

Reg Review: Wage & Hour Proposals

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WAGE AND HOUR: AN ENFORCEMENT AND EDUCATIONAL SUCCESS STORY

Wage and Hour's Mission

The mission of the Wage and Hour Division is to enforce the nation's employment standards to serve and protect the present and future workers of America. Wage and Hour protects the most vulnerable workers in the United States -- children, low-wage workers, migrant farmworkers, and working families.

Why Wage and Hour Works

Wage and Hour works because it provides an indispensable safety net for millions of workers. For example:

- **Lost pay.** Wage and Hour helped about 350,000 workers last year in cases where employers failed to pay the minimum wage or overtime. For many employees, Wage and Hour's actions frequently mean the difference between getting paid something and getting paid nothing at all. For example, three days before Christmas last year, the Wage and Hour office in Atlanta received an urgent call from workers who said that the company was refusing to pay its employees. Because Wage and Hour took immediate action to get the firm to make its payroll, workers received their pay in time for the holidays.
- **Child labor.** Society has an interest in protecting minors from harm in the workplace. Wage and Hour's presence is crucial in preventing on-the-job accidents and in punishing those employers who expose minors to workplace dangers. In just this past year, Wage and Hour stepped in after minors were seriously injured in accidents involving metal forming presses, electric meat grinders, power-driven band saws, and other dangerous pieces of industrial equipment. One 17-year-old working for a tractor company in Tennessee, for example, suffered a broken wrist when he was pinned inside a fork lift. Wage and Hour assessed fines of \$9,700 against the firm for allowing the minor to operate the fork lift.
- **Migrant farmworkers.** In the 1930s, John Steinbeck's novel *The Grapes of Wrath* focused America's attention on the plight of migrant farmhands. Unfortunately, today's migrant workers often fare little better than the migrants described by Steinbeck, enduring atrocious living and working conditions. Last year, for example, one employer in North Carolina was found guilty of horrible abuses of his migrant workers, including peonage (a form of slavery). Wage and Hour is one of a very small number of organizations responsible for protecting migrant workers.
- **Family Medical Leave.** Workers have the right under the

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Family and Medical Leave Act (FMLA) to take unpaid emergency medical leave from their jobs. Wage and Hour fights to prevent employers from firing workers simply because the worker faces an emergency medical situation. In one case, for example, a pregnant woman in Miami was illegally fired from her job and lost her health insurance after she requested a leave of absence to have her baby. After Wage and Hour worked to defend the employee's rights, the firm agreed to rehire the employee, pay back lost pay, and reinstate her health benefits.

Is Wage and Hour still necessary?

The Wage and Hour Division is as important to workers today as it was when it was established over 55 years ago. This tiny agency is responsible for laws which apply to virtually every employer and employee in the United States. Wage and Hour is justly proud of its successes, but clearly its mission is ongoing:

- It is estimated that about 5.3 million workers in the United States are paid approximately the minimum wage of \$4.25 an hour. Even if Wage and Hour devoted 100% of its enforcement resources to only those industries with the worst track records of paying below the minimum wage, abandoning all of its other enforcement responsibilities such as complaint-based investigations and child labor protection, it would have enough of a workload for at least five years.
- The Department estimates that between 2.5 million and 3.5 million minors are employed in the workforce every year. A 1988 study estimated that over 25% of all 15-year-olds and 50% of all 16- and 17-year-olds work some time during the year. A survey by the Bureau of Labor Statistics found that in 1992 nearly 100,000 workers aged 19 and below were injured on the job. Last year, Wage and Hour found about 8,500 minors employed under illegal, and often unsafe, working conditions.
- It is estimated that there are between 1.6 million and 2.7 million seasonal agricultural workers (migrants) in the United States. Last year, Wage and Hour found about 37,000 workers employed in violation of the migrant worker protection law, which provides for minimum standards in worker housing, transportation, and other areas.
- Every year, many American workers have to take time off from their jobs in order to care for a sick family member. While workers sometimes lose their jobs for this reason, studies show that when firms utilize family and medical leave policies, corporate competitiveness may actually increase, not decrease. Since the passage of the Family and Medical Leave Act in 1993, Wage and Hour has devoted a lot of time to educating employers about the law and to enforcing workers' rights under it. Last year, Wage and Hour devoted about 35,000 staff hours to educating employers about FMLA and conducted about 1,200 FMLA cases.

