

Minimum-Wage Enforcement and the Low-Wage Labor Market

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Task Force Working Paper #WP11

Prepared for the April 16, 1999, conference
“Raising the Floor: Strategies for Upgrading Low-Wage Labor Markets”

August 1, 1999

Draft in Circulation

This paper was prepared for the Task Force on Reconstructing America’s Labor Market
Institutions, with support from the Ford and Rockefeller Foundations.

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Foreword

The Task Force on Reconstructing America's Labor Market Institutions

The world of work is changing, but the traditional structures governing the labor market, in place since the New Deal, no longer serve the needs of workers and their families or of corporations seeking to compete in a global economy.

The mandate of the Task Force on Reconstructing America's Labor Market Institutions is to provide a body of evidence that helps policymakers and practitioners structure a national discussion on how to update the nation's labor market institutions—resolving the mismatch between a fundamentally new economy and a set of inappropriate intermediaries, laws, and corporate practices.

The efforts of Task Force members are divided among three working groups, each charged with examining a particular aspect of this labor market mismatch: the Working Group on the Social Contract and the American Corporation, the Working Group on Low-Income Labor Markets, and the Working Group on America's Next Generation Labor Market Institutions.

"Raising the Floor: Strategies for Upgrading Low-Wage Labor Markets," Task Force Conference, April 16, 1999

One of the most striking outcomes of the dismantling of post-War economic institutions has been the deterioration of conditions for workers at the bottom end of the U.S. labor market. On April 16, 1999, the Working Group on Low-Wage Labor Markets organized a day-long conference to examine both legislative and worker-led options for raising the floor for low-wage workers, bringing together researchers, policymakers, and representatives of community organizations and labor unions.

The meeting opened with a discussion of minimum-wage enforcement as only one of many strategies for upgrading low-wage labor markets, exploring the role that a breakdown in government enforcement has played in the growth of low-wage labor markets. To inform this conversation, Howard Wial of the Keystone Research Center prepared this paper, "Minimum-Wage Enforcement and the Low-Wage Labor Market," which focuses on how improvements in the enforcement system—including allowing worker organizations to bring charges against employers that violate labor laws—can help to supplement the enforcement resources of the U.S. Department of Labor.

Abstract

America's low-wage workers have fared poorly during the past two decades. Since the late 1970s, the wages of workers at the tenth percentile of the wage distribution have declined in both absolute terms (adjusting for inflation) and relative to those of middle- and high-wage workers. This paper examines the influence of the enforcement of the minimum wage by the U.S. Department of Labor on the wages of the poorest workers. It concludes that enforcement can and does raise those wage levels for workers receiving subminimum wage, but that the Department faces several problems in ensuring that employers comply with the law.

The resources of the Department's enforcement arm have diminished over time, whether measured by inflation-adjusted budgets, the number of its investigators, or the number of enforcement actions it has taken. More importantly, the Department also has to work within a system that offers few deterrents to the minority of employers that is bent on violating the law and little compensation to workers who are denied the wages to which they are legally entitled. Wial makes recommendations for improving the enforcement of labor standards in low-wage labor markets, including: increasing penalties, plugging legal loopholes, providing incentives to employers to put enforcement pressure on their subcontractors and competitors, and making it easier for unions and other worker organizations to take collective action to help to enforce the minimum wage.

Global: Department

Introduction

It is by now a well-established fact that low-wage workers have fared poorly during the past two decades. Since the late 1970s, the wages of workers at the tenth percentile of the wage distribution (workers who earned only \$5.46 per hour in 1997) have declined in both absolute terms (adjusting for inflation) and relative to those of middle- and high-wage workers.¹

Economists have advanced and debated a variety of explanations for the growth of wage inequality and the decline of wages at the bottom of the labor market. Among these are the shift of employment from high-wage manufacturing to lower-wage service industries, technological change, international trade, the decline of union representation, and the long-term decrease in the inflation-adjusted value of the minimum wage.²

This paper examines another influence on the wages of America's poorest workers, one that analysts of inequality have neglected: the enforcement of the minimum wage. The first section presents a quantitative analysis of how the U.S. Department of Labor's enforcement of the Fair Labor Standards Act of 1938 (FLSA)³ (which includes the federal minimum wage, overtime pay requirements, and restrictions on child labor) affects the wages of America's poorest workers. The second section explains how the U.S. Department of Labor's Wage and Hour Division enforces the FLSA and also surveys the changes that have occurred in enforcement methods, resources, and priorities. The third section surveys the enforcement-related consequences of economic, organizational, and legislative developments that are outside the control of the Department of Labor. The fourth section makes some recommendations for improving the enforcement of labor standards in low-wage labor markets, and a fifth and final section provides a summary of the paper.

The Impact of Government Enforcement on the Low-Wage Labor Market Since the 1970s

Whether measured by inflation-adjusted budgets, the number of investigators, or the number of FLSA compliance actions taken, the enforcement resources of the Wage and Hour Division (WHD) are smaller today than they were 20 years ago (Table 1). The WHD's inflation-adjusted budget for fiscal year 1998 was 7 percent below its level in fiscal year 1979. The number of investigators dropped by 11 percent between 1979 and 1988, and the number of compliance actions were 34 percent lower. One might expect that fewer enforcement resources has led to more workers being paid less than the minimum wage. It may be the case that the decline in enforcement resources is in part responsible for the decline in the wages of the poorest workers.

Table 1: Enforcement Resources of the Wage and Hour Division, 1979-1998

Fiscal Year	Annual Appropriation (Budget) (thousands of 1998 dollars)	Number of Investigators (on board at end of year)	Number of FLSA Compliance Actions
1979	130,574	1087	63,504
1980	122,025	1059	65,110
1981	113,972	953	60,248
1982	104,205	914	64,848
1983	109,826	928	64,214
1984	110,513	916	64,155
1985	108,947	950	66,943
1986	103,630	908	72,641
1987	111,432	951	72,028
1988	111,887	952	75,656
1989	117,516	970	74,197
1990	115,946	938	74,128
1991	110,459	865	60,685
1992	111,885	835	60,457
1993	107,895	804	54,404
1994	106,883	800	50,716
1995	106,447	809	45,458
1996	103,173	781	40,933
1997	119,141	942	35,940
1998	121,213	942	43,057

Source: Wage and Hour Division, U.S. Department of Labor. Annual appropriations adjusted for inflation using implicit GNP deflator for non-defense federal government expenditures.

The story is not quite this simple, however. Although enforcement resources are lower today than they were two decades ago, they fluctuated during the intervening years. As Table 1 shows, both the inflation-adjusted WHD budget and the number of WHD investigators generally fell from 1979 through the mid-1980s, rose during the late 1980s, fell again during the early 1990s, and have risen again since 1996. The number of FLSA compliance actions generally fell during the early 1980s, rose during the late 1980s, and fell during the 1990s. At the same time, the share of workers paid less than the minimum wage fell during most of the 1979-97 period, typically rising in years when Congress increased the minimum wage and falling as inflation eroded the minimum wage's purchasing power. The share of workers earning subminimum wages was actually lower in 1997 than in 1979 (Table 2). Moreover, the great decline in the wages of workers at the tenth wage percentile occurred during the 1980s; after 1989, these workers became better off (in inflation-adjusted terms) although not by enough to offset the wage decreases they suffered during the 1980s.⁴ Therefore, the data in Tables 1 and 2 do not necessarily show that declining enforcement resources are responsible for either the long-term decline in wages at the bottom of the labor market or changes in the share of workers paid less than the minimum wage.

Using regression analysis, it is possible to disentangle the effects of enforcement resources on the low-wage labor market from those of other factors. To do this in a way that would be fully convincing to economists, one would need a complete model of the determinants of wages for the lowest-paid workers. Because no such model exists, I used a simplified model that relates the wages of low-wage workers to the WHD resources devoted to enforcing the FLSA, the value of the minimum wage relative to the median wage (a measure of the impact of the value of the minimum wage as distinct from measures of enforcement), and summary measures of the wage distribution. I estimated the model using data for 1979-80, 1987-90, and 1994-97, the only years for which complete data were available to the author. (For details on data, variables, and regression results, see the Appendix.)

Table 2: The Share of Workers Earning Less than the Minimum Wage, 1979-1997

Year	All Wage and Salary Workers	Hourly Workers Only
1979*	6.2%	5.6%
1980*	6.3%	6.0%
1981*	N/A	6.8%
1982	N/A	4.6%
1983	N/A	4.0%
1984	N/A	3.4%
1985	N/A	2.9%
1986	N/A	2.8%
1987	3.1%	2.5%
1988	2.7%	2.2%
1989	2.6%	2.2%
1990*	3.4%	3.4%
1991*	N/A	N/A
1992	N/A	N/A
1993	N/A	N/A
1994	3.4%	2.6%
1995	3.0%	2.2%
1996*	3.1%	2.4%
1997*	4.3%	3.8%

*Minimum wage increase went into effect during this year.

Source: Nordlund (1997) and the author's analysis of Current Population Survey data. It is difficult to estimate the number of workers covered by the minimum-wage requirement using this data source; therefore, estimates of subminimum-wage employment are presented for all wage and salary workers and for hourly workers only.

Because of the limited number of years included and the primitive nature of the model used, my findings should be regarded as preliminary. Nevertheless, one strong finding emerged:

The more enforcement resources that the WHD devotes to the FLSA, the higher the average wage of workers receiving subminimum wages relative to the minimum wage.

I found no corresponding results for low-wage workers who are paid just above the minimum wage. When I used models similar to the one used for workers receiving subminimum wages, I found that enforcement resources had no statistically significant effect on the relative values of the fifth or tenth percentiles of the wage distribution or on the relative wages of the lowest 5 or 10 percent of wage-earners. Nor did I find that enforcement resources had any significant effect on the share of workers paid less than the minimum wage.⁵

If the finding presented here holds up under more complex analysis, it shows that the government's enforcement of the FLSA reduces wage inequality by raising the wages of workers

who earn less than the minimum wage. Declining enforcement resources, therefore, contribute to wage inequality and to the decline of wages at the very bottom of the labor market.

Why does government enforcement affect subminimum-wage workers in this manner? One possibility is that workers are less likely to complain to the WHD (or the WHD is less likely to penalize non-complying employers) for small minimum-wage violations than for large ones. There may be a zone of “small violations” within which employers are relatively safe from penalty. As a result, when the WHD steps-up enforcement of the minimum wage, it may simply be prompting non-compliant employers to reduce the magnitude of their violations to a level that falls within this zone.⁶ The existence of such a zone may also explain why government enforcement does not appear to affect the share of workers who are paid less than the minimum wage.

Government Enforcement of the Minimum Wage

The minimum wage requirement of the FLSA can be enforced in several ways. First, WHD may inspect an employer's payroll records⁷ and, if FLSA violations are found, the Secretary of Labor may then sue the employer for the unpaid back wages that the employer owes the worker and for an equal additional amount in liquidated damages.⁸ The Secretary of Labor may also sue for an injunction ordering the employer to pay back wages due or to keep accurate payroll records or prohibiting the employer from shipping or selling goods produced in violation of FLSA wage or hour restrictions.⁹

Second, an individual worker (or a group of workers) who has been denied minimum wage or overtime pay may sue the employer for any unpaid back wages and for an equal additional amount in liquidated damages. (This means that a worker may sue for the equivalent of double damages.) However, workers generally lose their right to sue if the Secretary of Labor sues on their behalf for back wages or for an injunction ordering the employer to pay back wages.¹⁰

Third, the Secretary of Labor may seek a civil fine of up to \$1,000 per violation against an employer who repeatedly or willfully¹¹ fails to pay minimum wage or overtime pay. Finally, the Department of Justice may prosecute an employer criminally. Such an employer may be sentenced to a fine of up to \$10,000 and/or, if the employer is both a repeat and a willful violator, up to six months in prison.¹² Unlike the National Labor Relations Board and the Occupational Safety and Health Administration, the WHD has no authority to order any employer to do anything and, therefore, has no administrative appeals process. If an employer refuses to comply voluntarily with the FLSA, the Secretary of Labor (acting through the Department of Labor's Office of the Solicitor) must sue to enforce any back wage assessments against the employer.

