



IMPROVING WORKPLACE CONDITIONS THROUGH

STRATEGIC ENFORCEMENT

A REPORT TO THE WAGE AND HOUR DIVISION

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INTRODUCTION AND REPORT OVERVIEW

The challenges facing the major agencies in the U.S. Department of Labor (DOL) that regulate conditions in the workplace are daunting. Public policies on health and safety, discrimination, and basic labor conditions cover millions of workers, and have to be implemented in hundreds of thousands of disparate workplaces in differing geographic settings. Conditions within those workplaces vary enormously—even within a single industry—and employers often face incentives to make those conditions as opaque as possible. Workers in many of the industries with the highest levels of noncompliance are often the most reluctant to trigger investigations through complaints due to their immigration status, lack of knowledge of rights, or fears about employment security. Even the laws, which set forth the worker protections DOL agencies are charged with enforcing, have limitations in the 21st-century business community. Compounding all of the above, agencies charged with labor inspections have limited budgets and stretched staffing levels, coupled with a very complicated regulatory environment.

These challenges, however, reach beyond the number of investigators available to the DOL or to the Wage and Hour Division (WHD) in particular. Profound changes in the workplace, including the splitting up of traditional employment relationships, the decline of labor unions, and the emergence of new forms of workplace risk make the task facing DOL agencies far more complicated. In addition, expectations and demands on all regulatory agencies to demonstrate progress toward achieving outcomes and the resulting impacts on how government agencies are overseen by Congress, accountability agencies, and the public have created intensified pressure and scrutiny.

These changes in the U.S. workplace require a revised approach to enforcement, one that is built on an understanding of how major sectors of the economy employing large

numbers of vulnerable workers operate and then using those insights to guide enforcement strategy. Just as the forces driving workplace outcomes, including those related to compliance with workplace regulations, have changed, so must the strategies that agencies employ to improve conditions.

This report draws on a series of studies led by David Weil, Professor of Economics at Boston University School of Management, that have sought to examine how industry structures affect the way employers behave and, in particular, their likelihood to comply with the important provisions of the Fair Labor Standards Act (FLSA). These studies have examined key dimensions of the ways that many of the industries employing large numbers of vulnerable workers create incentives or disincentives for compliance. The research shows that insight into these relationships provides opportunities to increase compliance through different approaches to enforcement.

Key Findings

1. Changes in the structure of the economy and in the complexity of employment relationships, as well as the decline in unionization together render the traditional, workplace-focused approach to enforcement less and less effective. At the same time, the changing expectations of Congress, the OMB, key stakeholders, and the public have raised the performance demands on agencies like WHD. As a result, traditional approaches to enforcement are no longer sufficient, even given the significant increase in enforcement resources.
2. The employment relationship in many sectors with high concentrations of vulnerable workers has become complicated as major companies have shifted the direct employment of workers to other business entities that often

operate under extremely competitive conditions. This “fissuring” or splintering of employment increases the incentives for employers at lower levels of industry structures to violate workplace policies, including the FLSA. Fissuring means that enforcement policies must act on higher levels of industry structures in order to change behavior at lower levels, where violations are most likely to occur.

3. Deterring violations before they occur has long been recognized as part of overall enforcement policy, but has often not been incorporated as a central component of how investigations are targeted, conducted, and followed up on, or in the way that penalties are assessed and levied. As a result, deterrence incentives are often low, uneven, and inconsistent. There are many opportunities to significantly enhance deterrence incentives, particularly at the industry level.
4. The structure of industries—particularly the way that “fissuring” plays out in them—has important implications for strategic enforcement. Analysis of the structures of industries can give guidance on why some employers comply and others do not. These insights, in turn, can help shape sector-based enforcement strategies and policies to change employer behavior and improve compliance systemically. The impact of supply-chain relationships, branding, franchising, third-party management, and subcontracting all have important implications for patterns of compliance in an industry and for strategies that WHD can take to affect employer behavior.
5. The two main types of investigations undertaken by WHD—directed¹ and complaint—have often been treated as separate and distinct. Strategic enforcement and the demands placed on the agency by oversight institutions and the public require integration of these key tools of enforcement, particularly in the way they are undertaken in the context of specific industries and initiatives.
6. The external and internal changes in the environment in which WHD operates require new criteria for judging the success of enforcement initiatives. In particular, enforcement strategy should be guided and evaluated on the basis of the following four criteria: prioritization; deterrence; sustainability; and system-wide impacts.