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CHARTING WAGE AND HOUR'S STRATEGIC DIRECTION

Wage and Hour faces an ever-increasing set of responsibilities with an ever-shrinking pool of resources. Since 1978, Wage and Hour has lost about 550 investigators. This year, fewer than 800 investigators -- 60% of the total number Wage and Hour had in 1978 -- are responsible for administering laws applicable to about six million firms and 110 million workers.

Clearly, Wage and Hour must chart new strategies to cope with these resource constraints. Wage and Hour has begun to rethink its goals in order to leverage its scarce resources by:

● **Targeting worst violators.** This year, Wage and Hour is identifying and targeting "worst violator" farm labor contractors along the migrant agricultural worker streams and is utilizing compliance surveys in the garment industry to target "worst violator" production contractors. Wage and Hour also recognizes that targeted efforts in all enforcement areas will be more effective if demographics are intelligently applied. Therefore, Wage and Hour is encouraging the productive use of demographic data such as industry and geographic analyses in local targeting efforts.

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● **Protecting most vulnerable populations.** Wage and Hour recognizes that it should provide more comprehensive protections to the lowest paid and least-advantaged members of the workforce. Therefore, it is devoting more of its resources to enforcement in low-wage industries and is targeting specific industries for intensive education and outreach activities.

● **Decreased reliance on after-the-fact enforcement.** Wage and Hour has long been driven by a complaint-based enforcement logic which emphasizes reactive policing over proactive compliance efforts. While Wage and Hour continues to value the complainant as a customer, it recognizes that a complaint-based program should be seen as only one tool in its "toolkit" of compliance techniques. Therefore, Wage and Hour has increased the proportion of targeted investigations and has increased the total amount of hours spent in educating employers about our laws.

● **Getting results faster.** Wage and Hour is emphasizing timely service to the customer. Therefore, it is encouraging innovation by empowering employees on the front lines to experiment with time-saving enforcement strategies.

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MAKING WAGE AND HOUR WORK BETTER

Wage and Hour understands the need for continuous improvement in its relationships with its customers. Wage and Hour is focusing on six areas for improvement:

- (1) *Eliminate unnecessary regulations.*
- (2) *Eliminate unnecessary regulatory functions.*
- (3) *Target compliance efforts toward the worst violators to increase efficiency and limit unnecessary burden on employers and employees.*
- (4) *Choose the regulatory environment.*
- (5) *Promote strategies to bring employers into voluntary compliance.*
- (6) *Build upon Wage and Hour's solid Reinvention foundation by finding more ways to empower employees, eliminate silly and unnecessary internal rules, reengineer core work processes, and devote attention to devising performance measures based on results, not outputs.*

In the following pages, Wage and Hour will explain how it is making itself better in these six areas.

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(1) *Eliminate unnecessary regulations:*

Example: Outdated regulations. Over time, some regulations have become outdated, obsolete, or trivial. This creates confusion for employers and adds to Wage and Hour's burden of explaining the law in a clear and concise way to its customers.

The Solution? Wage and Hour has already identified for elimination 24 parts of its regulations that are out of date, unnecessary, or trivial. A total of 274 out of 1165 pages of regulations would be eliminated, almost 25% of the total.

Concerns: Changes to many of these parts of the regulations would require a Notice and Comment period.

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(1) *Eliminate unnecessary regulations:*

Wage and Hour recognizes that some of the regulations which made sense in the industrial era do not make sense in the information age. That is why Wage and Hour continues to press for *changes to existing regulations* to give employers greater flexibility in the workplace while maintaining protections for workers.

Example: Salaried employees. One such example involves professional employees who are exempt from receiving overtime. The way the regulations are written right now, if an employee is paid on a "salary basis" they might qualify for exemption. The problem is that, as employers have devised new methods for paying employees, a great deal of confusion has developed over just what the term "salary basis" means. There is so much confusion, in fact, that employers and employees have come into more and more conflict over the meaning of this term.

