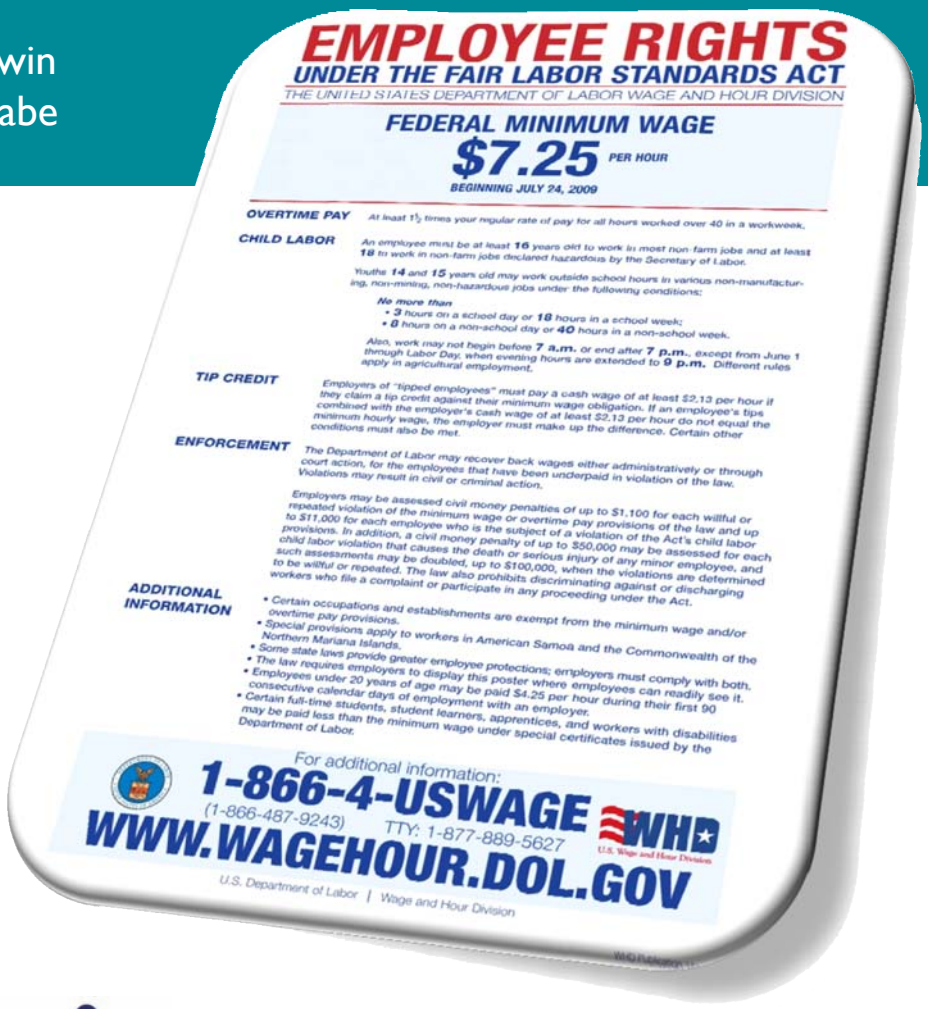
LABOR STANDARDS ENFORCEMENT AND LOW-WAGE IMMIGRANTS:

Creating an Effective Enforcement System

By Donald M. Kerwin
with Kristen McCabe



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Executive Summary

As the United States moves through an extended period of economic difficulty, characterized by high rates of unemployment and "involuntary" part-time employment, enforcement of labor laws has become an even more critical concern. The presence of vulnerable workers, including those without immigration status, influences labor standards compliance, as does the necessity of many businesses to cut costs. Yet budgetary limitations — at both federal and state levels — constrain the ability of enforcement agencies to carry out their mandates.

In today's workplace, low-wage workers, especially unauthorized immigrants, face significant challenges, ranging from nonpayment of wages to poor working conditions to unrealized collective bargaining rights. This report examines the characteristics of an effective labor standards enforcement system, with a particular emphasis on enforcement in industries and firms with heavy concentrations of low-wage immigrant workers. It argues that the administration, Congress, states, localities, and other stakeholders should make labor standards enforcement a pillar of their immigrant policymaking agendas.[1]

The presence of vulnerable workers, including those without immigration status, influences labor standards compliance.

The report highlights gaps and anomalies in labor protection, while recognizing that US law sets significant standards for minimum wage, overtime pay, child labor, safe and healthy workplaces, antidiscrimination, labor organizing, and collective bargaining. It recommends that Congress extend core labor protections to categories of workers now exempt, to unauthorized workers, and to others not meaningfully afforded protections. It also argues that Congress should strengthen penalties for labor standards violations in order to promote compliance and deter violations, and that it should provide for the tolling of statute of limitation periods upon the filing of complaints.

The Obama administration has restored staffing at the US Department of Labor (USDOL) Wage and Hour Division (WHD) and Occupational Safety and Health Administration (OSHA) to 2001 levels. However, these increases follow many years of significant cuts in enforcement capacity. Furthermore, the budget crisis makes additional funding increases unlikely in the near term. Given budget realities, USDOL must employ creative, cost-effective approaches to address enforcement challenges. WHD has already begun, for example to examine the dynamics and structure of fissured industries,[2] to identify choke points in the system, and to seek out key employers that can influence the practices of other companies. This report recommends that WHD also make it a priority to leverage the resources and knowledge of states, localities, and other federal agencies; consulates; business and trade associations; labor unions; worker centers; faith-based agencies; and other stakeholders.

1 By immigrant policy, the report refers to more than "immigration" policies that govern who can be admitted, who can stay (and on what conditions), and who must leave. It means the policies that are crucial to the success of immigrants and their communities.

2 Fissured industries are those in which many functions historically carried out by lead corporations have been assigned to smaller business entities that operate in highly competitive environments.

Based on a Migration Policy Institute (MPI) survey of state labor-standards enforcement agencies and of other recent studies, this report finds that states:

- collectively devote resources to labor standards enforcement that rival federal resources;
- have developed extensive enforcement expertise; and
- have created programs that target industries (such as the garment industry) and practices (such as the misclassification of employees) that are also federal priorities.

The report recommends that USDOL establish a new office of federal/state labor standards that would:

- survey states annually on their labor standards enforcement resources, priorities, and activities as a way to identify potential areas of collaboration, to inform federal and state planning processes, to create enforcement partnerships, and to avoid redundancies;
- communicate with state agencies on a continuous basis regarding federal and state research on problem industries, evolving employer structures, tactics used to avoid liability under the law, and successful enforcement strategies; and
- facilitate information sharing among states as to best practices and enforcement challenges that require federal and multistate collaboration, including through formal task forces.

State labor standards enforcement agencies should, in turn, develop more expansive partnerships with federal agencies (particularly WHD), other state agencies, and a range of other stakeholders. Some states have developed sophisticated solutions to labor standards challenges. Their experiences could be shared more widely in order to inform the decision-making processes of their peers in other states. In establishing partnerships, states should seek to:

- Leverage educational and enforcement resources
- Share information on problem industries and employers
- Educate employers, employees, and the public on the law
- Pursue offending industries and firms
- Counter business practices used to evade labor and related laws
- Monitor compliance with the law.

Effective labor standards enforcement turns on the ability of federal and state regulators to identity industries and firms that substantially violate the law. There is widespread consensus that employers with heavy concentrations of unauthorized workers are more likely than others to violate labor and workplace safety and health laws, but no comprehensive study in recent years has compared employers that violate immigration and labor laws. This report recommends that the Government Accountability Office (GAO) or USDOL conduct or commission such a study and that federal and state regulators make it a centerpiece in their enforcement planning. An effective, federally coordinated enforcement policy must also:

- map the structure of industries, industry sectors, and business clusters that substantially violate labor standards;
- determine the nature of those violations;
- exploit the full range of educational and enforcement tools at the government's disposal with the goal of maximizing compliance with the law and deterring violations;

- establish metrics that reflect and demonstrably advance the goals of compliance and deterrence;
- ensure that immigration enforcement activities do not undermine labor standards enforcement, and vice versa; and
- address the widespread problem of misclassification of employees as "independent contractors," which allows employers to avoid the requirements of labor standards and other laws.

This report also addresses the ancillary issue of whether increased labor standards enforcement will drive substantial numbers of employers and employees into the informal economy. It concludes that this is unlikely, given the comparatively modest nonwage obligations on US employers, low labor standards compliance costs, and the minimal risk to employers of being targeted for enforcement. Nonetheless, the report recommends that USDOL commission an analysis of the industries and industry sectors that employ large numbers of workers off the books, compare these industries with those that employ unauthorized workers at high rates, and target offending employers for enforcement. USDOL should also analyze whether the recent recession (December 2007 to June 2009) — and its aftermath — has led to growth in the informal economy, and it should monitor the effect of (potentially) heightened labor standards enforcement on the informal economy.

While far from perfect, federal labor standards embody enduring national goals.

Finally, the report asks whether enhanced labor standards enforcement might lead to a decrease in illegal employment and migration. Given the paucity of research on this issue, it recommends that USDOL assess the impact of improved labor standards enforcement on illegal immigration and employment. Alternatively, this responsibility could fall under the mandate of a new Standing Commission on Labor Markets and Immigration.[3]

While far from perfect, federal labor standards embody enduring national goals. The fact that many unauthorized immigrants work in jobs not covered by these standards places them in jeopardy, drives down wages and working conditions for other employees, and undermines the US labor standards enforcement system as a whole. Strengthened and well-enforced standards could safeguard vulnerable workers, while ensuring that scofflaw employers do not benefit at the expense of companies that are complying with the rules.

3 Such a commission, independent and nonpartisan, has been proposed to make recommendations to Congress and the executive branch on levels of employment-based immigration. See Doris Meissner, Deborah W. Meyers, Demetrios G. Papademetriou, and Michael Fix, *Immigration and America's Future: A New Chapter* (Washington, DC: Migration Policy Institute, 2006), www.migrationpolicy.org/ITFIAF/finalreport.pdf; Demetrios G. Papademetriou, Doris Meissner, Marc R. Rosenblum, and Madeleine Sumption, *Harnessing the Advantages of Immigration for a 21st Century Economy: A Standing Commission on Labor Markets, Economic Competiveness, and Immigration* (Washington, DC: Migration Policy Institute, 2009), www.migrationpolicy.org/pubs/StandingCommission_May09.pdf.

I. Introduction

The US Department of Labor (USDOL) Wage and Hour Division (WHD) employs 1,035 investigators and enforces federal labor laws that cover roughly 135 million workers and 7.3 million business establishments. In addition, states collectively employ several hundred additional investigators to monitor and enforce their labor laws.[2] Considering their limited resources, federal and state labor agencies can investigate only a fraction of the employers subject to their jurisdictions in a given year, even in problem industries.[3] Complicating matters, certain vulnerable workers — particularly unauthorized immigrants — are reluctant to complain to government regulators. Federal and state agencies need to maximize compliance with the law by educating otherwise law-abiding employers, developing high-impact enforcement strategies that deter violations, and rigorously enforcing laws against willful and repeat violators.

No comprehensive study in recent years has shown that employers that illegally hire unauthorized immigrants are more likely to violate labor and workplace safety and health laws. However, labor standards abuses occur at high rates in certain industries that employ heavy concentrations of low-wage immigrant workers, including those without immigration status. President Barack Obama has argued that because many unauthorized immigrants cannot effectively protest labor violations, they "end up being abused, and that depresses the wages of everybody, all Americans."[4] Following the failure of the 111th Congress to pass comprehensive immigration reform legislation, the labor market problems raised by a large, unauthorized workforce will persist and may worsen.

By analyzing the challenges faced by federal and state labor agencies in responding to and attempting to deter violations against low-wage immigrant workers, this report identifies best practices in labor standards enforcement and recommends how federal and state agencies can use their limited resources more effectively. The primary focus is wage-and-hour standards, but the paper also touches on workplace safety and health, labor organizing, and collective bargaining rules. The report also presents results of a Migration Policy Institute (MPI) survey on state labor standards enforcement resources, priorities, and initiatives.

Section II outlines the core federal labor and workplace safety and health laws, who and what they cover, and the agencies that enforce them. It discusses the *Fair Labor Standards Act* (FLSA) and, to a lesser extent, the *Occupational Safety and Health Act* (OSH Act) and the *National Labor Relations Act* (NLRA). WHD, the Occupational Safety and Health Administration (OSHA), and the National Labor Relations Board (NLRB), respectively, administer these laws.[5]

Section III analyzes studies that have attempted to identify industries and firms that violate both immigration (employment verification) and labor laws at high rates. It discusses recent USDOL-commissioned research that argues for the need to map the relationships and incentives of employers in "fissured" industries. It also describes longstanding concerns related to the impact of low-wage immigrant workers (particularly those without immigration status) on wages and working conditions.

Section IV reviews the enforcement approaches, strategies, and accomplishments of the Clinton, Bush, and Obama administrations. It also outlines and evaluates the traditional enforcement metrics used by WHD.

Section V describes the characteristics of an effective enforcement regime, including the need to: identify industries and firms that violate labor standards at high rates; craft strategies that deter violations; enforce the law without reference to immigration status; address the misclassification of employees as independent contractors; and leverage additional resources.

4 Transcript of remarks by President Barack Obama at a town hall meeting at the Orange County Fair and Event Center, Costa Mesa, CA, March 18, 2009, http://latimesblogs.latimes.com/washington/2009/03/obama-text.html.

5 The report uses the term "labor standards" to refer to laws enforced by the Wage and Hour Division (WHD), NLRB, and Occupational Safety and Health Administration (OSHA). It also separately refers to OSHA-enforced laws as "workplace safety and health" standards.

Section VI discusses whether rigorous enforcement of labor and workplace safety and health laws may have secondary effects on employment, as well as the growth of the "informal economy."[6]

Section VII weighs whether increased enforcement of labor laws would contribute to lower levels of illegal hiring and migration.

Finally, the report concludes with detailed policy recommendations to address the challenges facing federal and state agencies in enforcing labor standards laws.

II. Federal and State Labor Standards Enforcement Systems

While the federal government plays the primary role in enforcing labor standards in the United States, many states have assumed critical enforcement responsibilities, especially those that have stricter state standards than the federal law. As a result, federal and state enforcement resources, priorities, and strategies need to be better understood and coordinated.

Many commentators argue that US labor laws must be extended to currently exempt workers, need stronger penalties, and should be more aggressively enforced. Immigrants, particularly the unauthorized, disproportionately occupy low-paying and dangerous jobs. The hazardous quality of these jobs frequently reflects the failure to apply labor standards to unauthorized workers, as well as underlying government policy choices related to economic competitiveness and other considerations.

A. Fair Labor Standards Act and Other WHD-Administered Laws

WHD has responsibility for enforcing core federal labor laws covering more than 135 million private, state, and local government workers in 7.3 million business establishments.[7] These critical laws include the FLSA, *Migrant and Seasonal Agricultural Worker Protection Act* (MSPA), *Family and Medical Leave Act* (FMLA), *Davis Bacon and Related Acts* (DBRA), certain temporary worker programs, and other labor-related laws (see Table 1). USDOL officials have informed MPI that WHD devotes 60 to 65 percent of its enforcement resources to the wage-and-hour and child-protection standards codified in FLSA. WHD relies on USDOL's Office of the Solicitor, which represents the Secretary of Labor and USDOL agencies in litigation to pursue cases in federal court.

6 Jan L. Losby, John F. Else, Marcia E. Kingslow, Elaine L. Edgcomb, Erika T. Malm, and Vivian Kao, *Informal Economy Literature Review*, December 2002: 8, www.kingslow-assoc.com/images/Informal_Economy_Lit_Review.pdf. One commentator has defined the informal economy as the "enterprises and activities that may not comply with standard business practices, taxation regulations, and/or business reporting requirements but are otherwise not engaged in overtly criminal activity."

7 US Department of Labor (USDOL), "FY 2010: Budget in Brief," (Washington, DC: USDOL): 36, www.dol.gov/dol/budget/2010/PDF/bib.pdf.

Table 1. Select Laws Administered and Enforced by WHD[8]

Description	Coverage	Exemptions	Possible Penalties
***Davis-Bacon Act* and Related Government Contracts Statutes**[9]			
Sets wage-and-hour standards for employees working on contracts with the federal government.	Davis-Bacon covers workers on certain types of federal construction contracts and federally financed or federally assisted state and local government construction contracts. Other statutes cover workers on contracts such as federal supply contracts and federal service contracts.	Varies by statute.	Varies by statute. Violators of Davis-Bacon may be subject to contract termination, temporary debarment from future contracts, and contract payment withholding. Select violations may lead to civil or criminal prosecution and result in fines and imprisonment.
Labor Standards Provisions of the *Immigration and Nationality Act* Relating to Certain Nonimmigrant Workers[10]			
Sets labor standards for certain nonimmigrants (D-1, E-3, H-1B, H-1B1, H-1C, H2A, H-2B) related to wages, employment verification, and legal rights/protections.	Varies by nonimmigrant category.	Varies by nonimmigrant category.	Varies by nonimmigrant category.
Fair Labor Standards Act[11]			
Establishes minimum wage, overtime, hours worked, recordkeeping, and youth employment requirements.	"Enterprise" or "individual" coverage. Enterprise coverage applies to businesses or organizations with annual sales or business of at least $500,000, and hospitals, government agencies, residential medical/nursing facilities, schools, and preschools. Individual coverage extends to workers "engaged in [interstate] commerce or in the production of goods for commerce" and usually to domestic service workers.	FLSA exempts certain farm workers and workers at seasonal and recreational establishments from its minimum wage and overtime standards. It exempts live-in domestic workers and several other categories of workers from its overtime requirements.	Payment of back wages; civil monetary penalties; and criminal penalties, including fines and imprisonment.
Migrant and Seasonal Agricultural Worker Protection Act[12]			
Establishes safety and health standards for migrant and seasonal agricultural workers as related to housing, transportation, disclosure, and recordkeeping. Requires farm labor contractors and employees who perform farm labor contracting functions to register with USDOL.	With some exceptions, MSPA applies to "any person [or business] who recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker."	Select exemptions include small businesses and certain poultry operations.	Payment of back wages; civil monetary penalties; revocation of farm labor contractor/contract employee status; and criminal penalties, including fines and imprisonment.
Family and Medical Leave Act[13]			
Requires employers to provide eligible employees up to 12 weeks of unpaid, job-protected leave during a one-year period for the birth or adoption of a child; to care for a spouse, child, or parent who has a "serious health condition;" or if "a serious health condition … makes the employee unable to perform the functions of the employee's position." It includes special provisions for military families.	Applies to all public agencies and private-sector employers with 50 or more employees. Eligible employees must meet conditions such as working for the employer for 12 months for at least 1,250 hours during those months.	Special rules for school employees.	Payment of back wages and reinstatement of employment.

Source: Author's compilation from relevant statutes.

8 WHD also administers the *Employee Polygraph Protection Act,* Pub. L. No. 100-347, 102 Stat. 647 (June 27, 1988), and the Wage Garnishment Provisions of the *Consumer Credit Protection Act*, Pub. L. No. 90-321, 82 Stat. 146 (May 29, 1968).

9 *The Davis-Bacon Act, as Amended,* Pub. L. No. 107-217, 116 Stat. 1062, 1304 (August 21, 2002). The *Davis-Bacon Act* was originally enacted on March 3, 1931.

10 *Immigration and Nationality Act*, Pub. L. No. 82-414, 66 Stat. 163 (June 27, 1952).

11 *Fair Labor Standards Act*, Pub. L. No. 75-718, 52 Stat. 1060 (June 25, 1938).

12 *Migrant and Seasonal Agricultural Worker Protection Act.* Pub. L. No. 97-470, 96 Stat. 2584 (January 14, 1983).

13 *Family and Medical Leave Act*, Pub. L. No. 103-3, 107 Stat. 6. (February 5, 1993).

