Testimony of
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The Fair Labor Standards Act: Is it Meeting the Needs of The Twenty-First Century Workplace?

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Good morning Chairman Walberg, Representative Woolsey, and members of the Subcommittee on Workforce Protections. My name is Judith M. Conti, and I'm the Federal Advocacy Coordinator for the National Employment Law Project (NELP). NELP is grateful for the opportunity to address the Subcommittee today and share our views of how vitally important the Fair Labor Standards Act (FLSA) and its vigorous enforcement is to today's workforce, particularly for low-wage workers.

NELP is a non-profit organization that for over 40 years has fought for the rights and needs of low-income and unemployed workers. We seek to ensure that work is an anchor of economic security and a ladder of economic opportunity for all working families. In partnership with state, local and national allies, we promote policies and programs that create good jobs, strengthen upward mobility, enforce hard-won worker rights, and help unemployed workers regain their economic footing.

One of NELP's priority issues is enforcement of the protections of the FLSA. As a nation that strives to create fair and moral conditions in workplaces, under which both workers and employers can mutually thrive and succeed, there is no more basic underpinning to the social contract of employment than "a fair day's pay for a full day's work." If we cannot enact and enforce basic wage and hour protections, we can never hope to remedy the other abuses such as discrimination and unsafe working conditions that go on in far too many workplaces. So the heart and center of worker protections is the FLSA and its promises of minimum wages, proper hourly payment, overtime premiums, and prohibitions against child labor. And as anyone who has ever represented low-wage workers can tell you, when employers don't respect the basic mandates of the FLSA, other violations of labor and employment laws are virtually guaranteed to follow.

My experience with the FLSA is deep and varied. I analyzed it as a law clerk to a judge in the United States Court of Appeals for the Seventh Circuit. While in private practice, I counseled large and small employers on how to comply with its mandates as well as litigated on behalf of many workers, both individually and in collective actions, who were denied their rights under the FLSA. I spent seven years as an employer and was tasked with applying and enforcing the FLSA with regard to my organization's workforce. During that same period of time, I supervised hundreds of staff and volunteer attorneys who prosecuted FLSA violations. Most recently, as a policy advocate with NELP, I have worked with our allies throughout the country to ensure the vigorous enforcement and defense of the FLSA.

All of those experiences and perspectives lead me to two conclusions about the FLSA: 1) it's vital for the protection of hourly workers in this country; and 2) it's a relatively simple and straightforward statute and regulatory scheme to administer. So much of law is very gray in its application, yet the FLSA offers the closest to black-and-white that exists, at least with respect to labor and employment law.

At the start, I also wish to make clear that I am not here to suggest that a majority or even a substantial minority of employers do not follow the FLSA. Indeed, given the clarity of the law, numerous employers quite willingly comply, and where there are judgment calls to be

made, they do their best to make the right judgment. There is a thriving management-side bar that ably advises employers and human resources professionals across the country as to compliance with the FLSA and by and large they do a very good job.

But we cannot ignore the fact that there are low-road employers, both big and small, who to varying degrees push the boundaries of the FLSA beyond reason, who misclassify workers as independent contractors in order to avoid their legal responsibilities under the FLSA, who wrongfully classify workers as exempt from coverage of the FLSA, and who flat-out do not pay their workers minimum wage and/or overtime. It is these employers, and their employees, for whom the vigorous enforcement of the FLSA is most important, for not only do they cheat workers out of their wages, but they gain an unfair competitive edge over honest employers. Neither outcome should be tolerated.

You will likely hear the other witnesses speak today about the great lengths to which they go to comply with the FLSA; how much time and money it takes them to do so and how they could better spend those resources on other things that could lead to more hiring, for example. I suggest that compliance with the FLSA is not nearly so time consuming or expensive. More importantly, given the realities I will discuss below about how wide-spread violations of the most basic provisions of this law are, now is not the time to think about weakening the FLSA in a misguided notion of lessening employer burdens, but rather, to redouble our efforts to enforce this vital law.