The solution? Eliminate this requirement and simply increase the amount of money a person has to earn in order to qualify for exemption. This would wipe out all of the confusion over which employees are paid a salary or whether deductions from salaried employees' checks are legal. Instead, it would create a simplified system that would give employers maximum flexibility in devising their pay practices but would still protect the rights of low-income and non-professional employees.

Concerns:

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(1) *Eliminate unnecessary regulations:*

Example: Child labor regulations. Wage and Hour wants to create child labor rules that make sense to all concerned. Therefore, Wage and Hour's goal is to create regulations that provide flexibility to employers yet still take into account the health, well-being, and educational needs of our young people.

Child labor regulations prohibit minors from operating dangerous machinery, including paper baling machines. Paper baling machines have traditionally been very dangerous pieces of equipment, but recent technological changes may be making our regulations obsolete.

Child labor regulations currently limit the number of hours and times of day that 14- and 15-year-old children can work. The current standards do not permit minors to work past 7:00 p.m. during the academic year even when the following day is not a workday. A minor who works in the local mall, for example, is not allowed to work later than 7:00 p.m. on a Friday night.

The solution? Wage and Hour is actively pursuing ways in which it can simplify and clarify these regulations to make them both more relevant to current workplace conditions and easier to follow.

To attack the paper baler issue, Wage and Hour is utilizing the scientific expertise of the National Institute of Occupational Safety and Health to conduct on-site studies of this issue. The aim is to generate common sense regulations that give greater flexibility to employers while ensuring that minors are not placed in any danger if they're allowed to begin the operation of paper balers.

To address the hours standards issue, Wage and Hour worked to have the Department issue a Notice of Proposed Rulemaking (NPRM). This notice proposed changes to existing child labor hours standards. The Department received numerous comments reflecting a wide range of opinions.

A final rule will soon be issued which will allow 14- and 15-year-old professional sports attendants (such as "batboys") to work more flexible hours. Wage and Hour is also open to the idea of allowing minors in other job categories to work more flexible hours on non-schoolnights.

Concerns: Wage and Hour does not want to implement any change which increases the odds that more minors would be harmed by workplace conditions. Therefore, any changes in the child labor regulations must be made only after thoughtful consideration of the trade-offs between the benefits to be gained from additional workplace flexibility and the dangers of removing certain child labor standards.

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Additionally, Wage and Hour does not want to send the message that all child labor standards, particularly in the hazardous equipment area, should be loosened. Wage and Hour remains committed to protecting workplace safety for children.

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(2) *Eliminate unnecessary regulatory functions.*

Wage and Hour recognizes that it must continue to reach out to the states to form cooperative arrangements. It must strive to create innovative partnerships which focus federal-state resources in the most critical areas of service to the taxpayer and to workers.

Example: Delegation of authority. Wage and Hour knows that government is facing severe resource limitations. It wants to reduce the amount of overlap between government agencies. Right now, some states have labor standards which are as strong or stronger than federal standards. Additionally, some of these states have the resources and the will to enforce these standards. One problem is that the federal government and the state governments often do not share information and resources in ways which eliminate overlap. As a result, employers can become confused by the presence of different agencies with responsibilities in identical subject areas.

The solution: Wage and Hour might consider piloting the redelegation of its authority in two or three states that have strong labor laws and the resources to enforce them. Under this proposition, Wage and Hour would delegate its enforcement responsibilities in certain areas of Federal law to a state where the state has standards nearly equivalent to, or stronger than, Federal standards. Wage and Hour would consider doing this only where the delegation would not result in a loss of worker protections.

Implementation of such a project might have two benefits: (1) it would bring Wage and Hour and the various states closer together in their efforts, and (2) Wage and Hour could devote its resources to other critical enforcement areas within the chosen states.

Concerns: Wage and Hour has four primary concerns with this proposal.

- The loss of uniform application of a national standard.
- The possibility that the States involved would request funding for taking on the added responsibility and workload, and that without funding, Federal withdrawal would be seen as a burden.
- The possibility that Wage and Hour's funding would be decreased as a result of the redelegation of its authority. A major reason for redelegating authority is to shift enforcement resources to areas where attention is needed, and away from areas where some states might be able to meet an enforcement burden. Wage and Hour is interested in

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increased effectiveness in areas which desperately need attention, but a redelegation might cause some to call for a corresponding decrease in Wage and Hour funding.