FLSA sets standards for national minimum wage, overtime pay, recordkeeping, and child labor.[14] It exempts certain domestic workers, farm workers, and seasonal and recreational workers from its minimum-wage and overtime requirements,[15] as well as a wide range of additional workers from its overtime rules.[16] In general, FLSA allows children to work at younger ages in agricultural jobs.[17]

Remedies for minimum-wage and overtime violations include back pay, liquidated damages equal to the wages owed, and civil monetary penalties.[18] Repeated or willful violations of minimum-wage and overtime requirements carry fines up to $1,000 per violation.[19] The penalties for illegal termination or discrimination against employees who bring complaints or who institute suits over alleged FLSA violations include reinstatement, promotion, payment of lost wages, and liquidated damages (i.e., damages equal to lost wages).[20] Willful violations carry criminal penalties of no more than $10,000 and imprisonment of no more than six months.[21] As discussed in Section IV, USDOL can also seek to restrain the transport, delivery, and sale of so-called "hot goods" (i.e., those produced in violation of the law).[22]

Many commentators contend that FLSA's remedial sanctions and penalties do not sufficiently deter violations, particularly when weighed against the limited chances of being caught or, if caught, of having to pay the full penalty assessed.[23] Others criticize WHD and the Secretary of Labor for failing to pursue all penalties available under the law.[24] Moreover, FLSA's two-year statute of limitations for recovery of wages (three years in the case of willful violations) runs from the time of the employer's failure to pay the proper wages and not from the filing of the complaint.[25] As a result, investigative delays can threaten recovery of back wages and liquidated damages.[26]

B. State Enforcement of Labor Standards

Federal labor law undergirds the nation's system of labor standards enforcement. While state agencies have long been viewed as supplementing federal efforts, they play a significant role in this nationwide system and a lead role in several states. Some states have minimum-wage or child labor laws that exceed federal standards. In these cases, state agencies view themselves as the "primary enforcer" of claims under these laws.[27] Other states do not have their own minimum-wage and overtime laws — or their laws mirror or establish weaker standards than federal law.[28]

14 29 USC §§ 201 et seq.
15 29 USC §§ 213(a)(15) and 213(b)(21).
16 USDOL, *Fair Labor Standards Act* Advisor, accessed June 28, 2011, www.dol.gov/elaws/esa/flsa/screen75.asp.
17 29 USC § 213(c).
18 29 USC § 216(b).
19 29 USC § 216(e).
20 29 USC §216(b).
21 29 USC §216(a).
22 29 USC §§ 215(a) and 217.
23 Rebecca Smith and Catherine Ruckelshaus, "Solutions, Not Scapegoats: Abating Sweatshop Conditions For All Low-Wage Workers As a Centerpiece of Immigration Reform," *N.Y.U.J. Legis. and Pub. Pol'y,* 10, no. 3 (2007): 555-602, 583, 585, www1.law.nyu.edu/journals/legislation/issues/vol10num3/smith_ruckelshaus.pdf; David Weil, *Improving Workplace Conditions through Strategic Enforcement: a Report to the Wage and Hour Division* (Boston: Boston University, 2010): 14, www.dol.gov/whd/resources/strategicEnforcement.pdf. An analysis of WHD's Wage and Hour Investigative Support and Reporting Database (WHISARD) indicated that USDOL collected 61 percent of the civil monetary penalties that it assessed between 1998 and 2008.
24 Just Pay Working Group, *Just Pay: Improving Wage and Hour Enforcement at the United States Department of Labor* (New York: National Employment Law Project, 2010): 10, www.nelp.org/page/-/Justice/2010/JustPayReport2010.pdf?nocdn=1.
25 29 USC § 255(a).
26 Testimony of Gregory D. Kutz, Managing Director, Forensic Audits and Special Investigations, Government Accountability Office (GAO), and Jonathan T. Meyer, Assistant Director, Forensic Audits and Special Investigations, GAO, before the US House Committee on Education and Labor, *Department of Labor Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft*, 111th Cong., 1st sess., March 25, 2009: 22-3, www.gao.gov/new.items/d09458t.pdf.
27 Irene Lurie, *Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes* (Albany, NY: Nelson A. Rockefeller Institute of Government, State University of New York, 2010): 10.
28 Ibid., 4; Zach Schiller and Sarah DeCarlo, *Investigating Wage Theft* (Cleveland, OH: Policy Matters Ohio, 2010),

State statutes also supplement federal law, covering employees not protected by FLSA and requiring employers to pay wages within a set period.[29] "Wage payment" or "payday" laws — for which there is no federal counterpart — occupy a significant share of enforcement resources in many states, and virtually monopolize labor standards enforcement in three states: Hawaii, Maryland, and Texas.[30] These laws account for a large percentage of wages collected by states.[31] In addition, many state agencies possess the administrative authority to compel payment of back wages, liquidated damages, and civil monetary penalties.[32] WHD does not have this authority and instead relies on USDOL's Office of the Solicitor to pursue enforcement actions in court.

The Interstate Labor Standards Association (ILSA) serves as a forum for state labor officials to share information and best practices, but it does not systematically collect information on member resources or tactics.[33] The WHD State Standards Team in the Office of Performance, Budget, and Departmental Liaison tracks state labor legislation and maps certain types of state labor laws, including minimum wage and overtime. However, as discussed below, WHD could multiply resources and avoid redundancies if it devoted more resources to coordinating and partnering with states.

Federal labor law undergirds the nation's system of labor standards enforcement.

To understand the role of state labor standards enforcement agencies, MPI surveyed agencies in all 50 states and the US Virgin Islands in the spring of 2010. (It had previously conducted interviews with state labor officials in Alabama, Illinois, Iowa, and New Jersey.) The survey covered state resources, organizational structures, investigative strategies, and key partnerships. Thirteen states responded to MPI's survey: Florida, Georgia, Hawaii, Idaho, Illinois, Massachusetts, New Jersey, New York, North Dakota, South Carolina, Tennessee, Texas, and Washington. While not a high response rate, the participants nonetheless constituted a cross-section of states based on size, location, and immigrant population. They also include states ranked among the top five in 2009 in key immigration measures: number of immigrants (New York, Texas, Florida, and New Jersey); share of immigrants (New York, New Jersey, and Florida); growth in numbers of immigrants between 2000 to 2009 (Texas, Florida, Georgia, and New York); and percentage growth during the same period (South Carolina and Tennessee).[34]

MPI's survey contributes to a growing body of literature on state labor standards enforcement, which includes a 2007 Brennan Center for Justice report on labor standards enforcement in New York and recent surveys by Policy Matters Ohio (covering 43 states and Washington, DC), and surveys by Irene Lurie of the Nelson A. Rockefeller Institute of Government at the State University of New York (assessing 18 states with minimum-wage laws).

www.policymattersohio.org/pdf/InvestigatingWageTheft2010.pdf. States like Indiana, Texas, and Utah limit their coverage to workers not covered by federal law.

29 Lurie, *Enforcement of State Minimum Wage and Overtime Laws:* 2-3. Every state, except Alabama, Florida, and South Carolina, has a wage payment law. However, Ohio does not enforce its law. State laws also cover certain workers not protected by the *Fair Labor Standards Act* (FLSA) in businesses with less than $500,000 in annual sales or that are not engaged in interstate commerce.

30 Ibid., 6-7, 26-7.

31 Ibid., 15.

32 Ibid., 12-4.

33 Interstate Labor Standards Association (ILSA), www.ilsa.net/; phone conversation with Lester Claravall, ILSA Midwest Representative and Child Labor Officer, Oklahoma Department of Labor, April 12, 2010.

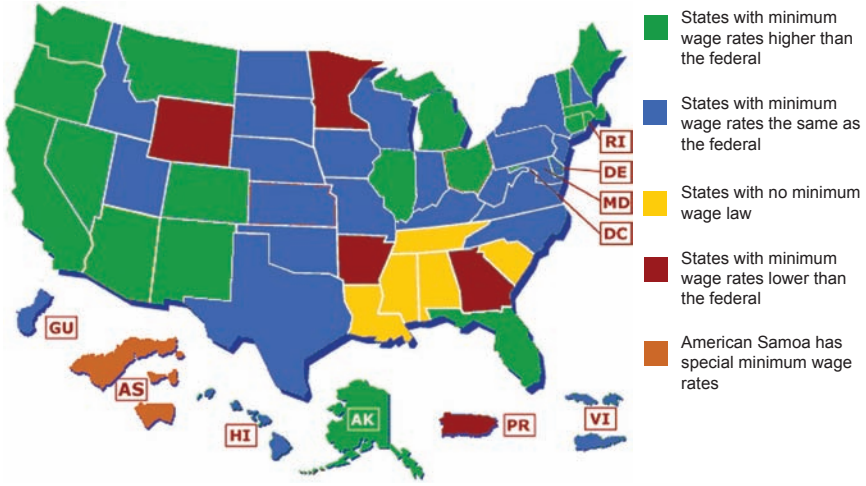
34 Jeanne Batalova and Aaron Terrazas, "Frequently Requested Statistics on Immigrants and Immigration in the United States," *Migration Information Source*, December 2010, www.migrationinformation.org/USfocus/display.cfm?id=818#7.

Of the 13 respondents to the MPI survey, two states reported that they did not enforce minimum-wage or overtime laws. The Georgia Department of Labor said it enforced only child labor standards, while the Florida Department of Business and Professional Regulation noted that it enforced only child and farm labor standards. The Mississippi Department of Employment Security informed MPI that it provides job training and business services, but does not enforce labor standards.[35] Similarly, The Rockefeller Institute reports that Georgia and Texas provide "little or no enforcement by any [state] agency" but provide a private right of action for labor standards violations.[36]

1. State Resources

Survey responses revealed a wide range of state funding and investigative staffing levels. States with minimum-wage and other laws stricter than or parallel to federal standards often devote substantial resources to enforcing these laws. By contrast, when state labor laws are not in place or are weaker than federal laws, states have little reason to enforce their own laws and employees typically seek redress under federal laws.[37] For example, despite dramatic growth in their immigrant populations and subsequent job growth preceding the recent recession, Georgia and Tennessee devote only modest resources to labor standards enforcement.[38] According to WHD, 17 states and the District of Columbia have minimum-wage rates higher than the federal rate, 24 states have minimum-wage rates that equal the federal rate, four states have lower minimum-wage rates, and five states have not established a state minimum-wage requirement (see Figure 1). Thirty-two states and the District of Columbia require premium pay for overtime work.[39]

Figure 1. Minimum-Wage Laws in the States



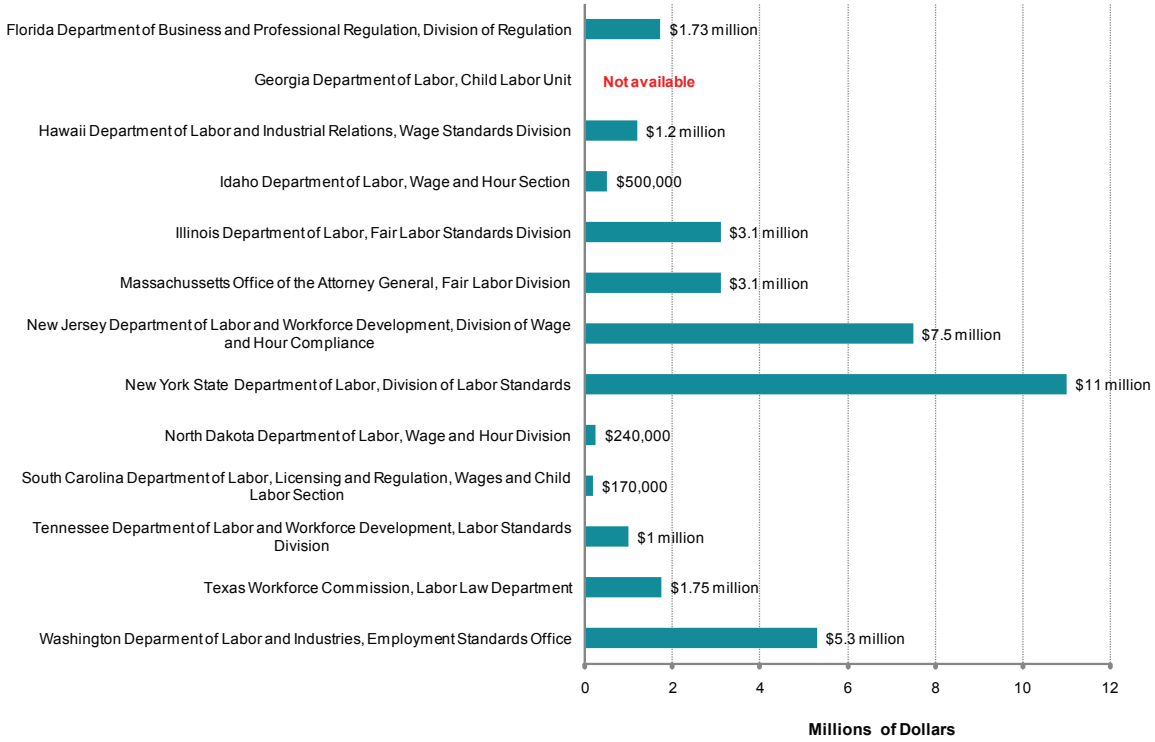
Note: Where federal and state laws have different minimum-wage rates, the higher standard applies.
Source: US Department of Labor, Wage and Hour Division, "Minimum Wage Laws in the States—January 1, 2011," www.dol.gov/whd/minwage/america.htm.

As shown in Figure 2, the fiscal year (FY) 2010 budgets reported by survey participants ranged from $170,000 for the South Carolina Wage and Hour Division to $11 million for the New York Division of

35 Mississippi Department of Employment Security, "About Us," www.mdes.ms.gov/Home/AboutUs.html; ILSA, "State Contacts," www.ilsa.net/contacts/contact007.htm. The Mississippi Department of Employment Security provides job training and business services.
36 Lurie, *Enforcement of State Minimum Wage and Overtime Laws:* 4-6.
37 Some employees may only be able to seek redress under state laws as, for example, when a state statute of limitations for obtaining back wages (such as in Florida) is longer than the federal statute of limitations — even though state minimum wage or other provisions are weaker than federal laws.
38 USDOL Bureau of Labor Statistics (BLS), "Table 5. Union affiliation of employed wage and salary workers by state," http://stats.bls.gov/news.release/union2.t05.htm. These states tend to have low union density. In fiscal year (FY) 2009, 4.6 percent of Georgia's workforce and 5.1 percent of Tennessee's workforce belonged to labor unions.
39 Lurie, *Enforcement of State Minimum Wage and Overtime Laws:* 3.

Labor Standards. These disparities reflect, in part, differences in underlying state statutes: The stronger the state law, the greater the need for state resources to enforce it. Other relevant factors include the number of covered workers and establishments and the prevalence of industries and firms that violate labor standards at high rates.

Figure 2. Budgets for Select State Labor Standards Enforcement Agencies, FY 2010



Source: Responses to MPI survey on Labor Standards Enforcement for State Labor Standards Agencies; Executive Office of the Governor of Illinois, Illinois State Budget Fiscal Year 2011 (Springfield, IL: Office of Management and Budget, 2010), www.state.il.us/budget/FY2011/FY2011_Operating_Budget.pdf.

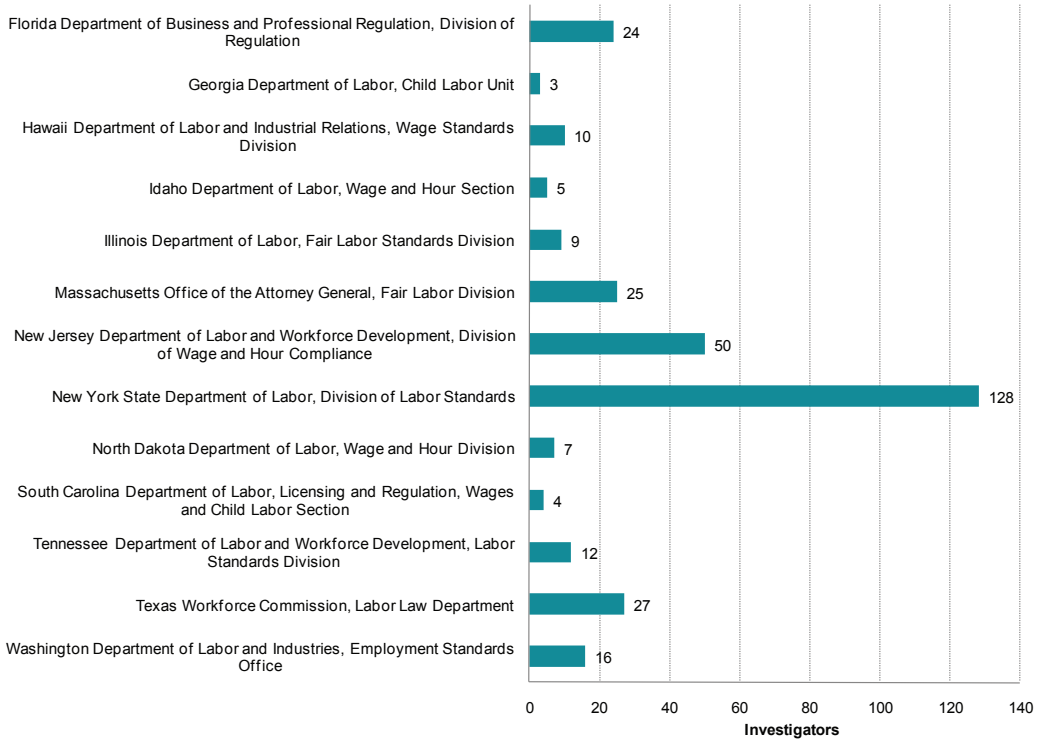
As shown in Figure 3, investigative staffing levels ranged from a high of 128 investigators in the New York State (NYS) Division of Labor Standards to a low of three investigators in the Georgia Department of Labor, Child Labor Unit. In its survey, Policy Matters Ohio found that larger states such as California and New York employed substantial numbers of labor standards investigators, but most states employed fewer than ten.[40] In addition, investigators in California, New York, and Connecticut are assigned specific responsibilities, with some responding to employee complaints, others initiating investigations, and some handling specific types of claims.[41]

In short, most states commit modest resources to this work, but *collectively* states employ nearly as many investigators as WHD. The 13 state respondents to MPI's survey employ 320 labor standards investigators, while the 18 state agencies surveyed by The Rockefeller Institute in November 2009 and March 2010 employed 405 investigators.[42] The Policy Matters Ohio survey (administered in the summer and fall of 2010) found that the [43] respondents employed 659.5 labor standards investigators.[43] Twenty-one of the 43 states noted that their investigators also enforced prevailing wage requirements, either as part of their normal responsibilities or exclusively.[44] New Jersey, for example, reported that 14 of its 45 investigators enforced prevailing wage standards.

40 Schiller and DeCarlo, *Investigating Wage Theft*: 4.
41 Lurie, *Enforcement of State Minimum Wage and Overtime Laws*: 6-7.
42 Ibid., 18.
43 Schiller and DeCarlo, *Investigating Wage Theft*: 2-4.
44 Ibid., 2-3.

The Policy Matters Ohio survey also found that many states had recently cut or planned to cut their enforcement budgets and staffing levels. Recent cuts include a 23 percent budget cut in Ohio, a decrease from 12 to seven investigators in Wisconsin, seven vacant positions among 18 total positions in Arizona, the furloughing of all California investigators three days a month, and planned cuts in Hawaii and Maryland.[45]

Figure 3. FY 2010 Investigative Staffing Levels for Select State Labor Standards Agencies



Source: Responses to MPI survey on Labor Standards Enforcement for State Labor Standards Agencies.

A 2007 report by the Brennan Center for Justice, which studied 13 industry clusters in New York City, highlighted the challenges in successfully enforcing labor standards, even in communities that benefit from relatively large numbers of investigators, comparatively strong labor laws, established task forces devoted to particular industries, and high union density.[46] At the time, roughly 100 of the NYS DOL investigators covered approximately 500,000 workplaces while 128 OSHA health and safety inspectors worked in the state.[47] The Brennan Center report documented widespread minimum-wage, overtime, OSHA, and workers' compensation violations against unauthorized workers; these violations often affect authorized immigrants as well.[48] It concluded that the violations were not confined to firms that traditionally violate these laws at high rates — among them firms responding to global competition, lower-end establishments, or smaller employers — but extended to a cross-section of sectors and businesses.

