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Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance

Abstract

The FLSA sets federal minimum wage and overtime pay requirements applicable to millions of U.S. workers and allows workers to sue employers for violating these requirements. Questions have been raised about the effect of FLSA lawsuits on employers and workers and about WHD's enforcement and compliance assistance efforts as the number of lawsuits has increased. This report (1) describes what is known about the number of FLSA lawsuits filed, and (2) examines how WHD plans its FLSA enforcement and compliance assistance efforts. To address these objectives, GAO analyzed federal district court data from fiscal years 1991 to 2012 and reviewed selected documents from a representative sample of lawsuits filed in federal district court in fiscal year 2012. GAO also reviewed DOL's planning and performance documents and interviewed DOL officials, as well as stakeholders, including federal judges, plaintiff and defense attorneys who specialize in FLSA cases, officials from organizations representing workers and employers, and academics about FLSA litigation trends and WHD's enforcement and compliance assistance efforts.

Keywords

Fair Labor Standards Act, FLSA, federal minimum wage, overtime

Comments

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Report to the Chairman, Subcommittee
on Workforce Protections, Committee
on Education and the Workforce,
House of Representatives

December 2013

FAIR LABOR STANDARDS ACT

The Department of
Labor Should Adopt a
More Systematic
Approach to
Developing Its
Guidance

GAO Highlights

Highlights of [GAO-14-69](#), a report to the Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, House of Representatives

Why GAO Did This Study

The FLSA sets federal minimum wage and overtime pay requirements applicable to millions of U.S. workers and allows workers to sue employers for violating these requirements. Questions have been raised about the effect of FLSA lawsuits on employers and workers and about WHD's enforcement and compliance assistance efforts as the number of lawsuits has increased. This report (1) describes what is known about the number of FLSA lawsuits filed, and (2) examines how WHD plans its FLSA enforcement and compliance assistance efforts. To address these objectives, GAO analyzed federal district court data from fiscal years 1991 to 2012 and reviewed selected documents from a representative sample of lawsuits filed in federal district court in fiscal year 2012. GAO also reviewed DOL's planning and performance documents and interviewed DOL officials, as well as stakeholders, including federal judges, plaintiff and defense attorneys who specialize in FLSA cases, officials from organizations representing workers and employers, and academics about FLSA litigation trends and WHD's enforcement and compliance assistance efforts.

What GAO Recommends

GAO recommends that the Secretary of Labor direct the WHD Administrator to develop a systematic approach for identifying and considering areas of confusion that contribute to possible FLSA violations to help inform the development and assessment of its guidance. WHD agreed with the recommendation, and described its plans to address it.

View [GAO-14-69](#). For more information, contact Revae Moran at (202) 512-7215 or moranr@gao.gov.

December 2013

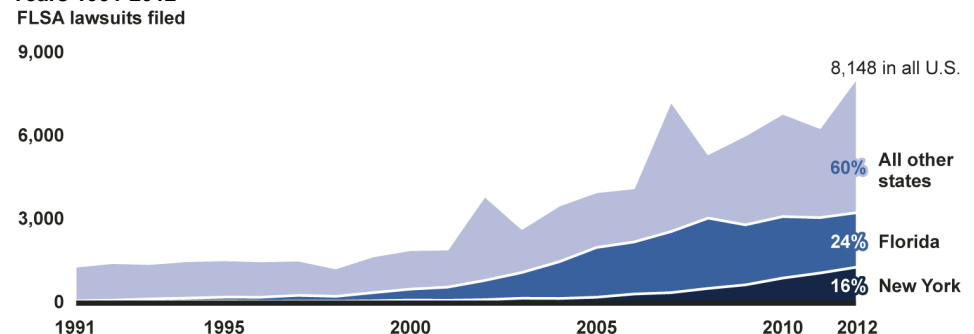
FAIR LABOR STANDARDS ACT

The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance

What GAO Found

Substantial increases occurred over the last decade in the number of civil lawsuits filed in federal district court alleging violations of the Fair Labor Standards Act of 1938, as amended (FLSA). Federal courts in most states experienced increases in the number of FLSA lawsuits filed and the percentage of total civil lawsuits filed that were FLSA cases, but large increases were concentrated in a few states, including Florida and New York. The number of workers involved in FLSA lawsuits is unknown because the courts do not collect data on the number of workers represented. Many factors may contribute to this general trend; however, the factor cited most often by stakeholders, including attorneys and judges, was attorneys' increased willingness to take on such cases. In fiscal year 2012, an estimated 97 percent of FLSA lawsuits were filed against private sector employers, often from the accommodations and food services industry, and 95 percent of the lawsuits filed included allegations of overtime violations.

FLSA Lawsuits Filed in Federal District Court in Florida, New York, and Other States, Fiscal Years 1991-2012



Source: GAO analysis of Federal Judicial Center data.

The Department of Labor's (DOL) Wage and Hour Division (WHD) has an annual process for planning how it will target its enforcement and compliance assistance resources to help prevent and identify potential FLSA violations, but it does not compile and analyze relevant data to help determine what guidance is needed, as recommended by best practices previously identified by GAO. In planning its enforcement efforts, WHD targets industries it determines have a high likelihood of FLSA violations. Although WHD does not analyze data on FLSA lawsuits when planning its enforcement efforts, it does use information on its receipt and investigation of complaints about possible FLSA violations. In developing its guidance on FLSA, WHD considers input from its regional offices, but it does not have a systematic approach that includes analyzing relevant data, nor does it have a routine, data-based process for assessing the adequacy of its guidance. For example, WHD does not analyze trends in the types of FLSA-related questions it receives. Since 2009, WHD has reduced the number of FLSA-related guidance documents it has published. According to plaintiff and defense attorneys GAO interviewed, more FLSA guidance from WHD would be helpful, such as guidance on how to determine whether certain types of workers are exempt from overtime pay and other requirements.

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Abbreviations

DOL	Department of Labor
FLSA	Fair Labor Standards Act of 1938
GPRA	Government Performance and Results Act of 1993
NAICS	North American Industry Classification System
PACER	Public Access to Court Electronic Records
WHD	Wage and Hour Division

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December 18, 2013

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
Committee on Education and the Workforce
House of Representatives

Dear Mr. Chairman:

After 75 years, the Fair Labor Standards Act of 1938 (FLSA), as amended, remains the primary federal law that sets minimum wage and overtime pay standards applicable to most U.S. workers.¹ The Department of Labor's (DOL) Wage and Hour Division (WHD) is responsible for ensuring that employers comply with the FLSA, and workers may also file private lawsuits to recover wages they claim they are owed because of a violation of the act, such as an employer's failure to pay overtime compensation to workers who are entitled to it.² In July 2008, we found that WHD did not effectively take advantage of available information and tools in planning and conducting its enforcement and compliance assistance activities, and we recommended that WHD establish, maintain, and report on performance measures for the FLSA.³

More recently, as the number of FLSA lawsuits has increased, questions have been raised about the effect of the FLSA on employers and workers and about WHD's enforcement and compliance assistance efforts.

This report examines the following questions:

1. What is known about the number of FLSA lawsuits filed?
2. How does WHD plan its FLSA enforcement and compliance assistance efforts?

¹ Ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-19).

² WHD administers the FLSA with respect to private employers, state and local government employers, and certain federal employers. WHD is also responsible for the administration of other federal laws such as the Family and Medical Leave Act of 1993.

³ GAO, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, [GAO-08-962T](#) (Washington, D.C.: July 15, 2008).

To describe what is known about trends in the number of FLSA lawsuits filed, we analyzed data from the federal district courts for fiscal years 1991 through 2012 provided by the Federal Judicial Center.⁴ We also reviewed complaints from a randomly selected and generalizable sample of 97 FLSA lawsuits filed in federal district courts in fiscal year 2012 to generate estimates about selected characteristics of such lawsuits.⁵ We did not review FLSA lawsuits filed in state courts or cases from the federal appeals courts.⁶ To describe how WHD plans its FLSA enforcement and compliance assistance efforts, we reviewed the agency's planning and performance documents and its published guidance on FLSA enforcement and compliance assistance. We also compared WHD's planning process to internal control standards and best practices that we have previously identified.⁷ We did not assess WHD's implementation of its enforcement and compliance assistance plans. To inform both objectives, we interviewed DOL officials, attorneys who specialize in wage and hour cases, federal judges, officials from organizations representing workers and employers, and academics about FLSA litigation trends and WHD's enforcement and compliance assistance activities, and reviewed relevant federal laws and regulations.

We conducted this performance audit from November 2012 to December 2013 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

⁴ The Federal Judicial Center is the research and education agency of the federal judicial system. It compiles data from the federal courts via the Administrative Office of the U.S. Courts for research purposes.

⁵ A "complaint" is the legal term for the document the plaintiff files with the court to initiate a civil lawsuit. For this analysis, we reviewed only the initial complaint from the lawsuits in our sample. Our review did not include any subsequent documents filed, and therefore the information we collected was limited to the information provided by the plaintiff at the time the lawsuit was filed. All estimates from our sample have a 95 percent confidence interval of within plus or minus 10 percentage points.