- Federal delegation might be strongly opposed by constituent groups.

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- (3) *Target compliance efforts toward the worst violators to increase efficiency and limit unnecessary burden on employees and employers.*

Wage and Hour has begun to utilize innovative enforcement techniques which rely on the employer's active participation in determining compliance. Wage and Hour recognizes that it no longer has the resources to do everything by itself, in an adversarial relationship with employers at every juncture. Instead, it is beginning to see that employers might have interests which are compatible with Wage and Hour's goals, such as voluntary compliance.

Example: Self-audits. One example of this new approach to enforcement and compliance is a new enforcement tool called a "self-audit." Wage and Hour's standard procedure for the typical investigation used to be to send out an investigator to a firm to conduct an exhaustive review of the employer's records, interview employees, compute fines, and negotiate with the employer.

Many of our field employees began to question why we had to operate in this way for every case, especially given that many employers seemed to be perfectly willing to help us out and that Wage and Hour's resources were getting smaller every year.

The solution? Employees devised the self-audit method. Investigators send out letters to employers asking them to audit their pay practices. The letter explains that Wage and Hour is interested in compliance in certain areas, such as the minimum wage or overtime, and informs the employer that compliance requires certain things. The employer is then asked to compute any back pay for employees if they discover errors in compliance. The investigator reviews the firm's work and either conducts a full investigation or oversees the payment of the back pay which the firm has computed.

Self-audits work. The evidence shows that the self-audit technique saves time for the employer, for Wage and Hour, and for workers. Last year, Wage and Hour conducted about 1900 self-audits, resulting in about \$25,200,000 in back pay to approximately 31,000 workers. This technique usually requires fewer investigator hours spent on each case.

One good example of the effectiveness of the self-audit technique is a project conducted by Wage and Hour employees in San Diego. A team of investigators utilized the self-audit procedure to blitz the construction industry in Imperial County, California. Their highly creative project increased awareness within the industry, generated almost \$200,000 in back pay to construction workers, drastically reduced the number of hours put in by investigators on a per-case basis, substantially lowered the number of days it took to finish the cases, and required

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substantially lower amounts of travel monies for Wage and Hour investigators.

Wage and Hour will be implementing the self-audit, and other innovative tools, nationwide.

Concerns: Self-audits are not feasible in many instances because they are applicable only to those employers who have no track record of violations and where the regulatory issues involved are relatively simple.

Additionally, as Wage and Hour increases the proportion of its investigations using the self-audit technique, it must not allow employers to come to believe that Wage and Hour is dropping its "policing" functions in favor of an exclusive reliance on employer "self-policing". The self-audit technique will be most effective if it supplements other techniques.

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(4) Choose the regulatory environment.

Example: Alternative Dispute Resolution (ADR). A team in the Southern New Jersey District Office knew that the formal administrative appeals process in farm labor cases didn't satisfy anyone. This process took a long time, frustrated the farmers who had to wait for their case to be resolved, did not solve problems discovered during Wage and Hour's investigations, and took up a lot of staff time.

The solution? The team tried a novel approach which recognizes farmers as partners in the compliance effort. They created a Farm Labor Appeals Committee, a sort of alternative dispute resolution board. This committee consists of representatives from Wage and Hour and the New Jersey Farm Bureau.

After Wage and Hour conducts an investigation of a farmer who employs migrant farmworkers and assesses fines, the committee gives farmers the option of coming before the board and pleading their case. Farmers can present evidence that they've corrected the problems on their farm (for example, they've improved the migrant housing conditions), and they can make arguments as to why they believe they were incorrectly cited with a violation. After hearing evidence, the committee resolves the case by either accepting an informal settlement or proceeding with formal action.

Experience with the committee to date has been extremely positive:

- farmers have been overwhelmingly positive about this process, believing that they have received a fair "day in court";
- the average length of time to close a case before the committee is a matter of a few months, instead of years with the formal process;
- the Farm Bureau's presence gives the committee credibility with the farmers;
- the Farm Bureau representative has become an advocate of the committee.

Wage and Hour is planning to expand this concept to other areas of the country.