45 Ibid., 4-5. Also the Rockefeller Institute found staff shortages "a perennial constraint" in state labor standards enforcement, and that "cuts, hiring freezes and furloughs" had led to staffing reductions in half of the state agencies surveyed. Lurie, *Enforcement of State Minimum Wage and Overtime Laws*: 7-8.

46 Annette Bernhardt, Siobhán McGrath, and James DeFilippis, *Unregulated Work in the Global City: Employment and Labor Law Violations in New York City* (New York: Brennan Center for Justice, 2007): 36, http://nelp.3cdn.net/cc4d61e5942f9cfdc5_d6m6bgaq4.pdf. Researchers interviewed 326 workers, employers, regulators, union members, and staff from community-based agencies between 2003 and 2006 and extensively reviewed secondary data sources.

47 Ibid., 32.

48 Ibid., 36.

2. Initiating an Investigation

States overwhelmingly rely on complaints to initiate investigations.[49] This is significant because certain vulnerable workers are less prone to file complaints than others. Six states reported to MPI that *all* of their investigations were initiated by complaints. Others used alternate means to initiate investigations but primarily responded to complaints. For example:

- 96 percent of investigations in New York were complaint-driven and 4 percent were initiated by agencies, the latter targeting industries where employees traditionally worked long hours and received low wages.
- 96 percent of investigations in Hawaii responded to complaints, with 4 percent initiated in response to probabilistic (random) sampling.
- 80 percent of investigations in Massachusetts were driven by complaints, 15 percent targeted specific industries or firms, and 5 percent responded to complaints from competitors of the firm.
- 100 percent of investigations in Tennessee that involved unpaid wages, receipt of final paychecks, and illegal employment were triggered by complaints, while child labor and prevailing wage investigations were both complaint-driven and conducted on a random basis.

The Florida Department of Business and Professional Regulation reported that it had initiated investigations of farm contractors. Both Florida and Hawaii reported using probabilistic sampling to identify employers likely to violate the law.

Of the 18 states surveyed by The Rockefeller Institute, California, New York, New Jersey, and Connecticut engaged in "proactive, strategic enforcement" targeting industries with a history of violations, inspecting firms within targeted industries, conducting "sweeps" of targeted neighborhoods and employers, partnering with community groups, and participating in task forces devoted to particular industry sectors.[50]

3. Organizational Structure and Partnerships

As illustrated in Table 2, state labor departments or their equivalents are responsible for enforcing labor standards in most of the states that responded to MPI's survey. In Massachusetts, the Fair Labor Division falls under the jurisdiction of the Office of the Attorney General.

Partnerships with other state agencies, business groups, labor unions, and community organizations allow state labor standards agencies to leverage additional resources, to identify problem industries and employers, to pursue employers that violate related laws, and to educate employers and employees on the law.

However, most respondents — Hawaii, Idaho, Illinois, North Dakota, South Carolina, Tennessee, Texas, and Washington — perform investigations independently. The NYS Division of Labor Standards reported that it conducted 95 percent of its investigations by itself and 5 percent with partners, including the NYS DOL Unemployment Insurance Division, the NYS Workers' Compensation Board, and the NYS DOL Bureau of Public Works. NYS DOL also participates on a joint enforcement task force on worker misclassification with these entities, as well as with the NYS Workers' Compensation Board Fraud Inspector General, the NYS Department of Taxation and Finance, the NYS Office of the Attorney General, and the Comptroller of the City of New York.

49 Ibid., 8, 25. In all 18 states surveyed by the Rockefeller Institute, "the percent of cases that were initially initiated by complaints was higher than WHD." State agencies in Michigan, Oklahoma, and Texas lack the authority to initiate investigations.

50 Ibid., 9.

Table 2. Respondents to MPI Labor Standards Enforcement Survey

State and Department	Labor Standards Agency
Florida Department of Business and Professional Regulation	Division of Regulation *(farm labor and child labor only)*
Georgia Department of Labor	Unemployment Insurance Tax Administration *(child labor only)*
Hawaii Department of Labor and Industrial Relations	Wage Standards Division
Idaho Department of Labor	Wage and Hour Section
Illinois Department of Labor	Fair Labor Standards Division
Massachusetts Office of the Attorney General	Fair Labor Division
New Jersey Department of Labor and Workforce Development	Division of Wage and Hour Compliance
New York Department of Labor	Division of Labor Standards
North Dakota Department of Labor	Wage and Hour Division
South Carolina Department of Labor, Licensing and Regulation	Wages and Child Labor Section
Tennessee Department of Labor and Workforce Development	Labor Standards Division
Texas Workforce Commission	Labor Law Department
Washington State Department of Labor and Industries	Employment Standards Program

Other states also partner in a small percentage of their investigations. The New Jersey Department of Labor and Workforce Development, Division of Wage and Hour Compliance, reported that it performed 95 percent of its investigations independently, and roughly 5 percent with the state's Public Employees Occupational Safety and Health Program. It also participates in a joint task force on the apparel industry with USDOL and NYS DOL.

The Massachusetts Office of the Attorney General reported that it conducted 85 percent of its investigations independently and 15 percent with partners like the Insurance Fraud Bureau of Massachusetts and the Massachusetts Department of Labor. The Massachusetts DOL addresses workers' compensation, safety and health standards, collective bargaining for public employees, and education on minimum-wage laws. The Office of the Attorney General also participates in a task force with the Massachusetts Department of Labor to investigate employee misclassification.

Most states reported collaborating with diverse stakeholders, typically outside the context of investigations. Hawaii's Wage Standards Division partners with local contractor associations such as the Hawaii Employers Council and the state chapter of Associated Builders and Contractors Inc. (ABC Hawaii), as well with the Hawaii chapter of the Society for Human Resources Management. The Idaho Wage and Hour Section refers cases to the Idaho Department of Labor's Tax Division to determine if employers are paying appropriate taxes on wages. These entities jointly initiate liens on property for payment of back wages and taxes owed. The Illinois Fair Labor Standards Division pursues child labor and other violations in cases referred by USDOL. The Texas Workforce Commission reported pursuing talks with USDOL on data sharing and training. Massachusetts' Fair Labor Division relies on unions, industry trade groups, community organizations, workers' rights organizations, and immigrant advocacy groups to report on potential labor standards violations and to maintain victims' participation in lengthy

investigations. Washington's Employment Standards Program partners with state entities such as the Division of Safety and Health, Department of Licensing, Secretary of State, Department of Revenue, and Department of Employment Security in order to obtain information on wages, business licenses, and the corporate status of employers.

C. Federal and State Enforcement of Workplace Safety and Health Standards

The *Occupational Safety and Health Act of 1970* (OSH Act) was enacted to ensure that the nation's workplaces are "free from recognized hazards": it requires employers to comply with safety and health standards, warn of potential hazards, and provide appropriate safety equipment.[51] The act also allows employees to request workplace inspections and protects them from discrimination for filing complaints or instituting legal actions.[52] Employers must address violations within a reasonable time and can be assessed financial penalties and criminal sanctions for violations of the law.[53]

OSH Act applies to businesses affecting interstate commerce that have employees,[54] but it does not apply to all employers. Domestic workers are not covered.[55] In addition, a longstanding rider to USDOL's appropriations bill has prohibited enforcement of OSH Act's safety and health standards against farming operations that do not have labor camps and have ten or fewer employees. Except on the basis of complaints, the rider also prohibits OSH Act's safety (not health) standards from being enforced against employers in an extensive list of "low-hazard industries" with ten or fewer employees.[56]

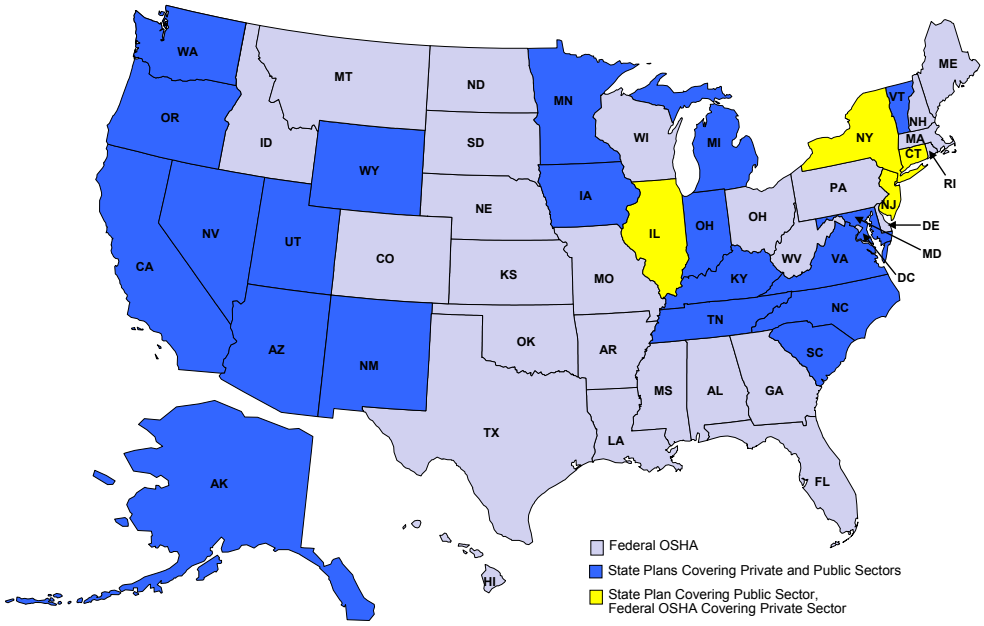
OSH Act covers an estimated 114 million workers at 7.5 million *private* business establishments and 200,000 construction worksites. Over the last decade, OSHA has employed between 2,100 and 2,400 inspectors per year (see Appendix A, which compares OSHA, NLRB, and WHD funding and staffing levels from 2003 to the present). Like WHD, OSHA can investigate only a fraction of the employers, even in the most dangerous industries.[57] In addition, OSHA has been criticized for levying fines that do not approximate what it would cost employers to comply with health and safety rules and, thus, that do not compel them to comply with the law.[58] Between 1980 and 2006, the number of worksite visits by federal and state health and safety inspectors fell to 97,000 from 174,000.[59]

1. State Health and Safety Plans

Twenty-seven states administer and enforce health and safety standards under plans approved and monitored by OSHA (see Figure 4). The safety and health standards of state plans must equal or exceed OSHA standards.[60] State plans may cover both the public and private sectors or the public sector alone.[61]

51 29 USC §§ 654 and 655(b)(7).
52 29 USC §§ 657(f)(1), 660(c)(1).
53 29 USC §§ 658(a), 659(a), 666.
54 29 USC § 652(5).
55 29 CFR § 1975.6 (2009).
56 OSHA, OSHA Instruction, CPL 2-0.51J, *Enforcement Exemptions and Limitations under the Appropriations Act* (Washington, DC: USDOL, 1998), www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1519; Memorandum from David Michaels, PhD, MPH, to Regional Administrators and State Designees, "Appropriations Act: Replacement of Appendix A for CPL 02-00-051" (January 3, 2011), www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1519.
57 Smith and Ruckelshaus, "Solutions, Not Scapegoats": 587-88.
58 David Weil, "Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters," *Comparative Labor Law and Policy Journal,* 28, no. 2 (2007): 125-54, 145, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996901.
59 OMB Watch, "Workers Threatened by Decline in OSHA Budget, Enforcement Activity," January 23, 2008, www.ombwatch.org/node/3587.
60 OSHA, "Frequently Asked Questions about State Occupational Safety and Health Plans," www.osha.gov/dcsp/osp/faq.html#establishingyourown.
61 USDOL, "FY 2011 Congressional Budget Justification: Wage and Hour Division": 46, www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V2-03.pdf. Excluding the US Virgin Islands, there are four states with public-sector (only) plans — Connecticut, Illinois, New Jersey, and New York — that rely on OSHA to enforce the law in the private sector.

Figure 4. Occupational Safety and Health Coverage, 2010



Notes: Not pictured: Puerto Rico is a "State Plan" state and the US Virgin Islands is a public-sector only "State Plan" state.
Source: Occupational Safety and Health State Plan Association, USDOL, *FY 2011 Congressional Budget Justification,* www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V2-03.pdf.

State-plan states must match federal funding dollar for dollar.[62] Federal funding levels are based on "the number of workers covered by the program and the hazardousness of the state's industries."[63] In total, these states employ 1,331 investigators, the great majority of them "safety" investigators. (Appendix B details state and federal funding for state-plan states in FY 2009, and the number of investigators (by type) in state-plan states in FY 2010.)

All state-plan states belong to the Occupational Safety and Health State Plan Association (OSHSPA).[64] OSHSPA holds three meetings a year with OSHA in order to share information and discuss common workplace safety and health challenges.[65]

D. National Labor Relations Act: Union Organizing and Collective Bargaining

The *National Labor Relations Act* (NLRA) safeguards the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively … and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[66]

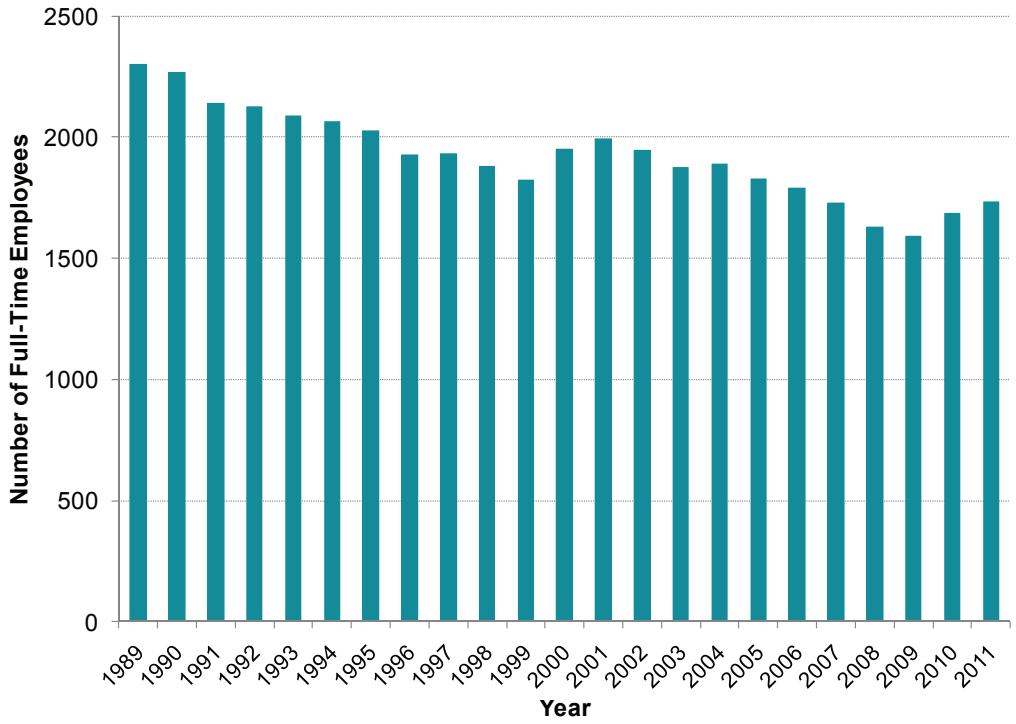
An independent government agency headquartered in Washington, DC, the National Labor Relations Board (NLRB), administers the NLRA. It investigates potential unfair labor practices and administers elections to determine whether groups of employees want union representation. The NLRB is led by five board members, including the chairman and a general counsel, appointed by the US president with the advice and consent of the Senate. The five-member board decides cases based on formal records of administrative proceedings.

62 Occupational Safety and Health State Plan Association (OSHSPA), *Grassroots Worker Protection 2009 OSHSPA Report — State plan activities of the Occupational Safety and Health State Plan Association* (Washington, DC: OSHSPA, 2009): ii, www.osha.gov/dcsp/osp/oshspa/grass2009.pdf.
63 USDOL, *FY 2011 Congressional Budget Justification:* 43.
64 OSHSPA, *Grassroots Worker Protection 2009*: ii, vi.
65 OSHA, "Occupational Safety and Health State Plan Association," (Washington, DC: OSHSPA, 2009), www.osha.gov/dcsp/osp/oshspa/index.html.
66 29 USC §§ 151-169.

NLRA does not cover agricultural workers, certain domestic workers, and several other categories of workers.[67] The congressional authors of the *Wagner Act of 1935* (the original NLRA) viewed agricultural workers as the "hired hands" of small family farmers and domestic workers as quasi-family members of their employers, enjoying close personal ties with them.[68] As a result, these categories of workers were seen as ill-suited for coverage under a law designed to curb industrial strife and unrest. In the current era of large-scale corporate farming and expanding demand for in-home child and especially elder care, these assumptions may no longer be valid.

In 2002, the US General Accounting Office (GAO) estimated that three-quarters of the civilian workforce enjoyed collective bargaining rights under federal, state, or local laws.[69] This left 32 million workers without such rights, among them 10.2 million managers and supervisors; 8.5 million independent contractors; 6.9 million federal, state, and local employees; 5.5 million small-business employees; 532,000 domestic workers; and 357,000 agricultural workers.[70] Unauthorized workers are found at high rates in many jobs within these exempt categories.[71]

Figure 5. NLRB, Full-Time Employees, 1989-2011*



Note: The 2011 figure is requested workers.
Source: National Labor Relations Board (NLRB), *Justification of Performance Budget for Committee on Appropriations, Fiscal Year 2011* (Washington, DC: NLRB): 45, www.nlrb.gov/nlrb/shared_files/reports/NLRB_JUST/2011/JUST2011FULL.pdf.

67 29 USC § 152(3).

68 Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* (New York: Human Rights Watch, 2000): 247-50, www.hrw.org/legacy/reports/2000/uslabor/.

69 GAO, *Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights,* GAO-02-835 (Washington, DC: GAO, 2002): 10, www.gao.gov/new.items/d02835.pdf.

70 Ibid.; Human Rights Watch, *Unfair Advantage"*: 173. According to Human Rights Watch: "Workers in all walks of life are excluded from labor law protection …. These workers include many or all farm workers, household employees, taxi drivers, college professors, delivery truck drivers, engineers, product sellers and distributors, doctors, nurses, newspaper employees, Indian casino employees, employees labeled 'supervisors' and 'managers' who may have minimal supervisory or managerial responsibility, and others."

71 Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States* (Washington, DC: Pew Hispanic Center, 2009): 32, http://pewhispanic.org/files/reports/107.pdf. The unauthorized represent 23 percent of private household workers and 20 percent of crop-production workers. Many legal immigrants also lack collective bargaining rights.

NLRB can order an employer to discontinue an unlawful practice, to reinstate an employee, and to pay back wages and benefits.[72] Such nonpunitive sanctions, however, have been criticized for failing to dissuade anti-organizing efforts. The limited sanctions available in cases involving unauthorized workers exacerbate their vulnerability to labor standards violations. The most substantial penalty — payment of back wages — is not available in cases involving unauthorized workers,[73] and unauthorized workers fired for exercising their labor rights cannot be reinstated.[74]

In FY 2009, NLRB investigated 22,941 unfair labor practice cases and 2,912 union representation cases. It issued unfair labor practice complaints in 36.2 percent of the cases, recovered more than $92 million in back wages, fines, and other costs, and secured reinstatement offers for 2,021 employees.[75] As with WHD and OSHA, NLRB staffing fell significantly between 2001 and 2008. As Figure 5 illustrates, it has increased modestly since 2009.

III. Identifying Industries and Firms that Violate Labor and Workplace Safety and Health Laws at High Rates

The labor standards enforcement enterprise turns on the ability of WHD and state regulators to identify industries and firms that substantially violate the law.[76] Yet there is surprisingly little research that *systematically* compares employers that violate labor standards with those that illegally hire unauthorized immigrants. Although there is no strong body of literature demonstrating that employers with unauthorized workers are overall more likely than other employers to violate labor standards, there is strong evidence that unauthorized and other low-wage immigrants work at high rates in certain industries and firms that substantially violate these laws. Lawmakers, courts, government agencies, and experts consistently maintain that certain employers use and even prefer unauthorized workers as a way to lower wages and working conditions. That, in turn, has a deleterious effect on other workers in those firms and industries. There is also empirical evidence that firms competitively benefit from hiring unauthorized workers.

