Statement of

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before the

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Committee on Education and the Workforce
Subcommittee on Workforce Protections

Hearing on

"Examining Regulatory and Enforcement Actions
Under the Fair Labor Standards Act"

November 3, 2011

Mr. Chairman and members of the Subcommittee:

Thank you for the opportunity to speak with you today regarding the Department of Labor's Wage and Hour Division and the Fair Labor Standards Act. As you may recall, I served as Administrator of the Wage and Hour Division from 2002 to 2004. I remain an interested and close observer of the Wage and Hour Division.

Currently, I am a shareholder in the Washington D.C. office of Littler Mendelson, P.C. where my practice focuses on assisting employers to comply with the Fair Labor Standards Act. In addition, I often represent employers during investigations by the Wage and Hour Division, and serve as an expert witness in FLSA collective actions. I am also a member of the National Federation of Independent Business's (NFIB) Small Business Advisory Board.

My testimony today is based on my own personal views and does not necessarily reflect the views of Littler, its attorneys, or of any other organization or client. Mr. Chairman, I request that the entirety of my written testimony be entered into the record of this hearing.

I. EXECUTIVE SUMMARY

The last three years have seen significant changes in the Wage and Hour Division's approach to its most important mission – increasing employer compliance with the Fair Labor Standards Act and ensuring that employees are paid in compliance with the Act. I want to spend my time today discussing some of these changes with you, and the impact they are having on the Division's effectiveness. Before I begin, however, let me be clear that these changes are not just changes from Bush Administration policies; these are changes from historic policies and practices of the Division which long pre-date the Bush Administration.

The Wage and Hour Division's approach to enforcement has become increasingly punitive over the last three years – regardless of whether the Division is investigating an employer with a long history of violations, or an employer with no prior violations; and regardless of whether the violation is obvious and serious, or an error on an issue where the law is unclear and reasonable minds can differ. Examples of changes at the Wage and Hour Division which demonstrate this punitive approach include:

- Conducting unannounced investigations of employers without a prior history of violations, and sending multiple investigators to conduct an investigation of a single facility;

- Demanding that employers produce documents which they are not required to maintain under the recordkeeping regulations, and threatening to bring subpoena actions in federal court against employers who fail to respond to broad document requests within 72 hours;

- Prohibiting field career staff from using the "self-audit" investigation method, which is the most efficient way of determining back wages due in large cases where an employer has already agreed to pay 100% of back wages, and instead requiring investigators to conduct "full" investigations in almost every case;

- Mandating that the career field staff impose draconian penalties – civil money penalties, liquidated damages – in almost every case, rather than allowing these experts to exercise their own discretion regarding the appropriate remedy; and

- Refusing to issue WH-58 waiver forms, or issuing only limited waiver forms, even when the employer agrees to pay 100% of back wages as calculated by the Division.

At the same time, the Division has closed its doors to employers seeking guidance regarding what the FLSA requires. In other words, the Wage and Hour Division has stopped efforts to inform employers how to comply with the law, preferring only to impose draconian punishments when an employer guesses wrong about what the law requires. Examples of changes at the Wage and Hour Division which demonstrate this "gotcha" approach include:

- Withdrawal, without replacement of nearly 20 Opinion Letters, and refusal to issue any additional Opinion Letters – or even provide informal guidance to employers who inquire regarding whether their pay practices comply with the FLSA;

- Announcing changes to enforcement policies through *amicus* briefs, which are publicized only through an email subscription service and an obscure web posting;

- Refusing to enter into compliance partnerships with employers;

- Refusing to assist employers who, after discovering FLSA violations, request that the Division supervise the payment of back wages; and

- Proposing in their FY 2012 budget to decrease funding for compliance assistance and the Division's call center by over $2 million and 12 FTEs.

Although officials from the Labor Department might claim that these changes have been implemented to strengthen enforcement and better protect workers, enforcement of the FLSA by the Wage and Hour Division has actually declined. Included in my testimony is are charts comparing the Division's budget, full-time equivalent employees (FTEs) and back wages collected from FY 2001 through FY 2010. Perhaps the fairest measure of performance is to compare the first full fiscal year of the Bush Administration (FY 2002) with that of the Obama Administration (FY 2010). In FY 2002, with a budget of $155.2 million and 1480 FTEs, we recovered $175.6 million in back wages. In FY 2010, with a budget of $227.6 million and 1582 FTEs, the Division recovered only $130 million in back wages. Thus, in FY 2010, with 102 more employees, the Division spent $72.4 million more to recover $45 million less in back wages.