⁶ Within this report, unless otherwise specified, "FLSA lawsuits" refers to lawsuits filed in federal district court under the FLSA.

⁷ GAO, *Managing for Results: Enhancing Agency Use of Performance Information for Management Decision Making*, [GAO-05-927](#) (Washington, D.C.: Sept. 9, 2005); *Standards for Internal Control in The Federal Government*, [GAO/AIMD-00-21.3](#) (Washington, D.C.: November 1999); *Managing for Results: Strengthening Regulatory Agencies' Performance Management Practices*, [GAO/GGD-00-10](#) (Washington, D.C.: Oct. 28, 1999).

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. For more information on our scope and methodology, see appendix I.

Background

The FLSA requires that workers⁸ who are covered by the act and not specifically exempt from its provisions be paid at least the federal minimum wage (currently \$7.25 per hour) and 1.5 times their regular rate of pay for hours worked over 40 in a workweek.⁹ The act also regulates the employment of youth under the age of 18 and establishes recordkeeping requirements for employers, among other provisions. There are a number of exceptions to the requirements of the FLSA; for example, independent contractors are not covered by the FLSA, and certain categories of workers, such as those in bona fide executive, administrative, or professional positions, are exempt from the minimum wage requirements, overtime requirements, or both. WHD has issued regulations implementing the FLSA that further define these exemptions and other requirements of the FLSA.¹⁰

The mission pursued by DOL through its WHD is to promote and achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce. The FLSA authorizes DOL to enforce its provisions by, for example, conducting investigations, assessing penalties, supervising payment of back wages, and bringing suit in court on behalf of employees. DOL's WHD also conducts a range of compliance assistance activities to support employers in their efforts to understand and meet the requirements of the law. WHD's enforcement and compliance assistance activities are conducted by staff in its 52 district offices, which are located throughout the country and managed by staff in its five regional offices and Washington, D.C. headquarters.

⁸ In this report, we use the term "worker" to mean "employee" as defined by the FLSA, 29 U.S.C. § 203(e).

⁹ See 29 U.S.C. §§ 206 and 207.

¹⁰ See generally 29 C.F.R. pts. 510 – 794.

WHD's Enforcement of the FLSA

In response to complaints of alleged FLSA violations it receives from workers or their representatives, WHD conducts several types of enforcement activities. These range from comprehensive investigations covering all laws under the agency's jurisdiction to conciliations, a quick remediation process generally limited to a single alleged FLSA violation such as a missed paycheck for a single worker. Before WHD initiates an investigation of a complaint, it screens the complaint to determine, among other factors, whether the allegations, if true, would violate the law, and to ensure the statute of limitations has not expired. If WHD identifies a violation through an enforcement activity, but the employer refuses to pay the back wages or penalties assessed, DOL's Office of the Solicitor may sue the employer on behalf of the affected workers. In fiscal year 2012, WHD conducted investigations or conciliations in response to about 20,000 FLSA complaints and DOL's Office of the Solicitor filed about 200 federal lawsuits to enforce the requirements of the FLSA on behalf of workers.¹¹

In addition to responding to complaints, WHD enforces the requirements of the FLSA by initiating investigations of employers by targeting industries it believes have a high probability of violations but a low likelihood that workers will file a complaint. In fiscal year 2012, WHD concluded about 7,000 targeted FLSA investigations.

WHD's FLSA Compliance Assistance

WHD encourages compliance with the FLSA by providing training for employers and workers and creating online tools and fact sheets that explain the requirements of the law and related regulations, among other efforts. The agency refers to these efforts collectively as compliance assistance. One form of FLSA compliance assistance WHD provides is written interpretive guidance that attempts to clarify the agency's interpretation of a statutory or regulatory provision. WHD disseminates this guidance to those who request it—such as employers and workers—and posts it on the WHD website for public use. WHD's interpretive guidance includes opinion letters which apply to a specific situation. However, in 2010, WHD stopped issuing opinion letters and indicated that it would instead provide administrator interpretations, which are more broadly applicable. As a result of the Portal-to-Portal Act of 1947, which

¹¹ DOL may seek financial damages on behalf of affected workers, a court order prohibiting the employer from continuing to violate the FLSA, or both. The FLSA also provides for criminal penalties in certain circumstances.

established a “safe harbor” from liability under the FLSA for employers that rely in good faith on a written interpretation from WHD’s administrator, certain WHD written guidance could potentially provide a “safe harbor” in FLSA litigation.¹²

Lawsuits Filed by Workers Alleging Violations of the FLSA

The FLSA also grants workers the right to file a private lawsuit to recover wages they claim they are owed because of their employer’s violation of the act’s minimum wage or overtime pay requirements.¹³ WHD cannot investigate all of the thousands of complaints it receives each year because of its limited capacity. Therefore, the agency informs workers whose complaints of FLSA violations are not investigated or otherwise resolved by WHD of their right to file a lawsuit. Workers filing an FLSA lawsuit may file in one of the 94 federal district courts, which are divided into 12 regional circuits across the country.¹⁴

FLSA lawsuits may be brought individually or as part of a collective action. A collective action is a single lawsuit filed by one or more representative workers on behalf of multiple workers who claim that an employer violated the FLSA in similar ways.¹⁵ The court will generally

¹² 29 U.S.C. § 259. To avoid liability, the employer must prove that the violation was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the Administrator. An employer unable to prove the complete defense may still be able to avoid paying certain types of damages if it can prove it acted in good faith with reasonable grounds to believe the action was not in violation of the FLSA. 29 U.S.C. § 260.

¹³ 29 U.S.C. § 216(b). Workers may also file a lawsuit seeking damages for an employer’s retaliation against them under 29 U.S.C. § 215(a)(3).

¹⁴ Workers may also file FLSA lawsuits in state court. In addition, state laws may establish higher minimum wage, lower maximum hours, or higher child labor standards than those established by the FLSA. Lawsuits filed in federal court with FLSA claims may include related state law claims.

¹⁵ The FLSA provides that an action may be brought “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b). Collective actions under the FLSA and some other laws operate on an “opt-in” basis, meaning that workers must affirmatively consent in writing to participate as plaintiffs. In contrast, litigation under other laws may generally be brought as a class action. Class actions operate on an “opt-out” basis, whereby anyone who is part of a court-certified class is included as a plaintiff unless they actively choose not to be. Unlike the members of a class action, a potential plaintiff who does not “opt-in” to an FLSA collective action is not bound by the court’s judgment in the case. In some cases, a federal court may hear both a collective action under the FLSA and a class action under state law.

certify whether an action meets the requirements to proceed as a collective; in some cases, the court may decertify a collective after it is formed if the court subsequently determines that the collective does not meet those requirements.¹⁶ In such cases, the court may permit the members of the decertified collective to individually file private FLSA lawsuits.

FLSA Lawsuits Have Increased Substantially over the Last Decade and Share Some Characteristics

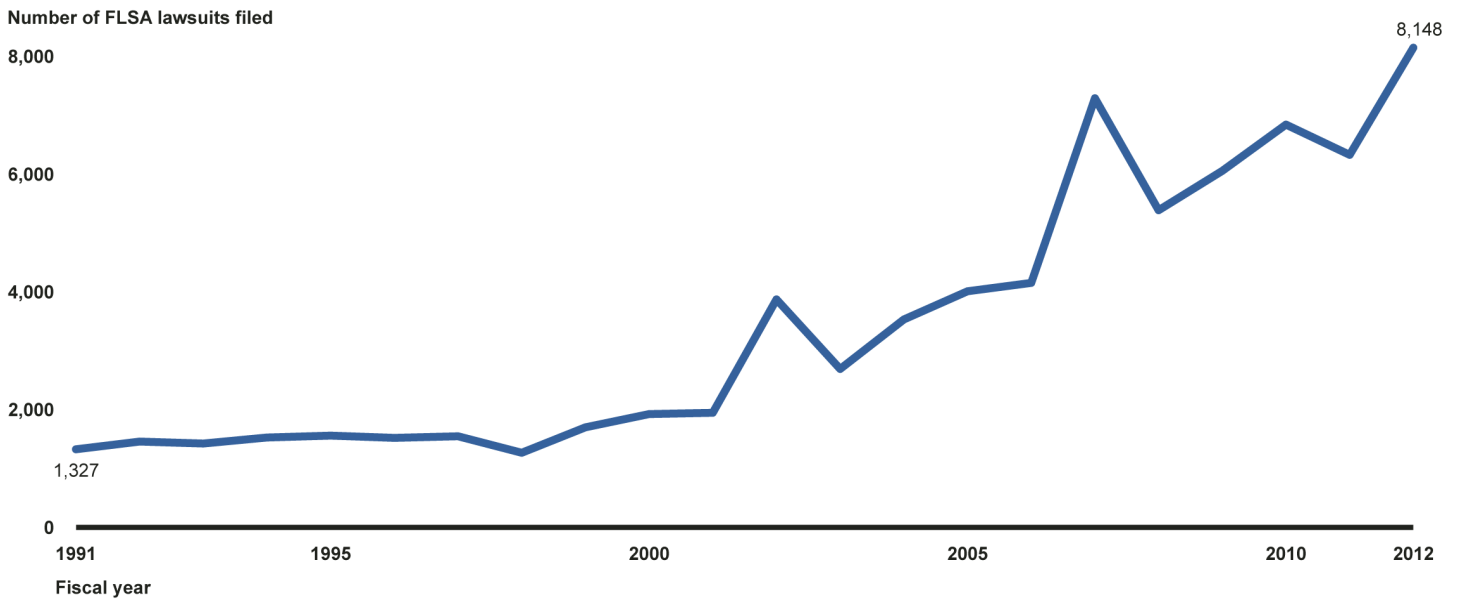
FLSA Lawsuits Have Multiplied over the Last Decade and Most Were Filed in a Few States