Thus, as we discuss whether the FLSA is suitable for the 21st century, we must all remember that the employers you have invited here today do NOT represent all employers out there. Rather, low-road employers who do not even follow the very clearest mandates of the FLSA exist in more than sufficient number. In order to eradicate their behavior, our task must be to look for ways to increase vigorous enforcement of the wage and hour laws that are already on the books, and to craft better solutions to the common schemes of wage theft that are so rampant in this country. If we do those things, we not only make conditions better for workers in this country, but we simultaneously level the playing field for high-road employers who strive to do the right thing by their workforces.

Enactment and Purpose of the FLSA

At its core, the FLSA was aimed at eliminating subpar jobs, sweatshops and the subcontracting (including independent contractor abuses) that were going on in the US economy in the early 1900's. And sadly, many of those structures and persistent low-wage jobs are still in existence today, making the statute as relevant and important now as it was when enacted in 1938.

As a society, we agree that there should be a wage floor, below which employers cannot go, [1] and overtime premiums for those who work more than 40 hours per week. [2] These

[1] 29 U.S.C. §206.

[2] Id. at §207.

baseline laws ensure not just that we prevent people from being unfairly overworked, but that we spread out employment among workers. Indeed, as Justice Reed noted in 1941, job creation was at the core of the enactment of the overtime premium, a goal as important and laudable in the Great Depression as it is now in the Great Recession and its aftermath:

> By this requirement although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours of the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of extra work.[3]

Finally, the FLSA included essential child labor prohibitions to eliminate the particular evil of child labor in the days when young children lost their youth to long hours and horrific conditions in the garment and other industries.[4]

The FLSA is a statute that is intended to protect workers and to dissuade unfair competition by unscrupulous employers who flout its rules to the disadvantage of those employers who do play by the rules.[5] As the Supreme Court stated:

> This Act seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation. The purpose is to raise living standards. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based upon substandard labor conditions. Otherwise the Act will be ineffective, and will penalize those who practice fair labor standards as against those who do not.[6]

Thus, as with all remedial statutes, the FLSA should be read broadly, and doubts about coverage should be construed in favor of coverage, not exemption.

Current Conditions for Hourly Workers

For the last few decades, anecdotal evidence indicated that with changing workforce demographics and sectoral shifts within the economy, there had been a persistent rise in the

[3] Overnight Motor Transport. V. Missel, 316 U.S. 527, 577-78 (1941).
[4] 29 U.S.C. §212.
[5] Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 36 (1987); see also Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 299 (1985) ("[P]ayment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of 'unfair method of competition' that the Act was intended to prevent." (citation omitted)); Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1332, 1334 (9th Cir.1991) (Nelson, J., dissenting) (discussing the FLSA's effort to protect law-abiding employers against unfair competition from businesses paying substandard wages).
[6] Roland Elec. Co. v. Walling, 326 U.S. 657, 669-70 (1946).

incidence of wage theft, particularly among low-wage workers, though they are by no means the exclusive victims of this practice.[7] While the Department of Labor and its state counterparts kept records of complaints and investigations, and lawsuits alleging wage theft are matters of public record, there was no rigorous, methodical study documenting just how wide-spread this practice was.

That changed in 2008 when researchers specializing in the low-wage workforce joined together to conduct the first-ever comprehensive survey of low paid hourly workers to get a precise measure of the nature and incidence of the problem. Together with researchers from the Center for Urban Economic Development at the University of Illinois at Chicago and the UCLA Institute for Research on Labor and Employment, NELP surveyed more than 4000 hourly workers in low-wage industries in Chicago, Los Angeles and New York City. Using findings generated by a detailed and structured questionnaire that was carefully administered and analyzed by surveyors, the survey produced the first valid snapshot into the nature of exploitation by unscrupulous employers, and just how widespread abuses are. The results of the survey, published in the 2009 report *Broken Laws: Unprotected* Workers, included the following key findings:

- An astounding 68% of those surveyed experienced at least one pay-related violation in the work week preceding the survey.
- More than one-fourth (26%) of workers were paid less than the legally required minimum wage in the previous work week, and 60% of these workers were underpaid by more than $1 per hour.
- Among those working overtime (more than 40 hours in the previous work week), a whopping 76% were **not** paid the legally required overtime rate by their employers.
- Nearly a quarter of workers came in early or stayed late on the job, and 70% of these workers received no compensation for this "off the clock" work.
- Three-in-ten tipped workers surveyed were not paid the tipped worker minimum wage, and 12% of tipped workers experienced tip stealing by their employer or supervisor.
- The majority of workers never complained about any of these violations for fear that they would experience retaliation, and indeed, of those who did complain, 43% did experience illegal employer retaliation.
- The cost of wage theft is enormous: The typical worker experiencing wage theft lost $51 per week out of average weekly earnings of $339. On a full-time year-

[7] "Wage theft" refers to a range of practices that reflect employers' failure to pay workers the wages they have earned. These include the failure or refusal to pay some or all of wages promised, requiring workers to put in unpaid time off the clock, denial of minimum wage and overtime pay, and misclassification of employees as independent contractors.

round basis, this translates into lost annual earnings of $2,634 (15% of total earnings of $17,616). [8]

Extrapolating from these findings, the research team estimated that *in these three cities alone*, low-wage workers lose more than $56.4 million *per week* as a result of employment and labor law violations. At a moment when our economy continues to suffer from lack of demand (consumer purchasing), these findings suggest that one important key to economic recovery is more vigorous enforcement of wage and hour protections—so workers are paid what they earn, and can pump money back into their local economics. It goes without saying that wage theft of this magnitude also contributes to the phenomenon of working poverty.

The 2008 survey was broad, encompassing twelve different industries: apparel and textile manufacturing; personal and repair services; private households; retail and drug stores; grocery stores; security, building and grounds services; food and furniture manufacturing, transportation and warehousing; restaurants and hotels; residential construction; home health care; social assistance and education; and other industries such as finance and other health care. Workers from employers of all sizes were part of the survey, and while employers with less than 100 employees had markedly higher rates of violations of basic wage and hour laws, employers with more than 100 employees still had shockingly high rates of violations.[9]

A few other important findings are worth noting:

- Women are more likely to be victims of wage theft than men are.[10]
- Minimum wage violations are most common in three industries: apparel and textile manufacturing; personal and repair services; and private households.[11]
- In each of the following occupations, *more than 50%* of the workers surveyed experienced overtime violations:[12]

    - Child care workers (90.2%)
    - Stock/office clerks & cashiers (86%)
    - Home health care workers (82.7%)
    - Beauty/dry cleaning & general repair workers (81.9%)
    - Car wash workers/ parking attendants & drivers (77.9%)
    - Waiters/cafeteria workers/ bartenders (77.9%)
    - Retail salespersons and tellers (76.2%)

[8] Annette Bernhardt, et al. Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (2009), http://www.nelp.org/page/-/Justice/BrokenLawsPresentation2010.pdf?nocdn=1.
[9] For those workers who were employed by a company with more than 100 employees, 15.2% experienced minimum wage violations, 52.8% were victims of overtime violations, 64.9% were made to work off the clock, and 63.8% had a meal break violation. Those who worked for smaller companies experienced minimum wage violations at a rate of 28.5%, overtime violations at a rate of 82.4%, off the clock work at 73.6%, and meal break violations at a rate of 73.5%. Id. at 30.
[10] Id. at 42.
[11] Id. at 31.
[12] Id. at 34.

- Building services & grounds workers (71.2%)
- Sewing & garment workers (69.9%)
- Cooks, dishwashers & food preparers (67.8%)
- General construction (66.1%)
- Cashiers (58.8%)

As this brief overview makes clear, the most basic and bright-line rules of the FLSA are being routinely ignored with impunity. These violations are not occurring because of complex determinations of whether or not someone is an exempt professional or a legitimate independent contractor. Rather, they are flagrant abuses of very straight-forward and relevant provisions of our basic federal and state wage and hour laws.