In my opinion, this significant decrease in the Division's effectiveness is caused by the changes I have discussed. Investigations are taking longer to conduct because investigators can no longer use the "self-audit" investigation method. It is increasingly difficult to resolve investigations at agency level as employers are much less likely to settle when the Division insists on civil money penalties and liquidated damages, in addition to back wages, while at the same time depriving those employers of the opportunity to obtain waivers of FLSA claims. Finally, there is no path for a good faith employer to voluntarily correct violations under the oversight of the Wage & Hour Division or to effectively seek compliance assistance from the Division.

To summarize, the current Administration is doing less with more. The Wage and Hour Division's new "gotcha" approach towards employers – carrying a larger stick while refusing to pass out any carrots – is not working to ensure our nation's employees are paid in compliance with the Fair Labor Standards Act.

II. INVESTIGATIONS

The last three years have seen significant, and for the most part, unannounced, changes in the Wage and Hour Division's approach to conducting investigations. The Division has become increasingly aggressive and punitive toward employers – failing to distinguish between good faith employers with no prior violations and bad faith employers with a long history of violations; and failing to distinguish between serious and obvious violations of the FLSA and situations where the law, and DOL's policy, is unclear and reasonable minds can differ. The Division should be aggressive and punitive towards bad faith employers who willfully and repeatedly violate the FLSA. However, such an

approach is counter-productive for good faith employers without a history of violations and who have taken steps to comply.

In the past, many investigations could be resolved quickly when good faith employers working cooperatively with Wage and Hour Division investigators. However, today, more and more often, the Division's initial contact with an employer is aggressive and adversarial, regardless of the employer's enforcement history. Further, more and more often, the Division refuses to settle investigations for 100% of back wages, instead insisting upon civil money penalties and liquidated damages. More and more often, the Division also refuses to issue its WH-56 receipt forms – the form which informs employees that they waive their right to bring a private lawsuit if they accept the payment of back wages as calculated by the agency. In short, from the beginning to the end of an investigation, even good faith employers face punitive treatment. This adversarial approach has made it increasingly difficult to resolve investigations quickly as even good faith employers have little incentive to settle an investigation at the agency level.

Examples of changes at the Wage and Hour Division which demonstrate this punitive approach are set forth below:

A. Unannounced Visits

The Wage & Hour Division can begin an investigation in one of three ways: (1) a telephone call announcing the investigation and asking to schedule an on-site visit; (2) a scheduling letter which requests an on-site visit on a specific date and includes an information request; or (3) an unannounced visit by an investigator at a facility.

In the past, the investigator was given the discretion to determine which of these three approaches was appropriate in light of the employer's violation history, industry, and the type of violations alleged by the complaining employee. Unannounced visits were used rarely, and only for investigations involving employers or industries with a history of violations (e.g., garment, agriculture), or when the investigator believed it likely that the employer, if provided advance notice of the investigation, would destroy time and pay records.

Today, the Division increasingly requires investigators to begin an investigation with an unannounced visit, taking discretion away from experienced field staff. Further, the decision to make an unannounced visit no longer seems tied to the employer's enforcement history, the industry, the type of alleged violation, or the possibility that the employer would destroy records. For example, recently, the Division began an investigation of a hotel owned by a large, national hotel chain by sending four investigators to the hotel for an unannounced visit. The hotel employer did not have a history of violations, and has knowledgeable in-house employment lawyers and HR staff. The Division had absolutely no basis to believe that the hotel employer would have destroyed documents or otherwise fail to cooperate with the investigation. Although this investigation remains open, thus far, the Division has found no violations of the FLSA.

B. Information Requests

The last three years has also seen significant changes in the requests for information which the Division typically makes to employers at the beginning of an investigation.

In the past, an investigation would begin with a single facility of an employer, and the investigator would request information relating only to that single facility. The investigator would require the employer to produce time records and payroll data for its last payroll or for a sampling of two or three payrolls. Investigators generally would give employers between 14 and 30 days to produce these documents. If the investigator found violations after reviewing those records, the investigator would request time records and payroll data for a full two years at the single facility, and also could recommend to the District Director that the investigation be expanded to other facilities of the employer. This approach ensures that investigators use their time efficiently, rather than reviewing mountains of documents for employers who, it is evident, have not violated the FLSA.