Over the last two decades, the number of FLSA lawsuits filed nationwide in federal district courts has increased substantially, with most of this increase occurring in the last decade.¹⁷ Since 1991, the number of FLSA lawsuits filed has increased by 514 percent, with a total of 8,148 FLSA lawsuits filed in fiscal year 2012. Since 2001, when 1,947 FLSA lawsuits were filed, the number of FLSA lawsuits has increased sharply (see fig. 1). Not only has the number of FLSA lawsuits increased, but they also constitute a larger proportion of all federal civil lawsuits than they did in past years. In 1991, FLSA lawsuits made up less than 1 percent (.6 percent) of all civil lawsuits, but by 2012, FLSA lawsuits accounted for almost 3 percent of all civil lawsuits, an increase of 383 percent.

¹⁶ The court may deny certification to a proposed collective action or decertify an existing collective action if the court determines that the plaintiffs are not “similarly situated” with respect to the factual and legal issues to be decided. For example, the court may determine that the plaintiffs’ jobs or pay structures are sufficiently dissimilar to require separate litigation of their claims.

¹⁷ The fact that a lawsuit was filed does not provide any information about how it was ultimately resolved. A case may be resolved in a variety of ways, such as settlement out of court, dismissal, or a judgment in favor of the plaintiff or defendant.

Figure 1: Number of FLSA Lawsuits Filed in Federal District Court, Fiscal Years 1991-2012



Source: GAO analysis of Federal Judicial Center data.

Note: An FLSA lawsuit may be filed on behalf of an individual worker or multiple workers. Data on the number of workers involved in each lawsuit were not readily available.

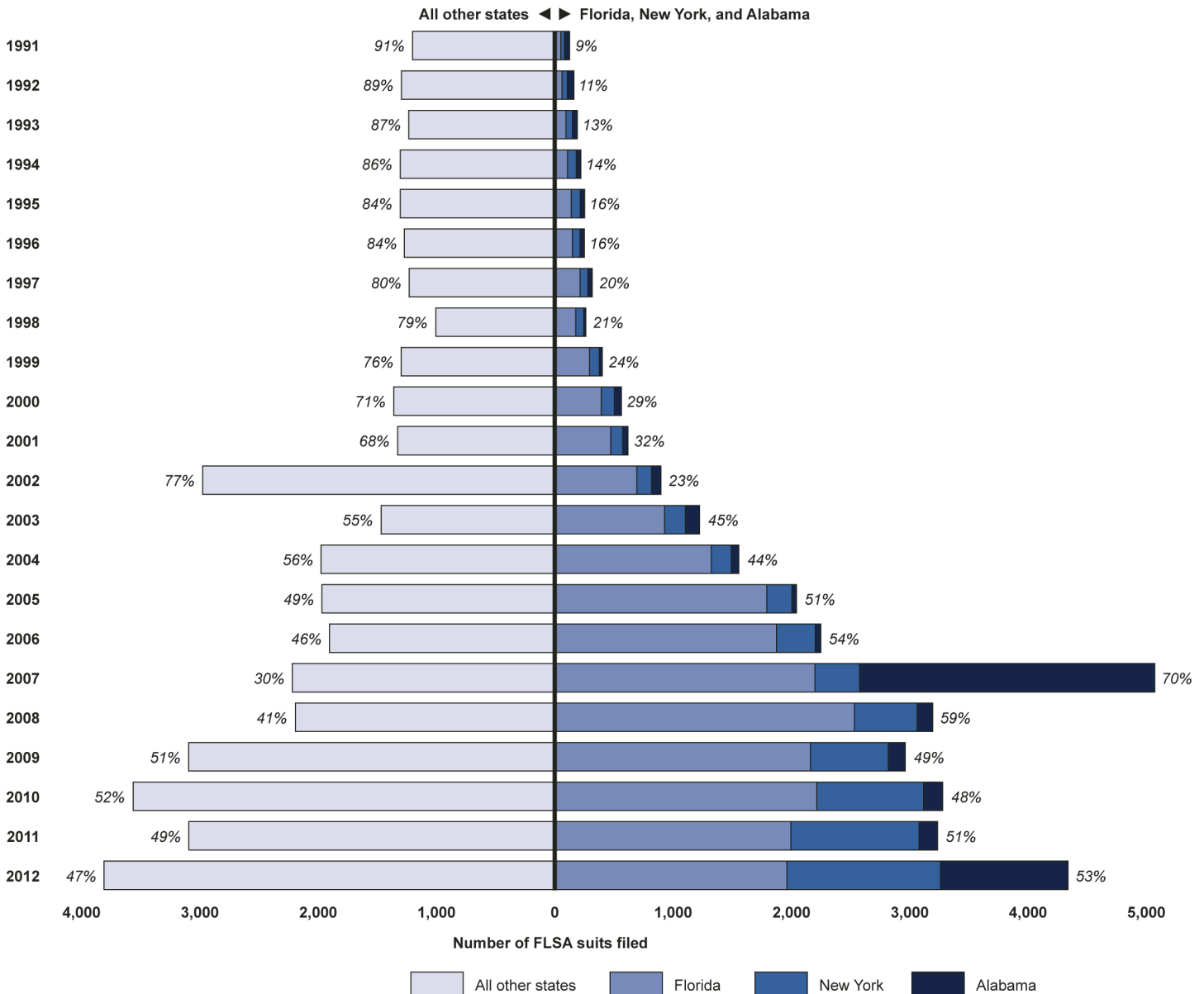
These increases, however, were not evenly distributed across all states. In fact, while federal district courts in most states saw increases in both the number of FLSA lawsuits filed and the percentage of all civil lawsuits filed that were FLSA lawsuits, increases in a small number of states were substantial and contributed significantly to the overall trends. In each of three states—Florida, New York, and Alabama—more than 1,000 more FLSA lawsuits were filed in fiscal year 2012 than in fiscal year 1991 (see fig. 2). Since 2001, more than half of all FLSA lawsuits were accounted for by filings in those three states. About 43 percent of FLSA lawsuits filed nationwide during this period were filed in either Florida (33 percent) or New York (10 percent). At the same time, the percentage of all federal civil cases that were FLSA cases in those three states also increased significantly. In both Florida and New York, growth in the number of FLSA lawsuits filed was generally steady, while changes in Alabama involved sharp increases in fiscal years 2007 and 2012 with far fewer lawsuits filed in other years. Each spike in Alabama coincided with the decertification of at least one large collective action, which likely resulted in multiple

individual lawsuits.¹⁸ From 1991 to 2012, while most states experienced increases in the number of FLSA lawsuits filed, the proportion of civil lawsuits that were FLSA lawsuits, or both, these trends were not universal. In 14 states, the number of FLSA lawsuits filed in 2012 was less than or the same as the number of FLSA lawsuits filed in 1991, and in 10 states the proportion of civil lawsuits FLSA cases made up was smaller in 2012 than in 1991.¹⁹

¹⁸ For example, on August 7, 2006, the Chief District Judge for the Northern District of Alabama decertified a collective action filed by managers of Dollar General stores. In its motion to decertify, the defendant estimated the collective to contain approximately 2,470 plaintiffs. Order on Motion to Decertify, *Brown v. Dolgencorp, Inc.*, No. 02-673 (N.D. Ala. Aug. 7, 2006). Several stakeholders we interviewed cited decertifications of collective actions as a possible cause of spikes in the number of FLSA lawsuits filed.

¹⁹ We conducted sensitivity analyses using different years for the starting and ending points. Changing the start date generally did not have a large effect. Using 2011 rather than 2012 as the final year of the timeframe yielded more states that had fewer FLSA lawsuits filed and more states that had a decrease in the proportion of civil lawsuits filed that were FLSA lawsuits; however, regardless of the final year used, most states showed increases in the number of FLSA lawsuits filed and in the proportion of civil lawsuits that were FLSA lawsuits.

Figure 2: Percentage of FLSA Lawsuits Filed in Federal District Court in Florida, New York, and Alabama Compared to FLSA Lawsuits Filed in All Other States, Fiscal Years 1991-2012



Source: GAO analysis of Federal Judicial Center data.