These findings highlight just how important the FLSA still is and how we need to dramatically increase our enforcement of wage and hour laws throughout the country, across every industry and occupation. [13]

Decline of Enforcement of the FLSA and State Wage and Hour Laws

Over the same period that worker advocates have sounded alarms over the rise of wage theft, employers and their advocates have decried an increase in the rise of lawsuits claiming FLSA violations. The sheer increase in the number of employers and workers is obviously responsible for some of each of these trends, but declining enforcement by the Department of Labor and its state counterparts also is a significant factor in both trends. In the face of such decline, the private bar increasingly stepped into the enforcement void, where the low-hanging fruit of such basic violations of law was too obvious to ignore. And they've had their work cut out for them in recent years as the financial pressures of the recession that have driven low-road employers to engage in even more wage theft, and have pressured other employers who are barely hanging on to conform to those illegal practices simply to survive.

Indeed, USDOL has seen a recent uptick in complaints and investigations, which they have been better able to handle because of recent increases to Wage and Hour Division (WHD) staff to get it closer to pre-2001 staffing levels.[14] In FY 2010, WHD registered 31,824 complaints and closed 26,486 cases. As the economy has worsened, the number of complaints registered with WHD has continued to rise:

- FY 2008 – 23,845
- FY 2009 – 26,311
- FY 2010 – 31,824

[13] For an excellent summary of the abuses rampant in agricultural labor, please see "Weeding Out Abuses: Recommendations by Farmworker Justice and Oxfam America.: http://www.farmworkerjustice.org/files/immigration-labor/weeding-out-abuses.pdf.

[14] See http://www.dol.gov/wecanhelp/presentation/1.htm (slide 3 of the presentation). WHD began hiring new investigators in the summer of 2009, and, by the end of FY 2010, WHD had hired over 300 new investigators, taking the agency to a total of 1,035 investigators.

Of particular concern is the rise in the number minimum wage complaints where violations were found. For example, in FY 2009, WHD found violations in 9,176 minimum wage cases. In comparison, in FY 2010, that number increased to 10,529.[15]

USDOL's WHD has a very full plate. It has responsibility not just for enforcing the FLSA, but also the Family and Medical Leave Act (FMLA), the Migrant and Seasonal Agricultural Worker Protection Act (AWPA or MSPA), the Service Contract Act, and the Davis-Bacon Act, among others. Between FY 1975 to FY 2004, the number of WHD investigators declined from 921 to 788 in spite of the fact that the Division was given responsibility for the FMLA during the same time, the covered US workforce grew by 55% and the number of covered employers grew by 112%. These 788 investigators were responsible for protecting the rights of over 135 million workers in over 7.3 million establishments, a staggering average of 245,000 workers for each investigator. [16]

Statistics from the Solicitor's Office from FY 1992 to FY 2008 paint a similar picture. During that time, the total staff of the Solicitor's Office (attorneys, paralegals, secretaries, etc.) declined by 25% from 786 to 590.[17] During this same period of declining staff, the Solicitor's Office gained responsibility for litigation under both the FMLA, and under substantial amendments to the Mine Safety and Health Act (known as the Mine Improvement and New Emergency Response Act, or MINER Act) in 2006.[18] As recently as FY 1987, the Solicitor's Office filed 705 FLSA lawsuits, representing 48% of all FLSA lawsuits filed.[19] In FY 2007, the Solicitor's office filed only 151 FLSA lawsuits, representing only 2% of all FLSA lawsuits filed.[20]

A current snapshot of Wage and Hour offices throughout the country is similarly bleak. According to a 2010 survey conducted by Policy Matters Ohio, 43 states and the District of Columbia also have wage and hour investigatory staff – a total of 659.5 investigators across the country, responsible to ensure compliance on behalf of 96.9 million workers covered by state

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[15] http://ogesdw.dol.gov/.