Recently, however, the Division has required the field staff to begin with national investigations, requiring employers to produce, *within 72 hours*, a full two years of time records and payroll data for all employees nation-wide. This is the Division's approach in the recent directed investigations in the homebuilding industry, as reported in the *Wall Street Journal*, even though the homebuilding employers under investigation did not have a history of violations and no employee had filed a complaint. Further, when the employers informed the Division that producing this data within 72 hours was not feasible, the Division threatened to issue and enforce subpoenas in federal court. In other words, the Division began investigations on a nation-wide basis demanding production of thousands of pages of documents – and giving employers only 72 hours to produce these document – all without any basis for believing that the homebuilding employers were violating the FLSA. Although the homebuilder investigations began in August, the Division has yet to cite a single homebuilder for violating the FLSA.

Further, the Division has changed its standard information requests to seek documents that employers are not required to maintain under the FLSA recordkeeping regulations. For example, the Division has issued information requests requiring employers to produce lists of subcontractors, independent contractors, vendors and even customers – with a contact name and telephone number. I also have seen information requests requiring employer to provide the Division with:

> "Names of occupations of those employees whom the employer claims to be exempt, the specific exemptions that apply to those claimed to be exempt, and the basis for applying those exemptions."

Of course, employers are required to maintain records showing the employees classified as exempt. However, the FLSA regulations to not require employers to keep records of the specific exemptions claimed or the "basis for applying those exemptions." The Division has stated its intention to propose new "Right to Know Regulations" which would require employers to maintain such information. But, until such regulations are

proposed and finalized after the legally required notice and comment rulemaking, this information request is inappropriate.

C. Investigation Methods

In the past, investigators have been trained to conduct the following five different types of FLSA investigations, and were given discretion regarding which investigation method was appropriate in a given case:

1. *Full Investigation*: A complete investigation of all FLSA issues – off-the-clock work, misclassification, proper calculation of the regular rate.

2. *Limited Investigation*: An investigation of only those issues raised by an employee complaint.

3. *Office Audit*: A review of documents produced by the employer at the investigator's office.

4. *Self Audit*: After an investigator identifies a potential violation and the employer agrees to pay back wages, the investigator requests that the employer conduct a self-audit of the issue and compute back wages due. The investigator then conducts due diligence to confirm the back wage calculations.

5. *Conciliation:* Employer is contacted by telephone and asked to correct minor violations.

Today, in my experience, the Division requires investigator to conduct a full investigation – which, of course, is the most resource intensive investigation method. Although conciliation is still used to quickly correct minor violations, in the last three years, I have not seen an office audit and limited investigations are increasingly rare. Further, the Division has prohibited the field staff from using the "self-audit" investigation method, perhaps based on a mistaken belief that no employer can be trusted to self-report and accurately calculate back wages. The result should not be surprising: Investigators have to spend more time per investigations and investigations take longer to complete. In my opinion, failing to conduct limited investigations or allow self-audits in appropriate cases results in the inefficient use of the Division's limited resources.

D. Mandatory Civil Money Penalties

Another important area where the Division has taken discretion away from the expert field staff is in determining the appropriate remedy for an FLSA violation. Under the FLSA, an employer who violates the minimum wage or overtime requirements is liable for: two years of back wages; an additional third year of back wages for willful violations; liquidated damages in an amount equal to the back wages, unless the employer acted in good faith; and attorneys' fees. In addition, the Division has discretion to impose civil money penalties (CMPs) of up to $1,100 per violation for repeat or willful

violations. Unlike civil money penalties for child labor violations which go into the Treasury's general fund, civil money penalties for minimum wage and overtime violations go back to the Division to fund additional enforcement efforts.

In the past, the Division generally required employers to pay 100% of back wages for a two-year period. The Division did not assess civil money penalties for minimum wage and overtime violations unless an employer had a significant history of serious violations (e.g., a sweatshop employer or bad faith agricultural labor contractors). Further, the Division rarely requested liquidated damages.