General Features of WHD Enforcement

The foregoing statutory provisions do not reveal much about how the FLSA is actually enforced. Although much of the available evidence about enforcement is based on the experiences of the 1970s and 1980s, many of the basic features of the enforcement process are rooted in incentives and institutions that have not changed during the last two decades. In any

case, low-wage workers are usually poorly informed about the requirements of the FLSA, can rarely afford to sue, usually have such small back-wage claims that litigation costs would exceed any benefits that they may win,¹³ and are typically afraid to make their identities known to employers.¹⁴ For these reasons, workers rarely sue on their own behalf; instead, they file claims with the WHD.¹⁵

The WHD rarely seeks criminal penalties, in part because Justice Department attorneys dislike handling labor cases and in part because criminal prosecutions reduce the U.S. Department of Labor's ability to recover back-wages.¹⁶ Civil fines of up to \$1,000 per violation, authorized by statutory amendment in 1989, were not used until the early 1990s because the Bush administration's regulatory review delayed the adoption of regulations that would implement them. Civil fines are now used when regulations permit them and when they appear to WHD officials to be effective in deterring repeat violations.¹⁷

The FLSA's protections for low-wage workers are mainly enforced by WHD inspections and by lawsuits brought by the Department of Labor. However, many workers whose employers owe them back wages are afraid to complain to the WHD, fearing that complaints will lead to retaliation from their employers or, if they are undocumented immigrants, to a raid by the Immigration and Naturalization Service. The WHD never tells employers the names of those people who file complaints, and it conceals complainants' names when it responds to Freedom of Information Act requests or discovery requests during litigation. However, if the WHD sues an employer, it must be able to obtain workers' testimony in open court and can no longer keep workers' identities secret. Many low-wage workers are afraid to testify and, as a result, the WHD has sometimes been unable to obtain a judgment against an employer that has violated the statute. Moreover, some workers whose complaints to the agency triggered an investigation are unwilling to repeat those complaints to an inspector when the inspector visits the worksite.¹⁸

The U.S. Department of Labor settles most FLSA claims out-of-court rather than litigating them.¹⁹ According to a WHD staff member, most violations are inadvertent and are due to employers' lack of knowledge of the law. This staff member estimated that 70 to 80 percent of employers that investigators find to be violating the FLSA are willing to pay what they owe when the WHD informs them of their violations.²⁰ In 1995, the WHD was able to conciliate about half of all FLSA complaints through phone conversations with the employer and/or worker. Most of the remaining complaints, which usually involved multiple workers or

serious violations, were settled out-of-court. The WHD referred only about 1 percent of all compliance actions to the Solicitor of Labor for possible litigation.²¹

Even for recalcitrant employers, the FLSA's statute of limitations creates a strong incentive for the Department of Labor to settle, often for less than the full amount of back wages that the employer owes.²² The statute of limitations for the FLSA is three years for willful violations and two years for all other violations.²³ In contrast to some other federal employment laws (such as the National Labor Relations Act and Title VII of the Civil Rights Act of 1964) in which the statute of limitations runs only until a worker files a complaint with the relevant government agency, the FLSA's statute of limitations runs until the worker either files suit or is included as a plaintiff in a suit filed by the Department of Labor. It can take as long as a year for the WHD to complete an investigation and decide whether or not to sue. Therefore, workers can lose back wages while waiting for the WHD to complete this process, and they are rarely able to recover three years' back wages from willful violators.

Although the WHD attempts to get employers to agree to waive the statute of limitations, few employers are willing to do so. With the statute of limitations running—and potentially reducing the amount of back wages that can be recovered for workers—during the investigation and preparation of a case, it often makes sense for the U.S. Department of Labor to settle for less than the amount that the employer owes rather than to litigate and obtain even less for the worker.²⁴

When the Department does sue, there are strong incentives for it to seek an injunction rather than back wages and liquidated damages. Suits for injunctions usually move more quickly for the following reasons: because they are tried without a jury; because injunctions are enforced by the court's power to hold an employer in contempt of court; and because the statute of limitations stops running for all affected workers when the Department seeks an injunction.²⁵ Even when it sues for back wages, a variety of factors (including its limited resources, the employer's inadequate payroll records, and the low priority that the federal district courts give to labor cases) make it reluctant to seek liquidated damages.²⁶ In addition, since 1949, the courts have had the discretion to reduce or not to award liquidated damages in cases where the employer acted in good faith and reasonably believed that it was not violating the FLSA. These incentives make it unlikely that workers will receive liquidated damages and, therefore, it is also

unlikely that the threat of liquidated damages acts as much of a deterrent to those employers that are determined to violate the law.

Frequent record-keeping violations are another pervasive and important feature of enforcement, especially among employers who refuse to pay back wages.²⁷ Employers benefit from falsifying payroll records because payroll records are often the only evidence that the WHD has to back up its charges of wage or hour violations.²⁸ Yet there is no effective penalty for falsifying these records.²⁹

The general picture that emerges from the evidence is that compliance with the FLSA's wage and hour requirements is largely voluntary and occurs, or fails to occur, in the context of widespread fear among low-wage workers and ignorance of the law among both employers and workers. The minority of employers who are determined to violate the law are probably able to do so with little fear of penalty. Despite the recent adoption of civil fines, penalties for violating the law appear to be inadequate, largely because there is no real penalty for falsifying payroll records. Also, because the U.S. Department of Labor rarely seeks liquidated damages, low-wage workers who work for the "bad" employers do not receive adequate compensation for lost wages.³⁰

Changes in Enforcement Resources, Methods, and Priorities

These features of FLSA enforcement have, with the exceptions noted above, remained more or less unchanged since at least the mid-1970s. However, in other respects, enforcement has changed not only since the 1970s but also over the entire 60-year history of the FLSA.

The general decline in enforcement resources during the last two decades, as shown in Table 1, should be viewed in a long-term context. The WHD began its operations under severe fiscal constraints. In its first fiscal year, 1939, the WHD relied on staff members borrowed from other federal agencies³¹ and already had a backlog of worker complaints.³² Its first Administrator reported to Congress in 1939 that the agency did not have enough inspectors to do its job properly.³³

Table 3 presents historically consistent data on the numbers of WHD investigators and employees covered by minimum wage legislation from 1939 to 1988 and a separate series of data on investigators and covered employees from 1990 to 1996. (For 1939-1988, the number of investigators is measured in a different way in Table 3 than in Table 1 to preserve the historical

comparability of the various data used.) Before 1979, the number of WHD investigators underwent an initial period of generally steady growth (from 1939 to 1969), then declined precipitously during the recession of the early 1970s (up to 1973) and increased rapidly in the late 1970s (from 1974 to 1979), bringing the number of investigators to an historic high. The number of investigators for which resources were budgeted in 1988 (the last year for which data comparable with earlier years are available) was roughly the same as the number for 1964.

Relative to the numbers of employees and establishments covered by the minimum wage, however, the resources of the WHD have become steadily more inadequate throughout its existence. The number of workers covered by the minimum wage has grown due both to legislated expansions of coverage (discussed below) and to the general growth of the workforce. As a result, the number of investigators per thousand covered employees fell almost continuously from more than 0.05 in 1939 to about 0.01 in 1988 and subsequent years (Table 3). For similar reasons, the share of minimum wage-covered establishments that WHD inspected fell from 9 percent in 1947³⁴ to 5 percent in the mid-1950s³⁵ to about 2 percent in 1979³⁶ and 1987.³⁷

Table 3: Wage and Hour Investigators and Minimum Wage-Covered Employees, 1939-1996

Year	Number of Investigators*	Number of Minimum Wage-Covered Employees (Thousands)**	Investigators Per 1,000 Covered Employees
1939	669	12,291	.054
1947	571	22,601	.025
1950	527	20,933	.025
1953	612	23,976	.026
1957	749	24,301	.031
1959	656	23,723	.028
1960	659	23,857	.028
1962	959	28,496	.034
1964	980	29,593	.033
1967	1024	41,428	.025
1968	1147	42,778	.027
1969	1198	44,569	.027
1970	1026	45,511	.023
1971	1025	45,383	.023
1972	1027	46,950	.022
1973	984	49,427	.020
1974	1003	57,965	.017
1975	1088	56,648	.019

Year	Number of Investigators*	Number of Minimum Wage-Covered Employees (Thousands)**	Investigators Per 1,000 Covered Employees
1976	1135	51,875	.022
1977	1205	54,446	.022
1978	1343	57,572	.023
1979	1173	60,129	.020
1980	1107	60,191	.018
1981	1107	61,316	.018
1982	929	59,208	.016
1983	929	60,461	.015
1984	929	63,438	.015
1985	929	73,046	.013
1986	940	74,680	.013
1987	929	76,023	.012
1988	985	79,150	.012
1990	938	73,791	.013
1991	865	72,388	.012
1992	835	72,502	.012
1993	804	73,839	.011
1994	800	76,040	.011
1995	809	78,006	.010
1996	781	79,422	.010

*For 1939-1988, the number of investigators is the number of budgeted investigator positions for the Wage and Hour Division and (for earlier years when the two divisions were separate) the Public Contracts Division. For 1990-1996, it is the end-of-year onboard number of investigators (same data as in Table 1).

**For 1939-1988, the number of minimum wage-covered employees is the number of covered non-supervisory employees in a month during the year (usually September) for which data are available. For 1990-1996, it is the number of covered wage and salary workers.

Sources: Nordlund (1997) for investigators and covered employees 1939-1988; U.S. Department of Labor (1998) for covered employees 1990-1996; Wage and Hour Division, U.S. Department of Labor for investigators 1990-1996.

Despite a period during the 1950s and 1960s when a large majority of WHD investigations apparently were targeted (in other words, they were initiated by the agency without a specific complaint from a worker),³⁸ the agency appears to have initiated most of its investigations in response to worker complaints.³⁹ The share of compliance actions that were complaint-driven was 72 percent in 1979, a percentage that fell slightly in the early 1980s, then rose during the late 1980s, reaching a high of more than 80 percent in fiscal years 1991-1993. By 1998, the complaint-driven share declined to 71 percent.⁴⁰ According to one WHD staff

member, complaint-driven enforcement, which is in part a response to a lack of resources for targeted investigations, tends to concentrate WHD resources on overtime rather than minimum-wage violations, since workers are more likely to complain to the agency about overtime violations than about wage violations.⁴¹ Thus, resource constraints, and the complaint-driven emphasis that accompanies them, create a de facto bias against responding to the needs of the poorest workers.

