

**TESTIMONY PREPARED FOR DELIVERY BY  
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BEFORE THE  
SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS**

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Good afternoon. My name is Jim Leonard. I was an attorney for the U.S. Department of Labor for 22 years until I retired a while ago, and I am now on the advisory board of the National Wage and Hour Clearinghouse and also do volunteer legal work for two not-for-profit advocacy organizations -- Farmworker Justice and the Child Labor Coalition. Thank you for inviting me to testify today on the important subject of how the Fair Labor Standards Act can be better used to prevent the exploitation of employees with disabilities and other vulnerable workers. This exploitation can include, among other problems, paying workers not in cash, but instead with in-kind payments that are not in accord with the restrictions of the Fair Labor Standards Act.

The Fair Labor Standards Act (“FLSA”) contains minimum wage and overtime pay requirements for covered workers. The federal minimum wage is now \$6.55 per hour, and is scheduled to go up to \$7.25 per hour on July 24, 2009. The term “wage” means not only cash, but is also defined to include “the reasonable cost, as determined by the Secretary of Labor, of furnishing [any] employee with board, lodging, or other facilities, if [these] facilities are customarily furnished by [the] employer to his employees . . . .”<sup>1</sup> There are certain restrictions on how an employer can count the cost of lodging, meals, and other so-called facilities towards his wage obligation, which I will explain later.

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<sup>1</sup> FLSA section 3(m), 29 U.S.C. 203(m).

### *Handicapped Workers (FLSA Section 14(c))*

The FLSA also contains various exemptions that excuse an employer, in specified circumstances, from following some of its requirements. One of these exemptions relates to handicapped workers. Specifically, the law says that workers whose “earning or productive capacity is impaired by age, physical or mental deficiency, or injury, can be paid less than the minimum wage, so long as the wage paid is “related to the individual’s productivity” and is “commensurate” with the wages paid to non-handicapped workers in the vicinity who do “essentially the same type, quality, and quantity of work.”<sup>2</sup> An employer cannot employ any handicapped workers at less than the minimum wage unless the employer first receives a special certificate from the U.S. Department of Labor (“DOL”) authorizing such sub-minimum wage rates. The employer, in order to receive such a special certificate, has to provide written assurances to DOL that, among other things, he will maintain records that document the employees’ disability; their productivity; any times studies or other work measurements; and prevailing wage surveys that were used to set the handicapped workers’ wages. In addition, the employer must assure that he will “review” the wages of workers paid on an hourly basis at least once every six months, and will “adjust” the wages of all employees at least once a year to reflect changes in the prevailing wage rate paid to non-handicapped workers in the vicinity doing essentially the same work.

DOL’s regulations require that any employer of handicapped workers who has a special FLSA section 14(c) certificate must maintain, and have available for inspection, records that support the assurances that the employer made in the application for the

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<sup>2</sup> FLSA section 14(c)(1), 29 U.S.C. 214(c)(1).

certificate.<sup>3</sup> These records must show critical information, namely, verification of the worker's disability; evidence of the productivity of each worker, gathered on a continuing basis or at periodic intervals; the prevailing wages paid to non-handicapped workers in industry in the vicinity for essentially the same type of work; and the production standards and supporting documentation for non-handicapped workers for each job performed by the employer's handicapped workers.

If the policy goal of DOL's Wage and Hour Division, which enforces the FLSA, is to protect handicapped workers from exploitation, then there are two serious problems with Wage-Hour's regulatory approach.

The first problem is that when an employer first applies for a section 14(c) certificate, he does not have to send to DOL any information showing the employer's evaluation of the worker's productivity; this information does not have to be sent in until the employer applies to renew the certificate. The application form – FormWH-226 -- specifically says this in Items 10 and 11. Any certificate that is issued lasts for one year if the work is in competitive industry (such as a turkey processing plant), and for two years in other employments, such as sheltered workshops and residential care facilities. The application form and the regulations ought to be changed to require the employer to send in all this information not only with any application to renew the FLSA section 14(c) certificate, but also when any wage changes are made, including at the time of hiring handicapped workers after the first certificate is issued to an employer. DOL then would have in its possession information that would indicate problems, irregularities, or violations that warrant checking further into the matter.

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<sup>3</sup> The special recordkeeping regulation for handicapped workers is in 29 C.F.R. 525.16.

The second problem relates to those situations in which an employer has handicapped workers but does not have an FLSA section 14(c) certificate. In such cases, DOL does not have adequate procedures in place to protect those handicapped workers from abuse. There are several abuses that could occur.