Note: The large increase in FLSA lawsuits in all other states in fiscal year 2002 can be attributed to a spike in FLSA lawsuits filed in Mississippi in that year, coincident with an effort by a group of attorneys to bring FLSA lawsuits on behalf of certain school workers in Mississippi at that time.

While many factors have likely contributed to the overall increase in FLSA lawsuits and stakeholders we interviewed cited multiple factors, they most frequently cited increased awareness about FLSA cases and activity on the part of plaintiffs' attorneys as a significant contributing factor. Many stakeholders, including two plaintiffs' attorneys, told us that financial incentives, combined with the fairly straightforward nature of many FLSA cases, made attorneys receptive to taking these cases.²⁰ In some states, specifically Florida, where nearly 30 percent of all FLSA lawsuits were filed from 1991 to 2012, several stakeholders, including federal judges, WHD officials, and a defense attorney, told us that plaintiffs' attorneys advertise for wage and hour cases via billboards, radio, foreign language press, and other methods. Two stakeholders we spoke with also said that some plaintiffs' attorneys, when consulted by potential clients about other employment issues, such as wrongful termination, will inquire about potential wage and hour claims; a plaintiffs' attorney we interviewed also said that it is generally easier to evaluate the potential merits of wage and hour cases than of wrongful termination and employment discrimination cases. While a few stakeholders said they did not view increased interest among plaintiffs' attorneys to be a significant factor in the increase in FLSA lawsuits, most did, including some plaintiffs' attorneys. Two stakeholders, including an academic and a representative of an organization that works on behalf of low wage workers, told us that this increased interest was beneficial because it served to counterbalance DOL's limited FLSA enforcement capacity.

In addition, several stakeholders told us that evolving case law may have contributed to the increased awareness and activity on the part of plaintiffs' attorneys. In particular, they mentioned the 1989 Supreme Court decision *Hoffmann-La Roche, Inc. v. Sperling*, which held that federal courts have discretion to facilitate notice to potential plaintiffs of ongoing collective actions.²¹ Historically, according to several stakeholders, the requirement that plaintiffs must "opt in" to a collective action had created some challenges to forming collectives because the plaintiffs' attorneys

²⁰ The FLSA requires the court to award a reasonable attorney's fee to a prevailing plaintiff, to be paid by the defendant. 29 U.S.C. § 216(b). Several stakeholders said plaintiffs' attorneys in FLSA cases typically work on a contingent basis, meaning that, if the case settles, they receive a percentage of the settlement as a fee. However, if the plaintiff does not receive a settlement or win the case, the attorney is not paid for his or her services.

²¹ 493 U.S. 165 (1989).

had to identify potential plaintiffs and contact them to get them to join the collective. Stakeholders we interviewed said the *Hoffmann-La Roche* decision, which made it easier for plaintiffs' attorneys to identify potential plaintiffs, reduced the work necessary to form collectives. In addition, according to several stakeholders we interviewed, case law in other areas of employment litigation, such as employment discrimination, has evolved, making FLSA cases relatively more attractive for plaintiffs' attorneys who specialize in employment litigation and large multi-plaintiff cases. For example, one attorney cited two Supreme Court decisions in the late 1990s that made it more difficult for plaintiffs in employment-based sex discrimination lawsuits to prevail, and led plaintiffs' attorneys to consider other types of employment litigation such as FLSA cases.²²

Stakeholders also cited other factors that may have contributed to the increase in FLSA litigation over the last two decades; however, these factors were endorsed less consistently than the role played by plaintiffs' attorneys. First, a number of stakeholders said that economic conditions, such as the recent recession, may have played a role in the increase in FLSA litigation. Workers who have been laid off face less risk when filing FLSA lawsuits against former employers than workers who are still employed and may fear retaliation as a result of filing lawsuits. In addition, some stakeholders said that, during difficult economic times, employers may be more likely to violate FLSA requirements in an effort to reduce costs, possibly resulting in more FLSA litigation. Moreover, one judge we interviewed noted that the recent recession has also been difficult for attorneys and may be a factor in the types of lawsuits and clients they choose to accept. In addition, ambiguity in applying the FLSA statute or regulations—particularly the exemption for executive, administrative, and professional workers—was cited as a factor by a number of stakeholders. In 2004, DOL issued a final rule updating and revising its regulations in an attempt to clarify these exemptions and provided guidance about the changes, but a few stakeholders told us there is still significant confusion among employers about which workers should be classified as exempt

²² See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). These cases established an affirmative defense for employers in certain employment-based sex discrimination cases under Title VII of the Civil Rights Act of 1964. The Court held that an employer will not be liable for sexual harassment committed by its supervisors if it can prove that (a) the employer exercised reasonable care to prevent and correct sexual harassment, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise avoid harm.

under these categories.²³ Finally, the potentially large number of wage and hour violations was given as a possible reason for the increase in FLSA litigation. Federal judges in New York and Florida attributed some of the concentration of such litigation in their districts to the large number of restaurants and other service industry jobs in which wage and hour violations are more common than in some other industries. An academic who focuses on labor and employment relations told us that centralization in the management structure of businesses in retail, restaurant, and similar industries has contributed to FLSA lawsuits in these industries because frontline managers who were once exempt have become nonexempt as their nonmanagerial duties have increased as a portion of their overall duties. Service jobs, including those in the leisure and hospitality industry, increased from 2000 to 2010, while most other industries lost jobs during that period.²⁴

Many stakeholders also told us that the prevalence of FLSA litigation by state is influenced by the variety of state wage and hour laws.²⁵ For example, while the federal statute of limitations for filing an FLSA claim is 2 years (3 years if the violation is “willful”), New York state law provides a 6-year statute of limitations for filing state wage and hour lawsuits. A longer statute of limitations may increase potential financial damages in cases because more pay periods are involved and because more workers may be involved. Adding a New York state wage and hour claim to an FLSA lawsuit in federal court may expand the potential damages, which, according to several stakeholders, may influence decisions about where and whether to file a lawsuit. In addition, according to multiple stakeholders we interviewed, because Florida lacks a state overtime law, those who wish to file a lawsuit seeking overtime compensation generally must do so under the FLSA.

²³ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541).

²⁴ Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, volume 135, number 1 (Washington, D.C.: January 2012), p. 66.

²⁵ Based on our review of a sample of cases, in fiscal year 2012, almost 30 percent of FLSA lawsuits included a state wage and hour claim. Determining the effect, if any, of state wage and hour laws on federal FLSA litigation is difficult. State laws may vary and many factors influence decisions about where to bring FLSA lawsuits (e.g., in federal or state court, and if in state court, which state).

FLSA Lawsuits Filed in 2012 Were Concentrated in a Few Industries and Most Alleged Overtime Violations

Our review of a representative sample of FLSA lawsuits filed in federal district court in fiscal year 2012 showed that approximately half were filed against private sector employers in four industries.²⁶ Almost all FLSA lawsuits (97 percent) were filed against private sector employers.²⁷ An estimated 57 percent of the FLSA lawsuits filed in fiscal year 2012 were filed against employers in four broad industry areas: accommodations and food services; manufacturing; construction; and “other services” which, in our sample, included services such as laundry services, domestic work, and nail salons.²⁸ Almost one-quarter of all lawsuits filed (an estimated 23 percent) were filed by workers in the accommodations and food service industry, which includes hotels, restaurants, and bars.²⁹ This concentration of lawsuits is consistent with what several stakeholders, including DOL officials, told us about the large number of FLSA violations in the restaurant industry. At the same time, almost 20 percent of FLSA lawsuits were filed by workers in the manufacturing industry. In our sample, most of these lawsuits were filed by workers in the automobile manufacturing industry in Alabama, and most were individual lawsuits filed by workers who were originally part of one of two collective actions that had been decertified.³⁰ It is important to note that,

²⁶ We reviewed only the initial complaint from each lawsuit in our sample. Our review did not include subsequent documents filed as part of the lawsuit, such as those filed by the defendant, amendments to the initial complaint, or final judgments, if any. Therefore, we cannot determine whether the allegations in the complaint were substantiated or whether the allegations changed during the course of the lawsuit. All estimates from our sample have a 95 percent confidence interval of within plus or minus 10 percentage points.

²⁷ In 2010, 2.1 percent of U.S. jobs were in the federal government and 13.6 percent of U.S. jobs were in state or local government, according to the most recently available data from the Bureau of Labor Statistics.

²⁸ We used the North American Industry Classification System (NAICS) when determining the industry of workers filing lawsuits. NAICS is the standard used by federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. See appendix I for more information about our classification of lawsuits by industry.

²⁹ For 14 percent of the FLSA lawsuits in our sample, we were unable to identify the industry in which the workers were employed because information about the industry was not included in the complaint we reviewed from the lawsuit.

³⁰ Our sample included individual lawsuits originating from one of two collective actions initially filed in Alabama against an automobile manufacturer in 2008. In fiscal year 2012, these collective actions were decertified and a number of individual lawsuits were subsequently filed. One of these collective actions also named two staffing agencies as co-defendants.

because of the presence of collective actions, the number of lawsuits filed against an industry's employers may understate the number of plaintiffs involved in these suits.