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

[17] U.S. Department of Labor Budget Submission to Congress for Fiscal Year 1993; "Legal Services" in volume 3 of the U.S. Department of Labor's *FY 2008 Detailed Budget Documentation,* pp. DM-26 to DM-28, available at www.dol.gov/dol/budget/2008/PDF/CRJ-V3-02.pdf. Although the Solicitor's office had 590 employees in January 2007, it had funding to pay for only 551 employees. *Id.* at DM-28.

[18] The Solicitor's Office litigation responsibilities encompass not just FLSA cases, but many other laws as well, such as the Occupational Safety and Health Act (OSH Act), the Mine Safety and Health Act (MSH Act), the Employee Retirement Income Security Act (ERISA), and the Black Lung Benefits Act (BLBA).

[19] Administrative Office of the United States Courts, *Judicial Business of the United States Courts,* 1987 Annual Report, Table C-2 (Washington, D.C., 1987). The FLSA authorizes lawsuits not only by DOL handled by Solicitor's Office attorneys, but also by aggrieved employees represented by private attorneys. Until 1987, nearly 50 percent, and in most years far more, of all FLSA lawsuits were handled by DOL attorneys, but more recently employee lawsuits have represented a much higher percentage of all FLSA cases.

[20] Administrative Office of the United States Courts, *Judicial Business of the United States Courts,* 2007 Annual Report, Table C-2 (Washington, D.C., 2007), available at http://www.uscourts.gov/judbus2007/appendices/c2.pdf.

wage and hour laws. This means there is approximately one investigator for every 146,000 workers, but it should be noted that these investigators have responsibility for many laws other than basic wage and hour laws, and that distribution of these staff within and across states is neither equal nor proportionate. Some states like New York and California have relatively robust cadres of investigators, while others devote paltry to non-existent resources wage and hour enforcement. For example, Florida has no staff whatsoever to enforce its wage and hour laws. Indiana has only one investigator for the entire state.[21] Virginia has four investigators and a grand total of one attorney who prosecutes wage and hour violations in the state. None of this is meant to criticize any of these state agencies; rather, it points to how important it is to maintain a strong federal statute with an agency that's adequately resourced to enforce it.

Flexibility for the Modern Workforce

Some employers complain that they feel restricted by the FLSA – that the law hampers them in providing the flexibility that the modern workforce and worker demand. This is a fallacy. The fact is that the FLSA provides ample opportunity for flexibility on terms that both benefit and protect workers as well as employers.

A frequent complaint is that under the FLSA, employers are not allowed to offer workers compensatory time in lieu of overtime pay. This is an overstatement of the law that ignores the existing ability to give compensatory time off within the same workweek as overtime was performed. Moreover, it neglects to take into account the very important reasons that the ability to offer compensatory time is appropriately circumscribed in the private sector. I testified before this Subcommittee about this very issue on March 6, 2002, and the substance of my comments remains unchanged. I ask that my previous testimony be resubmitted for the record.[22]

The issue of workplace flexibility has become a very pressing and well-discussed issue in recent years. Recent publications have focused on all the ways in which modern technology allows employers to be increasingly flexible with their workforces, even low-wage workforces. It is a fact that there are certain jobs that require precise hours at a precise location, such as a receptionist, and there's little if anything that can be done to alter those realities. It is equally true that sometimes, jobs demand unscheduled overtime and employees must comply, and employers must pay the premium. But there are increasing options and opportunities for creativity that employers can take advantage of for the mutual benefit of themselves and their employees. The full reports that contain these suggestions are cited below,[23] and I submit them as part of the official record. A brief summary of ideas follows:

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[21] Investigating Wage Theft: A Survey of the States. A Report from Policy Matters Ohio. Zach Schiller and Sarah DeCarlo, November 2010. http://www.policymattersohio.org/pdf/InvestigatingWageTheft2010.pdf.

[22] http://www.dcejc.org/app/docs/Judy_Testimony%5B1%5D.pdf.