There is surprisingly little research that systematically compares employers that violate labor standards with those that illegally hire unauthorized immigrants.

Recent USDOL-commissioned research highlighted the importance of understanding and targeting "fissured" industries. These are industries in which many functions historically carried out by lead corporations have been assigned to smaller business entities that operate in highly competitive environments. These smaller entities are more likely to hire unauthorized workers and to violate labor and workplace safety and health laws.

72 29 USC § 160(c).

73 *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 122 S. Ct. 1275 (2002).

74 The *Immigration Reform and Control Act of 1986* (IRCA) made it illegal to hire unauthorized immigrants. Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986).

75 NLRB, *2009 Performance and Accountability Report* (Washington, DC: NLRB, 2009): 24, www.nlrb.gov/sites/default/files/documents/189/nlrb_fy_2009_par_web.pdf.

76 Weil, "Crafting A Progressive Workplace Regulatory Policy," 125-33. According to one commentator, regulators often fall into "ruts," targeting sectors, employers, or geographic areas based on biases, outdated business models or historical information, or even the criteria for evaluating their own performance.

A. Studies on Unauthorized Workers and Labor Standards Violations

There is no study in recent years that systematically compares employers that illegally hire unauthorized workers with those that violate labor standards.[77] However, USDOL studies from 1991 and 1999 to 2000, as well as a 2008 study of low-wage workers in Chicago, Los Angeles, and New York, offer evidence that certain employers substantially violate both immigration and labor laws.

It should be a relatively straightforward exercise to demonstrate — or disprove — that hypothesis. Industries and occupations with heavy concentrations of unauthorized workers can be identified through the Current Population Survey (CPS), New Immigrant Survey, and the Survey of Income and Program Participation.[78] CPS data on wages and hours worked, Bureau of Labor Statistics (BLS) data on work-related fatalities, injuries, and illnesses, and WHD and OSHA complaint and investigative databases can be mined for information on labor and workplace safety and health violations.[79]

A study mandated by Congress and published in 1991 analyzed violations of the employment verification requirements established by the *Immigration Reform and Control Act* (IRCA), as well violations of FLSA's minimum-wage, overtime, and child labor provisions.[80] IRCA made it unlawful "to hire, or to recruit or refer for a fee … knowing the alien" is ineligible to work.[81] Under the Form I-9 employment eligibility verification process, employers must review employee documents from a list establishing identity, work eligibility, or both. They must also attest that they have examined the relevant documents and that they appear, on their face, to be genuine.[82] They risk penalties for discrimination based on national origin or citizenship status if they request more or different documents than those required by law or if they refuse to accept documents that appear genuine.[83]

The 1991 study reviewed administrative data on the nonagricultural investigations opened and closed by WHD between October 1, 1987 and January 31, 1990.[84] Roughly one-half of the investigated firms had been targeted under the Special Targeted Enforcement Program (STEP) of the Employment Standards Administration (ESA), then WHD's parent agency with DOL.[85] In the STEP program, local ESA/WHD officials used information from their own investigations, as well as USDOL guidelines and information from the Immigration and Naturalization Service (INS),[86] to select firms "more likely" to employ

77 Employers who operate entirely off the books often violate immigration, labor, tax, and other laws.

78 Current Population Survey (CPS) data capture information regarding birthplace and citizenship. A process for assigning legal status has been developed by Jeffrey Passel at the Pew Hispanic Center. In addition, CPS records employment information by industry and occupation. The Survey of Income and Program Participation queries whether noncitizens are lawful permanent residents (LPRs) and can thus be used to approximate the unauthorized population. It also includes data on legal immigrants who were previously unauthorized and records employment information by industry and occupation. The New Immigrant Survey is a longitudinal survey of legal permanent residents (LPRs) and their children. Because it collects information on the year that respondents gained legal status, the starting year of various jobs by industry and occupation, and the year of entry into the United States, it can yield information on which industries respondents were working in and how much they were earning while still unauthorized immigrants.

79 David Weil and Amanda Pyles, "Why Complain? Complaints, Compliance, and the Problem of Enforcement in the US Workplace," *Comparative Labor Law & Policy Journal*, 27 (2005): 59-92, 66-8, www.hctar.org/pdfs/HR08.pdf; *A Survey of Literature Estimating the Prevalence of Employment and Labor Law Violations in the U.S.* (New York: Brennan Center for Justice, 2005), http://brennan.3cdn.net/bdeabea099b7581a26_srm6br9zf.pdf. The Brennan Center for Justice has compiled an exhaustive review of the literature on US labor law violations.

80 USDOL, Bureau of International Labor Affairs, *Employer Sanctions and US Labor Markets: Second Report* (Washington, DC: USDOL, Division of Immigration Policy and Research, Bureau of International Labor Affairs, 1991): 19-20. The analysis may have understated the rate of FLSA violations since unauthorized workers may be less likely to register complaints or be reflected in payroll records used to document violations. On the other hand, targeted firms had been "singled out as probable violators" based on employee complaints and the sector in which they were located and, thus, were not "statistically representative of the entire US business community."

81 INA § 274A(a)(1)(A).

82 INA § 274A(b)(1).

83 INA § 274B (a).

84 USDOL, *Employer Sanctions and U.S. Labor Markets: Second Report*: 11, 21. The study covered more than 60,000 firms.

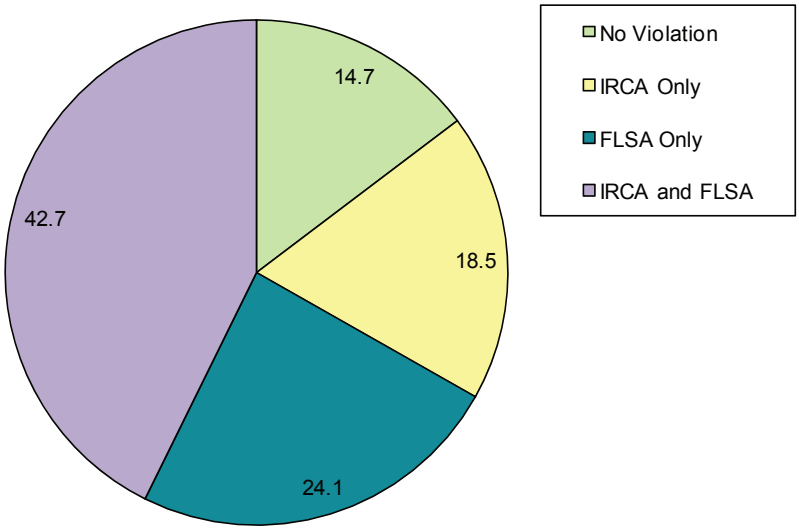
85 Ibid., 15, 21.

86 The Immigration and Naturalization Service (INS) was abolished with the establishment of the US Department of Homeland Security (DHS) in March 2003, and most of its functions were divided among three new DHS components: US Immigration

unauthorized immigrants.[87] The study further distinguished between firms in "high- and low-alien" industries. GAO defined "high-alien" industries as "non-agricultural industries that routinely employ illegal aliens." Those industries included construction, food manufacturing and the manufacturing of related products, apparel and textiles manufacturing, retail eating and drinking, and hotel and lodging services.[88]

The study found that firms investigated by ESA/WHD violated labor and immigration standards at high rates. However, STEP-designated firms (thought by USDOL more inclined to hire unauthorized immigrants) were only slightly more likely to violate both sets of laws. Figure 6 shows that among WHD-inspected firms, 24.1 percent violated only FLSA, 18.5 percent violated only IRCA, and 42.7 percent violated both FLSA and IRCA.[89]

Figure 6. Incidence of IRCA and FLSA Violations at ESA and WHD-Inspected Firms, 1991



Source: USDOL, Bureau of International Labor Affairs, *Employer Sanctions and US Labor Markets: Second Report* (Washington, DC: USDOL, Division of Immigration Policy and Research, Bureau of International Labor Affairs, 1991): 20.

STEP-designated firms proved only marginally more likely to violate FLSA (69 percent compared to 64 percent) and slightly more likely to violate both immigration and labor laws (46 percent compared to 39 percent).[90] The study posited that these modest differences could reflect a lack of "hard evidence" by ESA/WHD in determining which firms merited the STEP designation.[91] In addition, employers in the five "high-alien" industries committed FLSA violations (69 percent versus 66 percent) and minimum-wage violations (16 percent versus 14 percent) at slightly higher rates, but they were marginally less likely to violate overtime pay requirements.[92]

In 2008, the Center for Urban Economic Development, the National Employment Law Project, and the UCLA Institute for Research on Labor and Employment conducted a more targeted survey of 4,387

and Customs Enforcement (ICE), US Customs and Border Protection (CBP), and US Citizenship and Immigration Services (USCIS).

87 Ibid., 15.
88 Ibid., 26.
89 Ibid., 20-1.
90 Ibid., 21.
91 Ibid.
92 Ibid., 23, 27. Firms of ten to 49 employees had the highest rates of combined IRCA and FLSA violations, while firms of 50 to 99 employees had the highest rate of FLSA violations.

persons working in low-wage industries in Chicago, Los Angeles, and New York.[93] Survey respondents included workers who: (1) were at least 18 years old; (2) worked in "front-line" jobs (i.e. not management or professional workers); and (3) worked in industries for which the median wage for front-line workers was less than 85 percent of the city's median wage.[94] Foreign-born persons represented 70 percent of the total respondents, and the investigators estimated that nearly 40 percent of the respondents were unauthorized.[95]

The study started with a seed group of workers and used their social networks and the networks of successive respondents to identify survey participants.[96] Its authors attempted to reduce the bias inherent in "snowball sampling" by weighing data to account for differences in social network size.[97] The survey did not rely on the respondents' knowledge of the law, but collected raw data that allowed the researchers to determine whether workplace violations had occurred.[98] The respondents, whose median wage slightly exceeded $8 an hour, worked in a variety of industries and occupations.[99]

The survey found widespread labor standards violations. Based on hours worked and pay received the week prior to the survey, it appeared that 25.9 percent of all respondents had been paid subminimum wages. And 76.3 percent of respondents who had worked more than 40 hours were not paid overtime.[100] Violations occurred at higher rates for unauthorized than for authorized foreign-born workers, for foreign-born than for US-born workers, and for foreign-born women than for foreign-born men. In particular:

- 37.6 percent of *unauthorized workers* (including 47.4 percent of *unauthorized women*) reported being paid subminimum wages, compared to 25.7 percent of *authorized foreign-born workers*;
- 84.9 percent of *unauthorized immigrants* reported overtime violations, compared to 67.2 percent of *authorized foreign-born workers*;
- 31.1 percent of *foreign-born workers* reported minimum-wage violations, compared to 15.6 percent of *US-born respondents*; and
- 37.4 percent of *foreign-born women* had been paid subminimum wages, compared to 21.9 percent of *foreign-born men*.[101]

93 Annette Bernhardt, Ruth Milkman, Nik Theodore, Douglas Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz González, Victor Narro, Jason Perelshteyn, Diana Polson, and Michael Spiller, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (Center for Urban Economic Development, National Employment Law Project, UCLA Institute for Research on Labor and Employment, 2009), http://nelp.3cdn.net/1797b93dd1ccdf9e7d_sdm6bc50n.pdf.

94 Ibid., 56. Surveyed workers were thought to be underrepresented in official databases and reluctant to be surveyed due to fear of retaliation by their employers.

95 Ibid.,14-5, 43-5, 58, 62. The study reported only minimal information on unauthorized respondents, i.e., the percentage of unauthorized workers by gender who experienced minimum wage violations and the percentage of unauthorized workers overall who experienced overtime violations. The study relied on the Pew Hispanic Center for data on the number and characteristics of the unauthorized population in the targeted cities.

96 Ibid., 56-8.

97 They also adjusted each city's sample to match the race, ethnic, and nativity distributions of the 2007 American Community Survey (ACS) and adjusted this distribution based on 2005 estimates of the number of unauthorized workers in each city.

98 Ibid.,13-4. All three states had higher minimum wage rates than the federal standard.

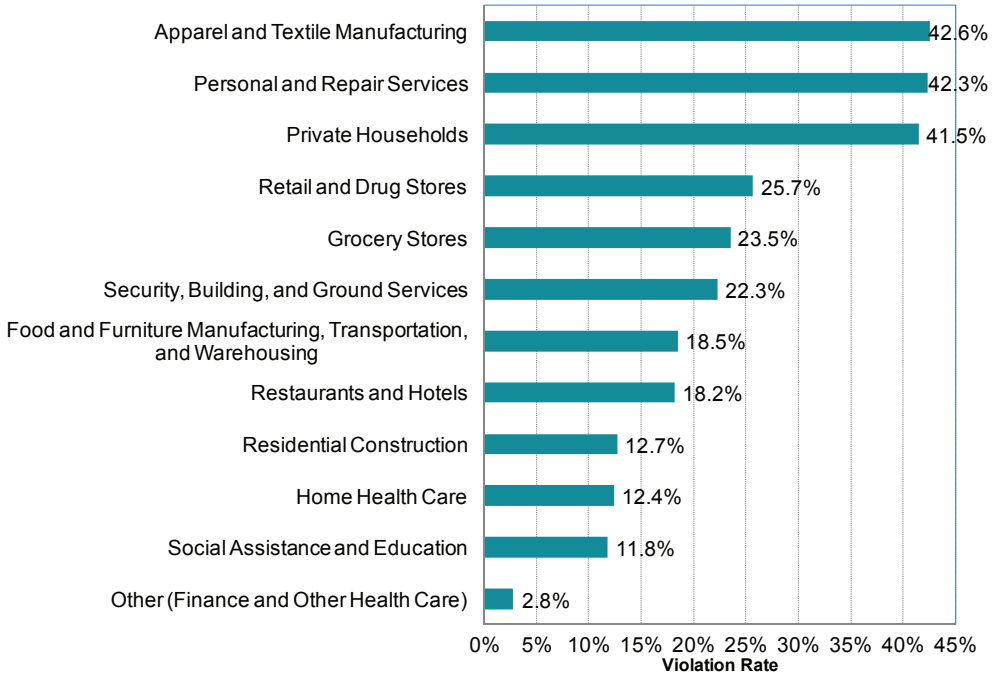
99 Ibid.,14-6. The main industries in which respondents worked were restaurants and hotels; private households; apparel and textile manufacturing; retail and drug stores; food and furniture manufacturing, transportation and warehousing; security, building and grounds services; social assistance and education; residential construction; grocery stores; personal and repair services; and home health care. Principal occupations included: cooks, dishwashers and food preparers; sewing and garment workers; building services and grounds workers; factory and packaging workers; child care workers; general construction; home health care workers; retail salespersons and tellers; maids and housekeeper; cashiers; waiters; cafeteria workers and bartenders; stock/office clerks and couriers; car wash workers, parking lot attendants and drivers; beauty, dry cleaning and general repair workers; security guards and teacher's assistants.

100 Ibid., 20.

101 Ibid., 42-4.

As Figure 7 indicates, employers posting the highest rates of minimum-wage violations were in apparel and textile manufacturing, personal and repair services, and private households.[102]

Figure 7. Minimum-Wage Violation Rates by Industry, 2008



Source: Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (New York: Center for Urban Economic Development at UIC, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, 2009): 31, http://nelp.3cdn.net/1797b93dd1ccdf9e7d_sdm6bc50n.pdf. All figures come from the report's analysis of the 2008 Unregulated Work Survey detailed in *Broken Laws, Unprotected Workers*.

By occupation, minimum-wage violations occurred most frequently among child care workers; beauty, dry cleaning, and general repair workers; sewing and garment workers; and maids and housekeepers (see Figure 8).[103]

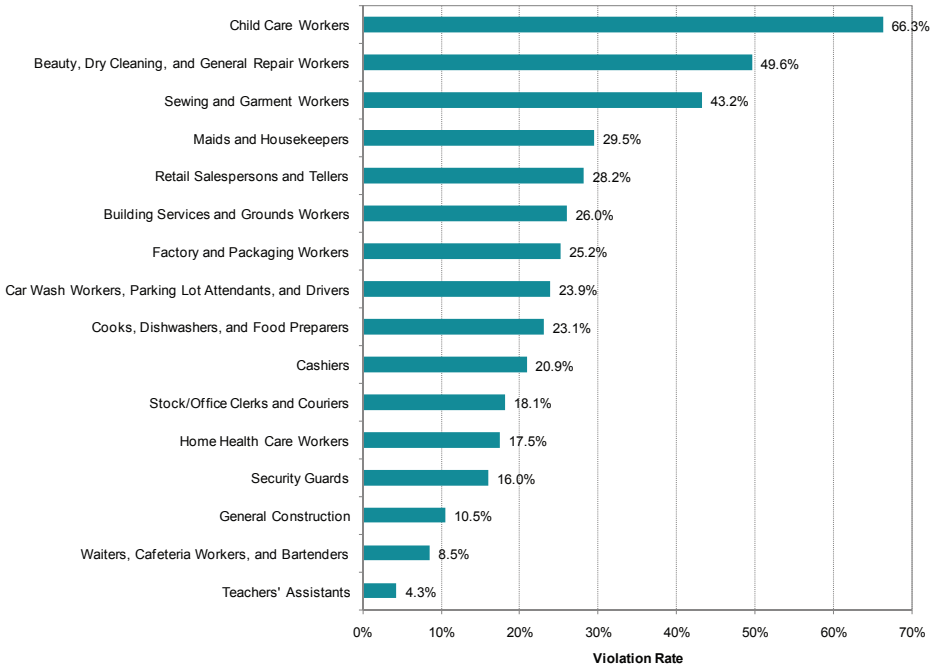
The rates of reported overtime violations ranged from more than 90 percent in personal and repair services jobs and among child care workers, to less than 45 percent among factory and packaging workers.[104]

Beyond these studies, there is substantial evidence that unauthorized immigrants work at high rates in industries with long track records of labor standards violations.[105] Lack of immigration status was identified as a "constant" factor in a study that found extensive minimum-wage, overtime, OSHA, and workers' compensation violations in 13 industry clusters in New York City.[106] Following a May 2008

102 Ibid., 31.
103 Ibid.
104 Ibid., 34.
105 Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.* (Washington, DC: Pew Hispanic Center, 2006): 12-3, http://pewhispanic.org/reports/report.php?ReportID=61. In 2006, the Pew Hispanic Center reported that unauthorized workers constituted 29 percent of US agricultural workers; 27 percent of meat, poultry, and fish processing workers; 26 percent of garment workers; and 18 percent of sewing machine operators. WHD has consistently identified endemic violations in these occupations.
106 Annette Bernhardt, et al., *Unregulated Work in the City*: 36. The study was based on interviews with 326 workers, employers, regulators, union members, and staff from community-based agencies between 2003 and 2006, as well as reviews of

immigration raid of a meat-packing plant in Postville, Iowa, federal and state prosecutors brought criminal charges against management for child labor violations, improper use of deducted wages, verbal and physical abuse, use of hazardous equipment, payment of subminimum wages, and tax fraud.[107] As detailed in Appendix C, immigrants also work at higher rates than natives in lower-paying and more dangerous jobs.[108]

Figure 8. Minimum-Wage Violation Rates by Occupation, 2008



Source: Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*. All figures come from the report's analysis of the 2008 Unregulated Work Survey detailed in *Broken Laws, Unprotected Workers*.

One common explanation for the exploitation of unauthorized workers is the workers' failure to speak out or report violations because they fear retaliation by employers and deportation by immigration authorities. This fear appears well founded.[109] In 2007, the Brennan Center reported that select employers in New York City threatened to report both unauthorized workers and their family members if the former asserted their labor rights.[110] The same threat was pervasive during post-Hurricane Katrina

secondary data sources.