FLSA lawsuits filed in fiscal year 2012 included a variety of alleged FLSA violations in addition to at least one of the three types of claims—overtime, minimum wage, and retaliation—that each private FLSA lawsuit must at minimum contain.³¹ Allegations of overtime violations were the most common type among those explicitly stated in the documents we reviewed (see fig. 3).³² An estimated 95 percent of the FLSA lawsuits filed in fiscal year 2012 alleged violations of the FLSA's overtime provision, which requires certain types of workers to be paid at one and a half times their regular rate for any hours worked over 40 during a workweek.³³ Thirty-two percent of the FLSA lawsuits filed in fiscal year 2012 contained allegations that the worker or workers were not paid the federal minimum wage, another main provision of the FLSA, while a smaller percentage of lawsuits included allegations that the employer unlawfully retaliated against workers (14 percent).³⁴ In addition, the majority of lawsuits contained other FLSA allegations, most often that the employer failed to keep proper records of hours worked by the employees (45 percent); failed to post or provide information about the FLSA, as required (7 percent); or violated requirements pertaining to tipped workers such as restaurant wait staff (6 percent).

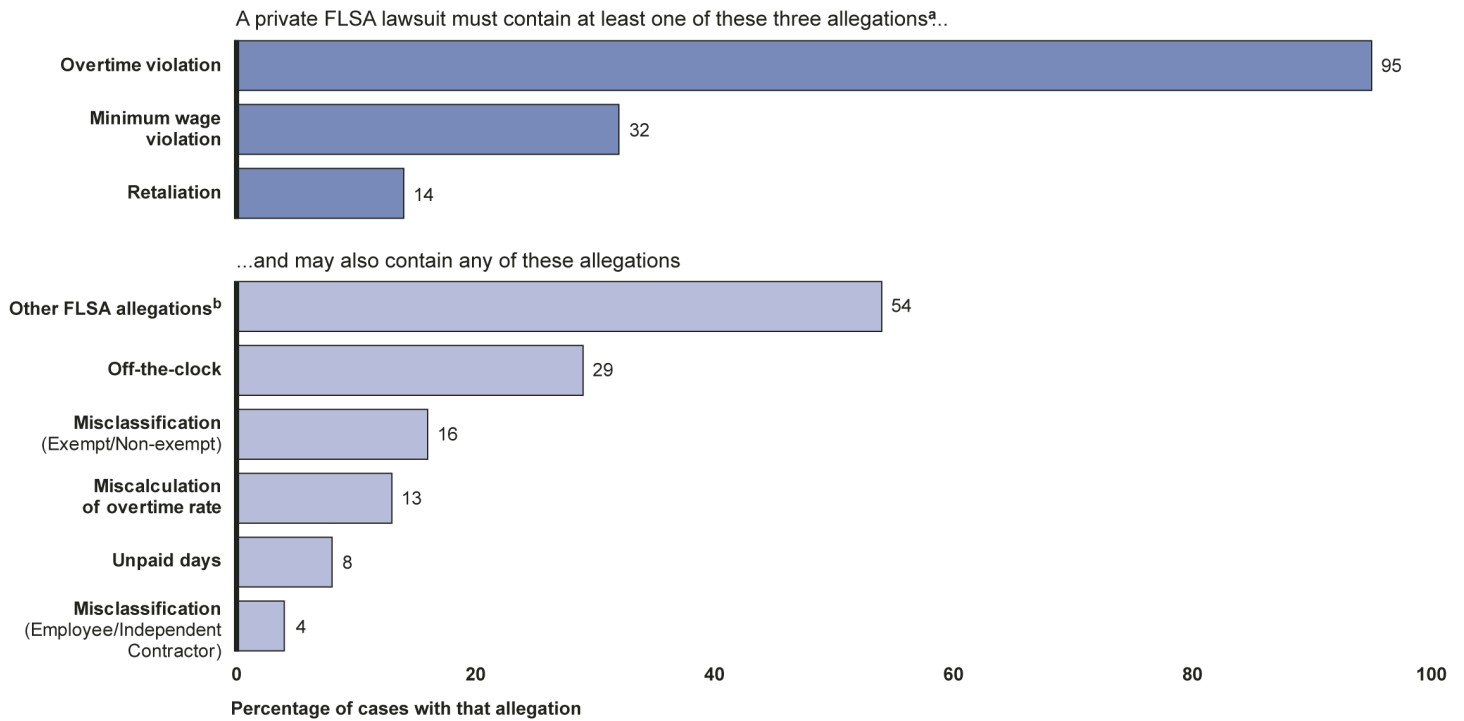
³¹ FLSA lawsuits filed by DOL may contain certain other claims that may not be made by private litigants, such as those related to child labor violations. However, the DOL-initiated lawsuits in our sample did not include such additional allegations.

³² Our estimates of allegations from FLSA lawsuits reflect only the issues that were specifically mentioned in the complaints that we reviewed from each lawsuit. Other lawsuits included in our sample may have involved these issues as well, but they were not specifically mentioned in the complaint, and therefore not counted for purposes of our review.

³³ Unless specifically exempted, workers covered by the FLSA are generally entitled to overtime pay. 29 U.S.C. § 207. However, the FLSA exempts certain types of workers from these requirements, including outside salespersons; workers in bona fide executive, administrative, or professional positions; and workers in certain computer-related occupations. 29 U.S.C. § 213(a)(1) and (17).

³⁴ Many lawsuits included multiple FLSA allegations. For example, the complaint from a particular lawsuit could include allegations of both minimum wage and overtime violations.

Figure 3: Estimated Percentage of FLSA Lawsuits Filed in Federal District Court in Fiscal Year 2012, by Type of Allegation



Source: GAO analysis of complaints from FLSA lawsuits obtained through the federal judiciary’s Public Access to Court Electronic Records (PACER) system.

Note: Percentages do not add to 100 because FLSA lawsuits may contain multiple allegations. Any allegations not specifically mentioned in the lawsuit complaint were not counted. All estimates have a 95 percent confidence interval of within plus or minus 10 percentage points.

^aAn FLSA lawsuit filed by DOL may include certain other allegations, such as those related to child labor violations; however, the DOL-initiated lawsuits in our sample did not include such additional allegations.

^bOther FLSA allegations include recordkeeping violations, failure to post FLSA-related information as required, and violations related to tipped workers, among others.

We also identified more specific allegations about how workers claimed their employers violated the FLSA. Nearly 30 percent of the FLSA lawsuits filed in fiscal year 2012 contained allegations that workers were required to work “off-the-clock” so that they would not need to be paid for that time, and 16 percent alleged that workers were not paid appropriately because they were employees who were misclassified as being exempt

from FLSA protections.³⁵ In a similar proportion of cases (13 percent), alleged overtime violations were claimed to be the result of the miscalculation of the wage rate a worker was entitled to as overtime pay. Such miscalculations could be the result, for example, of an employer not factoring in bonuses paid to workers when determining their regular rate of pay, which is used for the calculation of the overtime pay rate. Other lawsuits included allegations that a worker was misclassified as an independent contractor rather than an employee (4 percent). Independent contractors are generally not covered by the FLSA, including its minimum wage and overtime provisions.³⁶

In our review of FLSA lawsuits filed in fiscal year 2012, we found that a majority of them were filed as individual actions, but collective actions also composed a substantial proportion of these lawsuits. Collective actions can serve to reduce the burden on courts and protect plaintiffs by reducing costs for individuals and incentivizing attorneys to represent workers in pursuit of claims under the law.³⁷ They may also protect employers from facing the burden of many individual lawsuits; however, they can also be costly to employers because they may result in large amounts of damages. We found that an estimated 58 percent of the FLSA lawsuits filed in federal district court in fiscal year 2012 were filed individually, and 40 percent were filed as collective actions. An estimated 16 percent of the FLSA lawsuits filed (about a quarter of all individually-

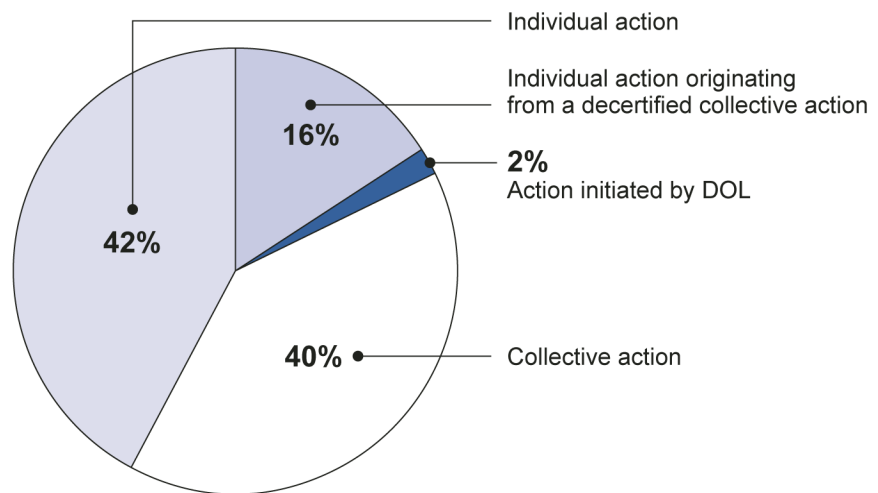
³⁵ For the purposes of our review, we defined an “off-the-clock” allegation as a claim that an employer did not pay workers for all of the hours they worked within a day. Examples include claims that workers were not credited or paid for time worked outside their scheduled work hours, such as the hours when they were donning protective gear or booting up their computers before starting work. Requiring an employee to work off-the-clock can result in both overtime and minimum wage violations. An overtime violation could occur if the hours worked off-the-clock result in more than 40 hours worked during the workweek. A minimum wage violation could occur if a worker’s wage is at or close to the minimum wage, and the extra hours worked without pay result in his or her average hourly wage falling below the minimum wage.