[23] http://www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf; http://workplaceflexibility2010.org/images/uploads/whatsnew/Flexible%20Workplace%20Solutions%20for%20Low-Wage%20Hourly%20Workers.pdf.

- For workforces that have variable scheduling from week to week, or month to month, employers can use scheduling software that allows them to ensure that their needs are covered, and allows workers to have meaningful input into what hours and shifts they will work;
- Allow telecommuting to the maximum extent possible;
- Allow work-sharing among teams of employees;
- Allow workers to shift their hours to those that accommodate their personal needs (such as child-care pick up) whenever possible;
- Allow workers to opt for compressed work-weeks whenever possible;
- Allow workers to swap shifts with ease as long as the employer needs are met;
- Allow a reasonable amount of paid sick leave;
- Implement leave banks at the workplace to accommodate emergency needs of workers;
- Assign overtime work on a voluntary basis to the maximum extent possible;
- Cross train employees to do different jobs so that there's more choice in accepting overtime and accommodating workers' needs for time off.

None of these practices is prohibited by the FLSA. Of course, they require employers to engage and trust their workers, but in my seven years of experience as an employer, I learned one lesson loud and clear – the more you trust your employees and allow them to balance their personal and professional needs, the harder they work for you and the more trustworthy they become. There may be a few along the way who abuse the trust, and they should be dealt with appropriately. But the many should not suffer because of the scant few, and the goodwill and hard work that flows from such a relationship is rewarding for both the employer and the employees.

Necessary Modernizations to the FLSA and its Implementing Regulations

Although the FLSA's current protections should remain untouched and vigorously enforced, it is true that there are some improvements that could be made, which would make the statutory scheme more sensible, aid in enforcement, and respond to popular ways to evade the FLSA's mandates, as well as other mandates of federal and state labor, employment and tax law.

First, NELP enthusiastically supports The Employee Misclassification Act (EMPA) that was introduced in Congress last term by Congresswoman Woolsey and Senator Sherrod Brown. This bill would amend the FLSA to require employers to keep records of independent contractors engaged to work, provide notice to those workers of their status as an "employee" or "independent contractor," require the USDOL to create an "employee rights website," and impose a penalty for employer misclassification of employees.

If enacted, EMPA would be an important step toward greater transparency in employment relationships. If workers know about their employment classification and the impacts of that status, they will be better prepared to report any violations. USDOL will be

better equipped to determine whether there is compliance if the employers maintain the basic records of their contractors. Indeed, doing so would certainly be a "best practice" for a smart business, so that it could keep track of payments and the labor or services that were the basis for those payments. Equally important, these practices would also help law-abiding employers that play by the rules but that are undercut by misclassifying firms. They would likewise provide the information needed to recover much-needed tax and payroll revenues lost when workers are misclassified as independent contractors. Finally, should an employer be subjected to investigation or litigation, it will be more readily able to defend and justify its practices, or minimize time spent assessing damages in the case of erroneous classification, if these records are kept.[24]

Second, in its last two budgets, the Administration sought $25 million for the USDOL's misclassification initiative to target misclassification with additional enforcement personnel and competitive grants to state unemployment insurance programs to address independent contractor misclassification. These efforts, which would ultimately yield much needed revenue to state and federal treasuries, not to mention much needed dollars to workers' pockets, should be supported.

Third, if we wanted to get serious about wage theft, we could also consider amending the FLSA to increase the penalties against employers who steal wages from their employees. Presently, the FLSA allows workers to collect double back wages for two years, three years in the case of "willful" violations. Many states have mandated treble damages and longer statutes of limitations, which are very effective strategies to reduce wage theft, made it much less profitable for employers to engage in these practice, and have proven a successful tool in speeding settlement in cases where violations are clear-cut.