Today, as reported to me by District Directors, the Division is requiring the field staff to assess civil money penalties against every employer with even one prior violation recording in the agency's enforcement database – regardless of the type of violation or when the violation occurred. For example, in an investigation that I was involved in, the Division assessed civil money penalties based on a $500 violation which was on a completely different issue and occurred a decade before at a different corporate subsidiary. The investigator conceded that the new violation was not willful, and I questioned how a decade-old violation on a totally different issue could be "repeat" violation. Unfortunately, there are virtually no standards, and few limits on the Division, for determining when a violation is repeat or willful. More recently, although I have not yet seen this myself, a District Director reported that the national office of the Wage and Hour Division issued a directive requiring mandatory assessment of liquidated damages.

In my experience, most employers are willing to pay 100% of back wages found due by the Division for a two-year period. However, employers are much less likely to settle when the Division seeks civil money penalties, and certainly will be more likely to litigate with the Division in order to challenge an assessment of liquidated damages. Thus, the Division's approach, used even against good faith employers, delays the resolution of investigations and payment of back wages to employees. Finally, I am concerned that, because civil money penalties for minimum wage and overtime violations go back to the Division, rather than to Treasury, this provides incentives for "bounty hunting" behavior by the Division.

E. The WH-58 Receipt Form

An employer and employee cannot privately agree to waive the employee's FLSA rights. Under the FLSA, there are only two mechanisms for waiver of claims: Through a court in private litigation, or through the Department of Labor after an investigation. Because FLSA litigation can take years to resolve, the quick settlement of investigations and payment of back wages through the Wage and Hour Division is important to both employers and employees.

Accordingly, as part of the 1947 Portal-to-Portal Act amendments to the FLSA, Congress enacted Section 16(c) which authorizes the Secretary of Labor to supervise the payment of back wages and provides that employees who decide to accept back wages as supervised by the agency waive the right to bring a private lawsuit under the FLSA:

> "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages."

Section 16(c) was enacted by Congress to address the Labor Department's concern that the absence of a waiver mechanism outside of litigation was hampering its ability to quickly settle FLSA violations.

For decades, the Wage and Hour Division form WH-58 has been the mechanism for implementation of the Section 16(c) supervision of back wages and waiver process. In the past, when an employer paid back wages to resolve an FLSA investigation, the Division would issue a WH-58 receipt form for each employee receiving back wages to sign as proof of the employer's payment of the back wages. The WH-58 form also explained to employees:

> "Your acceptance of back wages due under the Fair Labor Standards Act means that you have given up any right you may have to bring suit for such back wages under Section 16(b) of the Act. Section 16(b) provides that an employee may bring suit on his/her own behalf for unpaid minimum wages and/or overtime compensation and an equal amount as liquidated damages, plus attorney's fees and court costs. Generally, a 2-year statute of limitations applies to the recovery of back wages. Do not sign this receipt unless you have actually received payment of the back wages due."

The FLSA recordkeeping regulations at 29 C.F.R. § 516.2, *require* employers to deliver WH-58 receipt forms to employees, provide the Division with the originals signed by employees, and preserve a copy in their records:

> (b) *Records of retroactive payment of wages.* Every employer who makes retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division pursuant to section 16(c) and/or section 17 of the Act, shall:
>
> (1) Record and preserve, as an entry on the pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.
>
> (2) Prepare a report of each such payment on a receipt form provided by or authorized by the Wage and Hour Division, and (i) preserve a copy as part of the records, (ii) deliver a copy to the employee, and (iii) file the original, as evidence of payment by the employer and receipt by the

> employee, with the Administrator or an authorized representative within 10 days after payment is made.

Nonetheless, over the last three years, the Division has often refused to issue the WH-58 receipt forms. Although not publicly announced, it is my understanding that the Division has prohibited the field staff from issuing WH-58 receipt forms unless an investigator has conducted a full investigation. In one case I handled, the Division refused to issue WH-58s after a limited investigation, referring to this new directive. In response to my invitation for the investigator to conduct a full investigation so that she could issue WH-58s, the Division stated that they did not have sufficient resources to complete a full investigation. Further, even when the Division agrees to issue WH-58s, the agency often uses the new WH-58L form which purports to limit the scope of the waiver to specific issues or time periods for which back wages were found due – even when the Division conducted a full investigation and found no other violations. The Division has also refused to issue WH-58 receipt forms to employers who discover FLSA violations and voluntarily approach the agency for assistance to calculate and pay back wages.