107 Associated Press, "Managers Indicted in Immigration Case," *The Washington Post,* November 22, 2008, www.washingtonpost.com/wp-dyn/content/article/2008/11/21/AR2008112103163_pf.html; Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Antonin Trinidad Candido, a minor, Roman Trinidad Candido and Maria del Refugio Masias, individually and on behalf of an unspecified number of Detained Immigrant Workers v. United States Immigration and Customs Enforcement Division of the Department of Homeland Security, et al.*, No. 08 CV 1015 LRR (N.D. IA. May 15, 2008).

108 Demetrios G. Papademetriou and Aaron Terrazas, *Immigrants and the Current Economic Crisis: Research Evidence, Policy Challenges, and Implications* (Washington, DC: Migration Policy Institute, 2009): 14-6, www.migrationpolicy.org/pubs/lmi_recessionJan09.pdf. This fact can be attributed to the lower skill and education levels of immigrants, their relative youth, and their recent entry into the labor market.

109 Julia Preston, "Immigration Raid Draws Protest From Labor Officials," *New York Times,* January 26, 2007; Smith and Ruckelshaus, "Solutions, Not Scapegoats," 565-66; Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* (New York: Human Rights Watch, 2000): 33-5, www.hrw.org/legacy/reports/2000/uslabor/; Stephen Greenhouse, "Immigrants in the Middle of Union Push at Bakery," New York Times, October 9, 2000; R.H. Taylor, "Undocumented Hotel Workers Who Formed Union Are Released," (Minneapolis) Star Tribune, October 20, 1999; Peter Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor* (New York: W.W. Norton & Company, Inc., 1997), 172-74.

110 Annette Bernhardt et. al., *Unregulated Work in the City*: 36.

reconstruction in the Gulf Coast.[111]

One study analyzed formal labor charges, petitions, complaints, and other proceedings brought against companies that the INS district office in New York raided over a 30-month period between 1997 and 1999.[112] Of the 184 entities raided, 102 had been subject to formal federal or state labor investigations or proceedings, including 18 before multiple labor enforcement agencies. Immigration enforcement at worksites with a history of labor standards complaints and investigations can potentially chill the exercise of labor rights by unauthorized immigrants.

There is substantial evidence that unauthorized immigrants work at high rates in industries with long track records of labor standards violations.

Current economic turmoil has heightened the risk of labor standards violations. This is due to the precarious financial situation of many employers and their need to limit costs combined with the reduced job prospects of unauthorized workers and their diminished ability to protest poor working conditions. As Appendix D illustrates, the unemployment rate for Mexican and Central American immigrants rose from 5.5 percent in November 2007 to a peak of 14.6 percent in January 2010.[113] Between the second quarter of 2009 and the second quarter of 2010, the unemployment rate for all immigrants fell to 8.7 percent from 9.3 percent, while the jobless rate for natives rose to 9.7 percent from 9.2 percent.[114] During the same period, the unemployment rate for foreign-born Hispanics fell to 10.1 percent from 11 percent.[115]

B. Longstanding Concerns Related to Labor Standards Violations against Low-Wage Immigrant Workers, Particularly Those Without Immigration Status

Lawmakers, government agencies, courts, and select immigration commissions have long warned that, left unchecked, labor standards violations against low-wage (particularly unauthorized) workers can undermine the wages and working conditions of all workers.

In 1976, for example, the US Supreme Court found that "acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions."[116] Five years later, the Select Commission on Immigration and Refugee Policy (known as the Hesburgh Commission) recommended that immigration and labor standards be enforced in order to improve "wages and working conditions for those authorized to work."[117]

111 Judith Browne-Dianis, Jennifer Lai, Marielena Hincapie, and Saket Soni, *And Injustice for All: Workers' Lives in the Reconstruction of New Orleans* (New Orleans, LA: Advancement Project, 2006), www.nilc.org/disaster_assistance/workersreport_2006-7-17.pdf; USDOL, WHD, "2008 Statistics Fact Sheet," www.dol.gov/whd/statistics/2008FiscalYear.htm.

112 Michael J. Wishnie, "The Border Crossed Us: Current Issues in Immigrant Labor," *New York University Review of Law & Social Change* 28 (2003-2004): 389-95.

113 Migration Policy Institute analysis of US Census Bureau's Basic Current Population Survey, January 2000 to November 2010, www.migrationinformation.org/DataHub/charts/laborforce.4.shtml.

114 Rakesh Kochhar, with C. Soledad Espinoza and Rebecca Hinze-Pifer, *After the Great Recession: Foreign Born Gain Jobs; Native Born Lose Jobs* (Washington, DC: Pew Hispanic Center, 2010), http://pewhispanic.org/files/reports/129.pdf.

115 Ibid., 5.

116 *De Canas v. Bica,* 424 U.S. 351, 356-57 (1976).

117 Select Commission on Immigration and Refugee Policy, *US Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy to the Congress and the President of the United States* (Washington, DC: Select Commission on Immigration and Refugee Policy, 1981): 70-1,

IRCA authorized funding for WHD and USDOL's Office of Federal Contract Compliance "in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens."[118] In 1988, GAO attributed labor violations in sweatshops, in part, to their heavily immigrant workforces.[119] The 1998 Memorandum of Understanding between the INS and USDOL's Employment Standards Administration sought to "reduce the employment of unauthorized workers in the United States and the consequential adverse effects on the job opportunities, wages, and working conditions of authorized US workers.[120]

Most recently, in a May 2011 speech in El Paso, Texas, President Obama stated that "because undocumented immigrants live in the shadows, where they're vulnerable to unscrupulous businesses that skirt taxes and pay workers less than the minimum wage or cut corners with health and safety laws, this puts companies who follow the rules, and Americans who rightly demand the minimum wage or overtime or just a safe place to work, it puts those businesses at a disadvantage."[121]

A 1999 study by Julie Phillips and Douglas Massey found that post-IRCA unauthorized workers earned 22 percent less than authorized workers with similar characteristics, a difference not present pre-IRCA.[122] The authors concluded that employers that illegally hired unauthorized immigrants post-IRCA transferred the increased "costs and risks of doing so to workers in the form of lower pay and greater job instability."[123] It may also have been that established employees — both the pre-IRCA authorized and the unauthorized — enjoyed a significant advantage over unauthorized workers who could only work illegally post-IRCA.[124]

A series of more recent studies, described at length in Appendix E, provide empirical support for the argument that employers gain an advantage over their competitors by hiring workers whose lack of status limits their work options. The studies analyze data from Georgia's Employer File and Individual Wage File from 1990 to 2006. The data were collected by the state's Department of Labor in order to administer its unemployment insurance (UI) program.[125] The Employer File contains records on all UI-covered firms, as well as information at the establishment-level on the number of employees, total wage bill, and North American Industry Classification System (NAICS) code.[126]

The studies found that in Georgia employers paid unauthorized workers less than authorized employees, unauthorized workers had fewer work options than authorized workers (as measured by worker separations due to reduced wages), and firms benefitted competitively (as measured by firm survival) by employing the unauthorized. These findings suggest that employers may have an incentive to hire unauthorized workers.

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www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED211612.

118 IRCA § 111(d).

119 US General Accounting Office (GAO), "'Sweatshops' in the US: Opinions on their Extent and Possible Enforcement Options," No. HRD-88-130BR (Washington, DC: GAO, 1988), 20-1, 33-4, http://archive.gao.gov/d17t6/136973.pdf.

120 Memorandum of Understanding, Between the Immigration and Naturalization Service, Department of Justice, and the Employment Standards Administration, Department of Labor (November 23, 1998), www.nilc.org/immsemplymnt/emprights/MOU.pdf.

121 Remarks by President Barack Obama on comprehensive immigration reform in El Paso, Texas, May 10, 2011, www.whitehouse.gov/the-press-office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas.

122 Julia A. Phillips and Douglas S. Massey, "The New Labor Market: Immigrants and Wages after IRCA," *Demography,* 36, no. 2 (May 1999): 233-46, 243-44.

123 Ibid., 234.

124 White House, *Immigration Reform and Control Act: The President's Second Report on the Implementation and Impact of Employer Sanctions* (Washington, DC: White House, 1991): 36. Nearly 10 percent of legalization applicants during IRCA, who by definition lacked legal status, were paid subminimum wages.

125 J. David Brown, Julie L. Hotchkiss, and Myriam Quispe-Agnoli, "Undocumented Worker Employment and Firm Survival" (IZA Discussion Paper No. 3936, revised January 12, 2009): 5-6, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329574.

126 Workers in certain agricultural, domestic service, and nonprofit jobs who are excluded from UI coverage were not represented in the data.

C. Labor Violations against Vulnerable Low-Wage Workers in Fissured Industries

Over the last four years, USDOL has commissioned a series of studies that identify and map the structures of industries that violate labor standards at high rates.[127] Much of this work has been summarized in a May 2010 report titled *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division.*

The research concludes that low-wage, vulnerable workers in fissured industries, including immigrants, are particularly vulnerable to labor standards violations.

The USDOL research recommends that WHD target industry sectors with large concentrations of vulnerable workers (who are unlikely to complain) and in which employer behavior could be changed "in a lasting and systematic manner."[128] It concentrates on "fissured" industries, characterized by extensive use of subcontracting, franchising, third-party management, and self-employed contractors. In such industries, the dominant employer — the one that links multiple smaller employers — may be a buyer at the end of a large supply chain (like Wal-Mart), a national, brand-name organization (like McDonald's), a central production coordinator (like the large national home builder corporations), or a purchaser of services from multiple entities (like building owners).[129]

The research concludes that low-wage, vulnerable workers in fissured industries, including immigrants, are particularly vulnerable to labor standards violations[130] and argues for enforcement strategies that take into consideration the nontraditional structures and the often-competing incentives of the corporate actors in these industries.

Fast-food outlets, for example, are owned both by large brand-name organizations and by franchisees that operate through highly detailed and prescriptive agreements. The incentives of branded organizations and franchisees differ in meaningful ways. Brand-name organizations seek to preserve the value of their brands, as well as to ensure a flow of revenue from their franchisees. Franchise agreements provide branded organizations with a percentage of franchisee revenues. By contrast, franchisees are driven by shorter-term considerations of profit (revenue *minus* costs), giving them a stronger incentive than branded corporations to keep costs low.[131]

127 Weil, "Crafting A Progressive Workplace Regulatory Policy," 132-35. In previous research, Weil recommended that WHD target the service and retail industries, residential building networks (as opposed to commercial construction), suppliers, and other contractors for large corporations.

128 Weil, "Improving Workplace Conditions," 75-7. The report identifies the following industries as meeting these criteria: eating and drinking, hotel/motel, residential construction, janitorial services, moving companies/logistics providers, agricultural products, landscaping/horticultural services, health care services, home health care services, grocery stores-retail trade; and retail trade-mass merchants; department stores; specialty stores. It provides nail salons as an example of an employer whose behavior it would be difficult to change in a sustainable manner. This is because nail salons employ immigrants, non-English speakers, have low entry thresholds, and are small, geographically dispersed, and under competitive pressure.

129 Ibid., 24-5.

130 Ibid., 18-9.

131 Ibid., 58-71. The USDOL research similarly charts the ownership, operating structures, and the diverse incentives of the entities within the hotel and motel industry. Relying on a database of all hotel properties investigated by WHD between 2002 and 2008, the investigators measured compliance with FLSA based on total back wages per investigation, back wages per employee (who experienced violations), and percent of employers not in compliance. By all three compliance measures, they found better compliance by branded than by independent hotels. They also found that branded properties managed by top 50 independent management/operating companies had substantially higher noncompliance — measured by back wages per investigation and back wages owed per employee (who experienced a violation) — than properties not managed by one of the major independent management companies.

Analysis of USDOL investigation data from 2001 to 2005 found that fast-food outlets owned by brand-name corporations were more likely than franchisee-owned outlets to comply with the law. The study's measurements were back wages owed (overall and per employee) and the percentage of employers in compliance with the law. The report attributed this disparity to the premium placed by brand-name corporations on retaining brand value (through compliance with the law), in contrast to franchisees' incentive to keep costs low.[132] This research suggests a greater need to direct WHD investigations at franchisee-owned outlets than at outlets owned by branded corporations.

IV. Enforcing Labor Standards under the Clinton, Bush, and Obama Administrations

To be effective, a labor standards enforcement system should reflect the lessons learned from past enforcement programs and strategies. This section examines the distinct enforcement philosophies, strategies, and accomplishments of the Clinton and Bush administrations. It also describes WHD goals and initiatives under the Obama administration.

A. Clinton Administration (1993 to 2001)

Under the Clinton administration, WHD attempted to shift its strategic focus away from complaint-based investigations and toward the targeting of industries with the most pronounced compliance problems. It reasoned that complaints do not serve as an adequate proxy for labor standards violations and that pursuing individual claims for wages that should have been paid in the first instance does not sufficiently deter violations or otherwise increase compliance.

Using enforcement data and historical information from OSHA, INS, state labor departments, and other sources, WHD targeted industries that:

- employed high concentrations of low-wage workers and substantial numbers of immigrant workers (legal and unauthorized) unlikely to complain about violations and, thus, "easy targets for exploitation;"
- were undergoing rapid growth or contraction in a "changing, often global marketplace;" and
- had entities that could help to effect compliance throughout a supply chain.[133]

The garment manufacturing, health care, and agriculture industries met these criteria nationally, as did several locally targeted industry sectors.[134] During inspections, WHD surveyed randomly selected establishments within targeted industries and industry sectors. This allowed it to establish baseline information on patterns of noncompliance. To increase compliance, it pursued a course consisting of:

- Education of consumers, workers, and contractors
- Investigations
- Civil sanctions, including back wages, liquidated damages, and the return of gains realized from the sale of goods produced in violation of FLSA

132 Ibid., 44-8.
133 USDOL, Employment Standards Division, *1999-2000 Report on Initiatives* (Washington, DC: USDOL, 2001): 6, http://nelp.3cdn.net/a5c00e8d7415a905dd_o4m6ikkkt.pdf.
134 Ibid., 7, 8.

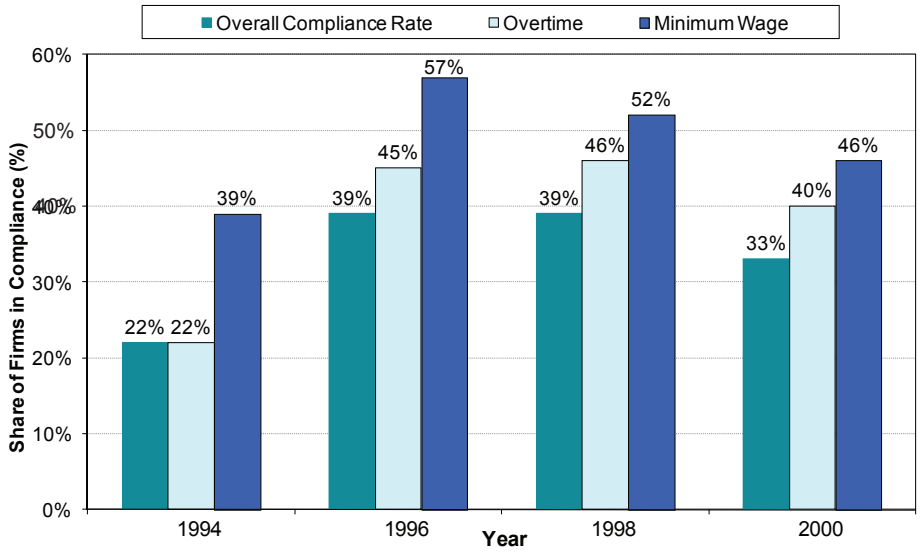
- Referrals for criminal prosecution
- Compliance agreements with multi-establishment and lead employers
- Establishment of strike forces in select low-wage industries
- Reviews of payroll records and time cards, interviews with employees, recommendations for corrective action, unannounced visits, and otherwise intensive monitoring of targeted employers.[135]

Subsequent surveys, typically two or three years later, measured changes in compliance levels and the effectiveness of intervening strategies. This enforcement approach sought to secure "widespread substantial compliance" within the targeted industries, recognizing that WHD would never have adequate resources to investigate more than a fraction of the employers subject to its jurisdiction.[136]

Although premised on a long-term, unflagging commitment to changing behavior in select industries, WHD measured its success over a relatively short period. This may explain, in part, why compliance rates did not uniformly or steadily improve in the targeted industries and sectors during these years.[137] Additionally, the studies may have failed to account for external factors that affected the targeted industries, such as the penetration of imports or increased outsourcing. ESA/WHD attributed what it viewed as "disappointing" results in US garment centers to competition by offshore manufacturers, as well as to pricing and consolidation by apparel retailers.[138]

As shown in Figure 9, FLSA compliance rates in the garment industry in Los Angeles rose significantly between 1994 and 1996, remained relatively steady from 1996 to 1998, and then fell between 1998 and 2000.

Figure 9. Garment Manufacturing Industry Compliance in Los Angeles, 1994-2000

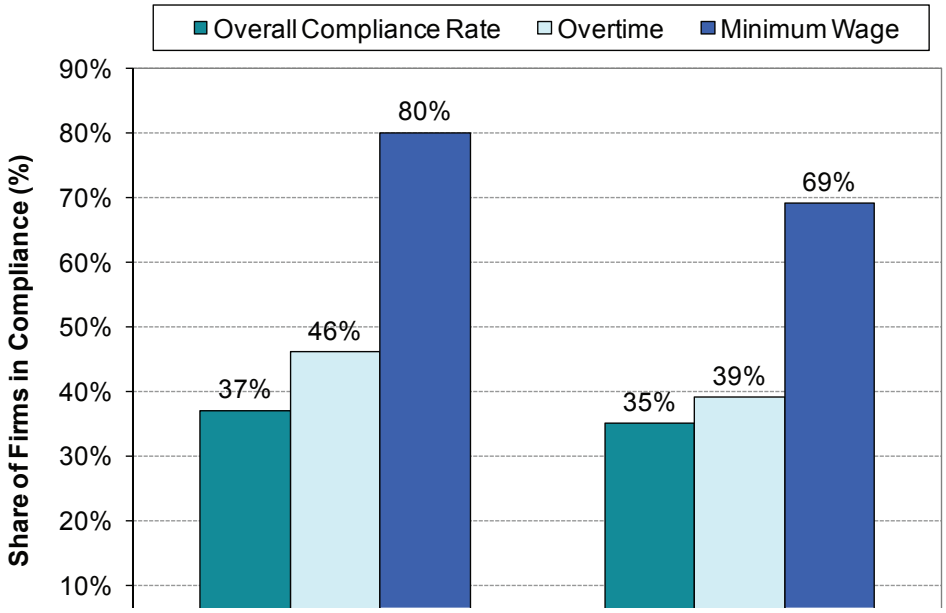


Source: USDOL, Employment Standards Administration, WHD, *1999-2000 Report on Initiatives,* (Washington, DC: 2001).

135 Ibid., 11-2.
136 Ibid., 6.
137 USDOL, *1999-2000 Report on Initiatives:* 36. WHD found significant differences in compliance within and between industries. For example, none of the health care firms surveyed in southern New Jersey complied with the law, while 100 percent of those in Wilkes Barre, Pennsylvania, did. It also found that compliance increased among certain occupational groups — such as chicken-catching crews — in certain industries.
138 Ibid., 14.

As Figure 10 illustrates, in the New York City garment sector, compliance rates fell from between 1997 and 1999.[139]

Figure 10. Garment Manufacturing Industry Compliance in New York, 1997 and 1999



Source: USDOL, Employment Standards Administration, WHD, *1999 - 2000 Report on Initiatives* (Washington, DC: USDOL, 2001).