The WHD has always tried to direct its enforcement resources at industries that it believed to be major violators of the FLSA, but it has not always emphasized low-wage industries or minimum-wage violations. The first targeted investigations, in 1940, focused on the lumber industry, which at the time was a major source of minimum wage and overtime violations.⁴² Between 1983 and 1990, the WHD increased the amount of attention that it gave to child-labor violations⁴³ (which, in the context of declining resources during much of this period, probably meant that it reduced the amount of attention dedicated to wage and hour violations). These efforts culminated in a series of targeted investigations (“Operation Child Watch”) in 1990.⁴⁴ Since 1990, overall resources devoted to child labor have remained more or less constant.⁴⁵ Since 1995, the WHD has increased its emphasis on targeted wage and hour investigations in industries that have many low-wage workers and high historical rates of FLSA violations. These industries have included the apparel industry, nursing homes, the “salad bowl” vegetables in the agricultural sector (lettuce, tomatoes, and cucumbers), eating and drinking places, hotels and motels, janitorial services, temporary help services, and security guard services.⁴⁶

The WHD now selects targeted industries in accordance with the results of surveys that are designed to measure compliance in low-wage, high-violation industries. Since 1994, the WHD has conducted such surveys in selected geographic locations in the garment industry, residential health care, agriculture, restaurants, hotels and motels, and poultry processing. The surveys, which over-sample past violators, are part of a new long-term effort to ensure that establishments inspected by the WHD do not become repeat violators of the FLSA.⁴⁷

In the last few years, the WHD has generally increased the amount of attention it pays to low-wage industries.⁴⁸ In addition to targeting these industries, it has begun enforcing the FLSA’s “hot goods” provision more vigorously than in the past.⁴⁹ This statutory provision

prohibits the shipment or sale of goods produced by workers who were employed in violation of FLSA minimum wage or overtime requirements.⁵⁰

The “hot goods” provision is particularly useful in low-wage manufacturing industries, especially the garment industry. It can be used against retailers, manufacturers, and other firms in the chain of production other than the firms that directly employed the affected workers. The direct employers in the garment industry are often small, labor-intensive firms that enter and exit the industry easily and are subject to the much greater market power of firms that are closer to the consumer in the chain of production.⁵¹ Therefore, penalizing the latter firms for the FLSA violations of the former can be an effective way of improving labor standards in the industry.

However, enforcement of the “hot goods” provision was limited in the past by a statutory requirement, enacted in 1949, which stated that a “hot goods” injunction could not be issued against a firm that did not have notice that its goods were produced in violation of the FLSA and that relied on a written assurance. The statute also hampered enforcement by requiring only on a written assurance from the producer that the goods were produced in compliance with the statute.⁵² The WHD now informs manufacturers and retailers of any FLSA violations by their contractors, which reduces the applicability of the lack-of-notice defense. It also categorizes retailers according to their records of working with FLSA violators and publishes its lists of retailers on the Internet, hoping that their concern about public reputation will motivate them to avoid doing business with violators.⁵³

Some changes in enforcement practices were made in response to the declining adequacy of the resources of the WHD in relation to the demands placed on the agency. Faced with a high volume of complaints in the 1970s, the WHD began to use conciliation and “limited” investigations in many cases as a substitute for full worksite investigations.⁵⁴ Telephone conciliation, which is always complaint-driven, became much more common after 1984, though onsite investigations remained the most common form of compliance action.⁵⁵ Although conciliation may be adequate for the vast majority of violations, which are inadvertent and are willingly corrected by employers, there is evidence that the conciliation process may miss some violations.⁵⁶

When Congress reduced the WHD’s budget in 1996, the agency came to believe that its resources did not permit it to enforce the FLSA entirely on its own. It increased its efforts to educate employers about FLSA requirements. It also began to work with state government

agencies, industry and worker advocacy groups, and retailers concerned about their public reputations. For example, the agency worked with the food manufacturers Newman's Own and H.J. Heinz to help them to educate their agricultural suppliers about the FLSA and farmworker protection laws.⁵⁷ The WHD also expanded a successful joint enforcement effort with California's Department of Industrial Relations that targeted wage and hour violations in the garment industry and agriculture.⁵⁸

It is difficult to evaluate the success of the long-term enforcement changes described in this section. There are no data on the wages of workers receiving subminimum wages for most of the period before the late 1970s, so it is impossible to know whether enforcement efforts affected those workers' wages in that period in the way that they appear to have done in more recent years. Data on the share of workers earning less than the minimum wage suggest that there were more such workers during the last two decades than during the 1965-1979 period, but the data on which this comparison is based are not fully comparable over time.⁵⁹ Also, no data exist that would make it possible to determine whether enforcement efforts had any effect on the share of workers earning subminimum wages prior to the late 1970s.

The general picture that emerges from this survey of WHD enforcement history is that there has been a long-term decline in the adequacy of enforcement resources, which has probably resulted in a long-term decline in the amount of attention that the WHD pays to low-wage workers. However, within its current resource constraints, the WHD has recently increased its emphasis on FLSA enforcement in low-wage industries. If enforcement resources are increased substantially or supplemented by enhanced enforcement efforts by worker or employer organizations, the new emphasis on low-wage industries seems quite promising. Otherwise, it remains to be seen whether devoting a larger share of a smaller pie to pursuing enforcement in low-wage industries will reverse the long-term decline in the wages of America's poorest workers.

The Broader Enforcement Environment: Economic, Organizational, and Legislative Developments

The previous section examined what might be termed the “supply” side of government minimum-wage enforcement: the resources and policies of the WHD. This section considers the “demand” side. Collective action (principally by unions and other worker organizations), the growth and industrial composition of the U.S. economy and the organization of production processes within it, immigration, and new legislation can make the WHD’s enforcement task either easier or more difficult. In so doing, they help to shape the level and nature of the “demand” for WHD enforcement.

Increasing Demands on the Wage and Hour Division

Employment and Coverage Growth

The number of workers subject to the FLSA’s minimum-wage requirement has grown steadily since the statute was enacted (Table 3). Part of this growth has been due simply to the growth of the working population.⁶⁰ However, the growth in the number of covered employees has also been due to a gradual broadening of coverage,⁶¹ particularly between 1961 and 1977, to include low-wage workers who were not initially covered.

The original FLSA covered only about 20 percent of all American workers, and workers in such low-wage industries as retail trade, private household services, and agriculture were not subject to the minimum wage and overtime requirements.⁶² Congress narrowed coverage slightly in 1949,⁶³ and the 1961 FLSA amendments added a few new exemptions. However, the latter change also covered additional workers in retail trade, services, and construction. The net effect of these changes was to extend minimum-wage coverage to about 3.6 million new workers, many of them in low-wage industries.⁶⁴

A much greater broadening of coverage came in 1966, when more than 9 million additional workers were covered.⁶⁵ Most of these workers were in hospitals and nursing homes (both public and private), retail trade, and educational institutions (both public and private)⁶⁶—all industries with large numbers of low-wage workers. Another large expansion of coverage occurred in 1974, when more than 6 million workers, mainly private household workers and additional state and local government employees, were added to the population covered by the minimum wage.⁶⁷

A major decline in coverage occurred in 1976 as a result of the Supreme Court’s decision in *National League of Cities v. Usery*,⁶⁸ which removed state and local government employees

from FLSA coverage. In 1977, Congress further expanded the number of low-wage workers subject to the minimum wage by lowering the minimum volume of annual sales that determined whether an employer's workers were covered. The effect of this change was to bring employees of small businesses under the protection of the FLSA.⁶⁹ The Supreme Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*⁷⁰ reversed *National League of Cities* and restored FLSA coverage to state and local government workers. By 1996, the minimum wage applied to about 65 percent of all American workers, although it still covered fewer than half of all agricultural and service workers.⁷¹

Expansion of Enforcement Responsibilities

In addition to the growth in the number of covered workers, new and increasingly diverse enforcement responsibilities⁷² have put an increasing strain on the WHD's resources. Before 1962, the WHD was responsible for enforcing the Davis-Bacon and Walsh-Healey Acts in addition to the FLSA. The former two statutes, enacted during the 1930s, established prevailing wages for federal government contractors and were, therefore, similar in substance to the FLSA's minimum wage requirement. Also similar to the WHD's core statute were the Contract Work Hours and Safety Standards Act of 1962 and the Service Contract Act of 1963, additional federal-contractor statutes which were also placed under the WHD's purview. The Equal Pay Act of 1963, which the WHD enforced from 1963 to 1979,⁷³ made the agency responsible for administering an anti-discrimination statute.

The WHD's enforcement responsibilities expanded dramatically in volume and scope during the 1980s and 1990s with the enactment of the Migrant and Seasonal Agricultural Worker Protection Act (1983), the Immigration Reform and Control Act (1986), the Employee Polygraph Protection Act (1988), and the Family and Medical Leave Act (1993). The WHD's enforcement responsibilities under these recent statutes are often far removed from its original mission of enforcing the FLSA. They include inspecting the housing of migrant farmworkers, checking employers' records to see whether workers have provided any documentation that they are legally authorized to work in the United States,⁷⁴ and making rules defining the medical conditions that entitle workers to unpaid leave. The WHD continues to concentrate primarily on enforcing the FLSA, but—perhaps as a result of these expanded responsibilities—the share of

WHD compliance actions devoted to the FLSA declined from an average of about 87 percent during the 1980s and early 1990s to about 84 percent from 1995 to 1997.⁷⁵

Increased Rates of Immigration

Immigration, which increased markedly during the 1970s and 1980s,⁷⁶ may itself be another source of pressure on the WHD's resources. This may be the case regardless of whether immigration has any causal role in the creation of low-wage jobs. The major problem, according to immigrant worker advocacy organizations that have expressed their concerns to the WHD, is that many immigrant workers are especially fearful and skeptical of government agencies. They are afraid that contact with the WHD will lead to an Immigration and Naturalization Service (INS) raid of their worksite. This fear may be correct even if the WHD has no contact with the INS after it inspects an employer's records; employers of undocumented immigrants sometimes call the INS after a WHD inspection in order to rid themselves of workers to whom they owe back wages.⁷⁷

Immigrant workers' fear of the WHD, combined with their often limited knowledge of English and of their rights under U.S. law, makes enforcing labor and employment laws more difficult at worksites that employ a large number of immigrants. The recent change in the WHD-INS memorandum of understanding, which sets the terms on which the two agencies cooperate in enforcing the Immigration Reform and Control Act, may improve FLSA enforcement in immigrant-dominated workplaces because it reduces the WHD's role in inspecting employers' immigration-related records. However, to the extent that the connection between the WHD's worksite inspections and INS raids is independent of any contact between the WHD and the INS, the improvement is likely to be modest. More promising, though, is the recent policy introduced by the INS of reducing its reliance on worksite raids as an enforcement tool.⁷⁸

The Structure of the U.S. Economy

There has long been a relatively stable set of industries that the WHD and independent analysts have identified as having unusually high rates of minimum-wage violations and/or unusually large numbers of complaints. As early as 1939-1940, the garment industry, food and kindred products businesses, and wholesale and retail trade were among the industries with the largest number of minimum-wage complaints.⁷⁹ As minimum-wage coverage expanded in the

agricultural and service sectors, those industries, too, became major violators. In 1988, a large majority of subminimum wage workers were employed in wholesale and retail trade and the service sector.⁸⁰ In 1996, more than half of all FLSA compliance actions were in retail trade and services combined. Retail trade and agriculture were the only major industries in which a majority of the workers whom the WHD found were owed back wages were also owed the minimum wage.⁸¹

Data for 1997 from the Bureau of Labor Statistics suggest that the apparel, agriculture, retail trade, and service industries (particularly private household services, personal services, entertainment and recreational services, educational services, and social services) remain among the biggest minimum-wage violators.⁸² This fact might lead one to suspect that WHD enforcement problems may have been exacerbated if the combined share of total employment in these industries rose during recent years. However, the data provide only modest support for this hypothesis. The combined share of hourly workers' employment accounted for by all of these industries combined (minus social services, for which historically comparable data are not available) rose only from 32.9 percent in 1979 to 36.2 percent in 1989 and then fell slightly to 35 percent in 1997.⁸³ Changes in the industrial composition of employment, therefore, can have played only a minor role in increasing the strain on the WHD's resources.