Central Recommendations

The main recommendations of this report, discussed in detail in Section VI, pertain to industry priorities for WHD; four major enforcement strategies; and organizational require-

1. Directed investigations are those initiated by WHD as opposed to those instigated by a worker complaint.

ments necessary to support strategic enforcement initiatives. The recommendations are summarized below.

SETTING INDUSTRY PRIORITIES

Labor standards violations occur in most sectors of the economy. However, problems facing particularly vulnerable workers are concentrated in a subset of sectors that require focused attention by the WHD. This report points to several clear principles regarding industry prioritization. WHD industry priorities at the national-, regional-, and district-levels should be guided by three criteria: (1) sectors with large concentrations of vulnerable workers; (2) sectors where the workforce is particularly unlikely to step forward; and (3) sectors where the WHD is likely to be able to change employer behaviors in a lasting and systemic manner. Based on these criteria, we identify a subset of industries that should be a focus of WHD attention over the next few years. These industries are listed (in no particular order) in Figure A.1.

ENFORCEMENT STRATEGIES

The environment in which the WHD and the DOL operate demands a more strategic approach to enforcement that both builds on successful policies used in the past and also breaks

FIGURE A.1

Priority Industries

(Listed in no particular order)

Priority Industries

Eating and drinking—Limited service (fast food)/ Full service

Hotel/motel

Residential construction

Janitorial services

Moving companies/logistics providers

Agricultural products—multiple sectors

Landscaping/horticultural services

Health care services

Home health care services

Grocery stores—retail trade

Retail trade—mass merchants; department stores; specialty stores

new ground. We group recommended enforcement strategies into four major areas. The four major components of strategic enforcement are listed in Figure A.2.

First, WHD should pursue strategies that focus at the top of industry structures, on the companies that affect how markets operate and many of the incentives that ultimately affect compliance. This starts with having a clear “map” of how priority industries operate and how that results in employer behavior. It then requires putting in place coordinated investigation procedures built around related business entities rather than individual workplaces and using those regulatory tools (from persuasion and education to the use of penalties, hot goods provisions, and other legal tools) to craft comprehensive agreements.

Second, the WHD needs to enhance deterrence at the industry and geographic levels. We show that WHD investigations have had significant deterrent impacts in the eating and drinking and portions of the hotel/motel industries. Drawing on these lessons and those from other government agencies, we discuss how deterrence can be improved through changes in how investigations are carried out, penalties assessed and levied, and work of the WHD is coordinated with that of the Solicitor of Labor. We also discuss how information disclosure and transparency might be better harnessed to broaden the impact of investigation activity.

Third, the WHD must better integrate complaint and directed investigation activity. Since almost 75 percent of all WHD investigations are initiated by worker complaints, it is incumbent upon the agency to find ways to leverage those investigations in several ways. As noted above, it must use information on where complaints come from—and more importantly, where they do not come from—to set overall priorities. We also propose a special complaint handling procedure for targeted industries in order to help the WHD use incoming complaints as a vital source of information about compliance and as a key part of system-wide enforcement activities, as well as to enhance the deterrence effects of complaint investigations. More generally, we propose policies to expand outreach to worker advocate communities to broaden the impact of WHD’s and other organizations’ relationships with workers and communities given the continuing importance of the exercise of rights under the FLSA and other statutes. In a related vein, leveraging complaint investigations in a more strategic manner requires protecting workers who exercise those rights against retaliation.

Finally, we examine a variety of policies to enhance the sustainability of enforcement—that is, the impact of enforcement initiatives on employer behavior in an ongoing way. We review the WHD’s experience in combining public enforcement with private monitoring in improving system-wide compliance in the garment industry and argue that model

FIGURE A.2

Key Recommendations on Strategic Enforcement

Recommendations

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|----------|---|
| 1 | <p>Focusing at the top of industry structures</p> <ul style="list-style-type: none"> • Mapping business relationships and reaching out to the top • Coordinated investigation procedures • Clarifying the boundaries of employment responsibility • Expanding the application of hot goods beyond the apparel industry |
| 2 | <p>Enhancing deterrence effects at the industry and geographic level</p> <ul style="list-style-type: none"> • Industry-focused deterrence • Penalty policy as a central element of deterrence • Expanded litigation to prevent noncompliance • Enhancing deterrence through transparency |
| 3 | <p>Transforming complaint investigations from reactive to strategic resources</p> <ul style="list-style-type: none"> • Responding strategically to complaints • Special complaint handling procedure for targeted industries • Reaching out to the worker advocate community • Increase protections for employees who complain |
| 4 | <p>Enhancing the sustainability of initiatives through monitoring and related procedures</p> <ul style="list-style-type: none"> • Creating new monitoring arrangements • Expanded settlement agreements • Making compliance an integral part of employer monitoring activity |

should be generalized to other sectors. We also review other available tools such as settlement agreements and related mechanisms to reinforce the incentives for proactive compliance and providing good jobs.