The Division's refusal to issue WH-58 receipt forms, and use of the WH-58L form, raises serious questions regarding whether and the extent to which an employee's acceptance of back wages is a waiver of claims under Section 16(c). If an employer pays 100% of back wages as calculated by the Wage & Hour Division, and employees accept those payments, but the Division refuses to issue a WH-58, have the employees nonetheless waived their FLSA claims under Section 16(c)? If the Division determined that only two-years of back wages are due because the violation was not willful and the employer acted in good faith, but the form WH-58L purports only to cover two years, can the employees still bring a private lawsuit for an additional third-year of back wages and liquidated damages? This legal uncertainty has undermined a significant incentive for employers to quickly resolve investigations and pay back wages as calculated by the Wage and Hour Division.

III. COMPLIANCE ASSISTANCE

To serve the public in an objective manner, the Division's new, more punitive approach to investigations should be combined with a vigorous program to assist employers in understanding what the FLSA requires. But, the opposite is happening: The Division has closed its doors to employers seeking guidance regarding what the FLSA requires. In fact, the Division's FY 2012 budget request – which seeks an increase of $13.3 million and 95 investigators over 2011 levels – proposes to *decrease* funding for compliance assistance and the Division's call center by over $2 million and 12 FTEs.

A. Opinion Letters

The first indication that the Wage & Hour Division was no longer interested in providing compliance assistance came in March 2009 when the Division withdrew almost 20 Opinion Letters because: "Some of the posted opinion letters, as designated by asterisk, were not mailed before January 21, 2009." No other reason was provided. The Division did not state that the enforcement positions expressed in the Opinion Letters were wrong, and the Division has not since replaced those Opinion Letters with other guidance

expressing different views. This, of course, creates significant legal uncertainty for employees, employers, attorneys and judges trying to determine the Division's current views on the issues addressed in the withdrawn letter.

A year later, the Division announced that it would stop issuing Opinion Letters addressing fact-specific interpretations of the FLSA. Instead, as reported by Thompson publications on March 24, 2010, the Division would issue "Administrators Interpretations" (AIs) providing more general interpretations when the Wage and Hour Administrator determines that "additional clarification is appropriate with respect to 'the proper interpretation of a statutory or regulatory issue.'"

> The U.S. Department of Labor's Wage and Hour Division will not be issuing new opinion letters addressing fact-specific interpretations of employment laws.
>
> In their place, the WHD Administrator is issuing "administrator interpretations" that, in contrast to opinion letters, provide general interpretation of the laws and regulations applicable to all those who are affected by the legislative or regulative provision at issue.
>
> The purpose of the administrator interpretations is to "provide meaningful and comprehensive guidance and compliance assistance to the broadest number of employers and employees," wrote DOL. "Guidance in this form will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees."
>
> The administrator interpretations are to be released when the WHD Administrator determines, at his or her discretion, that additional clarification is appropriate with respect to "the proper interpretation of a statutory or regulatory issue."
>
> Added DOL, "The Administrator believes that this will be a much more efficient and productive use of resources than attempting to provide definitive opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the assumed facts may result in a different outcome."

Apparently, over the last three years such "clarification" of the Division's interpretation of the FLSA has been necessary only twice, as the agency has issued only two Administrator's Interpretation on the FLSA: *first*, on the application of the administrative exemption to mortgage loan officers; and *second*, on the definition of the term "clothes" in Section 3(o) of the FLSA. Both of these AIs only served to create additional legal uncertainty by reversing enforcement policies announced by the Division just a few days earlier. Federal courts are often hesitant to grant deference to such agency flip-flops. The Division is facing an Administrative Procedures Act challenge to the mortgage loan officer AI claiming that the AI is contrary to the 2004 Final Part 541 regulations. Finally, in March of this year, a jury found that Quicken Loans had correctly classified its mortgage loan officers as exempt.

In my experience over the last three years, it is extremely difficult to obtain even informal guidance from the Division regarding whether a particular pay practice complies with the FLSA. Employer questions regarding whether a particular employee is properly classified as exempt, whether a particular activity is compensable work time, and whether a particular bonus payment must be included in the regular rate are met with silence from the agency. As quoted by Thompson publications, apparently the Division believes that responding to fact-specific inquiries from employer is a waste of its time. On the contrary, in my opinion, it is the Division's statutory responsibility to answer fact-specific questions from employers – especially, in light of the Division's new punitive approach to enforcement.