³⁶ We previously found that employee misclassification could be a significant problem with adverse consequences. See GAO, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Insure Detection and Prevention*, [GAO-09-717](#) (Washington, D.C.: Aug. 10, 2009).

³⁷ According to the Supreme Court in *Hoffmann-La Roche, Inc. v. Sperling*, a collective action allows plaintiffs “the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same ... activity.” 493 U.S. 165, 170 (1989).

filed lawsuits), however, were originally part of a collective action that was decertified (see fig. 4). For example, 14 of the 15 lawsuits in our sample filed in Alabama were filed by individuals who had been members of one of two collectives that were decertified in fiscal year 2012.³⁸

Figure 4: FLSA Lawsuits Filed in Federal District Court in Fiscal Year 2012, by Initiation Type



Source: GAO analysis of complaints from FLSA lawsuits obtained through the federal judiciary's Public Access to Court Electronic Records (PACER) system.

³⁸ There are a few examples of spikes in the number of FLSA lawsuits filed in other states in a particular year that may also relate to collective actions. For example, in Nebraska, no more than 19 FLSA lawsuits were filed in any fiscal year from 1991 through 2012, except for 2006 when 176 FLSA lawsuits were filed. In that year, a federal judge for the District Court of Nebraska rejected certification of an FLSA collective action filed by 177 plaintiffs, finding that the plaintiffs' circumstances were not sufficiently similar, and, therefore, the plaintiffs could not litigate their claims collectively.

WHD Plans Its FLSA Enforcement and Compliance Assistance Efforts Annually but Does Not Analyze Relevant Data to Improve Its Guidance

WHD Plans Its FLSA Enforcement Efforts Using an Annual, Data-Based Approach

Consistent with its stated mission of promoting and achieving compliance with labor standards, WHD has an annual process for planning how it targets its FLSA enforcement resources. Each year, WHD's national office plans the share of its enforcement resources that will be used for targeted investigations versus responding to complaints it receives from workers or their representatives about potential FLSA violations.

To plan the deployment of its resources for targeted investigations, WHD identifies broad initiatives that focus on industries it determines have a high likelihood of FLSA violations and where workers may be particularly vulnerable. For example, WHD has targeted industries where workers may be less likely to complain about violations or where the employment relationship is splintered because of models such as franchising or subcontracting. WHD's regional and district offices then refine the list of priority industries to develop plans that focus on the most pressing issues in their areas. Each year, with input and ultimate approval from the national office, WHD's regional and district offices use these plans to target their enforcement resources.

In developing their enforcement plans, WHD considers various inputs. For example, WHD officials consider the nature and prevalence of FLSA violations by using historical enforcement data to study trends in FLSA complaints and investigation outcomes in particular areas. University-based researchers under contract with DOL have also used the agency's historical enforcement data to help it plan for and strategize its FLSA

enforcement efforts.³⁹ In addition, WHD considers data from external sources, such as reports from industry groups, advocacy organizations, and academia. Although WHD's national office is aware of significant FLSA lawsuits through its monitoring of FLSA issues in court decisions, WHD's national, regional, and district offices do not analyze data on the number of FLSA lawsuits filed or use the results of such analyses to inform their enforcement plans. WHD officials noted that data on the number of FLSA lawsuits filed may not provide an accurate or sensitive gauge of FLSA violations because the number of workers involved and the outcomes of these lawsuits are not readily available.

In developing their annual enforcement plans, WHD regional and district offices identify approaches to achieving compliance given the industry structure and the nature of the FLSA violations that they seek to address. According to WHD internal guidance, strategic enforcement plans should not only include targeted investigations of the firms that employ workers potentially experiencing FLSA violations, but they should also contain strategies to engage related stakeholders in preventing such violations. For example, if a WHD office plans to investigate restaurants to identify potential violations of the FLSA, it should also develop strategies to engage restaurant trade associations about FLSA-related issues so that these stakeholders can help bring about compliance in the industry.

In Its Compliance Assistance Efforts, WHD Does Not Analyze Data on Requests for Information on the FLSA in Planning How to Improve Its Guidance

Our prior reports and DOL's planning and performance documents have emphasized the need for WHD to help employers comply with the FLSA. In documenting best practices about planning and performance management, we have suggested that agencies "involve regulated entities in the prevention aspect of performance."⁴⁰ In the case of WHD, this best practice means helping employers voluntarily comply with the FLSA, among other laws. Similarly, DOL's planning and performance documents have emphasized the importance of WHD promoting "sustained and corporate-wide compliance among employers" as a strategic priority.⁴¹ According to federal standards for internal control,

³⁹ David Weil, principal investigator, "Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division," Boston University, May 2010.

⁴⁰ GAO, *Managing for Results: Strengthening Regulatory Agencies' Performance Management Practices*, [GAO/IGD-00-10](#) (Washington, D.C.: Oct. 28, 1999).

⁴¹ See, for example, the *U.S. Department of Labor FY 2012 Annual Performance Report*.

program managers need operational data to determine whether they are meeting their agencies' strategic and annual performance plans as well as their goals for effective and efficient use of resources.⁴² In addition, according to our guidance on the Government Performance and Results Act of 1993 (GPRA),⁴³ for planning and performance measures to be effective, federal managers need to use performance information to identify problems and look for solutions and approaches that improve results.⁴⁴

WHD expects staff in its regional and district offices to play a key role in delivering some forms of compliance assistance. For example, staff in the district offices respond directly to employers' questions about laws such as the FLSA by providing informal guidance, most of which is offered over the phone but is sometimes provided in writing when the guidance is particularly technical. In addition, in each of WHD's five regions, there are three or more staff who specialize in community outreach and planning.⁴⁵ These specialists are involved in planning meetings and developing outreach efforts and other forms of compliance assistance as part of the annual, district-specific enforcement plans. Finally, WHD investigators in the field are responsible for providing information and education to employers during their enforcement actions.

At the national level, WHD publishes FLSA-related guidance including notably its interpretive guidance, though this guidance is not informed by systematic analysis of data on requests for assistance. To develop and assess its interpretive guidance about the FLSA, WHD's national office considers input from its regional offices, but it does not have a data-based approach that is informed by objective input, such as data on areas which

⁴² GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: November 1999).

⁴³ GPRA, Pub. L. No. 103-62, 107 Stat. 285, required federal agencies to develop strategic plans with long-term goals, performance plans with annual goals and measures, and performance reports on prior year performance. GPRA was intended to improve federal program effectiveness, accountability, and service delivery, among other purposes. The GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (2011), amended GPRA and included a provision for agencies to conduct quarterly, data-driven performance reviews.

⁴⁴ GAO, *Managing for Results: Enhancing Agency Use of Performance Information for Management Decision Making*, [GAO-05-927](#) (Washington, D.C.: Sept. 9, 2005).

⁴⁵ WHD has 26 such specialists nationwide.

employers and workers have indicated the need for additional guidance. Officials from WHD's Office of Policy, which is responsible for publishing interpretive guidance about the FLSA, told us they meet with WHD regional and national office leadership weekly to discuss ongoing initiatives and emerging issues. While WHD collects some data on the inquiries it receives from the public via its call center, the Office of Policy does not analyze these data to help guide its development of interpretive guidance. According to WHD officials, the call center frequently refers callers with technical questions to a WHD district office, but WHD does not compile data on FLSA-related questions received by its district offices. In addition, WHD does not use advisory panels to gather input about areas of confusion that might be addressed with the help of additional or clarified interpretive guidance on the FLSA. WHD officials cited the administrative burdens associated with the Federal Advisory Committee Act as a deterrent to using such panels to inform its guidance.

At the same time, despite the issuance of several FLSA-related fact sheets, WHD's publication of FLSA-related interpretive guidance has declined in recent years.⁴⁶ From 2001 to 2009, WHD published on its website, on average, about 37 FLSA interpretive guidance documents annually. However, in the last 3 years (2010 to 2012), WHD published seven FLSA interpretive guidance documents.⁴⁷ WHD officials cited various reasons for this decline, including the resource-intensive nature of developing the guidance; WHD's finite resources; and other priorities,

⁴⁶ Our review of trends in the quantity of interpretive guidance on the FLSA published by WHD included administrator interpretations, opinion letters, non-administrator letters, and field assistance bulletins. Field assistance bulletins, unlike the other forms of interpretive guidance, are addressed to WHD staff; but the field assistance bulletins are published on WHD's public website along with the other forms of guidance. Our review excluded guidance that is not published on WHD's website page for interpretive guidance. For example, our analysis excluded fact sheets, which are general guidance documents published elsewhere on WHD's website, and private correspondence to an individual employer or worker.