Other kinds of structural changes in the U.S. economy may have placed greater pressure on the WHD. One of these is the recent decline in the size of the average business establishment, coupled with an increase in the number of establishments. The decline in establishment size was the result of both a decline in the average size of manufacturing establishments and the continuing shift of employment from manufacturing (where establishments remain relatively large despite the recent decline) to services (where establishments are much smaller).⁸⁴ When workers are employed in a large number of small establishments rather than in a smaller number of large establishments, the WHD's inspection process probably becomes less efficient (if efficiency is measured in terms of the number of workers whose records are inspected per hour of WHD investigation). This occurs because, given the "fixed costs" of inspecting each establishment, the agency has more establishments to inspect and can cover fewer workers per inspection.⁸⁵

Finally, production processes in a variety of U.S. industries have become vertically disaggregated during the last two decades in ways that resemble those of the garment industry.

In such service industries as hospitals, janitorial services, hotels, and banking, as well as in manufacturing, steps in the production chain that were formerly performed by the employees of a single large firm are now often performed by employees of separate firms. The relationships between firms in the production chain may vary from arm's-length contracting (as between building owners and janitorial service contractors) to more cooperative "network" relationships (as among the computer hardware and software companies of Silicon Valley).⁸⁶ Some firms (typically those that are larger or closer to the final consumer in the production chain) have substantial market power in dealing with other firms in the same production chain. These firms (for example, retailers of clothing or food products, or owners of office buildings) can, by setting disadvantageous terms of trade, create a situation in which their contractors (for example, garment contractors, small farms, or janitorial service contractors) can remain in business only by paying workers very low wages.⁸⁷

The disaggregation of production may put further strain on enforcement resources by creating more situations in which the Department of Labor is unlikely to be able to enforce the FLSA quickly (and cheaply) through out-of-court settlements with employers. For disaggregated manufacturing processes, the "hot goods" injunction may be the only effective means of enforcing the minimum wage and overtime requirements. However, because the "hot goods" provision applies only to the goods themselves—and not to accounts receivable or proceeds from the sale of the goods—and because only a court may enjoin the sale of the goods, an employer that wishes to sell such goods can evade enforcement if it can do so before the U.S. Department of Labor is able to obtain an injunction.⁸⁸ Such an employer has little incentive to settle out-of-court.

Moreover, to obtain an injunction, the Department must prove that the employer's violation was willful, which can be difficult even in cases where violations are flagrant and repeated.⁸⁹ In service subcontracting cases, the FLSA's joint-employment doctrine (under which multiple firms may be deemed "employers" and held jointly and severally liable for unpaid back wages) is often applicable.⁹⁰ However, the complexity of the case law in this area reduces the incentive to settle. In both manufacturing and services, then, more disaggregated production means that the Department probably could not have maintained a constant level of worker protection even if its enforcement resources had remained constant instead of declining.

Collective Action

As noted above, individual low-wage workers rarely sue employers for back wages under the FLSA because they cannot afford to sue, are poorly informed about their rights under the statute, have individual claims that are usually too small to make lawsuits economically worthwhile, and are afraid to identify themselves publicly to employers and sometimes even afraid to complain to the WHD. Those workers who do sue or complain to the WHD rarely do so until after they have left the employer, as they risk being fired for suing or complaining while still employed.⁹¹ Therefore, workers who are paid less than the amount that the statute requires usually face a choice between collecting their back wages and keeping their jobs.

Collective action by workers can mitigate these problems.⁹² Workers can take collective action through unions, through other institutional representatives such as workers' centers,⁹³ through informal groups, or through class-action lawsuits. Collective action can make it easier for workers to enforce the FLSA on their own, whether through the courts, through collective bargaining and arbitral enforcement of collective agreements, through informal negotiations with employers, or through putting pressure on employers to maintain a good reputation in the labor market. Through its general capacity to raise wages, collective bargaining can also reduce the share of workers who are paid less than the minimum wage. Collective action can, therefore, reduce the need for the WHD's enforcement efforts. In addition, low-wage workers who are organized may be able to increase the supply of the WHD's enforcement resources (as well as direct those resources toward minimum-wage enforcement) in two ways: (1) by putting political pressure on Congress and the WHD; and (2) by providing the WHD with reliable, "on-the-ground" information about FLSA violations, thereby reducing the cost and increasing the accuracy of the agency's investigations.

Unions have never had a legally institutionalized role in the enforcement of the FLSA. The Roosevelt Administration's initial plan for the FLSA envisioned a quasi-judicial government agency (similar to the National Labor Relations Board) that would make and enforce wage and hour regulations independently of the courts, with unions able to act as worker advocates in cases brought before this agency.⁹⁴ Although this proposal never became law, unions nevertheless played an important informal role in FLSA enforcement during the early years of the statute. In 1938 and 1939, unions educated workers about their statutory rights, channeled workers' complaints to the WHD, issued their own bulletins interpreting the statute,

and encouraged workers to make their FLSA complaints through unions so that their complaints would be protected under the National Labor Relations Act.⁹⁵ Unionized pecan workers picketed plants where employers violated the statute.⁹⁶ In subsequent years, unions often sued on behalf of large groups of workers who had been denied minimum wage or overtime pay.⁹⁷

In 1947, Congress eliminated or curtailed two of the most effective means by which workers could act collectively to enforce their FLSA rights.⁹⁸ The Portal-to-Portal Act, enacted that year, repealed the FLSA provision that allowed workers to designate representatives (such as unions) to sue on their behalf.⁹⁹ It also required individual workers to consent in writing before they could be included as plaintiffs in class-action suits under the FLSA.¹⁰⁰ This requirement made FLSA class-action suits more difficult to launch, since the initiators of such suits now had to locate and gain the consent of each worker whom they sought to include in the suit.

Since 1947, unions have been allowed to play a more modest role in enforcing the FLSA. They have been able to inform workers about their rights under the statute, help workers to initiate class-action suits, and help them to channel information to the WHD. By facilitating worker contact with the WHD, they have sometimes been able to help the WHD to conduct more thorough investigations, as the United Food and Commercial Workers Union did during the 1980s in the case of Food Lion supermarket workers.¹⁰¹

Union representation of low-wage workers, therefore, can influence the demand for WHD enforcement. Union density among low-wage workers is much lower than among U.S. workers as a whole. In 1997, unions represented 14.1 percent of all U.S. workers but only 0.2 percent of subminimum-wage workers and 0.6 percent of workers in the bottom tenth of the wage distribution (workers who earned less than \$ 5.46 per hour).¹⁰² Union density was also well below its overall U.S. level in nearly all the major industries that are high violators of the minimum-wage requirement.¹⁰³ However, unlike overall union density, which has long been declining, union density among low-wage workers appears to have grown during the last decade.¹⁰⁴

Despite this growth, union density among low-wage workers is probably still far too low to have much effect on the demand for WHD enforcement or on the wages of low-wage workers. In other respects, workers' capacity to act collectively to enforce the FLSA is now lower than it was in the early years of the statute.

Strengthening Minimum-Wage Enforcement

The current system of federal minimum-wage enforcement suffers from two major flaws. First, the basic enforcement scheme puts almost exclusive responsibility for enforcement in the hands of the WHD and individual workers (who must complain to the WHD). By themselves, the WHD and individual workers lack the knowledge, incentives, and/or resources to enforce the minimum wage against employers that are determined to violate the statute. The WHD is familiar with the law but lacks resources and detailed, up-to-date, “on-the-ground” knowledge of what is happening at the worksite. It also has a strong incentive to settle cases for less than the full amount that the employer owes. Individual workers have the worksite knowledge that the WHD lacks but do not know the law, are afraid to complain or sue, and lack the resources and economic incentives to sue. The result is a systemic bias toward underenforcement. Second, a long-term decline in WHD enforcement resources combined with an increasing demand for WHD enforcement have created a growing mismatch between enforcement capabilities and enforcement needs. An enforcement system that was probably inadequate from its inception has, therefore, become more inadequate over time.

A seemingly simple solution to both of these problems is to increase the WHD’s budget and investigative staff. This is necessary, even with the additional statutory changes suggested below, but it cannot solve the entire problem. To raise the number of investigators per thousand minimum wage-covered workers to its 1979 level would require adding 607 new investigators (based on the number of investigators in 1998), an increase of 64 percent. If the WHD appropriation per investigator were to remain at its 1998 level, the WHD budget would also have to grow by 64 percent. An increase in budget or staffing of this magnitude would exceed the percentage gap between the highest and lowest staffing levels, as well as that between the highest and lowest WHD budgets, for all of the years since 1979. Raising the number of investigators per thousand covered employees to its 1939 level would require more than quadrupling the current budget and staff levels.¹⁰⁵ Moreover, these figures may be underestimated, because they do not take into account the increases in the demand for enforcement described in the previous section, which are harder to measure.

In addition to increasing the WHD's resources, enforcement could be improved by fine-tuning the FLSA (primarily by increasing penalties for violators as outlined below). However, these measures are only a foundation on which to build a more comprehensive approach to enforcement. If enforcement is to be improved more than marginally, we must abandon the FLSA's current assumption, rooted in a classical liberal view of the relation between the state and society, that (virtually) the only enforcers of the statute should be a government agency and individual workers. This assumption limits enforcement capability by excluding those collective social actors that can be effective enforcers, either by themselves or in combination with individuals and government. By making individual workers depend solely on government enforcement, it also misses the opportunity to encourage them to organize into groups that might have the ability to transform the labor market in ways that would better achieve the goals of the statute (for example, organizing into unions and worker associations to campaign for higher wages).¹⁰⁶

In place of this limiting assumption, we should build into the statutory scheme an explicit recognition that regulation is in fact always accomplished through a system that combines the coercive powers of government, business, and other social actors,¹⁰⁷ including groups intermediate between the individual and the state.¹⁰⁸ (In the case of the FLSA, the relevant groups include, most prominently, unions and other worker organizations.) To determine which of these actors should have a role in enforcement, we should ask the same question that was raised earlier in this section in the critique of the current enforcement scheme—which actors have, or could obtain, the knowledge, incentives, and resources to enforce the statute most effectively?¹⁰⁹ The most plausible answer would appear to be that workers' organizations, businesses within a chain of production, and business competitors are all well-situated to be effective enforcers. In addition, we should ask: Which actors can most effectively work to change social institutions to achieve the goals of the statute? The most plausible answer to this question is that worker organizations are in the best position to do so, further supporting the argument that they should a role in enforcement.