B. *Amicus* Briefs

Today, then, an employer often can only determine the Division's views on an issue through an enforcement action – or by reading *amicus* briefs filed by the Solicitor of Labor. The Labor Department does not have an open or transparent process regarding its decisions to file *amicus* briefs in litigation pending between an employer and employees. Rather, one of the parties to litigation will request that the Department file an *amicus* by letter, and the Department will review the pleadings and issues before making a decision. To the best of my knowledge, the Solicitor rarely gives notice to the opposing party that they are considering an *amicus*, or the opportunity for the opposing party to express its views.

Further, the filing of *amicus* briefs are barely publicized. Members of the public who have signed up to receive notices from the Departments email subscription service receive an email when a new *amicus* brief is posted on DOL's website. However, if you do not receive these emails, finding the web site on which the *amicus* briefs are posted is difficult, and that web site does not include any summary regarding the topic of the brief or the position taken by the Department – it contains only a list of case names categorized by statute.

Nonetheless, the Department has used *amicus* briefs to announce major enforcement policy changes. For example, the public learned for the first time in an *amicus* brief that the Division views pharmaceutical sales representatives as non-exempt. Employers also learned for the first time in an *amicus* brief that employers who pay tipped employees at or above minimum wage, and do not take a tip credit, nonetheless must comply with the FLSA tip pooling rules (a position, by the way, rejected by the Ninth Circuit Court of Appeal, but adopted in the April 2011 Final FLSA regulations).

C. Compliance Partnerships

In the past, both as Administrator of the Wage and Hour Division and in my private practice, I have worked with large, national employers to establish compliance partnerships with the Division designed to provide compliance assistance to the employer and to quickly resolve any violations revealed by employee complaints. I think most District Directors would agree that establishing a close relationship between a national employer and the District Office is one of the best tools for ensuring that employees are

paid in compliance with the FLSA. Under such partnerships, an employer was assigned an investigator or Assistant District Director to call with questions regarding the FLSA – from programming for a new timekeeping systems or the appropriate exempt status for a new job. Under these partnerships, the employer would agree to provide training on the FLSA to key managers; to provide additional disclosures and information about the requirements of the FLSA to non-exempt employees; and/or establish and publish a process for employees to make internal complaints regarding their pay. If an employee filed an internal complaint with the company regarding his pay, the Division would assist the employer in determining whether a violation had occurred and in calculating and paying back wages. In an employee filed a complaint with the Division, often the investigation could be resolved and back wages paid after a quick telephone call to the manager at the company responsible for wage and hour compliance.

The Division has a number of new programs to cooperate with the IRS, state agencies, unions, plaintiffs' lawyers and employee advocacy groups. Unfortunately, it is my understanding that a directive has been issued prohibiting the field staff from entering compliance partnerships with employers. Such partnerships only increase employer compliance with the FLSA, and should be encouraged by the Division – not prohibited.

D. Voluntary Correction

Finally, it is my understanding that the Division has issued a directive prohibiting the field staff from assisting employers who, after self-discovering FLSA violations, request that the Division supervise the payment of back wages.

Even good faith employers sometimes make mistakes because the law on so many FLSA issues remains unclear and the subject of litigation. But the best of employers, when they discover a practice that may violate the FLSA, want to correct the practice and pay back wages to employees. Over 75% of my practice is assisting employers to conduct internal wage and hour audits, and helping those employers to correct any violations which I uncover during those audits. Employers, in my experience, have no difficulty and, in fact, are anxious to quickly correct going forward any pay practices that might violate the FLSA.

Whether to pay employees back wages is a more difficult issue because, as discussed above, outside of private litigation, the only available mechanism for an employee to waive FLSA claims is through the Wage and Hour Division. Without a waiver, an employee can accept a large back-wage payment, and then turn around and file a collective action the next day – claiming additional hours worked, a third-year of back wages, and liquidated damages. In other words, the payment of back wages can never protect an employer against a subsequent lawsuit unless the Division supervises the payment of the back wages under Section 16(c) of the Act. Employees benefit from this process as the Division can ensure that the employer has correctly calculated the back wages due.