Fourth, the USDOL also should update the regulations governing the so-called "white collar" exemptions. Specifically, the salary threshold for exemption is only $455 per week, which translates into a full-time salary of $23,660 per year, an unreasonably low figure today. The salary threshold should be set at a sufficiently high level that it realistically reflects expected earnings of a professional and it should be indexed to inflation on a yearly basis. In addition, as written, the current regulations allow workers to be considered exempt professionals when, in fact, they spend only extremely small amounts of their time doing job tasks that truly qualify as exempt work. A worker should not be considered an exempt professional unless the majority of his or her time is spent on tasks that require independent judgment and discretion.[25]

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[24] A complementary bill, the Taxpayer Responsibility, Accountability and Consistency Act of 2009 (s. 2882) was introduced by Senator Kerry. This bill would amend the Internal Revenue Code's safe harbor exemption for employers who misclassify employees as independent contractors, which currently allows workers to pretty much misclassify with near impunity with no consequences. See 26 U.S.C. 7436, It would also, in appropriate cases, allow the IRS to issue guidance on the subject and collect unpaid taxes owed the government. These reforms are vital to combatting misclassification abuses.

[25] http://nelp.3cdn.net/112fc23c9ce271ff77_ppm6bnkya.pdf.

Finally, Congress should pass the Direct Care Job Quality Improvement Act of 2011 (H.R. 2341), introduced last month by Representative Linda T. Sanchez. This bill would remedy a serious flaw in current DOL regulations, that harken back to a time when home care workers were usually friends or relatives of an ailing adult, who spent but a few hours a day helping them with menial tasks around the house. As the population has aged and the home care industry has grown, the role of home care aides has also changed significantly. Home health care workers today are trained and devoted professionals, who deliver skilled health care to many of our nations' seniors and ailing adults in a highly professional manner. They work long hours, often performing back-breaking work, and are invested with significant responsibility. Whatever the merits of their original exclusion from minimum wage and overtime protections, this archaic exemption has failed to keep up with the evolution of the industry and the workers who have built. It is long past time for Congress to remedy this inequity by extending minimum wage and overtime protections to home health care workers. The USDOL can also remedy this injustice with appropriate regulations. It is on the Department's Regulatory Agenda and NELP urges swift issuance of proposed regulations.

Conclusion

The FLSA is a vitally important law, designed to protect hourly workers from substandard wages, unduly long hours, and child labor abuses. It promotes an equitable distribution of work among workers, and it protects employers from being under-cut by low-road employers who seek unfair competitive advantages. While some applications of exemptions require a nuanced analysis, by and large, the protections accorded by the FLSA are clear and simple to understand and administer. Improvements should be made to protect against growing abuses of low-wage workers and those misclassified as independent contractors, but current protections should not and must not be diluted nor enforcement weakened. To do so might seem at first blush to be beneficial to our nation's employers, but in fact, that harm it will do to workers and high-road employers is something we cannot and should not tolerate.

APPENDIX

Snapshot of Current and Recent Wage and Hour Suits Brought on Behalf of Workers

The following is by no means an exhaustive or methodical survey of current wage and hour lawsuits, but it is a representative sampling of what attorneys throughout the United States are litigating or have litigated. These examples come from the Just Pay group that NELP convenes. This "virtual table" of wage and hour practitioners and worker advocates includes attorneys in private practice, legal services organizations, government agencies, and policy organizations across the country, all devoted to the fair and vigorous enforcement of the nation's and states' wage and hour laws.

1. A large national employer makes its employees incur most of its business expenses as a condition of employment. The business expenses regularly result in the employees being paid less than the minimum wage. (There is no claim that the workers are independent contractors.) In addition to the expense shifting, branches were shaving time records to reduce overtime liability. The corporate offices knew it was happening, but decided not to audit the offices unless a complaint was raised and pressed by employees. The case was recently certified as a national collective action and a class action in 14 states that allow for wage and hour class actions.

2. Workers were regularly required to work more than 100 hours a week and paid under the fluctuating workweek rule. The inspectors were actually paid a declining hourly wage, i.e., the more they worked, the lower their hourly pay, a result directly contrary to the policy of the FLSA. Due to litigation in federal court, the industry has changed its practices.