The recommendations presented below do not include delegating exclusive enforcement authority to non-governmental groups. All the recommendations allow for the expression of the general public interest in labor standards enforcement, even if only through the courts. The recommendations made below enable individuals and non-governmental groups to serve as “fire

alarms” to signal where enforcement needs are greatest. Some of these recommendations also permit individuals and groups to serve as supplementary “police patrols” to reinforce the “policing” efforts of the WHD.¹¹⁰

Keeping the Basic Framework: Increased Penalties and Other Statutory Amendments

Even without additional WHD resources or more far-reaching reforms, increasing the penalties imposed on employers who violate the FLSA could improve deterrence. The civil fines that can now be imposed on willful and repeat violators should be increased. If the Secretary of Labor declines to seek these penalties, private plaintiffs should be able to sue on the Secretary’s behalf and keep a portion of the fines that they recover for the Secretary. (This would introduce into the FLSA a procedure that is already used successfully under the False Claims Act.¹¹¹) In addition to its deterrent effect, this change would give workers (and, in accordance with reforms proposed below, worker representatives and business firms) a greater incentive to sue, thereby relieving the U.S. Department of Labor of some of its enforcement burden.

As shown above, one of the most serious lacunae in the statute is the absence of any effective penalties for falsifying payroll records, which serve as the linchpin of the WHD enforcement process. Liability for back wages and liquidated damages, as well as for the civil fines that are now available for willful or repeat violators of wage and hour requirements, should be extended to employers that willfully or repeatedly maintain false payroll records or fail to maintain any payroll records.¹¹² In cases where the Secretary of Labor does not litigate, workers and other private plaintiffs should be able to sue employers for falsifying records and, if successful, they should be entitled to a portion of the fines imposed on employers that violate the statute.

As we have seen, the U.S. Department of Labor often does not seek, and courts are not required to grant, liquidated damages to workers. Liquidated damages can be an important source of compensation to low-wage workers. Moreover, although they are not intended to be punitive, they serve as a deterrent to employers. Congress should require the Department to seek liquidated damages in all minimum-wage and overtime cases that it litigates, and should eliminate the courts’ discretion to reduce or not grant such damages to workers in FLSA lawsuits brought by the Secretary of Labor.

In industries characterized by easy entry and exit, firms may currently be able to escape paying back wages and liquidated damages to workers because they have closed and reopened under a different name or have ceased operating as corporations. Although the courts have interpreted the FLSA's definition of "employer" capaciously, they have not held successor employers or large shareholders liable for making required payments to workers. The definition of "employer" should be amended so that it explicitly includes successors and the largest shareholders of a corporate employer.¹¹³

Finally, to reduce the Labor Department's incentive to settle cases for less than the full amounts that workers are owed, the FLSA statute of limitations should run only until a worker files a complaint with the WHD. Alternatively, for workers who do not file complaints but are found by the WHD to be owed back wages, the FLSA statute of limitations should run until the WHD notifies an employer of the start of its investigation.¹¹⁴

Strengthening Chain-of-Production Enforcement by Retailers and Manufacturers

Retailers and manufacturers are well situated to monitor the wages of their contractors and subcontractors. They are also often in a position to control those wages indirectly through the prices that they are able to negotiate with contractors and subcontractors. The FLSA recognizes this by authorizing "hot goods" injunctions. The current WHD has reinvigorated this provision by stepping-up its enforcement efforts. Less formally, the WHD also recognizes the usefulness of chain-of-production enforcement by working voluntarily with manufacturers. These efforts point in the right direction but need to be strengthened via statutory changes.

The WHD's policy of informing manufacturers of the FLSA violations of their contractors means that employers can no longer escape a "hot goods" injunction by claiming they received no notice that their contractors were violating the law. However, the effectiveness of this policy depends on the ability of the WHD to locate contractors that fail to pay minimum wage or overtime pay. If the WHD's budgets are again reduced, the agency will probably be able to locate fewer such contractors and, therefore, put fewer contractors on the list that it gives to manufacturers.

A straightforward way of preventing such a situation is to repeal the 1949 statutory provision that exempts from the "hot goods" provision any firm that relies on a contractor's written assurance and lacks notice of the contractor's violation. This might at first seem unfair

to the “innocent” firm. However, as the examples of Newman’s Own and H.J. Heinz show, a manufacturer is able to monitor its contractors. Furthermore, as argued above, a manufacturer is often able to use its market power to control its contractors’ wage levels indirectly. In any event, the manufacturer can protect itself against the economic losses imposed by a “hot goods” injunction by insisting on a contractual provision that requires the contractor to reimburse the manufacturer for lost revenues in the event that the contractor’s violations are a cause of a “hot goods” injunction against the manufacturer.

The WHD’s recent emphasis on the enforcement of the “hot goods” provision is also vulnerable to reversal by a future Administration, since only the Labor Department may seek a “hot goods” injunction. As a partial antidote, workers, worker representatives, and other private plaintiffs should be allowed to sue for such an injunction.¹¹⁵

The “hot goods” injunction is a deterrent to employers but does not directly provide compensation to workers who are paid less than the amount required by the statute. Manufacturers should be liable for the back wages and liquidated damages due to a contractor’s employees in cases where the contractor has gone out of business or is otherwise unable to pay.¹¹⁶ The WHD, workers, and other private plaintiffs should all be able to sue for back wages and liquidated damages. Manufacturers that repeatedly or willfully sell or ship goods produced in violation of wage or hour requirements should be subject to civil fines, just as repeated or willful violators of wage or hour requirements now are. If the Labor Department does not seek such fines, private plaintiffs should be allowed to do so on behalf of the government and to keep part of the proceeds in the event that they prevail.

Finally, a statutory change would help to prevent delays in the issuance of “hot goods” injunctions. (Recall that firms can sometimes sell “hot goods” before a court is able to issue an injunction.) Courts should be given the power to seize accounts receivable and proceeds from the sale of goods, as well as the goods themselves, and require that payments to workers be made out of these funds.¹¹⁷

Enforcement by Business Competitors

Firms often know the employment practices of their competitors, at least in general terms. In industries in which some firms comply with minimum-wage and overtime requirements and others do not, the former firms may know the identities of the latter firms and

have a strong interest in preventing violations by their competitors. For these reasons, firms that comply with the FLSA are well situated to monitor competing firms.

This “horizontal” monitoring could be accomplished in several ways. First, a firm could complain to the WHD about a competitor. This requires no change in the law but firms have little economic incentive to complain. Second, business firms could be permitted to sue other businesses for damages that result from the defendants’ violations of the FLSA, as well as for injunctions against falsifying records or selling “hot goods.” Such suits would be based on the idea that paying subminimum wages and failing to pay required overtime compensation are unfair methods of competition.¹¹⁸ This approach, which would require a statutory amendment, would borrow from federal antitrust law, under which lawsuits by business competitors are an important enforcement tool.¹¹⁹ Of course, as in antitrust law, problems of frivolous lawsuits and the use of lawsuits to impede either product market competition or wage-raising labor market competition may arise. Courts have developed rules (for example, of standing, proximate causation, and evidentiary burdens) to deal with these problems in antitrust cases. They could do likewise in FLSA cases.

A second way in which firms could monitor their competitors’ FLSA violations would be by participating in local industry committees that include representatives of employers, workers, and the public. Ontario’s Industrial Standards Act¹²⁰ and Quebec’s Collective Agreement Decrees Act¹²¹ are examples on which such a system could be modeled. Both statutes provide for union and employer participation in both the setting and enforcement of minimum employment standards on a local industry-wide or occupation-wide basis.

Under the Industrial Standards Act, the Ontario Minister of Labor may, after convening an industry-wide labor-management conference at the request of workers or employers, adopt regulations governing any minimum labor standards (for example, minimum wages, maximum hours, or overtime pay) to which a sufficient number of worker and employer representatives agreed at the conference.¹²² Each covered industry has an advisory committee that consists of three employer representatives and two union representatives. Currently, committees exist only in parts of the garment industry. The committees are responsible, among other things, for hearing complaints from employers or workers about violations and hiring inspectors to examine employers’ payroll records. However, only the Ministry of Labor may take legal action against employers that violate the statute.¹²³

Quebec's statute allows a union or employer that is already a party to a collective bargaining agreement to apply to the Minister of Labor to have the basic terms of that agreement (including wage and hour terms) extended throughout an industry or occupation. If the Minister orders the requested extension, the union(s) and employers in the covered sector are required to establish a joint committee to administer the extended agreement.¹²⁴ This "parity committee" must include an equal number of representatives of the employers and unions that signed the original agreement. The Minister of Labor may add to the committee representatives of other workers and employers in the covered sector.¹²⁵ The committee has the power to hire inspectors and to sue any employers that violate the extended agreement. The committee may sue for back wages. It may also sue for a penalty of 20 percent of the back wages owed; if it prevails, it may keep this penalty to finance its operations.¹²⁶

These Canadian examples are relevant to the U.S. not so much in how they set standards but in the fact that employers (and workers) participate in enforcement.¹²⁷ If petitioned by a sufficient number of workers (or unions representing a sufficient number of workers) and a sufficient number of employers in a geographic/industrial sector, the WHD could be authorized to establish a local industry committee, consisting of equal numbers of representatives of employers, workers, and the public. In those industries with high rates of FLSA violations, the establishment of these committees should not be left to the discretion of workers and employers but should be mandated by statute or WHD regulation. Unionized workers, nonunion workers, and employers would each elect their own representatives. Nonunion workers could choose other nonunion workers, union officials, or leaders of other groups with a concern for low-wage workers (for example, workers' centers or community organizations) to represent them. Employers recently found to have committed repeated or willful violations of the FLSA would be excluded from committee representation.

The committee could be given the authority, at a minimum, to hire its own inspectors, conduct its own complaint-driven and regularly scheduled inspections, and report violators to the U.S. Department of Labor.¹²⁸ (Because the committee would include employer representatives, some nonunion workers might be reluctant to complain to the committee even if there were appropriate safeguards that concealed the identities of complaining workers from their own employers; this problem is one that the WHD currently faces and has not been able to solve. Nevertheless, the presence of worker representatives on the committee is likely to make this

problem less severe than it currently is for the WHD. In addition, the committee could handle complaints from unions, unionized workers, and other employers.) To reduce the litigation burden on the U.S. Department of Labor, the committee could also be given the authority to sue on behalf of workers for back wages and liquidated damages and to seek civil fines in cases where the Department did not seek them. The WHD and the Labor Department would continue to have their current statutory duties; the object of this proposal is to supplement the WHD, not to replace it.

This proposal is likely to have the greatest effect on enforcement in those industries in which at least a substantial minority of workers are represented by unions or in which some other type of organized collective worker representation exists on a large scale. In addition to providing a means by which business competitors could participate in enforcing the FLSA, this proposal could promote cooperation between unions and all employers that obey the FLSA. It could also help increase employers' knowledge of the statute's requirements and reduce the perception of some employers that FLSA enforcement is unfair and inconsistent.¹²⁹

Enforcement by Unions and Other Worker Associations

As suggested above, collective action by workers is potentially the most important source of non-governmental enforcement of the minimum wage and the only one that is capable of transforming the labor market so as to raise wages and other labor standards over time. The discussion below presents recommendations for ways to foster collective action by both union and nonunion workers and to promote the unionization of low-wage workers.