Similarly, compliance rates in surveyed nursing homes fell to 40 percent, from 70 percent, between 1997 and 2000.[140] In 1997, 40 percent of the poultry processing plants fully complied with the law. By 2000, none of the 51 poultry plants investigated fully adhered to wage and hour requirements; failure to pay overtime was a particularly pervasive problem.[141]

WHD achieved notable success during the Clinton era in pressuring manufacturers and the entities in their supply lines to comply with the law. It did so by embargoing (preventing the delivery) of "hot cargo" goods produced in violation of FLSA.[142] Under this program — which won a Innovations in American Government Award from the Ford Foundation and Harvard University's John F. Kennedy School of Government — manufacturers developed compliance programs with subcontractors, leading to a drop in wage-and-hour and other violations.[143]

An analysis of data collected through WHD surveys of the Southern California (1998 and 2009) and New York (1999 and 2001) garment industries confirmed that monitoring by manufacturers significantly improved contractor compliance. The research compared contractors that had received no monitoring with those that had received "any" monitoring, and those that had received "comprehensive monitoring" (payroll inspection and unannounced visits).

More intensive monitoring consistently led to greater overall compliance with minimum-wage laws, fewer violations, and less severe violations per worker.[144] Comprehensive monitoring proved particularly

139 Ibid., 13.
140 Ibid., 19.
141 Ibid., 25.
142 Weil, "Crafting A Progressive Workplace Regulatory Policy," 140-42.
143 US Commission on Immigration Reform, "Enforcement in the Underground Economy," in *Curbing Unlawful Migration* (unpublished appendices of the US Commission on Immigration Reform, September 16, 1993): 266, 284-90.
144 Weil, "Improving Workplace Conditions," 32-3.

effective in improving compliance with minimum-wage and overtime standards: Southern California garment contractors in 2000 committed only nine violations per 100 workers when comprehensively monitored, versus 44 per 100 workers when not monitored.[145]

WHD also found that:

- compliance was higher in firms that paid workers through their regular payroll systems than in those that did not;
- compliance was lower among new and small businesses, arguing for increased outreach to these employers;
- compliance improved when contractors could renegotiate prices with manufacturers when circumstances changed; and
- top-down investigations of retailers effectively engaged them in efforts to address problems of noncompliance in their supply chains.[146]

In short, ESA/WHD crafted successful and replicable enforcement strategies during the Clinton era. Its programs confirmed the importance of:

- Rigorously identifying problem industries and sectors
- Pursuing "multipronged" education and enforcement strategies (in partnership with others), with severe penalties for repeat or egregious offenders
- Continually assessing individual strategies and combinations of strategies
- Exerting enforcement pressure on manufacturers, retailers, multi-establishment businesses, and brand-name agencies in order to enlist them in monitoring their contractors
- A sustained, multiyear approach to ensuring compliance in industries with a long history of violations of the law.

B. Bush Administration (2001 to 2009)

Under the George W. Bush administration, WHD prioritized outreach, educational activities, and compliance assistance, primarily to employer groups.[147] During this period, the number of establishments subject to its jurisdiction grew significantly.[148] Yet WHD's investigative staff fell to 731 from 945. In addition, the number of investigations handled per investigator fell to 32, from 53, between 1998 and 2008.[149]

145 Ibid., 33-4. This trend remained pronounced, even after separating out the effects of other contractor characteristics like size, type of products, and indicia of contractor sophistication.

146 USDOL, *1999-2000 Report on Initiatives:* 14-5.

147 Statement of Anne-Marie Lasowski, Acting Director, Education, Workforce and Income Security, US Government Accountability Office (GAO). before US House Committee on Education and Labor, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, 110th Congress, 2nd sess., July 15, 2008: 11-2, www.gao.gov/new.items/d08962t.pdf.

148 Weil, "Improving Workplace Conditions," 6; Annette Bernhardt and Siobhán McGrath, "Trends in Wage and Hour Enforcement by the US Department of Labor, 1975-2005," (Economic Policy Brief, no. 3, Brennan Center for Justice, New York, September 2005). Between 1975 and 2004, the number of workers within WHD's jurisdiction grew 55 percent, the number of business establishments covered by WHD increased by 112 percent, and the number of WHD investigators decreased by 14 percent.

149 Weil, "Improving Workplace Conditions," 6-7.

Staffing at USDOL's Office of the Solicitor also continued a long decline during the Bush administration — from 786 employees in FY 1992 to 590 in FY 2009, as did the number of FLSA lawsuits filed by the solicitor's office.[150] The decline in lawsuits can be explained, in part, by the increase in penalties and appeals (handled by the solicitor) under the *Federal Mine Safety and Health Act.*[151] In addition, the solicitor's office is required to represent USDOL when employers contest (by right) penalties levied under OSHA and MSHA.[152] It can decline to handle cases in which an employer refuses to remedy an FLSA violation.

GAO issued two sharply critical reports on WHD's planning, prioritization, and investigative work during the Bush administration.[153] In 2008, it reported that the number of WHD enforcement actions — ranging from responses to complaints to comprehensive investigations — fell by more than one-fourth to 29,584, from 40,251, between 2000 and 2007.[154] Seventy-two percent of these actions came in response to employee complaints.[155] WHD responded to most complaints through telephone "conciliations," which typically involved a single violation against a single worker.[156] It assessed penalties in only 6 percent of the enforcement actions in which it found FLSA violations.[157] In addition, the number of WHD-initiated enforcement actions fell to 6,868, from 11,669, between 2001 and 2008. This downward trend has continued during the Obama administration (see Figure 11).

In 2002, a series of WHD-commissioned studies identified nine industries in which low-wage workers were most likely to experience minimum-wage and overtime violations: construction; eating and drinking establishments; certain health services (like home health care and medical laboratories); grocery stores; hospitals; elementary and secondary schools; certain business services (like photo finishing); child day-care services; and hotels and motels.[158] Yet according to GAO, WHD's enforcement priorities did not substantially change as a result of these studies. Instead, it continued to concentrate on four industry groups, roughly coinciding with agricultural, restaurant, garment manufacturing, and health care workers, which it had been targeting for several years.[159] GAO also criticized WHD for failing to rely sufficiently on input from industry groups, labor unions, and state officials, and for failing to account for the strength of state labor laws and enforcement regimes in planning and prioritizing its work.[160]

In 2004, WHD reported that it had improved compliance through educational efforts, enforcement, and partnerships in the garment industry in New York City and, in Southern California, in the long-term health care industry and the agricultural commodities industry.[161] It attributed these results to its "compliance assistance" which included fact sheets and worker rights cards, in-person consultations with employers, and compliance agreements with nursing homes and farm bureaus. It also reported on the effectiveness of monitoring garment industry employers through unannounced visits, review of payroll records and timecards, and interviews with employees.

In March 2009, GAO reported on deficiencies in WHD's investigative work.[162] In response to ten fictitious

150 Ibid., 90. Between FY 1987 and FY 2007, the number of FLSA law suits filed by the Office of the Solicitor fell to 151 from 705.
151 Pub. L. No., 95-164, 91 Stat. 1290 (November 9, 1977).
152 Weil, "Improving Workplace Conditions," 90.
153 Between 2001 and 2008, the back wages collected by WHD fluctuated between $132 million (2001) and $221 million (2007), and the civil monetary penalties assessed ran from $12 million (2001) to $7.9 million (2006). See Table 3.
154 Lasowski, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*: 5-6.
155 Ibid., 7-8.
156 Ibid.
157 Ibid., 10-1.
158 Ibid., 16.
159 Ibid., 9-10.
160 Ibid., 13-7.
161 USDOL, *FY 2004 Performance and Accountability Report* (Washington, DC: USDOL, 2004): 80-1, www.dol.gov/_sec/media/reports/annual2004/annualreport.pdf.
162 As part of its investigation, GAO filed ten fictitious complaints at five WHD offices, reviewed 20 inadequately investigated cases, and studied a random sample of 115 conciliations and 115 nonconciliations between October 2006 and September 2007.

wage theft complaints filed by GAO, WHD:

- failed to record five complaints in its database and performed no investigative work in three of these complaints, including one report of a child working in hazardous conditions during school hours;
- inflated success rates by not recording unsuccessful conciliations;
- failed to investigate two of three (fictitious) employers who refused to pay wages owed; and
- recorded two conciliations as successful even though the complainant notified WHD that back wages had not been paid.[163]

In an analysis of 20 inadequately investigated wage-theft cases, GAO found that WHD failed to respond to several complainants for more than a year, to verify information provided by employers, to fully investigate businesses with repeat violations, or to investigate employers that did not return telephone calls.[164] GAO also criticized WHD for neglecting to refer violations for litigation and for failing to review employer records. [165]

C. Obama Administration (2009 to present)

The Obama administration set — and has met (see Appendix A-2) — a short-term goal of restoring WHD and OSHA staffing to 2001 levels.[166] Toward that end, USDOL funding for enforcement of wage-and-hour standards increased from $196 million in FY 2009 to $227.6 million in FY 2010 and in FY 2011.[167] Funding for OSHA's enforcement activities increased from $198 million in FY 2009 to $208.6 million in FY 2010 and in FY 2011.[168] OSHA funding for state programs increased from $92.6 million in FY 2009 to $104.4 million in FY 2010 and FY 2011.[169]

WHD is also revisiting several elements of its Clinton-era programs. It plans to identify problem industries and employers by drawing on:

- Current Population Survey data on industries that pay subminimum wages and require more than 40 hours of work per week (i.e. potential overtime pay violators)
- Federal and state complaint databases
- WHD-commissioned and academic studies on industries and business clusters thought to violate labor standards at high rates
- Reports of its investigators
- Partnerships with labor unions, worker centers, and other groups that have direct access to low-wage workers
- Nontraditional data sources, like state datasets and state-commissioned reports on problem industries and practices.

163 Testimony of Kutz and Meyer, *Department of Labor Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft,"* 8-11.
164 Ibid., 11-7.
165 Ibid., 19, 22-4.
166 USDOL, "FY 2011: Budget in Brief," 44-5, 58-9, www.dol.gov/dol/budget/2011/PDF/bib.pdf.
167 Ibid., 44-5; USDOL, "FY 2012 Department of Labor: Budget in Brief" (Washington, DC: USDOL, 47, www.dol.gov/dol/budget/2012/PDF/FY2012BIB.pdf.
168 USDOL, "FY 2011: Budget in Brief," 58-9; USDOL, "FY 2012: Budget in Brief," 63.
169 Ibid.

WHD also plans to analyze statistically reliable samples of firms in the targeted industries to determine the extent and nature of their noncompliance and to test if it has accurately identified problem industries, sectors, and firms. This process will also allow WHD to identity the corporations and other entities that can influence employers in their supply chains, geographic areas, or business clusters. Building on the research it has commissioned, WHD plans to identify the working relationships and the distinct incentives for compliance among employers within fissured industries, with the goal of crafting successful enforcement strategies.[170]

Additionally, while WHD plans to use the full range of enforcement tools at its disposal, it will emphasize high-impact measures that maximize compliance and deter violations. Its enforcement approach will shift toward more long-term (two- to three-year) WHD-initiated investigations and focus less on remedying case-specific violations. It will also pursue liquidated damages, litigation, and "hot goods" penalties. The "hot goods" penalty could be effectively extended to so-called "lean retailers" (i.e., those that do not stockpile goods but require frequent, time-sensitive shipments based on replenishment orders).[171]

WHD is in a period of transition.

WHD seeks to create "communities of compliance" by targeting lead or dominant employers that can influence contractors, suppliers, and other entities within their ambit. It plans to revitalize the Clinton-era strategy of pressuring private corporations to create monitoring programs — which would entail payroll review and unannounced visits — for their contractors and subcontractors. [172] In the case of business clusters or independent firms, WHD will attempt to target known violators in particular geographic areas and will seek to dissuade similar firms in the area from violating the law through public education and media coverage before, during, and after enforcement actions. It will also use the media to educate employers, workers, and community members about workplace rights and the consequences of violations. A component of WHD's enforcement plan, as during the Clinton administration, will be to measure baseline compliance with the law in targeted industry sectors over multiple years and to monitor these sectors.

WHD also plans to leverage additional resources through partnerships with state labor standards enforcement agencies. At present, working relationships between states and WHD largely involve case referrals. Improved data sharing, including possible aggregate analysis of federal and state data, may prove an effective form of collaboration, particularly on issues of common concern like employee misclassification.

WHD is in a period of transition. In November 2009, ESA was eliminated and WHD became a distinct department within USDOL. WHD has begun the laborious process of building its staffing levels, information technology, and other resources that have been long depleted. While WHD begins to resurrect promising strategies from past administrations, it plans to continue to collect information on problem industries and practices, to evaluate the success of enforcement tactics, and to adapt its strategies accordingly.

170 Targeting brand-name corporations may not be as effective in commodity industries (such as agriculture).
171 Weil, "Improving Workplace Conditions," 29.
172 Ibid., 30-2.

D. WHD Enforcement Metrics from 1997 to 2010

As Table 3 indicates, WHD has historically reported on back wages collected, penalties assessed, resources expended, cases concluded, and other metrics in enforcing labor standards.[173] WHD has not, however, consistently reported on the link between these metrics and deterrence and compliance in targeted industries. Section IV discusses the need for WHD to develop high-impact enforcement strategies and to measure their deterrent effect.

Table 3 provides an important point of reference and a more nuanced look at WHD's productivity during the Clinton, Bush, and Obama administrations. The metrics show, for example, that recent increases in WHD investigators and enforcement resources have not yet translated into increased enforcement actions, back wages collected, or penalties assessed. One explanation for this anomaly is that new investigators do not generally begin to contribute to case totals until their second year on the job. It takes time to put the proper resources in place, to hire and train multilingual investigators, and to allow them to develop sufficient investigative experience.

Perhaps most strikingly, over the entire period, there is no a discernible correlation between enforcement hours expended and the number of concluded cases or WHD-initiated actions. In addition:

- Back wages collected and penalties assessed have not increased since FY 1998, even without adjusting for inflation.[174]
- The number of WHD-initiated enforcement actions steadily declined between 1998 and 2010.
- There has also been a marked decline in all cases concluded by WHD and in FLSA cases concluded.

173 Lasowski, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance:* 17-21. GAO has criticized WHD for its failure to track basic performance metrics, including how often willful and repeat violations were found. During the Bush administration, WHD also frequently changed its performance measures, using 90 percent of its 131 metrics for two years or less. The failure to use consistent metrics makes it difficult to compare, much less evaluate, the success of WHD's enforcement efforts.

174 The two years in which WHD collected more than $200 million in back wages occurred during the Bush administration.

Table 3. WHD Enforcement Metrics, FY 1997-2010

	Back Wages Collected All Acts Enforced by WHD (Not Inflation Adjusted)	Employees Receiving Back Wages All Acts Enforced by WHD	Complaints Registered All Acts	Concluded Cases All Acts	WHD-Initiated Enforcement Actions All Acts	Enforcement Hours All Acts	*Fair Labor Standards Act* Registered (Concluded) Cases[1]	Civil Money Penalties Assessed All Acts Enforcement by WHD	WHD Investigators at End of Fiscal Year
FY 2010	$176,005,043	209,814	31,824	26,486	4,579	1,066,188	20,182	$7,574,953	1,035
FY 2009	$172,615,125	219,759	26,311	24,922	5,826	879,626	19,155	$10,525,617	894
FY 2008	$185,287,827	228,645	23,845	28,242	6,868	882,419	21,375	$9,935,111	731
FY 2007	$220,613,703	341,624	24,950	30,467	7,094	899,406	23,576	$10,255,735	732
FY 2006	$171,955,533	246,874	26,256	31,987	7,250	951,971	25,603	$7,879,529	751
FY 2005	$166,005,014	241,379	30,375	34,858	7,891	969,776	29,473	$10,541,997	773
FY 2004	$196,664,146	288,296	31,786	37,842	8,845	1,000,739	31,448	$8,865,725	788
FY 2003	$212,537,554	342,358	31,123	39,425	10,534	1,032,879	32,591	$9,974,537	850
FY 2002	$175,640,492	263,593	31,413	40,264	10,342	1,070,600	33,154	$9,397,213	898
FY 2001	$131,954,657	216,647	29,085	38,051	11,669	998,937	31,772	$11,978,461	945
FY 2000	$163,601,821	257,326	34,113	44,002	12,095	968,350	37,432	$10,567,305	949
FY 1999	$131,735,341	259,870	43,286	48,441	13,502	982,332	35,940	$9,259,131	938
FY 1998	$163,953,081	252,247	36,892	50,344	14,660	909,616	43,057	$9,947,063	942
FY 1997	$96,719,108	189,244	37,025	42,275	11,619	740,643	35,940	$10,448,778	942

Note: Data from FY1997 through 1999 are not comparable to more recent data because of a change in the agency's data management system. FLSA Registered Cases are those investigations or conciliations in which the FLSA is the primary Act investigated or conciliated.WHD checks for FLSA violations in many investigations registered under different Acts.
Source: USDOL, WHD, January 2011.

V. Characteristics of an Effective Enforcement Regime

As discussed, an effective labor standards enforcement system would rigorously identify problem industries, industrial sectors, and firms; map their structures, relationships, and the distinct incentives of employers within them; and continuously evaluate the effectiveness of its strategies. To achieve these goals, WHD needs to establish robust partnerships among relevant federal agencies, between federal and state agencies, and with nongovernmental organizations and community-based organizations that enjoy direct access to low-wage immigrant workers.

This section will elaborate on the *additional* characteristics of an effective enforcement regime. In particular, such a system would seek to deter violations and to assess the deterrent effects of its strategies. It would enforce the law without regard to immigration status. It would effectively mine and improve existing data sources, supplementing them with new sources of information on problem industries and effective enforcement strategies. It would also tackle the problem of "misclassification" of employees as independent contractors.

A. Deterring Violators by Pressuring Dominant or Lead Employers in an Industry or Geographic Area

Because WHD will never be able to investigate more than a fraction of the employers subject to its jurisdiction, deterrence should be a primary goal of its enforcement system. Yet the deterrent effect of WHD enforcement strategies has been difficult to measure, in part because WHD has not traditionally collected data on the workplaces that it has *not* investigated. However, recent USDOL-commissioned research has attempted to measure deterrence by analyzing the impact of prior investigations on the behavior of *subsequently investigated* fast-food outlets and hotels and motels. This research has found that investigations can have a significant deterrent effect, depending, *inter alia*, on their geographic location, the businesses investigated, and the type of investigation.

Analyzing USDOL data from 2001 to 2005, the research examined the incidence and severity of labor standards violations among fast-food outlets in areas (as measured by five-digit zip code) where there had been investigations of top 20 fast-food outlets within the previous year, compared to areas in which no investigation had taken place.[175] The research found that labor standards compliance, as measured by the percent of subsequently investigated fast-food outlets with no violations, steadily improved based on the number of past investigations in the area. Likewise, total back wages owed (per investigation) steadily diminished based on the frequency of past investigations.[176]

The study concluded that (prior) investigations lowered the total back wages owed by subsequently investigated outlets, lowered the number of employees found in violation, and lowered the average back wages owed per worker. These trends grew more pronounced in the case of prior *WHD-directed* (as opposed to complaint-driven) investigations. The report attributed this difference, in part, to the increased publicity generated by directed investigations. However, the deterrent effect largely disappeared when the previous investigation(s) occurred in a larger geographic area, measured by a three-digit (not five-digit) zip code.

Like the fast food industry, the hotel and motel industry rely heavily on franchising arrangements: Roughly 80 percent of hotel properties are franchised.[177] Ownership and operating structures in

175 Weil, "Improving Workplace Conditions," 50-7. From 2001 to 2005, WHD conducted roughly 2,000 investigations among the more than 100,000 top-twenty US fast-food outlets.

176 Ibid. However, total back wages owed per employee paid in violation of FLSA did not decline.

177 Ibid., 61.

franchise arrangements vary significantly. Brand-name corporations or franchisees may own an individual hotel or motel, with brand corporations, independent companies ("management" or "third-party management corporations"), or other entities managing the property. The top 50 management companies operate 10 percent of all branded hotels and, thus, have wide-ranging influence within this industry.[178]

The researchers sought to determine whether branded hotels acted as *market leaders* in setting and influencing policies and practices in particular geographic areas. As with the fast food industry, the hotel-motel study looked at properties that were located in areas (five-digit zip code) that had experienced investigations in the previous year and compared them with properties in areas in which no investigations had occurred in the prior year. It found that prior investigations of top-five brand hotels significantly improved subsequent compliance (measured by total back wages per investigation) by *branded* hotels in the area. By contrast, the impact of prior investigations of any hotel/motel property, or even of a top 25 or a top 50 brand property, was far more modest.[179] Prior investigations of top-five branded hotels and of independent hotels also substantially improved compliance by independent hotels.[180] Based on these results, the report concluded that hotels/motels "follow the leader."[181]

This research underscores the importance of identifying the lead or dominant entities in particular industries and industry subsets, and of learning which employers "watch" each other as well as how they do so, whether through trade journals, membership associations, publicity, or word-of-mouth.