⁴⁷ Our analysis included published guidance that WHD subsequently withdrew: 1 opinion letter published in 2002, 1 opinion letter published in 2006, 1 opinion letter published in 2007, 18 opinion letters published in 2009, 2 non-administrator letters published in 2009, and 1 field assistance bulletin published in 2010. The withdrawal of the opinion letter published in 2006 was invalidated by the Court of Appeals for the D.C. Circuit, which held that DOL must use the rulemaking process—which requires DOL to provide public notice and an opportunity to comment on a proposed rule before it is finalized—to change an authoritative interpretation of DOL's regulations under the FLSA. See *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013).

such as promoting compliance with the Family and Medical Leave Act of 1993. In addition, WHD cited its issuance of several FLSA-related fact sheets, which WHD posts separately from interpretive guidance on its website. For example, in September 2013, WHD published several fact sheets about domestic service employment under the FLSA, and, in July 2013, it revised a fact sheet about ownership of tips under the FLSA. According to WHD officials, there is no backlog of requests for FLSA interpretive guidance; however, WHD does not maintain a system for tracking requests for such guidance.

Because WHD does not have a systematic approach for identifying areas of confusion about the FLSA or assessing the guidance it has published, WHD may not be providing the guidance that employers and workers need. Of the nine wage and hour attorneys we interviewed, seven indicated that more interpretive guidance on the FLSA would be helpful to them.⁴⁸ The attorneys cited determining whether workers qualify for exemptions and calculating workers' regular rate of pay for purposes of overtime compensation as examples of FLSA topics on which more guidance would be useful.

Conclusions

Some policymakers have raised questions about the effect that an increasing number of FLSA lawsuits might have on employers' finances and their ability to hire workers or offer flexible work schedules and other benefits, but it is difficult to isolate the effect of these lawsuits from the effects of other influences such as changes in the economy. On the other hand, the ability of workers to bring such suits is an integral part of FLSA enforcement because WHD does not have the capacity to ensure that all employers are in compliance with the FLSA. While there has been a significant increase in FLSA lawsuits over the last decade, the reason for this increase is difficult to determine: it could suggest that FLSA violations have become more prevalent, that FLSA violations have been reported and pursued more frequently than before, or a combination of the two.

Improved guidance from WHD might not affect the number of FLSA lawsuits filed, but it could increase the efficiency and effectiveness of WHD's efforts to help employers voluntarily comply with the law. Without

⁴⁸ These attorneys were a mix of those who tend to represent workers and those who tend to represent employers. For more information on how we identified them, see appendix I.

a precise understanding of the areas of the law and related regulations that are not clear to employers and workers, WHD may not be able to improve the guidance and outreach it provides in the most appropriate or efficient manner. A clearer picture of the needs of employers and workers would allow WHD to more efficiently design and target its compliance assistance efforts, which may, in turn, result in fewer FLSA violations. Moreover, using data about the needs of employers and workers in understanding the requirements of the FLSA would provide WHD greater confidence that the guidance and outreach it provides to employers and workers are having the maximum possible effect. Such data could, for example, serve as a benchmark WHD could use to assess the impact of its efforts.

Recommendation for Executive Action

To help inform its compliance assistance efforts, the Secretary of Labor should direct the WHD Administrator to develop a systematic approach for identifying areas of confusion about the requirements of the FLSA that contribute to possible violations and improving the guidance it provides to employers and workers in those areas. This approach could include compiling and analyzing data on requests for guidance on issues related to the FLSA, and gathering and using input from FLSA stakeholders or other users of existing guidance through an advisory panel or other means.

Agency Comments

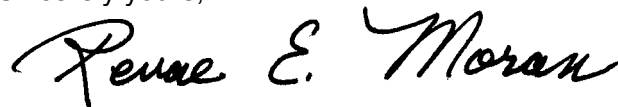
We provided a draft of this report to DOL for review and comment. DOL's WHD provided written comments, which are reproduced in appendix II. WHD agreed with our recommendation that the agency develop a systematic approach for identifying and considering areas of confusion that contribute to possible FLSA violations to help inform the development and assessment of its guidance. WHD stated that it is in the process of developing systems to further analyze trends in communications received from stakeholders such as workers and employers and will include findings from this analysis as part of its process for developing new or revised guidance. WHD also emphasized that it is difficult to determine with sufficient certainty that any particular action contributed to the described increase in FLSA lawsuits. In addition, WHD provided technical comments, which we incorporated as appropriate.

We also provided a draft of this report to the Administrative Office of the United States Courts and the Federal Judicial Center. These agencies had no comments—technical or otherwise—on the report.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the Secretary of Labor, the Director of the Administrative Office of the United States Courts, and the Director of the Federal Judicial Center. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-7215 or moranr@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 key contributions to this report are listed in appendix III.

Sincerely yours,

A handwritten signature in black ink that reads "Reva E. Moran". The signature is written in a cursive, flowing style.

Reva E. Moran
Director, Education, Workforce, and Income Security Issues

Appendix I: Scope and Methodology

Analysis of the Number and Characteristics of FLSA Lawsuits

To describe what is known about trends in the number of lawsuits filed under the Fair Labor Standards Act of 1938, as amended (FLSA), we analyzed federal district court data provided by the Federal Judicial Center.¹ The data included case-specific information for all FLSA lawsuits filed in federal district court during fiscal years 1991 through 2012.² We analyzed these data by year, circuit, state, and district.³ The Federal Judicial Center also provided data on the number of civil lawsuits filed during this time period, which we used to analyze the percentage of civil cases that were FLSA cases. We did not review FLSA lawsuits filed in state courts because data on these cases were not available in a consistent way. To provide context about identified trends such as the increase in FLSA lawsuits, we interviewed a range of FLSA stakeholders, including Department of Labor (DOL) officials, attorneys who specialize in wage and hour cases, federal district court and magistrate judges, officials from organizations representing workers and employers, and academics. To ensure balance, we interviewed both attorneys who represent plaintiffs and those who represent defendants. We identified some of these attorneys through organizations that represent workers, such as labor unions and advocacy organizations such as the National Employment Law Project, and industry organizations such as the National Small Business Association. In selecting judges to interview, we chose from districts with a significant increase in FLSA litigation in recent years as well as districts that had not seen such increases to ensure a variety of perspectives.

To provide information on selected characteristics of FLSA lawsuits filed, we reviewed a nationally representative random sample of complaints

¹ The Federal Judicial Center is the research and education agency of the federal judicial system. Among other things, it compiles data from the federal courts via the Administrative Office of the U.S. Courts for research purposes.

² Data on FLSA lawsuits in federal courts of appeals were not captured. FLSA lawsuits were identified as those with a “nature of suit” code of 710 (Fair Labor Standards Act). The nature of suit codes are a tool for categorizing the types of cases filed in the federal courts. The appropriate code is recorded by the attorney filing the lawsuit and filed with the court. Data are not readily available on the number of FLSA lawsuits that were collective actions or the number of plaintiffs contained in collective actions. Therefore, we were unable to determine the number of plaintiffs involved in these lawsuits.

³ We included data on the number of FLSA lawsuits and total civil lawsuits filed in federal district courts in Puerto Rico, Guam, the U.S. Virgin Islands, the Northern Mariana Islands, and the District of Columbia. However, we excluded these areas when we conducted trend analyses that tallied states.

from FLSA lawsuits filed in federal district court during fiscal year 2012. The sample of 97 complaints from FLSA lawsuits was drawn from the case-specific FLSA lawsuit data provided by the Federal Judicial Center.⁴ The filing date was determined by the “filing date” field, which records the date a case was docketed in federal court. Cases that were initially filed in federal court, cases removed from state court to federal court, cases transferred from another federal court, and cases for which a new federal docket was otherwise created during fiscal year 2012 (e.g., an individual docket created in fiscal year 2012 after a previously filed collective action was decertified) could be in our sample. We did not review cases from the federal courts of appeals because data linking appeals to their corresponding cases filed in district court were not readily available. All estimates from our sample have a 95 percent confidence interval of within plus or minus 10 percentage points. 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 10 percentage points). This is the interval that would contain the actual population value for 95 percent of the samples we could have drawn.

After the sample was drawn, we used the docket number associated with each lawsuit in the sample to retrieve the complaint from the Public Access to Court Electronic Records (PACER) database and review and record information about the lawsuit.⁵ In cases where multiple complaints were associated with a docket, such as amended complaints, we used information from the first available complaint in the docket.⁶ We selected

⁴ After drawing the sample, we identified four cases that were given the code 710, indicating that they were FLSA-related cases, but they were actually petitions to compel arbitration of an FLSA claim under the Federal Arbitration Act. Because these were not cases filed under the FLSA, we excluded and replaced those cases in the sample.