Promoting Collective Action by Both Union and Nonunion Workers

The simplest ways to enhance all low-wage workers' participation in the enforcement of the FLSA involve repealing the Portal-to-Portal Act's restrictions on collective action. First, all lawsuits under the FLSA that can be brought by workers should also be allowed to be brought by representatives designated by those workers.¹³⁰ The representatives might be unions (which, for purposes of FLSA enforcement, need not be collective bargaining representatives of the workers in question), workers' centers, community or ethnic organizations, or more informal groups. Second, the requirement that individual workers must specifically consent to be plaintiffs in class-action suits under the statute should be repealed. As with other federal lawsuits,

individuals would remain in the plaintiff class unless and until they specifically gave notice that they were opting out.¹³¹

Class-action suits and lawsuits by worker representatives can promote worker organizing either in unions or other groups, but more direct means of encouraging organizing are also needed. For the enforcement of the FLSA, the most effective form of worker organizing is likely to be union organizing; the next section presents proposals to encourage this. Is there any useful form of organizing that might assist in the enforcement of basic labor standards for nonunion workers who do not desire or cannot obtain collective bargaining agreements? The local tripartite industry committees proposed in the previous section might be an effective catalyst for organizing, but they suffer from one important limitation. Because the proposed committees would include employer representatives, some nonunion workers might be reluctant to use them.

One possible solution might be mandatory worksite committees of elected worker representatives that would have the authority to consult with the employer regarding all federally mandated basic labor standards (including minimum wage, overtime, safety and health, and family and medical leave).¹³² Such committees would be entitled to receive information about those labor standards at the worksite, including payroll records. These committees would resemble the worksite safety and health committees that are mandated by law in Washington, Oregon, and most Canadian provinces.¹³³ The limitations of committees for nonunion workers are plain: the committees have no power to force the employer to comply with the law or to prevent the employer from firing workers who lodge complaints with the committees or with the WHD. Nevertheless, there might be some value to such committees in relatively large worksites where low-wage workers have relatively stable attachments to the worksite. The committees could increase workers' awareness of their legal rights and make them less afraid to complain to the WHD while still employed. (Recall that worker representation appears to increase workers' awareness of occupational safety and health laws and that workers who complain in groups are among the only workers who are willing to lodge complaints with the WHD while they are still employed.) In addition, for labor standards other than those concerning wages and hours, worksite committees might increase the effectiveness of union enforcement efforts if the worksite were to become unionized. (For wage and hour standards, which unions can adequately enforce on their own through collective bargaining and the grievance process, there would seem to be little that committees could do to improve enforcement. However, there is evidence that

committees increase the enforcement of safety and health standards at unionized worksites relative to nonunion worksites, thereby making unions more effective in this arena.¹³⁴)

For the many low-wage workers who change worksites frequently or whose worksites are too small for a committee to have even a minimal impact, an alternative to worksite committees might be elected multi-employer consultative committees of workers. These committees could be mandated within geographic/occupational or geographic/industrial sectors designated by statute or regulation. Alternatively, they could be established within a geographic/occupational or geographic/industrial sector upon petition by 10 or 20 percent of the workers in the sector. They would have the same powers and the same drawbacks as the single-worksite committees described above.¹³⁵

A more effective alternative, especially for workers in small worksites and unstable jobs, would be to build into the law a worksite monitoring role for designated worker representatives who are not collective bargaining representatives. The Workers' Advocacy Program run by the central labor council in Victoria, British Columbia, exemplifies this general idea. Under this program, the labor council acts as an agent for a nonunion worker whose employer is violating the province's Employment Standards Act. The labor council conceals the worker's identity from the government, employers, and others. An employment-standards complaint by the labor council triggers a government inspection of the entire establishment.¹³⁶

It is straightforward to generalize and institutionalize the role played by the labor council in this example. To preserve workers' anonymity, the WHD should be given the authority to designate, either on its own initiative or through WHD-supervised community-wide elections among workers, a set of "authorized representative organizations" for each geographic region. (Geographic/industrial or geographic/occupational sectors might be used instead, at the cost of making the selection of representatives more complicated.) Such organizations might include, but would not be limited to, workers' centers, community organizations, unions, and central labor councils. A worker could complain anonymously to any of the authorized representative organizations in his or her geographic area. The complaint would then trigger a complaint to the WHD or the industry committee by the authorized organization, followed, if necessary, by WHD or industry committee enforcement action.¹³⁷ (Of course, the worker could also designate the authorized organization to sue on his or her behalf, as proposed above.)

The authorized representative organizations could easily help to educate and organize low-wage workers as well as monitor labor standards, just as workers' centers do today. They could do so without immediately raising the issue of exclusive representation and triggering the organizing difficulties that arise when an organization seeks to become an exclusive bargaining representative for a group of workers. At the same time, workers who participated in activities under the auspices of these organizations would enjoy the National Labor Relations Act's protection of work-related collective action¹³⁸ even if they were not union members.

Promoting the Unionization of Low-Wage Workers

Although this topic is perhaps the most important one in the entire paper, I will merely summarize briefly a set of issues and recommendations that I have discussed and advocated at length elsewhere.¹³⁹ These issues and recommendations have nothing to do with the FLSA per se. Instead, they arise out of the interaction between the National Labor Relations Act (NLRA), the structure of low-wage labor markets, and the characteristics of American unions in the post-World War II period.

The basic problem is that the procedure that the NLRA in its current form provides for establishing and conducting collective bargaining relationships is best suited to large, stable employers and worksites. The law exhibits a strong presumption in favor of single-employer and single-worksite bargaining and makes multi-employer bargaining relationships difficult to establish and maintain. In part for this reason and in part for other reasons having to do with the economics of union organizing, the dynamics of union certification election campaigns, and unexamined assumptions about what a union is, American unions usually prefer to organize and bargain on a single-employer or single-establishment basis. Yet single-employer and (especially) single-establishment bargaining are of little value to the many low-wage workers who work in small, scattered worksites or for employers in highly competitive industries. To raise their wages and improve their working conditions, these workers need multi-employer bargaining on a geographic/occupational, geographic/industrial, or chain-of-production/business network basis.

To encourage multi-employer organizing and bargaining, I have made the following proposals, some of which are based on current, past, or proposed features of Canadian provincial labor law.¹⁴⁰

- (a) Allow unions to seek certification through an election conducted among all of the workers in a geographic/occupational or geographic/industrial sector. If a majority of workers votes for a union, that union becomes the exclusive bargaining representative of all workers in the sector.
- (b) Allow the National Labor Relations Board to combine existing bargaining units for purposes of collective bargaining, either on its own initiative or upon petition and majority vote of each of the units for which combination is sought. All the employers and unions in the combined unit would then be required to bargain jointly.
- (c) Allow any employer to sign a “pre-hire” agreement with a union, under which the parties would agree that the union would represent all workers that the employer subsequently hires. (The workers subsequently hired may, if they wish, vote to decertify.) Pre-hire agreements, currently permitted only in the construction industry, enable collective bargaining to get started in sectors where jobs are unstable.
- (d) Allow unions to use “secondary” economic pressure on, or an agreement with, one firm to achieve recognition from another firm. Such pressure, now permitted only in the garment industry and to a limited extent in the construction industry, may be the only practical way for unions to affect the relations between firms within a chain of production in industries characterized by extensive subcontracting or “network” forms of business organization.
- (e) Allow workers who desire multi-employer consultation rather than collective bargaining to establish multi-employer consultative committees with the right to consult with and receive information from employers. This proposal, considered above in the context of FLSA enforcement, may be more effective as a prelude to multi-employer collective bargaining.
- (f) Allow the National Labor Relations Board to extend the basic economic terms of an existing collective bargaining agreement throughout an entire geographic/occupational or geographic/industrial sector if the agreement already covers a majority of workers in that sector. This proposal, patterned on the Quebec decree system discussed above, may also be a prelude to collective bargaining, although the evidence on this point is ambiguous.

Concluding Summary

Enforcing the minimum wage raises the wages of America’s poorest workers. However, the U.S. Department of Labor’s enforcement of the law occurs within a set of legal, administrative, and economic institutions that offers few deterrents to the minority of employers that is bent on violating the law and little compensation to workers who are denied the wages to which they are legally entitled. The system of minimum-wage enforcement has grown increasingly inadequate over time. This growing inadequacy cannot be attributed to the WHD, which has recently embarked on some promising initiatives that emphasize low-wage workers. Rather, it is a systemic problem. The policy recommendations presented here are designed to work together to create multiple points at which workers can access the enforcement system and multiple ways in which employers can be deterred from violating the labor laws. They combine WHD enforcement with enforcement by other individuals and groups, especially worker organizations. By enriching the enforcement system in this way, they can bring America’s “original anti-poverty law”¹⁴¹ closer to fulfilling its aspiration.

Endnotes

- ¹ Workers at the tenth percentile of the wage distribution are defined as those who earn more than 10 percent of all workers and less than the other 90 percent (see Mishel et al., 1999).
- ² See *id.* pp. 171-207.
- ³ Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, codified at 29 U.S.C. section 201 et seq.
- ⁴ Mishel et al. (1999), p. 131.
- ⁵ Results for the regressions that are described in this paragraph but not included in the Appendix are available from the author upon request.
- ⁶ I am indebted to Janice Fine for this hypothesis.
- ⁷ FLSA section 11(a), 29 U.S.C. section 211(a).
- ⁸ FLSA section 16(c), 29 U.S.C. section 216(c). Liquidated damages are intended to compensate workers for the costs of not being paid minimum wage or overtime pay when it was due. They are not intended to punish the employer.
- ⁹ FLSA section 17, 29 U.S.C. section 217.
- ¹⁰ FLSA section 16(b), 29 U.S.C. section 216(b).
- ¹¹ Merely paying a covered worker less than the minimum wage does not make a violation willful, even if the employer knows that it is paying less than the minimum wage. To commit a willful violation of the minimum wage requirement, the employer must also know that the employee is covered by the minimum wage or must act in reckless disregard of whether or not the employee is covered. A willful violation of the FLSA occurs if an employer either knows that it is violating the FLSA or acts in reckless disregard of whether or not it is violating the FLSA. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 130 (1988).
- ¹² FLSA section 16(a), 29 U.S.C. section 216(a).
- ¹³ Brock (1997).
- ¹⁴ Author's telephone interview with Rae Glass, Wage and Hour Division, Washington, DC, March 1999.
- ¹⁵ U.S. General Accounting Office (1992).
- ¹⁶ Wood and Wood (1983).
- ¹⁷ Amos Zehavi's interview with Joseph DiJulia, Wage and Hour Division, Boston, MA, March 1999.
- ¹⁸ Author's telephone interview with Rae Glass, WHD, Washington, DC, March 1999.
- ¹⁹ See U.S. House of Representatives (1992). The WHD's preference for settlement over litigation is not a recent phenomenon; even in 1938-39, the first year of the FLSA, the WHD favored settlements, consent decrees, and guilty pleas with sentences suspended when employers made restitution to employees (Herman, 1939).
- ²⁰ Author's telephone interview with Rae Glass, WHD, Washington, DC, March 1999.
- ²¹ Hansen (1996).
- ²² Wood and Wood (1983), p. 554.
- ²³ Portal-to-Portal Act of 1947, section 6(a).
- ²⁴ See U.S. General Accounting Office (1992) and Wood and Wood (1983), pp.559-560 (same findings for 1970s).
- ²⁵ Wood and Wood (1983), p. 555.
- ²⁶ *Id.* p. 556.
- ²⁷ U.S. House of Representatives (1992), p. 7.
- ²⁸ See U.S. General Accounting Office (1985) and Wood and Wood (1983), p. 554.
- ²⁹ See U.S. House of Representatives (1992), p. 7. The Department of Labor may obtain an injunction ordering the employer to stop falsifying records or to replace falsified records with correct ones, but this can be difficult to enforce. Note that the civil fines for willful or repeated violations do not apply to recordkeeping violations.
- ³⁰ In addition, state laws in many states, including California, impose only minimal penalties on employers who falsify payroll records, bounce paychecks, or refuse to pay wages, and they provide workers with little or no compensation for unpaid wages. See Foo (1994). But see Gordon (1998), which discusses the recent campaign leading to the enactment of strong penalties for unpaid wages in New York.
- ³¹ Nordlund (1997).
- ³² Herman (1939), pp. 383-384.
- ³³ *Id.*, pp. 370-71.
- ³⁴ Nordlund (1997), p. 68.