ORGANIZATIONAL REQUIREMENTS

Strategic enforcement requires that the WHD and the DOL undertake organizational changes to support these initiatives. As in the case of enforcement strategies, some of these proposals build on existing strengths or previous WHD initiatives. Others require rethinking the way that some activities are undertaken, the way that different levels of WHD interact, or the way WHD relates to other parts of the DOL. These organizational requirements are listed in Figure A.3.

Organizational requirements break into six major areas: (1) enhancing investigation capacities including by developing new training materials and modifying the WHD’s Field Operations Handbook; (2) strengthening the interactions between the Solicitor and the WHD, in regard to litigation strategies generally and penalty policies in particular; (3) given an emphasis on sector-based strategies, improving the operation of MODOs in their crucial role in coordinating across District and Regional offices; (4) enhancing information systems, particularly WHISARD, to make them more useful as investigation and planning tools; (5) building joint efforts with other DOL agencies in

key sector initiatives such as residential housing or on an issue like misclassification; and (6) undertaking systematic evaluations regarding program impact to learn from successful and unsuccessful initiatives in all of the above areas.

Report Organization

The report is organized in the following manner. Section I provides an overview of enforcement trends over the last decade and frames the limitations of traditional approaches to enforcement. It concludes by describing four principles by which to measure strategies going forward to better ensure they meet larger DOL objectives. Section II presents a survey of the workplace landscape to see where the most vulnerable workers—those who might benefit the most from WHD intervention—are concentrated. Although noncompliance can be found in virtually every part of the economy, it is particularly prevalent in a subset of sectors, in part because of the way some industries are structured. These industries are particularly suited to sector-level strategic initiatives.

Sections III, IV, and V focus on prominent sector examples with implications for strategic enforcement more generally. Section III examines the apparel sector and the garment initiative undertaken by the WHD in the late 1990s. The garment industry represents a shrinking part of the manufacturing workforce, but the effort pioneered by WHD in that sector provides important lessons related to supply chain considerations that can be applied in many other sectors with vulnerable workers.

Section IV looks at the eating and drinking industry, in particular the fast food sector. Core features of that sector—brand identity and franchising—create both incentives and disincentives for compliance as well as potential methods for improving overall conditions. Section V examines the hotel and motel sector, where branding, franchising, and third-party management combine to create a particularly fissured employment situation, creating both challenges and opportunities for new enforcement approaches.

Section VI pulls together lessons from these sectors and recommends other sectors where similar dynamics may be at play. It then draws on the implications of the report for crafting enforcement strategy and describes the organizational requirements that are required to support those efforts.

FIGURE A.3

Organizational Requirements for Strategic Enforcement

Organizational Requirements

- 1 Enhance investigation capabilities**
 - Investigation protocols
 - Training
 - Field Operations Handbook revisions
- 2 Coordinate activities of the WHD and the Office of the Solicitor**
 - Penalty policies
 - Litigation activities
 - Clarification of joint employment and related matters
- 3 Improve operation of MODOs**
 - Coordination of common employers, brands, and third-party management companies
 - Coordination of company- and industry-wide interventions
- 4 Enhance the accuracy and utility of WHD information systems**
 - Increased ability to track linkages across companies and organizations
 - Expanded links to other information sources regarding employers and workplaces
 - Improved accessibility to the public beyond WHD
- 5 Build stronger linkages to other key DOL agencies**
 - Strategic initiatives on particular problems (e.g., misclassification)
 - Coordinated initiatives in industries with multiple workplace problems (e.g., residential construction)
- 6 Expand evaluation of strategic initiatives**
 - Investigation-based surveys
 - Alternative measures of underlying incidence and severity of workplace violations
 - Intermediate measures of compliance
 - Impacts of different tools and approaches through an experimental approach