In the past, I would often advise employers to voluntarily disclose FLSA violations to the Wage and Hour Division and work with the Division to pay back wages. All parties

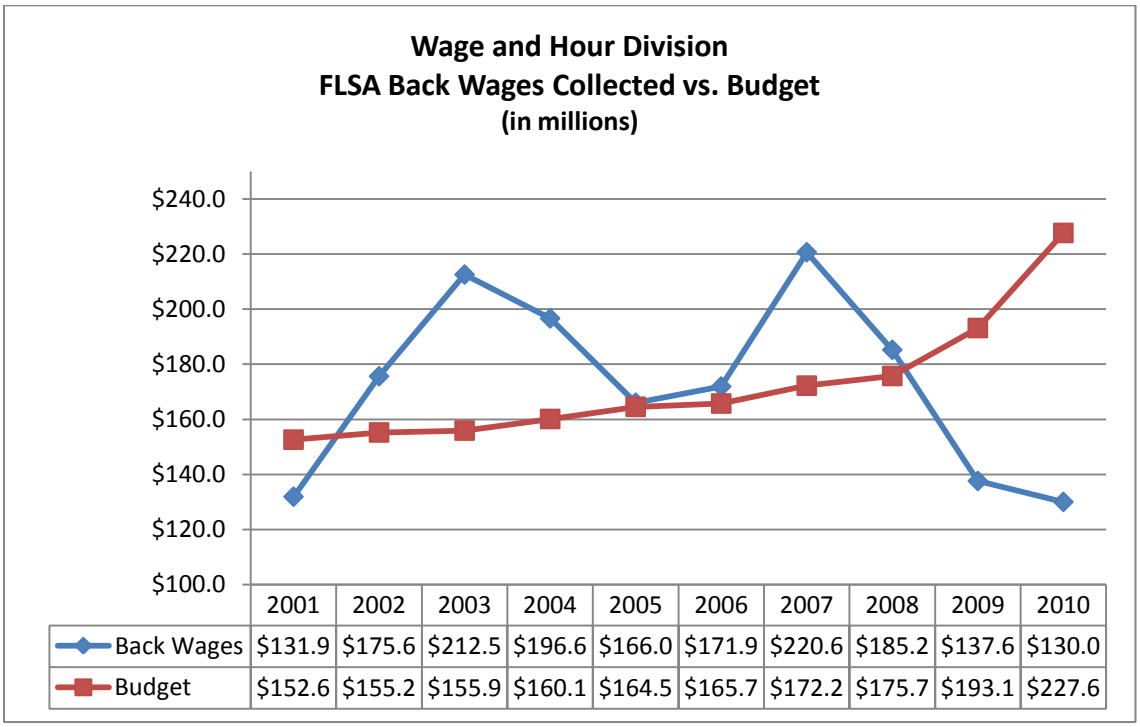
benefit from such voluntary correction: In just months, rather than waiting years for litigation, employees receive 100% of back wages due for non-willful violations (2 years) as reviewed and approved by the Division. Employers are able to obtain waivers from employees receiving back wages and can thus be assured that the issue has been finally resolved. The Division, in turn, efficiently leverages its scares resources to collect millions in additional back wages for employees.

Today, it is my experience that the Division will not work with good faith employers to voluntarily correct violations. Even if the Division were willing to work with employers, given the current punitive focus of the agency, I doubt that the Division would be willing to provide employers with any incentives to voluntarily audit and correct. Rather, most likely, DOL would insist on three-years of back wages, civil money penalties and liquidated damages – while refusing to issue WH-58 waiver forms.

Many federal enforcement agencies have voluntary corrections programs, even agencies within the Department of Labor (for example, EBSA's Voluntary Fiduciary Correction Program and Delinquent Filer Voluntary Compliance Program). Compliance with the FLSA is often difficult. The Wage and Hour Division should continue to provide a path which provides incentives for employers to voluntarily correct violations.