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- ³⁵ *Id.*, p. 84.
- ³⁶ Wood and Wood (1983), p. 543.
- ³⁷ Nordlund (1997), p. 187.
- ³⁸ See *id.*, p. 82 (27 percent of inspections were complaint-driven in 1961) and p. 118 (25 percent of inspections were complaint-driven in 1960).
- ³⁹ See *id.*, p. 62. The WHD's interim report to Congress in 1938 suggested early enforcement would be complaint-driven). See Sellekaerts and Welch (1983) and pp. 124, 126 (the majority of recent investigations have been complaint-driven). Data supplied to the author by the WHD show that between 55 and 83 percent of compliance actions during the period 1979-1998 were complaint-driven.
- ⁴⁰ Author's calculations based on data supplied by the WHD.
- ⁴¹ Amos Zehavi's interview with Joseph DiJulia, WHD, Boston, MA, March 1999.
- ⁴² Nordlund (1997), pp. 63-64.
- ⁴³ U.S. General Accounting Office (1990a).
- ⁴⁴ U.S. General Accounting Office (1991a and 1991b).
- ⁴⁵ Author's telephone interview with Rae Glass, WHD, Washington, DC, March 1999.
- ⁴⁶ See U.S. Department of Labor (1998) and author's telephone interview with Rae Glass, WHD, Washington, DC, March 1999.
- ⁴⁷ Author's telephone interview with Rae Glass, WHD, Washington, DC, March 1999. In the 1970s, WHD did not systematically reinspect past violators. See Wood and Wood (1983), p. 560.
- ⁴⁸ Amos Zehavi's interview with Joseph DiJulia, WHD, Boston, MA, March 1999.
- ⁴⁹ Author's telephone interview with Rae Glass, WHD, Washington, DC, March 1999; Amos Zehavi's interview with Joseph DiJulia, WHD, Boston, MA, March 1999.
- ⁵⁰ FLSA section 15(a)(1), 29 U.S.C. section 215(a)(1).
- ⁵¹ U.S. General Accounting Office (1994b).
- ⁵² FLSA section 15(a)(1), 29 U.S.C. section 215(a)(1).
- ⁵³ Amos Zehavi's interview with Joseph DiJulia, WHD, Boston, MA, March 1999.
- ⁵⁴ Nordlund (1997), p. 151.
- ⁵⁵ *Id.*, pp. 188, 196.
- ⁵⁶ *Id.*, p. 200.
- ⁵⁷ Author's telephone interview with Rae Glass, WHD, Washington, DC, March 1999.
- ⁵⁸ *Id.* See also Hansen (1997). p. 11.
- ⁵⁹ The share of minimum wage-covered workers paid less than the minimum wage ranged from 0.8 percent to 1.2 percent during the 1965-1979 period and, when adjusted for measurement differences across years within that period, probably declined between 1965 and 1979. See Sellekaerts and Welch (1983), p. 129. The most comparable data for the years since 1979 are the data on hourly workers presented in Table 2, which show that the share of workers earning subminimum wages ranged from 2.2 percent to 6.8 percent. However, these two data series are not fully comparable because not all hourly workers are covered by the minimum wage.
- ⁶⁰ The number of employed civilians in the United States rose from 58.9 million in 1950 to 126.7 million in 1996. U.S. Bureau of the Census (1997), p. 397, Table 619.
- ⁶¹ Wood and Wood (1983), pp. 530-531.
- ⁶² O'Brien (1997), p. 36.
- ⁶³ See Nordlund (1997), pp. 75-76.
- ⁶⁴ *Id.*, pp. 106-108.
- ⁶⁵ Nordlund (1997), p. 117.
- ⁶⁶ *Id.*; Sellekaerts and Welch (1983), p.129.
- ⁶⁷ Nordlund (1997), p. 136.
- ⁶⁸ 426 U.S. 833 (1976).
- ⁶⁹ See Nordlund (1997), p. 187.
- ⁷⁰ 105 S.Ct. 1005 (1985). [not clear]
- ⁷¹ U.S. Department of Labor (1998), p. 21.
- ⁷² For a summary and enactment timeline of federal labor and employment statutes and the federal agencies that are currently responsible for enforcing them, see U.S. General Accounting Office (1994a).
- ⁷³ Nordlund (1997), pp. 109, 152. In 1979, responsibility for enforcing the Equal Pay Act was transferred to the Equal Employment Opportunity Commission.

⁷⁴ The WHD and the Immigration and Naturalization Service (INS) are jointly responsible for this task. The two agencies previously had a memorandum of understanding that required the WHD to conduct these inspections and refer violations to INS whenever it inspected employers' payroll records for FLSA enforcement purposes. However, this memorandum was modified in January 1999 to require the WHD to conduct these inspections and refer violations to the INS only when it conducts targeted investigations, not when it responds to worker complaints. (Author's telephone interview with Rae Glass, WHD, Washington, DC, March 1999.)

⁷⁵ Author's analysis of data provided by Wage and Hour Division.

⁷⁶ U.S. Bureau of the Census (1997), p. 10, Table 5.

⁷⁷ Author's telephone interview with Rae Glass, WHD, Washington, DC, March 1999.

⁷⁸ Rae Glass described this INS policy change to the author. Author's telephone interview with Rae Glass, WHD, Washington, DC, March 1999.

⁷⁹ Nordlund (1997), p. 64. The lumber industry, also a major source of minimum-wage complaints at that time, is no longer among the major violators.

⁸⁰ *Id.*, p. 193.

⁸¹ U.S. Department of Labor (1998), p. 35, and author's analysis of data reported therein. In all industries taken together, more than 82 percent of all violations involved overtime pay (although some violations involved both minimum wage and overtime).

⁸² Author's analysis of 1997 Current Population Survey data. The analysis is suggestive rather than conclusive because it applies to all hourly workers, a group which does not correspond precisely to workers covered by the minimum wage. Of all hourly workers in 1997, 3.8 percent earned less than the minimum wage. The corresponding percentages for the industries mentioned in the text were: apparel, 6 percent; agriculture, 5 percent; retail trade, 10.3 percent; private household services, 18.8 percent; personal services, 6.3 percent; entertainment and recreational services, 7.9 percent; educational services, 4 percent; and social services, 6.1 percent. Each of these industries also accounted for a higher share of subminimum-wage employment than of total hourly employment.

⁸³ *Id.*

⁸⁴ Author's analysis of data in U.S. Bureau of the Census (1997), p. 544, Table 845.

⁸⁵ "Fixed costs" include the time that the investigator takes to travel to the establishment and become familiar with its recordkeeping system. Indirect support for the efficiency hypothesis in the text comes from the fact that the number of FLSA compliance actions per WHD investigator declined from 79.5 to 38.2 between 1990 and 1997, after rising more or less steadily from 58.4 in 1979. Author's analysis of data provided by the WHD. The hypothesis is consistent with the evidence that the WHD has been able to inspect a declining share of covered establishments over time.

⁸⁶ See, for example, Herzenberg, Alic, and Wial (1998), pp. 109-117.

⁸⁷ See *id.*, pp. 119-120. See also Harrison (1994).

⁸⁸ See Foo (1994), p. 2208, and U.S. General Accounting Office (1994b), pp. 8-9.

⁸⁹ U.S. General Accounting Office (1994b), p. 9.

⁹⁰ See 29 C.F.R. section 791.2(b); *McLaughlin v. Lunde Truck Sales, Inc.*, 714 F.Supp. 920, 924 (N.D. Ill. 1989). Employers are joint employers under the FLSA if they share employees, or if one employer acts directly or indirectly in the interest of the other in relation to the employee, or if the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of employee because one employer controls the other or because both employers are under common control.

⁹¹ U.S. General Accounting Office (1994a), p. 66 (which notes unions' perception that workers are unwilling to complain while employed) and author's telephone interview with Rae Glass, WHD, Washington, DC, March 1999. Although the FLSA contains a provision prohibiting an employer from retaliating against a worker who sues or files a complaint—see FLSA section 15(a)(3), 29 U.S.C. section 215(a)(3)—this provision does little to prevent employers who wish to fire complaining workers from finding a way to do so.

⁹² There are several pieces of evidence for this. Workers are sometimes willing to complain to the WHD while still employed if they complain as a group. Author's telephone interview with Rae Glass, WHD, Washington, DC, March 1999. The experience of Occupational Safety and Health Administration investigators indicates that workers (and also employers) are better informed about workplace safety and health laws at worksites where worker representation exists; the same thing may well be true for wage and hour laws. See U.S. General Accounting Office (1990b). Under typical collective bargaining agreements workers enjoy protection against being fired except for just cause, and unions may enforce this protection through arbitration rather than through much costlier and lengthier lawsuits. This enables workers who complain to government agencies about labor law violations to keep their jobs.

See Weiler (1990), pp. 72-73. Finally, unions often filed FLSA suits affecting large groups of workers before the Portal-to-Portal Act of 1947 prohibited such suits. See Linder (1991), p. 167

⁹³ Workers' centers, which are sometimes established by unions and sometimes by independent organizers, provide nonunion immigrant workers with education and training (including education and training in workers' legal rights), assistance in political and union organizing and enforcement of worker rights, and opportunities to come together outside the workplace. See, for example, Ness (1998).

⁹⁴ O'Brien (1997).

⁹⁵ Herman (1939), pp. 377, 385. During the FLSA's first twenty months, 4.5 percent of complaints to the WHD came from unions. Nordlund (1997), p. 64.

⁹⁶ Herman (1939), p. 385.

⁹⁷ Linder (1991), p. 166.

⁹⁸ Linder (1991), p. 167-176 recounts the history of these legislative changes.

⁹⁹ Portal-to-Portal Act of 1947. The federal courts have not consistently enforced the ban on representative suits. Compare *State of Nevada Employees' Association v. Bryan*, 916 F.2d 1384 (9th Cir. 1990) (employee association not a proper plaintiff to sue on behalf of its members) and *OTR Drivers at Frito-Lay, Inc.'s Distribution Center v. Frito-Lay, Inc.*, 160 F.R.D. 146, 149 (D. Kan. 1995) (union may not sue on behalf of its members) with *Abbott v. Virginia Beach*, 879 F.2d 132 (4th Cir. 1989) (union was plaintiff; court's opinion did not address the issue) and *Jacksonville Professional Firefighters' Association Local 2691 v. Jacksonville*, 685 F.Supp. 513 (E.D. N.C. 1988) (same).

¹⁰⁰ *Id.* In most other federal class action suits, parties who do not want to be included in the class of plaintiffs must specifically opt out of the class. See Federal Rules of Civil Procedure, Rule 23.

¹⁰¹ See Brock (1997), pp. 819-820. In principle, a union may perform these functions regardless of whether or not it is the collective bargaining representative of the workers in question. *Id.* See also *Arrington v. National Broadcasting Co., Inc.*, 531 F.Supp. 498, 500-503 (D. D.C. 1982) (union may make inquiries of Department of Labor on behalf of workers and coordinate their opt-ins to class-action suit as long as it is not a party to suit).