Concerns: The success of this approach is partially dependent upon the willingness of third-party groups to participate. In this pilot project, the Farm Bureau's representation gave the committee credibility with farmers. The success of additional

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efforts around the country will also be contingent upon getting farmers' advocacy groups to cooperate with Wage and Hour. Many of the farm bureaus, for example, view Wage and Hour as the enemy and might be reluctant to participate in a "joint venture" of this kind.

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- (5) *Promote strategies to bring employers into voluntary compliance.*

Last year, Wage and Hour conducted its first national survey of customer groups to determine their needs and their level of satisfaction with existing services. In the survey of employers, one of the things mentioned most frequently was the need for more information about the laws we enforce. While many employers are unscrupulous and will not come into compliance with the laws unless they are made to do so, the majority of employers want to comply with the law and would do so if they knew what the law is.

Given its limited resources, Wage and Hour cannot rely on enforcement techniques alone to do its job. Creative methods are needed to get the word out to employers about how the laws apply to their businesses.

Wage and Hour has begun to devote more of its resources to its education and outreach programs. Right now, Wage and Hour invests about 15% of its total enforcement time into education and outreach. Additionally, regions have been instructed to develop education and outreach plans which target the industries and the geographic areas with the most vulnerable populations of workers.

As an example of how Wage and Hour is focusing on voluntary compliance, Wage and Hour is altering its public information documents. In the past, investigators had to hand out either outdated booklets or the regulations themselves. Most employers didn't read these handouts.

A team in the Atlanta region decided to do something about it. It tasked employees all across the region to write up one-page fact sheets on very specific areas of the law, areas in which employers have a lot of questions. Wage and Hour employees were told to write them in plain, everyday language. 26 fact sheets were eventually developed, with more on the way. These sheets will cut down on the amount of paper sent to employers or handed out at seminars, saving money for Wage and Hour and headaches for employers.

Another way in which Wage and Hour has focused on making compliance easier for employers is its approach to writing new regulations. Wage and Hour broke new ground when it wrote the regulations for the Family and Medical Leave Act (FMLA) in 1993. Instead of approaching the task from the traditional bureaucratic perspective of making the regulations as full of jargon as possible, Wage and Hour decided to write the regulations from the point of view of the customer -- the general public and employers.

Wage and Hour used a question-and-answer format to write the FMLA regulations. Now, when an employer has a question about the

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Family and Medical Leave Act, the chances are their question is asked -- and answered -- in *their* language in the FMLA regulations themselves.

- (6) Build upon Wage and Hour's solid Reinvention foundation by finding more ways to empower employees, eliminate silly and unnecessary internal rules, reengineer core work processes, and devote attention to devising performance measures based on results, not outputs.

Wage and Hour knows that the government must fundamentally change the way in which it defines and approaches its work. In this spirit, Wage and Hour has been, and will continue to be, active in reinventing itself in the following areas:

Employee empowerment. Wage and Hour has been delegating responsibility for decision-making to front-line employees. Innovation is now encouraged instead of discouraged. Employees are now allowed to improve work processes for better service to the customers.

Listening to customers. Last year, Wage and Hour conducted its first nationwide survey of important customer groups. Based on the findings, Wage and Hour is beginning to change the way in which it interacts with customers and the work priorities it sets for itself.

Reengineering core work processes. Wage and Hour is committed to reengineering its core work processes. Wage and Hour has already tasked groups of front-line employees to identify opportunities for improvement and to act on them. Through the Process Reinvention approach, Wage and Hour has approved dozens of changes to work processes.

Eliminating internal rules. Wage and Hour is working to eliminate obsolete internal rules which hamstring front-line workers. The Division's Field Operations Handbook, for example, is being altered to allow investigators and local offices to use discretion and judgement when deciding how to pursue cases.

Restructuring Wage and Hour to encourage teamwork. Wage and Hour has formulated a restructuring plan which will combine groups of individual employees into self-managing teams, turn front-line supervisors into team leaders, increase the ratio of staff to managers, and flatten organizational hierarchy by consolidating regions.

Emphasizing results, not process. Wage and Hour is aggressively pursuing ways in which it might improve what it counts and why by focusing on results-based measures, not output-based measures. Wage and Hour wants to get away from its traditional reliance on enforcement aggregates as the sole means of evaluating its performance.