It also highlights the need to measure the deterrent effect of WHD enforcement strategies and to adjust strategies accordingly. Deterrent-relevant factors in the fast food and hotel/motel industries include the location of enforcement activities, their frequency, the entities targeted (brand-name, independent, or other), and the type of enforcement (complaint-driven or agency-directed).

Finally, the research suggests that labor standards monitoring could be incorporated into existing systems, standards, and procedures used by brand organizations to promote quality and performance in particular industries.[182] Franchise agreements, in particular, set forth the responsibilities of franchisees in painstaking detail. These agreements *could* require monitoring by the franchisor in the form of review of payroll statements and unannounced visits.

B. *Status-Blind Enforcement*

Labor standards have long applied to workers irrespective of their immigration status, and investigators have been reluctant to assume immigration responsibilities that might impede their ability to gain the confidence of unauthorized workers.[183] The distinct purposes of immigration and labor laws argue for vigilance in ensuring that enforcement of one set of laws complements or, at least, does not undermine the goals of the other.

1. USDOL and US Department of Homeland Security (DHS) Enforcement Policies and Agreement

USDOL and DHS/INS have long operated under formal working arrangements that recognize that their respective missions require distinct enforcement tactics. In late 1996, ten years following passage of IRCA, INS adopted a policy on immigration enforcement during labor disputes, which it incorporated into its Operating Instructions (OI) and subsequently into its Special Agent Field Manual.[184] The policy

178 Ibid., 66-7.
179 Ibid., 71-2.
180 Ibid., 73.
181 Ibid., 71.
182 Ibid., 87.
183 US Commission on Immigration Reform, "Options for Enhancing Worksite Enforcement," 173, 177.
184 INS Operating Instruction 287.3a, revised December 4, 1996, redesignated as 33.14(h) of *INS Special Agent's Field Manual*,

attempted to block employers from triggering immigration investigations that would interfere with the exercise of their employees' labor rights, and it encouraged unauthorized workers to bring complaints related to labor law violations.

The policy applied to complaints or tips on potentially unauthorized workers. If an immigration officer suspected a labor dispute, he or she was required to make a "reasonable attempt" to determine whether this was the case — however, the OI did not detail the actions to be taken. If a labor dispute was pending, a supervisor was required to review the case. However, immigration officials could still move ahead with an enforcement action. The OI required immigration officers to notify law enforcement officials who could assist in the prosecution of labor violations, prior to the removal of arrested noncitizens.[185]

The OI also did not stipulate the remedy for a violation of these procedures. However, in 2003, an immigration judge ordered the suppression of evidence due to INS's failure to abide by procedures.[186] In that case, an employer reported his unauthorized employees to INS in retaliation for their attempts, *inter alia*, to secure overtime pay. The court found that INS failed to make a reasonable attempt to determine whether a labor dispute was in progress. The immigration judge held that the INS's failure to follow its own instruction invalidated the proceeding.

In 1998, INS and USDOL's Employment Standards Administration entered a Memorandum of Understanding (MOU) to coordinate their work and to enhance enforcement of labor standards and employer verification laws.[187] The MOU listed mutual goals of immigration and labor laws:

- to reduce unauthorized employment and its adverse impact on the wages and working conditions of US workers by increasing compliance with employer verification requirements.
- to reduce the incentives to employ unauthorized immigrants and the resulting negative effects on the job opportunities, wages, and working conditions of US workers by increasing compliance with labor standards.
- to prevent the exploitation of unauthorized workers by employers that threaten to have their employees deported for exercising their labor rights.
- to promote employment opportunities for US workers by improving wages, benefits, and working conditions.

The MOU assumed that labor standards enforcement could deter illegal immigration by denying the competitive advantages "gained through the employment of highly vulnerable and exploitable workers at substandard wages and working conditions."[188] It stipulated that neither agency would take action that compromised their respective primary missions of worker protection (USDOL) and immigration enforcement (INS). It affirmed an INS policy against interference in labor disputes, albeit not during collective bargaining. In addition, it precluded USDOL from inspecting for employment verification

March 13, 1998, 74 *Interpreter Releases* 199-201, January 27, 1997.

185 Doris Meissner and Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course* (Washington, DC: Migration Policy Institute, 2009): 38, www.migrationpolicy.org/pubs/DHS_Feb09.pdf. Other commentators have recommended that unauthorized immigrants arrested in worksite raids be screened for their knowledge of employer violations of immigration, labor, and workplace protection laws.

186 US Department of Justice (USDOJ), Executive Office of Immigration Review (EOIR), *In the Matter of Herrera-Priego*, (Lamb, I.J., July 10, 2003).

187 Memorandum of Understanding between the Immigration and Naturalization Service, Department of Justice, and the Employment Standards Administration, Department of Labor (November 23, 1998), www.nilc.org/immsemplymnt/emprights/MOU.pdf.

188 Ibid.

violations in investigations prompted by complaints "alleging labor standards violations" but not in investigations initiated by the agency.[189]

The MOU also called for reasonable efforts to ensure that arrested unauthorized workers would not be "deprived of appropriate compensation for the work performed, thereby affording an economic benefit to the employer from employment of unauthorized workers."

The 1998 MOU did not preclude INS/DHS immigration enforcement activities during and following labor organizing activities, and these activities continued. In 2007, US Immigration and Customs Enforcement (ICE) officials conducted an audit of Woodfin Suite Hotels in Emeryville, California, and visited an employee's home following an attempt by employees to force their employer to comply with a living wage law.[190] In another case, employees at Durrett Cheese in Manchester, Tennessee, refused to leave the company break room in a dispute over back pay. The employer fired the workers, a local sheriff arrested them, and ICE interrogated and detained them.[191] According to recent testimony in a civil rights suit, ICE officials consulted with Signal International Company on how to fire and return Indian guest workers who had been hired to repair offshore oil rigs following Hurricane Katrina.[192] The fired workers had protested labor conditions and sought to organize other workers. In these cases, ICE received significant criticism for acting at cross-purposes with the MOU and with the underlying goals of the FLSA and OSH Act.

On March 31, 2011, ICE and USDOL entered a MOU that supersedes the earlier agreement, but which updates and affirms its broad goals and principles. The revised MOU seeks to prevent conflicts between the DHS and USDOL in their "civil work-site enforcement activities," to advance their respective missions, and to insulate enforcement from "inappropriate manipulation by other parties."[193]

Under the MOU, ICE must assess whether "tips and leads" related to immigration violations involve worksites with pending labor disputes or "are motivated by an improper desire to manipulate a pending labor dispute, retaliate against employees for exercising their labor rights, or otherwise frustrate the enforcement of labor laws." The MOU will be subject to the same criticism as its predecessor because it allows ICE to engage in worksite enforcement during a labor dispute in a broad range of circumstances, including:

- Investigations related to national security, critical infrastructure, or a federal crime other than illegal employment
- When directed by the Secretary of DHS or the Secretary of Labor or a designee.[194]

In cases involving immigration enforcement during a labor dispute, ICE must:

- Notify USDOL of its activities unless to do so would violate a federal law or would compromise an ICE investigation
- Produce detainees for interviews with USDOL, provided it does not interfere with or delay removal proceedings

189 INA § 274A(b)(3).

190 Rebecca Smith, Ana Avedaño, and Julie Martínez Ortega, *ICED Out: How Immigration Enforcement Has Interfered with Workers' Rights* (AFL-CIO, American Rights at Work Education Fund, and National Employment Law Project, 2009): 16.

191 Ibid., 18-9.

192 Julia Preston, "Suit Points to Guest Worker Program Flaws," *New York Times,* February 2, 2010, www.nytimes.com/2010/02/02/us/02immig.html.

193 Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (effective March 31, 2011), www.electronici9.com/wp-content/uploads/2011/04/Revised-MOU-between-DHS-and-DOL.pdf.

194 The memorandum of understanding does not preclude US Immigration and Customs Enforcement (ICE) investigations of many federal immigration-related crimes, such as illegal entry and re-entry, that have been prosecuted in large numbers in recent years.

- Consider USDOL requests to provide temporary immigration status (parole or deferred action) to unauthorized immigrants needed as witnesses in USDOL investigations.

The MOU commits the agencies to exchange information on "abusive employment practices against workers regardless of status" and on violations of labor standards, human smuggling and trafficking, child exploitation, and extortion or forced labor.

ICE and USDOL also agreed that their respective personnel would not suggest that "they represent or act" on behalf of the other agency without consent. This provision appears to respond to a well-publicized July 2005 case in which ICE agents impersonated OSHA trainers to lure unauthorized contract workers to a "safety" meeting at Seymour Johnson Air Force Base in North Carolina.[195]

The MOU creates a joint committee to address implementation issues, and it requires DHS and USDOL to notify and train their employees on its requirements. It stipulates that it does not create any right or benefit to outside parties.

2. Hoffman Plastics

The Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB* represents the most consequential blurring in recent years of the line between immigration and labor standards enforcement.[196] In a 5-to-4 decision, the court held that unauthorized workers illegally fired for union organizing did not qualify for back pay. In dissent, Justice Stephen Breyer criticized the majority for allowing employers to "conclude that they can violate the labor laws at least once with impunity" and by providing an "incentive to find and to hire illegal-alien employees."[197]

The Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. NLRB represents the most consequential blurring in recent years of the line between immigration and labor standards enforcement.

While it is difficult to assess the extent to which the denial of back pay to unauthorized workers has stifled labor organizing or has led to increased labor violations, commentators have argued that the Hoffman decision exemplifies how labor standards, if not extended to unauthorized workers, can undermine the purposes of both immigration and labor laws. [198] According to Human Rights Watch:

> *[t]he Hoffman decision … promotes new and perverse forms of discrimination. It creates an incentive for employers to hire undocumented workers because of their new vulnerability in union-organizing efforts, rather than hiring documented workers or citizens …. The resulting discrimination is two-fold: first, discrimination against documented workers and citizens who are not hired because of their status, followed by discrimination against undocumented workers who are hired because of their status.*[199]

195 Sandy Smith, "Immigration Agents, Posing as OSHA Trainers, Arrest Workers," *EHSToday*, July 18, 2005, http://ehstoday.com/news/ehs_imp_37691/.
196 535 U.S. 137, 122 S. Ct. 1275 (2002).
197 535 U.S. at 154-155, Breyer, J., dissenting.
198 "Developments in the Law: Jobs and Borders," *Harvard Law Review,* Vol. 118, No. 7 (May 2005): 2171-290, 2229.
199 Human Rights Watch, *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Pla*nts (New York: Human Rights

The court's reasoning — that labor protections should not be extended to workers who cannot legally work — has subsequently been adopted by courts in sexual discrimination, nonpayment of overtime, and workers' compensation cases.[200] It has also been used to deny the recovery of future earnings to injured workers under state statutes and common law.[201]

Hoffman applied to NLRA. USDOL has announced that it continues to enforce FLSA and MSPA without regard to immigration status.[202] It distinguishes *Hoffman* on the ground that NLRA *allows* but does not require back pay and involved an employee who sought back pay not for time he had worked, but for time he would have worked had he not been illegally discharged. By contrast, FLSA and MSPA *require* back pay for unreimbursed hours that employees actually work.

C. The Collection and Use of Data in Establishing Enforcement Priorities and Assessing the Effectiveness of Strategies

WHD has relied heavily in recent years on complaints to target its investigations. However, complaint-based enforcement strategies do not adequately cover workers who "feel vulnerable to exploitation" and are less prone to complain.[203] Put differently, workers who suffer serious violations are not necessarily more likely to complain. Lack of immigration status, union representation, knowledge of rights, and likelihood of job loss also influence the decision.[204]

The limitations of complaint-driven enforcement have been underscored by a 2008 survey of low-wage workers in Chicago, Los Angeles, and New York. Twenty percent of the workers surveyed had experienced a serious workplace problem in the previous 12 months but did not complain, mostly for fear of losing their jobs.[205] Another 20 percent either registered a complaint or attempted to form a union in response to substandard conditions. Of the latter, 43 percent experienced retaliation in the form of diminished hours and pay, threatened deportation, termination,[206] The report recommended more "proactive, 'investigation-driven' enforcement in low-wage industries" with "systemic" violations.[207]

WHD's case-management database, Wage and Hour Investigative Support and Reporting Database (WHISARD), tracks case history and the assessment and collection of monetary penalties. It would be a more useful tool in effecting compliance and deterrence if it also recorded the different contractual and employment relationships at targeted worksites.[208] It also does not link to federal or state data systems that would allow WHD to determine whether a targeted employer has violated other federal or state laws.

Watch, 2004): 119, www.hrw.org/reports/2005/usa0105/usa0105.pdf.

200 Statement of Tyler Moran, Employment Policy Director, National Immigration Law Center, before the House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, *Hearing on Proposals for Improving the Electronic Verification and Worksite Enforcement System,* 110th Cong., 1st sess., April 26, 2007, www.nilc.org/immsemplymnt/cir/eevs_testimony_nilc_2007-05-03.pdf; Smith and Ruckelshaus, "Solutions, Not Scapegoats," 55.

201 "Developments in the Law: Jobs and Borders," *Harvard Law Review*, 2229-231.

202 US DOL, WHD, "Fact Sheet #48: Application of US Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division," (Washington, DC: WHD, revised July 2008), www.dol.gov/whd/regs/compliance/whdfs48.pdf.

203 David Weil and Amanda Pyles, "Why Complain?," 91. Such workers include unauthorized immigrants, the less educated and skilled, and those in small workplaces and in informal work arrangements.

204 Weil, "Improving Workplace Conditions," 76.

205 Annette Bernhardt et al., "Broken Laws, Unprotected Workers," 24.

206 Ibid., 25.

207 Ibid., 52.

208 Ibid., 91.

Agency data could also be supplemented by research, reports by investigators, interviews with affected workers in their native languages, and consultation with stakeholders (like worker centers, labor unions, and faith-based groups) that enjoy the confidence of low-wage immigrant workers. Appendix E addresses challenges faced by OSHA in collecting accurate data on violations of safety and health standards and in establishing enforcement priorities in response.

D. Misclassification of Employees as "Independent Contractors"

Effective enforcement requires the identification of industries, industry sectors, and business clusters with high rates of labor standards violations. It also requires thorough and timely information on how employers attempt to evade the law and avoid legal liability.

While not in itself a violation of federal law, the misclassification of employees as independent contractors can lead to violations of multiple federal and state laws. Intentional misclassification is typically prompted by a desire to avoid compliance costs and the need to provide the protections required by compliance. Independent contractors do not receive FLSA, OSHA, NLRA, and other statutory protections. In cases of misclassification, employers do not pay their share of Social Security, Medicare, federal unemployment taxes, or workers' compensation or unemployment insurance premiums.

Standards used to classify workers as "employees" vary by federal and state statute, but they generally turn on an assessment of whether the employer controls and directs the employee's work or, conversely, whether the employee/contractor exercises autonomy in the performance of their work.[209] Under section 530 of the *Revenue Act of 1978*, a worker can be treated as a non-"employee" for the purposes of employment taxes if the employer files federal tax returns in a manner that does not treat the worker as an employee, if the employer treats individuals in substantially similar positions as nonemployees, and if there is a reasonable basis for treating the worker as a nonemployee.[210]

Though difficult to quantify, misclassification appears to be widespread. In 1984, the Internal Revenue Service (IRS) estimated that 3.4 million persons were misclassified. IRS plans to revisit this issue, reviewing the extent of misclassification as part of a broader study on employment tax compliance.[211]

A study conducted for USDOL/ESA in 1998 and 1999 on the impact of misclassification on unemployment insurance programs found substantial misclassification in the construction, manufacturing, home healthcare, and retail industries.[212] It also noted pervasive misclassification and exploitation of low-wage immigrant workers who are "unaware of American worker arrangements, ethics, rights and laws" and who do not protest misclassification "owing to fear of deportation, language barriers and ignorance of worker rights."[213]

State labor officials have similarly reported that "immigrants are less likely to know their rights and more likely to be misclassified than other types of workers."[214] Several studies have found high rates of misclassification in the construction industry, which employs substantial numbers of unauthorized workers.[215] In its first 16 months of operation, the New York State Joint Enforcement Task Force on Employee Misclassification identified 12,300 instances of misclassification, primarily in the construction

209 Planmatics, Inc., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs,* Report for the US Department of Labor, Employment and Training Administration (Rockville, MD: Planmatics, 2000): 2, 14-22, http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

210 Pub.L. No. 95-600, 92 Stat. 2763 (November 6, 1978).

211 GAO, *Employee Misclassification: Improved Coordination, Outreach and Targeting Could Better Ensure Detection and Prevention* (Washington, DC: GAO, 2009): 10-1, www.gao.gov/new.items/d09717.pdf.

212 Planmatics, Inc., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs:* 91.

213 Ibid., 35-6.

214 GAO, *Employee Misclassification: Improved Coordination, Outreach and Targeting Could Better Ensure Detection and Prevention:* 19.

215 Ibid., 14.

industry.[216] The National Employment Law Project has identified 20 studies on the incidence and costs of misclassification in particular states.[217] Most of these studies rely on audits of unemployment insurance and workers compensation programs.

In August 2009, the GAO recommended that:

- WHD increase its focus on misclassification during its investigations
- WHD and OSHA share information on misclassification cases
- USDOL and the IRS establish an interagency, federal/state partnership to address misclassification
- USDOL and IRS increase education and outreach to workers on misclassification and develop a standard document on classification that employers can provide to new workers.[218]

Misclassification has become a high enforcement priority for WHD, for many state enforcement agencies and, to a lesser extent, for OSHA.[219] USDOL's FY 2012 budget requests $46 million to fund state grants to combat misclassification.[220] Its FY 2011 budget also prioritized this work.[221]

VI. Potential Growth of the Informal Economy Due to Enhanced Labor Standards Enforcement

Although the recession ended in June 2009, unemployment remains high and the economic recovery has been tepid. As of May 2011, the unemployment rate stood at 9.1 percent, with 8.5 million involuntary part-time US workers and 2.2 million persons marginally attached to the labor force.[222] Unemployment and involuntary underemployment have been strongly linked to growth in the informal economy,[223] defined as the "enterprises and activities that may not comply with standard business practices, taxation regulations, and/or business reporting requirements but are otherwise *not* engaged in overtly criminal activity."[224]

216 New York State Department of Labor and Joint Enforcement Task Force, *Annual Report of the Joint Enforcement Task Force on Employee Misclassification.* To David Paterson, Governor, State of New York (New York: New York State Department of Labor and Joint Enforcement Taskforce, 2009): 3, www.labor.state.ny.us/agencyinfo/PDFs/Misclassification_TaskForce_Annual-Rpt_2008.pdf.

217 National Employment Law Project, "Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries" (New York: National Employment Law Project, 2010), www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1.

218 GAO, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention:* 41-2.

219 Schiller and DeCarlo, *Investigating Wage Theft*: 6.

220 USDOL, "FY 2012: Budget in Brief," 2.

221 USDOL, "FY 2011: Budget in Brief," 1-2. The FY 2011 budget included funding for: (1) a joint USDOL/Department of Treasury initiative to identify, deter, and pursue misclassification cases; (2) $12 million for 90 full-time positions to train field investigators on misclassification; (3) $11.25 million in grants to states, including to those states that are most successful in detecting and prosecuting employers for misclassification; (4) $1.6 million and ten full-time staff for the USDOL Office of the Solicitor to coordinate with states to pursue litigation on this issue; and (5) $150,000 to modify OSHA's training curriculum and investigative guidelines so that inspectors can better identify misclassified employees and can share information with WHD.