¹⁰² Author's analysis of 1997 Current Population Survey data.

¹⁰³ In 1997, union densities for hourly workers in these industries were: agriculture 3.2 percent, retail trade 7.3 percent, private household services 1.0 percent, personal services 8.7 percent, entertainment and recreational services 8.6 percent, educational services 29.1 percent, and social services 8.3 percent. *Id.*

¹⁰⁴ Union density among subminimum-wage hourly workers increased from 0.1 percent in 1987 to 0.2 percent in 1997. Among hourly workers in the bottom tenth of the wage distribution, it rose from 0.4 percent to 0.6 percent. In contrast, it fell from 17.0 percent to 14.5 percent among all U.S. workers. *Id.*

¹⁰⁵ Author's analysis based on the data on WHD appropriations and numbers of investigators in Table 1 and the data on investigators per thousand covered employees in Table 3.

¹⁰⁶ These critiques of the government-individual system of FLSA enforcement parallel O'Brien's criticisms of the FLSA's systems of rulemaking and adjudication. O'Brien argues that an independent, quasi-judicial agency (such as was envisioned in the Roosevelt Administration's early proposal for the FLSA) would have made for more effective rulemaking and adjudication and created the opportunity for unions to use the FLSA as an organizing tool. See O'Brien (1997), pp. 39-41.

¹⁰⁷ Gunningham and Rees (1994). See also Langille (1994), pp 192-193.

¹⁰⁸ Cohen and Rogers provide a comprehensive argument that such groups, which they call "secondary associations," should be given an important and explicit regulatory role in a democratic political system. See generally Cohen and Rogers (1995). During the 1930s, Jaffe argued that this role was both desirable and inevitable. See Jaffe (1937). For American examples of the explicit statutory delegation of law enforcement authority to such groups, see *id.*, pp. 232-234, and note (1932) pp. 92-93.

¹⁰⁹ This formulation of the problem emerged out of a conversation with Jim Wooten. Steven Shavell's analysis of the generic problem of choosing between tort law and administrative regulation provides an example of how the answer to this sort of question can be used to design an enforcement system. See Shavell (1984).

¹¹⁰ The "police patrol"- "fire alarm" distinction, first developed to describe alternative types of institutions that monitor administrative agencies' compliance with congressional intent, can also be applied to alternative institutions for monitoring employers' compliance with the FLSA. "Fire alarms" supplement rather than replace "police patrols." See McCubbins, Noll, and Weingast (1987).

¹¹¹ This proposal, as well as a description of its operation under the False Claims Act, can be found in Foo (1994), pp. 2205-2207. Plaintiffs in such suits are known as qui tam relators.

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- ¹¹² Other authors have made similar proposals. See *id* and Wood and Wood (1983), p. 565.
- ¹¹³ These and related proposals, as well as a more extensive legal analysis including bankruptcy issues, can be found in Foo (1994), pp. 2200-2202.
- ¹¹⁴ The General Accounting Office has made this proposal. U.S. General Accounting Office (1992), p. 9. A similar proposal can be found in Wood and Wood (1983), pp. 569-570.
- ¹¹⁵ Foo has also made this proposal (Foo, 1994, 2208-2209).
- ¹¹⁶ Foo has also made this proposal (Foo, 1994, 2192-2195). See also U.S. General Accounting Office (1994b), p. 12.
- ¹¹⁷ Foo has also made this proposal (Foo, 1994, 2208-2209).
- ¹¹⁸ This theory is not entirely foreign to minimum-wage law. It is consistent with section 2 of the FLSA, which characterizes low labor standards as “an unfair method of competition in commerce.” FLSA section 2(a)(3), 29 U.S.C. section 202(a)(3). Wisconsin’s early minimum-wage statute went even further, authorizing the Governor to set a minimum wage so as to prevent unfair competition. See Wylie (1937) and case note (1937).
- ¹¹⁹ Private parties may sue for damages or injunctions under the Clayton Act sections 4 and 16, and they have frequently done so. See Salop and White (1988).
- ¹²⁰ Industrial Standards Act, Revised Statutes of Ontario, ch. I.6 (1990) (Can.).
- ¹²¹ An Act Respecting Collective Agreement Decrees, Revised Statutes of Quebec, ch. D-2 (1977) (Can.).
- ¹²² Ontario District Council of the International Ladies’ Garment Workers’ Union and INTERCEDE (1993) pp. 31, 32 (hereinafter Ontario District Council, 1993). This procedure resembles negotiated rulemaking in the United States.
- ¹²³ *Id.*, p. 33.
- ¹²⁴ See Wial (1993). See also Ontario District Council (1993), pp. 35-36; Bernier (1993), Bergeron and Veilleux (1996).
- ¹²⁵ Bernier (1993), p. 750.
- ¹²⁶ *Id.*; Bergeron and Veilleux (1996), pp. 151-152.
- ¹²⁷ The FLSA initially provided for an Ontario-like system of nationwide industry committees, including representatives of workers, employers, and the general public, to negotiate industry-specific minimum wages above the general federal minimum wage and to recommend such wages to the Labor Department, which had the discretion to adopt them through regulation. See Dickinson (1939). However, this provision now applies only to American Samoa. See FLSA section 5, 29 U.S.C. section 205. Resurrecting industry committees on a local basis throughout the nation might be a means of creating continuous pressure to upgrade basic labor standards, but I do not consider this option in the text of this paper because it involves standard-setting rather than enforcement.
- ¹²⁸ This proposal is based on but not identical to the one advanced in Ontario District Council (1993), pp. 60-71.
- ¹²⁹ On employers’ ignorance of the law and suspicion of the WHD enforcement process, especially among small employers, see U.S. General Accounting Office (1994a), pp. 4, 6, 56-59.
- ¹³⁰ Brock (1997) has also made this proposal; see p. 819. See also Linder (1991), pp. 167-176.
- ¹³¹ See Brock (1997), pp. 803-804, and Linder (1991), pp. 167-176.
- ¹³² Summers (1992) has made a similar proposal.
- ¹³³ See U.S. GAO (1994c), pp. 14 and 27, and Bernard (1995).
- ¹³⁴ See Weil (1999).
- ¹³⁵ This proposal is adapted from my earlier proposal for voluntary multi-employer consultation. See Wial (1993), pp. 727-731, and Herzenberg, Alic, and Wial (1998), pp. 165-166.
- ¹³⁶ See Fudge (1991). In a similar program in Toronto during 1994-1996, community organizations, legal clinics, and immigrant workers’ centers were designated as employment standards monitors that took anonymous complaints from workers and alerted the provincial government. The Toronto program failed, though, because government inspectors were reluctant to follow up on these complaints. The inspectors had never before dealt with anonymous complaints and many of them preferred to have an exclusively cooperative relationship with employers. Author’s telephone interview with Shelly Gordon, Workers’ Information and Action Centre, Toronto, ON, March 1999.
- ¹³⁷ A variation on the proposal outlined in the text would be to grant the authorized representative organizations the right to conduct their own inspections of payroll records. This option would provide those organizations with additional monitoring capability. However, even employers that comply with the law might reasonably object to having their payrolls subject to inspection by, say, a dozen independent organizations in addition to the WHD and the local industry committee. For this reason, this option does not appear in the text.

¹³⁸ National Labor Relations Act, as amended, section 7; 29 U.S.C. section 157.

¹³⁹ See Wial (1993), Herzenberg, Alic, and Wial (1998), and Wial (1994).

¹⁴⁰ See Weiler (1980), Baigent et al. (1992), Fudge (1991), Bernier (1993), Bergeron and Veilleux (1996), and Wial (1993), pp. 737 and 738 n. 206 (citing additional Canadian references).

¹⁴¹ Wood and Wood (1983), p. 529, citing Willis (1972).

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Appendix

The regression results presented here are based on annual data for the years 1979-1980, 1987-1990, and 1994-1997. Unless otherwise indicated, wage data cover all hourly workers who are at least 16 years old. (Regression results for all wage and salary workers who are at least 16 years old are very similar to those presented here.) The dependent variable, computed from the combined outgoing rotation groups of the Bureau of Labor Statistics' Current Population Survey (CPS), is the logarithm of the ratio of the average wage of subminimum-wage workers to the minimum wage. It measures the wages of subminimum-wage workers relative to the minimum wage. The explanatory variables are the following:

- WHDINV, the number of Wage and Hour Division (WHD) investigators onboard at the end of the fiscal year (obtained from the WHD). This is a measure of the WHD's enforcement resources.
- WHDEXPRL, the inflation-adjusted annual appropriation for the Wage and Hour Division for the fiscal year (computed from data supplied by the WHD, using the implicit GNP deflator for federal non-defense expenditures). This is an alternative measure of the WHD's enforcement resources.
- ACTFLSA, the number of FLSA compliance actions taken by the WHD in the fiscal year (obtained from the WHD). This is a measure of the amount of the WHD's enforcement resources devoted to the FLSA.
- FLSAPCT, the share of WHD compliance actions during the fiscal year that were due to complaints (computed from data supplied by the WHD as the ratio of complaints completed to compliance actions taken). Included only in regressions that use WHDINV or WHDEXPRL as an explanatory variable, this measures the share of the WHD enforcement effort devoted to the FLSA.
- PCT50, the fiftieth percentile of the wage distribution for all wage and salary workers, in nominal terms (computed from the CPS combined outgoing rotation groups). This variable is included to control for effects of the overall wage distribution on the wages of subminimum-wage workers. As the overall wage distribution shifts upward, the wages of subminimum-wage workers are expected to increase relative to a given minimum wage.
- TEN50, the ratio of the tenth percentile of the wage distribution for all wage and salary workers to the fiftieth percentile of the same distribution (computed from the

CPS outgoing rotation groups). This variable is included to control for general wage influences on the relative wages of all low-wage workers. As the wages of low-wage workers in general rise relative to the median, the wages of subminimum-wage workers are also expected to rise relative to the minimum wage.

- MIN50, the ratio of the minimum wage to the fiftieth percentile of the wage distribution for all wage and salary workers (computed from the federal minimum wage and the CPS combined outgoing rotation groups). When the minimum wage changed in the middle of a year, the variable is computed using the appropriate minimum wage for each month and then averaged across months. This variable is included to control for the influence of the minimum wage on the wages of subminimum-wage workers. An increase in the minimum wage might be expected to raise the relative wages of subminimum-wage workers if subminimum-wage employers must raise their workers' wages when the minimum wage rises, in order to maintain an adequate labor supply. However, if the minimum wage does not affect the subminimum-wage labor market, then an increase in the minimum wage will leave the average wage of subminimum-wage workers unchanged, leading to a decline in that average wage relative to the minimum wage.

Three separate linear specifications were used, one including WHDINV and FLSAPCT as enforcement measures, one including WHDEXPRL and FLSAPCT as enforcement measures, and one including ACTFLSA as the only enforcement variable. The following are the coefficient estimates.

Variable			
Intercept	-4.145411**	-3.390315**	-2.709968**
WHDINV	0.000442**	---	---
WHDEXPRL	---	0.000005**	---
FLSAPCT	2.603797**	2.173304*	---
ACTFLSA	---	---	0.000007**
PCT50	0.044523**	0.030978*	0.077079**
TEN50	1.346065	0.302889	0.472892
MIN50	0.193737	0.483986	2.411231*
R²	0.989	0.978	0.923

Note: * indicates coefficient significantly different from zero at 0.05 level.
 **indicates coefficient significantly different from zero at 0.01 level.