- One abuse is that the employer may just be paying less than the minimum wage to handicapped workers and hoping that DOL will not find out. This is a clear violation of the law because no employer can pay handicapped workers less than the minimum wage without a section 14(c) certificate. The only way that DOL can learn about such violations is if it receives a complaint from an employee, a business competitor, or some other source, or if DOL, even in the absence of a complaint, decides to target the employer for an investigation. In order to do a better job of finding employers who are violating the law, DOL needs to make more use of the “eyes and ears” of individuals and organizations who are most likely to have knowledge of workplace practices affecting handicapped workers. DOL has in recent years had various so-called “partnerships” with employers and employer organizations, but very few if any partnerships with worker advocacy organizations that have ties to local communities. Just as some cities work closely with community groups to bring criminal activity to their attention, so DOL must expand its outreach in this manner. If DOL had had such partnerships in place, the many organizations that knew what was happening to Henry’s Turkey Service workers at the West Liberty Foods plant and about the shoddy lodging facilities in Atalissa, Iowa, would have been much more likely to bring the facts to DOL’s attention.

- Another abuse is that the employer may have a section 14(c) certificate and not seek to renew it but still pay his handicapped workers less than the minimum wage. This, too, is a clear violation of the law. I'm not sure what DOL now does when an employer does not renew a section 14(c) certificate, but DOL should follow up with the employer, by phone, letter, or even my sending an investigator to look into the matter.
- Another possibility for abuse occurs when the prevailing wage for the particular job may be high enough that even when the lower productivity of the handicapped worker is taken into account, the handicapped worker's commensurate wage would be above the minimum wage. Here, the employer does not need an FLSA section 14(c) certificate. Nevertheless, there may be handicap discrimination problems under the Americans with Disabilities Act, and this kind of situation is one in which there could also be FLSA violations as well. Here, too, if DOL had partnerships with worker advocacy organizations, it could rely on these "eyes and ears" to alert it to possible violations of the law.

*Board, Lodging, and "Other Facilities" Wage Credit (FLSA Section 3(m))*

Under section 3(m) of the FLSA all workers, including handicapped workers, can be paid not just in cash, but also in "board, lodging, or other facilities" that are provided primarily for the benefit or convenience of the employee. One example of the "other facilities" that have been deemed to be primarily for the benefit or convenience of the employee are the cost of transportation provided by the employer to employees from

home to work before the workday begins and back home again at the end of the workday, provided that the employee is not doing compensable work (such as driving the vehicle).<sup>4</sup> If any facility is furnished to an employee in violation of federal or state or local law, it cannot count towards the employer's FLSA wage obligations.<sup>5</sup>

It is important to note, in light of the Atalissa, Iowa, situation involving Henry's Turkey Service and West Liberty Foods that prompted this hearing, that these FLSA limitations apply only to deductions from cash wages. The FLSA does not restrict, for example, deductions from Social Security disability payments. I do not know if the Social Security Act or its regulations have any restrictions in this regard, but the FLSA does not.

DOL needs to think of ways of strengthening section 3(m) by regulatory action, and Congress should also look to see whether legislative action is also needed. The key to section 3(m)'s protections is that the employer cannot deduct from cash wages any "board, lodging, or other facilities" that are primarily for the benefit or convenience of the *employer*; and even with the "board, lodging, or other facilities" are primarily for the benefit or convenience of the *employee*, the employer cannot deduct more than the "reasonable cost." Most unfortunately, DOL has recently taken steps to weaken these two requirements. I will mention these steps briefly, and can elaborate, if you wish more detail, during any question and answer period.

First, DOL, contrary to the rulings of every court that has faced the issue, has taken the position that the costs that an employer expends to recruit workers to come to work for him are primarily for the benefit of the employee, and hence can be deducted from

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<sup>4</sup> 29 C.F.R. 531.32(a).

<sup>5</sup> 29 C.F.R. 531.31.

wages even if those deductions reduce the employee's wage below the minimum wage. For years DOL took no position on this issue, stating that it was reviewing the matter. Then out of a clear blue sky, DOL, in the preamble of a final regulation issued on December 18, 2008, stated that these recruitment expenses were primarily for the benefit of the employees. There was no proposed regulatory change to this effect in the proposed regulations, nor did the final regulations contain a regulatory change that adopted the position. Instead, the preamble of the final regulation, for the first time, announced DOL's position.