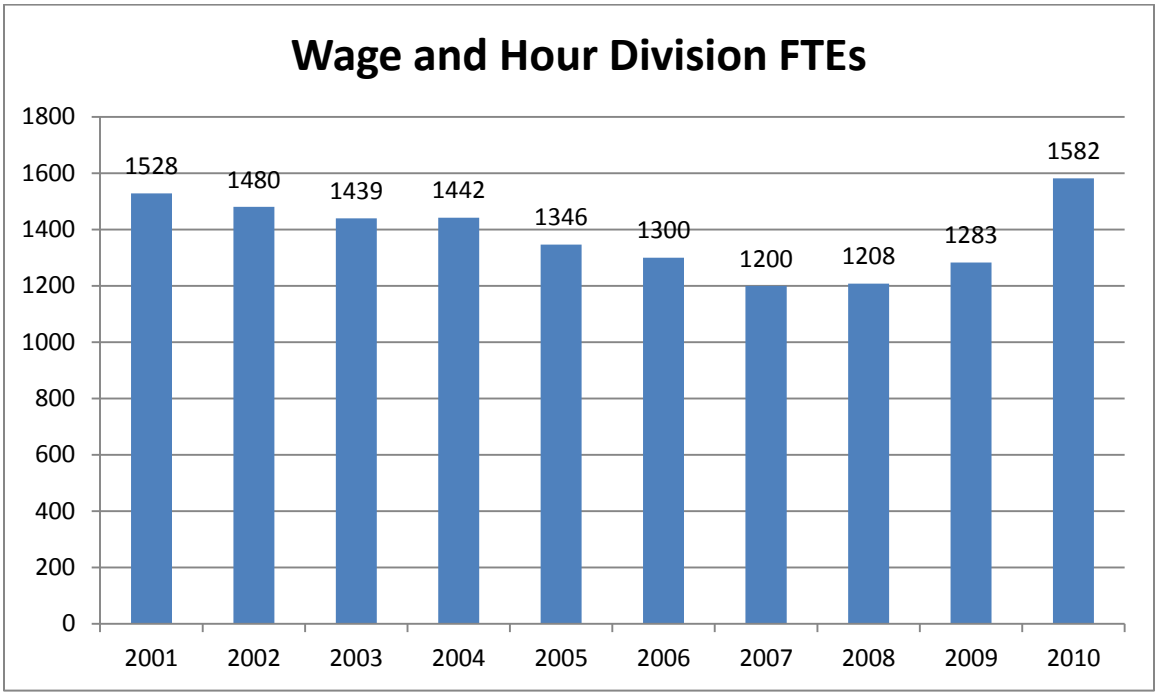
IV. AGENCY EFFECTIVENESS

Although officials from the Labor Department might claim that these changes have been implemented to strengthen enforcement and better protect workers, enforcement of the FLSA by the Wage and Hour Division has actually declined – especially given the Division's increased budget and FTEs. The chart below compares the Division's budget versus back wages collected from FY 2001 through FY 2010:



	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Back Wages	$131.9	$175.6	$212.5	$196.6	$166.0	$171.9	$220.6	$185.2	$137.6	$130.0
Budget	$152.6	$155.2	$155.9	$160.1	$164.5	$165.7	$172.2	$175.7	$193.1	$227.6

The following chart shows the number of full-time equivalent employees working for the Wage & Hour Division each fiscal year from 2001 to 2010:



Perhaps the fairest measure of performance is to compare the first full fiscal year of the Bush Administration (FY 2002) with that of the Obama Administration (FY 2010). In FY 2002, with a budget of $155.2 million and 1480 FTEs, we recovered $175.6 million in back wages. In FY 2010, with a budget of $227.6 million and 1582 FTEs, the Division recovered only $130 million in back wages. Thus, in FY 2010, with 102 more employees, the Division spent $72.4 million more to recover $45 million less in back wages.

In my opinion, this significant decrease in the Division's effectiveness is caused by the changes I have discussed. Investigations are taking longer to conduct because investigators can no longer use the "self-audit" investigation method. It is increasingly difficult to resolve investigations at agency level as employers are much less likely to settle when the Division insists on civil money penalties and liquidated damages, in addition to back wages, while at the same time depriving those employers of the opportunity to obtain waivers of FLSA claims. Finally, there is no path for a good faith employer to voluntarily correct violations under the oversight of the Wage & Hour Division.

To summarize, the current Administration is doing less with more. The Wage and Hour Division's new "gotcha" approach towards employers – carrying a larger stick while refusing to pass out any carrots – is not working to ensure our nation's employees are paid in compliance with the Fair Labor Standards Act.