⁵ PACER is an electronic public access service that allows users to obtain case and docket information from federal appellate, district, and bankruptcy courts via the Internet. PACER is administered by the Administrative Office of the U.S. Courts.

⁶ In some cases, this approach meant we reviewed a complaint that had been initially filed prior to fiscal year 2012. For example, when individual actions were initiated in fiscal year 2012 as a result of the decertification of an earlier collective action, the first available complaint in each individual docket was the original collective action complaint (which had been filed prior to fiscal year 2012). Thus, we recorded identical information for individual actions that originated from the same collective action.

this approach to ensure that we recorded information for each individual case at approximately the same stage of litigation. We relied solely on information that could be ascertained from the complaint; we did not do additional research to confirm the accuracy of the information.⁷ With respect to our analysis of the specific types of violations alleged in our sample of complaints, our estimates include only those cases in which an allegation was explicitly made in the complaint. It is possible that a larger percent of FLSA litigation involved specific issues that were not alleged explicitly in the complaint and instead were described more generically as overtime or minimum wage violations.⁸ In addition, we did not review subsequent documents filed in the case beyond the initial complaint. Therefore, our review does not provide any information about how these lawsuits were ultimately resolved. Information on the number of plaintiffs taking part in a collective action was neither consistently available in the complaints nor was it precise when it was available.

Our analysis with regard to the industries in which FLSA lawsuits are filed is based on the number of FLSA lawsuits filed, not the number of plaintiffs included in those lawsuits. A single collective action represents multiple plaintiffs. Therefore, the number of FLSA lawsuits filed against employers in a specific industry may not accurately reflect the number of workers or relative frequency of workers claiming FLSA violations by industry.

The complaint from each lawsuit was reviewed by a GAO analyst and a GAO attorney to identify the FLSA violation(s) it alleged and other information, such as whether the lawsuit was a collective action, whether there were associated allegations of state wage and hour law violations,

⁷ For example, we did not research a specific defendant's company name in order to determine the industry of the worker or workers who filed the complaint, if the actual complaint did not provide enough information to make this determination.

⁸ As a hypothetical example, an alleged overtime violation may have resulted from workers being required to work "off-the-clock," but the complaint may simply have described the issue as an overtime violation.

and the industry of the worker or workers who filed the lawsuit.⁹ In cases in which the two reviewers recorded information about the lawsuit differently, a discussion between them was held to resolve the difference.

We assessed the reliability of the data received from the Federal Judicial Center by interviewing officials at the Administrative Office of the U.S. Courts and the Federal Judicial Center and by reviewing documentation related to the collection and processing of the data. In addition, we conducted electronic testing to identify any missing data, outliers, and obvious errors. We determined that certain data fields were not sufficiently reliable, and therefore did not use them. For example, we could not analyze data about judgments such as the amount of monetary awards in FLSA lawsuits because, for a large percentage of the cases, the information on the judgment was missing. We determined that the data included in our report were sufficiently reliable for our purposes.

Analysis of WHD's Planning Efforts

To describe how DOL's Wage and Hour Division (WHD) plans its FLSA enforcement and compliance assistance efforts, we reviewed the agency's planning and performance documents, as well as its published guidance on the FLSA. In addition, we interviewed DOL officials in WHD's Office for Planning, Performance, Evaluation, and Communications; Office of Policy; two regional WHD offices; and DOL's Office of the Solicitor about the agency's enforcement and compliance assistance activities. In addition, we asked the other stakeholders we interviewed about their views of WHD's enforcement and compliance assistance efforts. To provide context throughout the report, we also reviewed relevant federal laws and regulations. Finally, we compared WHD's planning process to internal control standards (see GAO, *Standards for Internal Control in The Federal Government*, [GAO/AIMD-00-21.3](#), Washington, D.C.: November 1999) and best practices that we have previously identified (see GAO, *Managing for Results: Enhancing Agency*

⁹ We used the North American Industry Classification System (NAICS) as a reference when determining the industries in which the workers who filed the lawsuits worked. The NAICS is the standard used by federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. In some cases we were unable to determine the industry of the worker or workers who filed the lawsuit from the information contained in the complaint. The NAICS codes for the industries that appeared most frequently in our sample—accommodations and food services; manufacturing; construction; and other services (excluding public administration)—were 72, 31-33, 23, and 81, respectively.

Use of Performance Information for Management Decision Making, [GAO-05-927](#), Washington, D.C.: Sept. 9, 2005; and *Managing for Results: Strengthening Regulatory Agencies' Performance Management Practices*, [GAO/GGD-00-10](#), Washington, D.C.: Oct. 28, 1999). We did not assess WHD's implementation of its enforcement and compliance assistance plans.

We conducted this performance audit from November 2012 to December 2013 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.

Appendix II: Comments from the Department of Labor

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210



November 27, 2013

Barbara D. Bovbjerg
Managing Director
Education, Workforce, and
Income Security Issues
U.S. Government Accountability Office
Washington, D.C. 20548

Dear Ms. Bovbjerg:

The Department of Labor's Wage and Hour Division (WHD) appreciates the opportunity to submit a statement in response to the recommendation in the Government Accountability Office (GAO) Draft Report (Report) entitled "*Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Improving Its Guidance*" (GAO-14-69).

GAO's original objectives in conducting this study, as outlined in its letter to then-Secretary of Labor Hilda L. Solis on December 6, 2012, were to examine: (1) the types of Fair Labor Standards Act (FLSA) lawsuits that have been filed in recent years and what is known about their impact on employers and employees, and (2) the extent to which any Department of Labor (DOL or Department) policy or operations changes have affected the number and types of FLSA lawsuits filed. It is the Department's understanding, based on conversations with GAO staff, that GAO concluded it cannot attribute the increase in FLSA lawsuits, which accelerated more than a decade ago, to changes in DOL policies or operations. Accordingly, GAO modified its original objectives to examine the two questions that are addressed in the Report: (1) what is known about the number of FLSA lawsuits filed, and (2) how does WHD plan its FLSA enforcement and compliance assistance efforts. As the Report states, GAO ultimately concluded that "many factors have likely contributed to the overall increase in FLSA lawsuits" (pg. 11); the Report discusses a number of possible factors dating as far back as 1989 (pgs. 11-14). The Report further notes that, "[w]hile there has been a significant increase in FLSA lawsuits over the last decade, the reason for this increase is difficult to determine: it could suggest that FLSA violations have become more prevalent, that FLSA violations have been reported and pursued more frequently than before, or a combination of the two" (pg. 24). We agree that the reasons for the increase in FLSA litigation are varied, complex, and subject to speculation and that it is difficult to show with sufficient certainty that a particular action resulted in, or contributed to, the increase. We also agree with the Report's conclusion that the ability of workers to bring private lawsuits is an integral part of FLSA enforcement because WHD does not have the capacity to ensure that all employers are in compliance with the FLSA.

The GAO Report does contain one recommendation for the Department, based on its observation that “[b]ecause WHD does not have a systematic approach for identifying areas of confusion about the FLSA or assessing the guidance it has published, WHD may not be providing the guidance that employers and workers need” (pg. 23). Our current and planned actions are described below.

Recommendation:

That the Secretary of Labor direct the Wage and Hour Administrator to develop a systematic approach for identifying and considering areas of confusion that contribute to possible FLSA violations to help inform the development and assessment of its guidance.

WHD Response:

WHD agrees that it can institute additional processes for identifying and considering areas of the FLSA that could benefit from development of guidance or revisions to existing guidance. WHD’s Office of Policy is in the process of developing systems to further analyze trends in correspondence and communications received from stakeholders, including workers and employers. The agency will include findings from this analysis of correspondence and communications as part of the process for developing new or revised guidance. WHD will continue to include in its process for developing guidance the various other considerations that it has already identified to GAO, such as observations from its own enforcement efforts and information from regular communications with its regional officials. The overarching purpose of WHD’s guidance efforts is to increase compliance with the FLSA, so its process for developing new or revised guidance must include consideration of all factors that suggest a particular guidance document will lead to an increase in compliance.

Again, thank you for the opportunity to comment on the Report. If you have any questions, please do not hesitate to contact us.

Sincerely,



Laura A. Fortman
Principal Deputy Administrator

Appendix III: GAO Contact and Staff Acknowledgments

GAO Contact

Revae Moran, (202) 512-7215 or moranr@gao.gov

Staff Acknowledgments

In addition to the contact named above, Betty Ward-Zukerman (Assistant Director), David Barish, James Bennett, Ed Bodine, David Chrisinger, Sarah Cornetto, Justin Fisher, Joel Green, Ying Long, and Walter Vance made significant contributions to this report. Also contributing to the report were Jessica Botsford, Susanna Clark, Melinda Cordero, Ashley McCall, Sheila McCoy, Drew Nelson, Catherine Roark, Sabrina Streagle, Anjali Tekchandani, and Kimberly Walton.

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