Second, DOL has proposed a regulatory change that would permit an employer to deduct from an employee's cash wages an amount that is greater than the cost to the employer of the meals that the employer furnishes to an employee.<sup>6</sup> This proposed regulation, fortunately, has not been issued in final form, and is apparently on hold.

#### *More Aggressive DOL Enforcement of the FLSA*

The best way for DOL to prevent worker exploitation across the board is for DOL to be more aggressive in the remedies it seeks under the FLSA when it finds that an employer has violated the law. The FLSA permits DOL to recover back wages that are due going back two years or, if the employer's violations are willful, going back three years. DOL, though, typically seeks back wages going back only two years, even when the violations are willful. The FLSA also authorizes DOL to recover -- in addition to back wages -- an equal, additional amount as liquidated damages. DOL rarely if ever seeks liquidated damages unless it files a lawsuit against an employer that has been

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<sup>6</sup> See Notice of Proposed Rulemaking by the Department of Labor, 73 Fed. Reg. 43654, 43660 (July 28, 2008).

investigated. But DOL files lawsuits in only about 1 percent of the total number of FLSA cases that DOL investigates.<sup>7</sup> DOL investigators in effect reward employers who violate the law because the employers are not even asked to pay interest on the money they have withheld from employees, so it is cheaper for an employer to pay back wages after an investigation than to pay the wages when they are due. There is even some indication that DOL investigators may point out to employers who owe back wages that the employers would be better off paying only back wages, since they might have to pay an equal, additional amount as liquidate damages if the case goes to court.

DOL can also impose civil money penalties, of up to \$1,000 for each violation, against any person who repeatedly or willfully violates the minimum wage or overtime pay provisions of the FLSA. Moreover, if DOL files a lawsuit, it can seek an injunction barring the employer from committing further violations. If an employer violates an injunction that the court issues, the employer can be held in contempt of court and be forced to pay the costs that DOL incurs in proving that the employer has violated the injunction, and also be required to take such other corrective measures as the court, in its sound discretion, considers appropriate.

Another remedy that is available, though rarely sought by DOL, is a so-called hot goods injunction. This is an emergency order, issued by a court, that bars shipment in the channels of interstate commerce of any goods that have been produced by employees who have been paid in violation of the FLSA's minimum wage or overtime pay (or child labor) provisions. *Any* person – not just the employer of the underpaid employees – can

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<sup>7</sup> In Fiscal Year 2007, the latest year for which data are publicly available, DOL filed only 151 FLSA lawsuits, whereas DOL Conducted more than 11,000 FLSA investigations. (The exact number of FLSA investigations may have been considerably higher than this, but this information is not available on DOL's Web site.)

be sued in a hot goods case, and can be barred from shipping such “tainted” goods in his possession. In the Atalissa, Iowa, situation, the companies that could have been sued in a hot goods case would include not only Henry’s Turkey Service, but also West Liberty Foods and any food brokers or wholesalers who had possession of the turkeys, if any of the turkeys were in the flow of commerce that would eventually go out of Iowa into another state.

Why is DOL not being more aggressive in enforcing the FLSA? As I see it, there are two basic reasons.

First, the number of Wage and Hour Division investigators and DOL lawyers has declined markedly in recent decades, even though the number of employees in the workforce, and the various laws that DOL has to enforce, have increased significantly. Here are some statistics. From Fiscal Year 1975 to Fiscal Year 2004, the number of Wage-Hour investigators declined from 921 to 788, a reduction of 14 percent.<sup>8</sup> These investigators enforce not only the FLSA, but also many other laws, including the Family and Medical Leave Act (FMLA), the Migrant and Seasonal Agricultural Worker Protection Act (AWPA or MSPA), the Service Contract Act, the Davis-Bacon Act, and other laws. Moreover, the investigators do not spend all of their time investigating employers for possible violations of the law; they also engage in “compliance assistance” (e.g., giving lectures to employer groups to educate them about the law’s requirements), take part in training, and perform other tasks). In 2004, the actual amount of hours spent

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<sup>8</sup> Brennan Center for Justice, Economic Policy Brief, No. 3, September 2005, available on-line at [www.brennancenter.org/dynamic/subpages/download\\_file\\_8423.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_8423.pdf). The 788 investigators in FY 2004 were only part of Wage-Hour’s total staff, which numbered 1,442 employees; the other staff included supervisors, analysts, technicians, and administrative employees. (*Department of Labor FY 2009 Performance Budget*, [www.dol.gov/dol/budget/2009/PDF/CBJ-2009-V2-03.pdf](http://www.dol.gov/dol/budget/2009/PDF/CBJ-2009-V2-03.pdf), pp. ESA-35 and ESA-36.)

in investigative activity was 1,000,739.<sup>9</sup> This is the equivalent of 544 full-time investigators to enforce the FLSA and the various other laws.<sup>10</sup> The laws that these investigators enforce protect over 135 million workers in more than 7.3 million establishments.<sup>11</sup> Accordingly, each full-time investigator is responsible for protecting 245,000 workers..

