company with only a mail box location, no other reputable sources that could identify CP&D Meats, and a company with no known physical address. Although they made every effort to determine the legitimacy of the complaint, the district office managers believed that the complaint was not credible. The office management determined that it did not warrant further action unless the complainant made a second call. The complaint was not entered into the agency's database because it was found to be suspect.

GAO Recommendations:

Recommendation 1: The Administrator should reassess current policies and processes and revise them as appropriate to better ensure that relevant case information is recorded in WHD's database, including all complaints alleging applicable labor law violations, regardless of whether the complaint was substantiated, and all investigative work performed on conciliations, regardless of whether the conciliation was successful.

WHD agrees with the recommendation. It is WHD's current policy to enter all complaints into the Wage and Hour Investigator Support and Reporting Database (WHISARD) and maintain a record of all such complaints. WHD has consistently defined "complaints" as all allegations for which there is sufficient information to indicate that a wage and hour violation has occurred or may be occurring. Given the demonstrated failure to follow existing policy, WHD staff will again be trained on the policies and procedures, and the Field Operations Handbook (FOH) will be rewritten to be more explicit on the proper handling of WHD complaints.

Recommendation 2: To provide assurance that WHD personnel interacting with complainants and employers appropriately capture and investigate allegations of labor law violations, and provide appropriate

customer service, the Administrator should conduct an assessment of WHD's complaint intake and resolutions processes and revise them as appropriate.

WHD agrees with the recommendation and will reevaluate existing complaint intake and customer service policies and procedures. WHD will also reintroduce customer service goals and measures in its annual performance plan and will examine whether it can reinstitute customer satisfaction surveys relating to complaint handling.

Recommendation 3: To improve the efficiency and effectiveness of WHD personnel handling wage theft complaints, the Administrator should explore providing more automated research tools to WHD personnel that would allow them to identify key information used in investigating complaints such as bankruptcy filings, annual sales estimates for businesses, and information on additional names and locations of businesses and individuals under investigation.

WHD agrees with the recommendation to explore more automated research tools and will look into costs and licensing requirements for a variety of such data sources. WHD notes, however, that it already has a policy for obtaining key information on issues such as bankruptcy filings, annual sales, and the additional names and locations of businesses during the course of an investigation—although it requires that investigators obtain the information from more traditional sources.

For example, investigators are directed to obtain information from the employer on the type of bankruptcy being filed, the case number assigned to the bankruptcy action, the date of the filing, and the court in which the bankruptcy was filed. (FOH section 52a06(e)) They are to obtain information on the annual dollar volume of the employer under investigation during their review of its records. (FOH section 52b00) Investigators are instructed to review the monthly, quarterly, or annual operating statements, the profit and loss statements, the sales tax returns, and the state and Federal income tax returns to determine the amount of sales made or business done when they are attempting to establish enterprise coverage or the applicability of certain exemptions. (FOH section 52h01) If necessary and appropriate, WHD can issue an administrative subpoena for the records required to be kept by employers under 29 C.F.R. 516, which includes all of the records discussed above.

Recommendation 4: To assist in the verification of information provided by employers under investigation, the Administrator should explore gaining access to information maintained by IRS and other agencies as needed through voluntary consent from business being investigated.

Although WHD has had numerous contacts with Internal Revenue Service (IRS) officials on many occasions about the possibility of obtaining information on employers, the IRS has never indicated that it had a voluntary consent form by which WHD could obtain

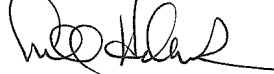
information on employers. WHD will again contact IRS and seek information about gaining access to IRS information through voluntary consent of the business under investigation. As noted above, WHD can issue an administrative subpoena where records are not voluntarily produced.

Recommendation 5: To provide assurance that WHD has adequate human capital and resources available to investigate wage theft complaints, the Administrator should monitor the extent to which new investigators and existing staff are able to handle the volume of wage theft complaints, and if not, what additional resources may be needed.

As widely reported, WHD is in the process of hiring 250 new investigators. We anticipate that these new employees will be on board by the end of the calendar year. Investigators undergo an intensive on-the-job training that lasts for their first few years of employment, during which time they develop the experience, judgment, and skills of more seasoned investigators to address violations of all the laws that WHD enforces. This infusion of new staff does, however, provide the agency with the opportunity to reinvigorate the existing staff and reinforce WHD's commitment to the workers in this country.

As we have noted throughout our response, WHD is committed to addressing the shortcomings and deficiencies highlighted in your report and testimony. We appreciate the opportunity to provide the above comments. In addition, we have enclosed technical corrections to the text of the draft report. If you have any questions, please do not hesitate to contact us.

Sincerely,



Shelby Hallmark
Acting Assistant Secretary

Enclosure

Technical Corrections to the Draft Report, "Department of Labor: Wage and Hour Division Needs Improved Investigative Processes and Ability to Suspend Statute of Limitations to Better Protect Workers Against Wage Theft" (GAO-09-629)

Page 2 of the cover letter implies that there is no distinction between investigations and conciliations in the assessment of civil money penalties (CMPs). WHD's policy as discussed in FOH section 52f14(b) clearly states that "CMPs shall not be assessed in any conciliation nor as the result of a 'self-audit' by an employer."

Page 9 of the cover letter, footnote number 6 describes a two year statute of limitations for recovery of wages in court under the Davis-Bacon Act. That statute of limitation does not apply to administrative actions to recover back wages under the Davis-Bacon Act.

Also on page 9 footnote number 6, the statement on the statute of limitations is correct in that there is a two year statute of limitations on most FLSA cases. The filing of a complaint in a court of competent jurisdiction stops the running of the two-year statute of limitations. In such cases, WHD can go back two years from the date of the court filing in a court of competent jurisdiction. As an administrative matter, however, the period for which back wages are sought is two years from the date the investigation begins, regardless of how long it may take to assign the case.

Appendix III: GAO Contacts and Staff Acknowledgments

GAO Contacts

Gregory D. Kutz, (202) 512-6722, kutzg@gao.gov

Staff Acknowledgments

In addition to the contacts named above, individuals making key contributions to this report included Erika Axelson, Christopher Backley, Carl Barden, Shafee Carnegie, Randall Cole, Merton Hill, Jennifer Huffman, Barbara Lewis, Jeffery McDermott, Andrew McIntosh, Sandra Moore, Andrew O'Connell, Gloria Proa, Robert Rodgers, Ramon Rodriguez, Sidney Schwartz, Kira Self, and Daniel Silva.

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