3. A fish market/restaurant in a major metropolitan area that employs 30-40 workers requires many employees to work 15 hours a day, five days a week. It pays straight time for all hours worked. In order to appear as if it is complying with the law, the employer issued paychecks that have a lower hourly rate than the employees are actually paid, and a few "overtime" hours at 1.5 times the incorrect rate. The remainder of the pay is in cash, which also means that the employer is avoiding paying social security/medicare taxes, and is evading most of its obligation to the state and federal unemployment funds.

4. An individual was employed to take care of disabled people who need 24-hour care. She would start at 3 pm at the home where the disabled clients lived, and was required to care for them until 8 am the next morning. The company for which she worked advertised on its website that it provided "round-the-clock, 24-hour care" to its clients, and received state and federal funds to pay for their care. However, the employee was only paid for the 3 pm to 9 pm and 6 am to 8 am hours, even though she was on-duty the entire time, had to take care of people during the night and did not have separate sleeping quarters.

5. At the start of the day, before they are "on the clock" and being paid, call center workers who are employed by a national IT company are required to boot up their computers, initialize programs, and read internal emails regarding services/client offers and other business so that they are ready to take calls at "the start of the shift," when they begin being paid. This practice means that employees usually lose 15+ minutes of pay each work day.

6. A group of construction workers are required to report to the company's warehouse/yard at the start of each day. They pick up orders and then load trucks with equipment and supplies they will need when they drive out into the field to work. The company does not pay them for that time, for the time that it takes to drive the truck and materials to the worksite in the morning, for the time to drive the truck back to the yard in the afternoon. As a result, the workers are performing work "off the clock" for up to two hours per day.

7. One employer, when the minimum wage increased, would pay its employees the higher wage and then require the workers to repay the difference between the higher rate and the previous rate.

8. A restaurant made its workers sign a "VOLUNTARY AGREEMENT" to work only for tips and pledge that they never expected nor would they accept a penny from the employer as compensation. The agreement also had the workers waive all rights to any legal recourse.

9. A large group of construction/home repair workers with limited English proficiency were paid with checks that had the word "VOID" written in the subject line on the bottom.

10. Over 100 men who worked as "chicken catchers" for Perdue Farms on the Eastern Shore of Maryland, Virginia and Delaware. These men, using equipment provided solely by Perdue Farms, and transported in Perdue Farms vehicles, travel from chicken farm to chicken farm, scooping up full grown chickens in their bare hands, and loading them into Perdue cages and trucks so they can be transported to processing plants for slaughter. In the early 1990's, Perdue, and other major chicken processors, decided to misclassify these workers as independent contractors, all so that they could increase their profits at the expense of the workers, who had previously received overtime, health and retirement benefits, and the protections of workers' compensation and unemployment compensation laws. A federal judge ruled that this scheme was willfully illegal and ordered millions of dollars in back-pay to these workers, who thanks to intervention from the Federal Department of Labor, are now all, on a nationwide basis, properly classified as employees and receive all the pay and protections to which they are entitled. Perdue never appealed the case and settled for the full measure of damages, as established by plaintiffs' expert witness.

11. Restaurant workers who earn tips, particularly delivery workers, are required to work 6 days per week, between 10 and 12 hours per day without breaks. They are paid a monthly salary of $300-$600, which equates to an hourly salary of between $1.30 and $2.00 per hour. Although they earn tips, they are sometimes required to give a portion of their tips to non-tipped workers. They also must spend a portion of their day doing non-tipped work (e.g., cleaning bathrooms, stocking supplies). The delivery workers also must buy and repair their own bikes, which further reduces their take home earnings.

12. Restaurant and Grocery baggers who are not paid any wage at all, but are required to work for tips only. In the case of grocery baggers, tip income may be $2.00 per hour.

13. Low-road employers often pay employees under two names so that they can avoid paying overtime. Some create false records of work hours to show the DOL in case of an investigation. Others pay workers partly in cash and partly by check, with checks showing an hourly rate that is more than the workers actually get paid (e.g., showing that someone worked 20 hours and got paid $5.00 even though the employee worked 60).