DOL's legal staff – known as the Solicitor's Office -- has also been cut drastically, especially since 2001. In 1992, the Solicitor's Office had 786 employees,<sup>12</sup> but by 2001, it was down to 709 employees, and in January 2007, it had only 590 employees.<sup>13</sup> These employees enforce not only the FLSA but also many other laws such as the Occupational Safety and Health (“OSHA”), the Mine Safety and Health Act (“MSHA”), the Employee Retirement Income Security Act (“ERISA”) and many others. As a result of these many responsibilities the Solicitor's Office lacks the ability to litigate many FLSA cases – and cases under other laws as well -- aggressively. The contrast in a 20-year period, from Fiscal Year 1987 to Fiscal Year 2007, is striking. In 1987 DOL's legal staff filed 705 FLSA lawsuits, whereas in 2007 it filed only 151, a

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<sup>9</sup> DOL response to Freedom of Information Act (FOIA) request.

<sup>10</sup> A full-time employee works 40 hours per week for 52 weeks, or 2,080 hours per year. It would take 481 such full-time investigators to spend 1,000,739 hours in investigative activity. Since even full-time employees take vacations and holidays, and are sometimes ill, it is more realistic to expect a full-time investigator to be absent from work roughly six weeks per year, and thus on the job for 46 weeks, or 1,840 hours per year. It would take 544 such investigators to accumulate a total of 1,000,739 investigative hours.

<sup>11</sup> *Department of Labor FY 2009 Performance Budget*, [www.dol.gov/dol/budget/2009/PDF/CBJ-2009-V2-03.pdf](http://www.dol.gov/dol/budget/2009/PDF/CBJ-2009-V2-03.pdf), p. ESA-35.

<sup>12</sup> U.S. Department of Labor Budget Submission to Congress for Fiscal Year 1993.

<sup>13</sup> “Legal Services,” in volume 3 of the U.S. Department of Labor's *FY 2008 Detailed Budget Documentation*, pp. DM-28 to DM 28, available at [www.dol.gov/dol/budget/2008/PDF/CRJ-V3-02.pdf](http://www.dol.gov/dol/budget/2008/PDF/CRJ-V3-02.pdf). Although the Solicitor's office had 590 employees in January 2007, it had funding to pay for only 551 employees. *Id.* at DM-28.

decline of 79 percent.<sup>14</sup> The FLSA authorizes lawsuits not only by DOL, but also by aggrieved employees represented by private attorneys. In 1987 there were 773 private FLSA lawsuits, and in 2007 there were 7,159 private FLSA lawsuits, an 826 percent increase.<sup>15</sup> This means that in 1987, DOL filed 48 percent of all FLSA lawsuits, but only 2 percent in fiscal year 2007.

The second main reason that DOL has not been aggressively enforcing the FLSA is that it needs to rethink, from top to bottom, its enforcement strategies, in light of its greatly reduced staff. There are too many issues it has to address under this heading to discuss today, but here are just a couple key ones that would benefit all workers (including handicapped workers).

In the case of the Solicitor's Office, since it is filing only 2 percent of FLSA lawsuits, it needs to focus more on lawsuits of a type that the private bar tends not to handle.

In the case of DOL's Wage and Hour Division, there are three steps it could take right away. One is to propose amendments to various regulations that would strengthen the existing law. Many FLSA regulations are far out of date and do not reflect key court decisions that have strengthened the FLSA. A second step is to publicize much more widely and graphically the results of investigations in which employers pay back wages found due. The third step that Wage-Hour could take, mentioned above, is to work more closely with worker advocacy organizations, as well as with lawyers in private practice who represent employees in FLSA cases. This would leverage the power that DOL, in

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<sup>14</sup> Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, 1987 Annual Report, Table C-2 (Washington, D.C., 1987); Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, 2007 Annual Report, Table C-2 (Washington, D.C., 2007).

<sup>15</sup> See previous footnote.

order to better protect vulnerable workers whose wages in many situations, it is not an exaggeration to say, have been stolen by their employers.