222 BLS, "The Employment Situation—May 2011" (news release, June 3, 2011), www.bls.gov/news.release/pdf/empsit.pdf.

223 Freidrich Schneider and Dominik Enste, "Shadow Economies: Size, Causes and Consequences," *Journal of Economic Literature* 38, no. 1 (2000): 77-114, 82, 87.

224 Losby et al., *Informal Economy Literature Review:* 8.

The Great Recession and its aftermath likely exacerbated the pressure on certain employers to cut costs through off-the-books employment, and on vulnerable workers to accept jobs in the underground economy. This pressure may be particularly acute in the case of unauthorized immigrants who, even before the recession, worked at high rates in industries with significant off-the-books employment. The Fiscal Policy Institute estimated that 37.1 percent of New York City residential construction workers in 2005 were paid off-the books or misclassified as independent contractors.[225]

A literature review by Jan Losby et al. concluded that informal work serves as an "economic buffer" to unemployed persons and can provide additional income in a low-wage labor market.[226] Resorting to the informal economy allows certain low-wage workers to cobble together sufficient income and social supports to subsist.[227] During periods of economic turmoil, employers are more likely to look for ways to pay employees off the books, to subcontract, and to misclassify employees as independent contractors. Restrictive state legislation targeting immigrants, particularly in states that have adopted mandatory employer verification requirements, may also increase the likelihood of off-the-books employment.[228]

The Great Recession and its aftermath likely exacerbated the pressure on certain employers to cut costs through off-the-books employment.

The demand for informal labor by employers and the attractiveness of the informal economy for unemployed and partially employed workers suggests the need for vigilance regarding observance of labor and workplace safety and health standards. With significantly increased enforcement, however, there may be the risk that some employers will try to avoid regulation entirely. The question arises whether there might be a tipping point at which enhanced enforcement leads certain employers and employees into informal economic activities.

In a comprehensive survey, Friedrich Schneider and Dominik Enste concluded that informal economies grow due to "the rise of the burden of taxes and social security contributions; increased regulation in the official economy, especially of labor markets; forced reduction of weekly working time; earlier retirement; unemployment; and the decline of civic virtue and loyalty …"[229] These burdens are particularly acute in OECD countries where the nonwage costs that firms pay for on-the-books employees — in taxes, social security contributions, and meeting administrative regulations — can equal workers' wages.[230]

For individuals, the greater the difference between their earnings in the informal economy and after-tax earnings in the formal economy, the greater is their incentive to work in the informal economy.[231] For employers, the greater the nonwage costs, the greater the incentive to: (1) reduce costs by paying employees off the books and (2) employ fewer full-time workers, in which case laid-off or part-time

225 The Fiscal Policy Institute, *The Underground Economy in the New York City Affordable Housing Construction Industry* (New York: Fiscal Policy Institute, 2007): 12, www.fiscalpolicy.org/publications2007/FPI_AffordableHousingApril2007.pdf.
226 Ibid., 12.
227 Ibid., 14.
228 Westat and Temple University Institute for Survey Research, "Findings of the Basic Pilot Program Evaluation, Summary and Detailed Reports" (Rockville, MD and Philadelphia: 2002): 196. A review of the E-Verify program, even before the recession, cautioned that the program could lead to "growth in the underground economy" and increased "worker exploitation and related problems."
229 Schneider and Enste, "Shadow Economies: Size, Causes and Consequences," 79, 82, 107.
230 Ibid., 105.
231 Ibid., 82.

workers may have an incentive to move to the informal economy.

Enhanced labor standards enforcement will raise the compliance costs for employers that violate the law. Investigations may also burden certain law-abiding employers at a time of economic stress. More research is needed on the overlap between the US informal and unauthorized workforces and on whether the current economic turmoil has led to growth in the former; still it is unlikely that enhanced enforcement of labor and workplace safety and health laws will contribute to significant increases in informal employment. The United States imposes comparatively modest nonwage obligations on US employers. The cost of increased labor standards enforcement would likely have to be substantial to reach the tipping point at which nonwage obligations led significant numbers of employers to "informalize" their workforces. In fact, compliance costs will be insubstantial for law-abiding employers, and it is uncertain whether the Obama administration's relatively modest goal of restoring federal labor standards enforcement resources to 2001 levels will significantly change the behavior of large numbers of scofflaw employers.[232] WHD back pay, civil monetary penalties, and other enforcement metrics have not increased under the Obama administration (see Table 3).

By contrast, immigration restrictions — which do not just increase costs but also threaten the workforces of certain employers — may well lead to increased informal employment. A recent study by the Public Policy Institute of Californian concluded that the 2007 *Legal Arizona Workers Act* (LAWA), mandating that licensed businesses in Arizona use E-Verify, the federal electronic employment verification system, led to a substantial increase in self-employment by "likely" unauthorized immigrants between 2007 and 2009.[233] The E-Verify requirement does not apply to independent contractors (i.e., the self-employed). The study found that in the two years following LAWA's passage, employment rates of likely unauthorized wage and salary workers in Arizona were 11 to 12 percent lower than in comparison states without such laws, and that LAWA led to job loss for roughly 56,000 of these workers.[234] By contrast, LAWA resulted in an 8 percent gain (the equivalent of 25,000 persons) in self-employment for likely unauthorized workers over the same period, a far higher increase than in comparison states.[235]

VII. Possible Effect of Labor Standards Enforcement on Illegal Migration and Employment

President Obama has argued in favor of immigration reform legislation as a way to reduce violations of labor and workplace safety and health standards. His argument raises the question of whether the converse is true: Would stronger labor standards enforcement diminish unauthorized employment? Arguments in favor of labor standards enforcement as an *immigration enforcement* tool have long been a mainstay of the immigration debate.[236] One line of reasoning maintains that effective labor standards enforcement would reduce unauthorized migration and hiring by: (1) targeting employers that are more likely to violate immigration laws; (2) eliminating the ability of certain employers to exploit unauthorized workers and, thus, removing their incentive to hire them; (3) weakening the magnet (work) that draws unauthorized immigrants to the United States and keeps them here; (4) making jobs more appealing

232 The presence of several million unauthorized immigrants in the United States places a heavy burden on an already overwhelmed regulatory system. Conversely, properly crafted immigration reform legislation could improve the ability of WHD to enforce the law by removing a tool (unauthorized workers) that unscrupulous employers can use to violate labor standards.

233 Magnus Lofstrom, Sarah Bohn, and Steven Raphael, *Lessons from the 2007 Legal Arizona Workers Act* (San Francisco, CA: Public Policy Institute of California, 2011): 25, www.ppic.org/content/pubs/report/R_311MLR.pdf. For the purposes of assessing employment changes, the report used noncitizen Hispanic men from 16 to 60 years old, who had a high school diploma or less, as its proxy for unauthorized workers.

234 Ibid., 24.

235 Ibid., 25.

236 Immigration enforcement policies address which foreign-born persons can enter the country, who can stay, who can work, and who must leave.

to US workers by increasing wages and improving working conditions; and (5) gradually leading to the replacement of unauthorized with authorized workers.[237]

The appeal of this argument can be attributed, in part, to the modest budgets for labor standards enforcement relative to immigration enforcement, the perception that labor standards enforcement benefits all workers, and concerns over the impact of immigration policies on families and communities. Funding for immigration enforcement has increased enormously in recent years. The combined US Customs and Border Protection (CBP) and ICE budgets for FY 2011 exceed $17 billion, nearly three times INS's 2002 budget.[238] By contrast, in FY 2010, WHD ($227.6 million), OSHA ($558.6 million), and NLRB ($283.4 million) collectively received less than $1.1 billion.[239]

Would stronger labor standards enforcement diminish unauthorized employment?

The impact of enhanced labor standards enforcement on illegal hiring and employment is uncertain. No study has established a link between increased labor standards enforcement and decreased unauthorized employment or migration.

In February 2009, the Migration Policy Institute released a report titled *DHS and Immigration: Taking Stock and Correcting Course*.[240] The report concluded that an effective, humane immigration enforcement plan would address the root causes of migration, strengthen multilateral security arrangements, reform the US system of legal immigration, and improve immigration and labor standards enforcement. The success of such a plan would depend on close collaboration within DHS, between DHS and other federal agencies, among federal, state, and local agencies, and with migrant-sending nations. The report recommended that the Obama administration form a task force to develop a comprehensive enforcement plan, to assess its effectiveness at regular intervals, and to recommend adjustments in the mix of strategies and the level of resource allocation.[241]

Labor standards enforcement may complement but will not obviate the need for immigration reform or traditional immigration control strategies. However, if labor standards enforcement ultimately proved to be an effective means of immigration control, the proposed immigration enforcement task force could recommend that more funding be directed to this work, perhaps even by diverting monies from less effective DHS programs.

237 US Commission on Immigration Reform, "Options for Enhancing Worksite Enforcement," 173, 177.
238 DHS, *FY 2012 Budget in Brief* (Washington, DC, DHS, 2011): 70, 83, www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf; Meissner and Kerwin, *DHS and Immigration: Taking Stock and Correcting Course:* 100.
239 USDOL, "FY 2011: Budget in Brief," 44-5, 58-9; NLRB, *Justification for Committee on Appropriations, Fiscal Year 2012* (Washington, DC: NLRB, undated): 42, www.nlrb.gov/sites/default/files/documents/188/just2012full.pdf.
240 Meissner and Kerwin, *DHS and Immigration*.
241 Ibid., 96-7.

VIII. Conclusion and Recommendations

This report examines the characteristics of an effective system of labor standards enforcement, with a focus on industries and firms with heavy concentrations of low-wage (including unauthorized) workers. In broad terms, **the report recommends that the administration, Congress, states, and other stakeholders make labor standards enforcement a pillar of their immigrant policymaking agendas.**

A. Recommendations

1. Identification of Industries and Firms that Substantially Violate Immigration and Labor Laws

Federal and state regulators would benefit from research that compares employers that illegally hire unauthorized immigrants with those that substantially violate labor and workplace safety and health laws. Such research would provide a foundation to develop, test, and fine-tune enforcement strategies against employers whose business model gives them an unfair advantage over law-abiding competitors and undermines wages and working conditions.

GAO or USDOL should commission and regularly update an exhaustive study that matches industries and industry subsets that violate employment verification laws with those that violate labor and worker safety and health laws at high rates. This study should constitute a centerpiece of federal and state labor standards enforcement planning.

2. Strengthening Core Labor and Workplace Safety and Health Standards

FLSA exempts certain farm workers and seasonal and recreational workers from its minimum-wage and overtime requirements, and it exempts live-in domestic employees and other categories of workers from its overtime rules.[242] In addition, it allows children to work at more dangerous jobs and at younger ages in agriculture than in other industries. Some have argued that FLSA generally seeks to make affected employees financially whole through the payment of back wages, rather than to punish employers. WHD has been criticized, in turn, for not seeking penalties and sanctions sufficient to deter violations, particularly given the low likelihood of punishment and difficulties in collecting assessed penalties. In addition, WHD investigative delays can threaten the recovery of wages and liquidated damages because FLSA's statute of limitations runs from the time of the employer's failure to pay the proper wages and is not tolled by the filing of a complaint.

OSH Act applies to employers engaged in interstate commerce. It does not cover domestic employees. In addition, a recurrent rider in USDOL appropriations bills prohibits enforcement of OSH Act's safety and health standards in certain farming operations and bars enforcement of its safety standards (except on the basis of complaints) against an extensive list of "low-hazard industries" with ten or fewer employees. Like WHD, OSHA has been criticized for levying fines that do not approximate the noncompliance savings enjoyed by scofflaw employers, thus creating a disincentive to compliance.

NLRA does not apply to agricultural, certain domestic workers, and other categories of employees. In 2002, GAO estimated that 32 million workers did not have collective bargaining rights under NLRA, state or local laws. The NLRA's sanctions — to order discontinuance of an unlawful practice, reinstatement of an employee, and payment of back wages — seek to remedy past violations. As a result, they have been criticized as lacking the teeth to dissuade anti-organizing efforts. In addition, under the *Hoffman Plastics* ruling, the NLRA's most substantial penalty — payment of back wages — cannot be assessed in

242 USDOL, *Fair Labor Standards Act* Advisor, www.dol.gov/elaws/esa/flsa/screen75.asp.

cases involving unauthorized workers. Reinstatement, meanwhile, has not been an available remedy for unauthorized workers since IRCA made it illegal to hire unauthorized workers.

Congress should comprehensively review federal, state, and local labor and workplace safety and health laws. It should extend core labor protections to categories of employees who are now exempt or otherwise are not substantially afforded these protections, should strengthen penalties so they meaningfully deter violations, should provide for the tolling of statute of limitation periods upon the filing of complaints, and should address other anomalies in coverage.[243] **As part of this review, Congress should consider granting USDOL administrative authority to order payment of back wages, liquidated damages, and civil monetary penalties without being required to pursue final orders in federal court.**

WHD should assess fines and penalties based on their deterrent effect and the severity of the violation(s). The EPA's "ABEL" computer software may be a useful tool in this regard. ABEL uses common financial ratios and projected future cash flow to assist EPA in determining the ability of private corporations to pay civil penalties and to meet compliance costs.[244] EPA uses ABEL to assess whether a settlement amount will create a financial hardship on a corporation. A similar system and methodology might be useful in setting appropriate penalties for labor standards violations.

If enforcement agencies take into account the status of workers, unauthorized workers will be less likely to report violations or cooperate in investigations and unscrupulous employers will have a strong incentive to violate both immigration and labor laws. **Congress should pass legislation to make unauthorized workers eligible for payment of back wages under NLRA and to ensure that all remedies under the FLSA, OSH Act, and NLRA are available to workers, regardless of their immigration status, consistent with other federal laws.**

3. Increasing Resources and Leveraging Knowledge

The Obama administration has restored WHD and OSHA staffing to 2001 levels (see Appendix A). While an appropriate short-term goal, these increases follow significant weakening of enforcement capacity, and funding for enforcement of these laws remains modest.

In FY 2010, WHD, OSHA, and NLRB collectively received roughly $1.1 billion. In comparison, the combined budgets for DHS' two immigration enforcement agencies, ICE and CBP, now total more than $17 billion. Current economic turmoil increases the need for robust enforcement of US labor and workplace safety and health laws. However, the budget crisis makes funding increases unlikely in the near term.

Government regulators will never be able to investigate or monitor even a small percentage of the nation's workplaces on a regular basis. Labor Secretary Hilda Solis has estimated that at current staffing levels it would take WHD more than 130 years to inspect each of the nation's workplaces.[245]

Under these circumstances, regulators need to ensure high levels of employer self-compliance. They also need to leverage additional enforcement resources. Between 1997 and 2007, WHD established 78 formal partnerships, with an emphasis on employer outreach and education.[246] In recent years, it has entered several agreements with foreign governments, through their embassies and consulates, to educate foreign

243 Smith and Ruckelshaus, "Solutions, Not Scapegoats," 583-85. Smith and Ruckelshaus propose that Congress amend FLSA to provide for treble damages in unpaid wage claims, to allow investigators to embargo "hot goods" produced under "substandard" (not just "sweatshop") conditions, and to create a presumption that workers providing "labor or services for a fee" be deemed "employees" for the purposes of FLSA protections.

244 US Environmental Protection Agency (EPA), "Overview of Ability to Pay Guidance and Models" (Washington, DC: EPA, 1995), www.epa.gov/compliance/resources/policies/cleanup/superfund/ovrview-atp-rpt.pdf.

245 Remarks by Secretary of Labor Hilda L. Solis, National Action Summit for Latino Worker Health and Safety, April 14, 2010, www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=2146.

246 Lasowski, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, 11-2.

workers on US labor standards, to facilitate the exercise of their rights, and to secure information on labor and health and safety violations.[247] WHD also partners with state labor agencies on case referrals, education, outreach, data sharing, and cross training. In addition, it increasingly works with states, worker associations, and other federal agencies.

Given its immense responsibilities and limited resources, WHD should make it a priority to leverage the resources and knowledge of other federal agencies, states, and localities; consulates; business and trade associations; labor unions, worker centers, and faith-based groups; and other stakeholders.

Labor unions, worker centers, faith-based agencies, and consulates occupy a central role in many immigrant communities, and they enjoy access to and the confidence of low-wage workers. Beyond offering a safe space for training, public education, and meetings, these entities can educate employees on the protections and remedies available to them.[248] They can also collect and bring evidence of labor standards violations to the attention of employers, regulators, and the press. Partnerships with these groups will improve WHD's ability to:

- Educate employers, employees, and the public on the law
- Connect with vulnerable workers who are unlikely to register complaints
- Identify problem industries and/employers
- Chart the complex relationships in fissured industries
- Pursue employers who violate labor and related laws
- Train employees how to file complaints
- Test and evaluate enforcement strategies
- Monitor compliance with the law.

4. The Role of States in a National Labor Standards Enforcement System

States collectively devote resources to labor standards enforcement that rival WHD resources. State agencies have taken the lead in labor standards enforcement in several states. Beyond expertise in their own laws, states have developed programs to target industries and practices that are also WHD priorities.[249]

While USDOL already tracks and maps state labor laws, it should also create an office of federal/state labor standards that would:

- **Survey states annually on their labor standards enforcement resources, priorities, and activities as a way to identify and share best practices, to inform federal and state planning processes, to create enforcement partnerships, and to avoid redundancies**

247 USDOL, Bureau of International Labor Affairs, "Secretary Solis and ambassadors of Guatemala and Nicaragua sign declarations protecting migrant workers' rights," July 16, 2011, www.dol.gov/ilab/; USDOL, Bureau of International Labor Affairs, "Joint Declaration Between the Department of Labor of the United States of America and the Ministry of Foreign Affairs of the United Mexican States To Reaffirm their Commitment of Working Together to Inform Mexican Workers in the United States about their Labor Rights," May 4, 2010, www.dol.gov/ilab/20100504USMexico.htm; USDOL, Bureau of International Labor Affairs, "Agreement Establishing an Understanding Between the US Department of Labor's Wage and Hour Division, Southeast Regional Office and the Consulate General of Mexico in Atlanta, Georgia," April 14, 2011, www.dol.gov/_sec/newsletter/2011/20110414-4.htm#english.

248 Bernhardt et al., "Broken Laws, Unprotected Workers," 52.

249 Schiller and DeCarlo, *Investigating Wage Theft*: 6.

- **Communicate with state agencies on a continuous basis regarding federal and state research on problem industries, evolving employer structures, tactics used to avoid liability under the law, and successful enforcement strategies**
- **Facilitate information sharing among states on best practices and enforcement challenges that require federal and multistate collaboration, including through formal task forces.**

The goal of this office should be a continuous learning and enforcement cycle that helps participating agencies identify problem industries, understand business models and tactics designed to evade the law, coordinate education and enforcement strategies, evaluate the effectiveness strategies, and adjust their programs accordingly.

MPI's survey revealed that while state labor enforcement agencies primarily pursue investigations independently, they partner with other state agencies on public education and related activities. The relationship between many state labor enforcement agencies and WHD is limited to the referral of cases under their respective jurisdictions.

State labor enforcement agencies should develop more expansive partnerships with WHD and other federal agencies as well as with other state agencies, business associations, labor unions, worker centers, and faith-based groups. In establishing these partnerships, states should seek to:

- ***Leverage educational and enforcement resources***
- ***Share information on problem industries and employers***
- ***Educate employers, employees, and the public on the laws***
- ***Pursue priority industries***
- ***Counter business practices used to evade labor and related laws***
- ***Monitor compliance with the law.***

5. The Goal and Elements of a National Labor Standards Enforcement System

Federal and state labor standards enforcement agencies will never enjoy the resources that would allow them to investigate, penalize, or monitor even a significant share of the US employers that violate labor and workplace safety and health standards.

Like any law enforcement and regulatory agency, these agencies need to prioritize the use of their limited resources, leverage additional resources, and pursue smart, cost-effective, and high-impact strategies. The overall goal should be to maximize compliance with the law and deter violations.

While enforcing the law, federal and state regulators must be able to make informed decisions on how best to use their resources, to adapt to changes in employer practices and in enforcement priorities, to evaluate enforcement strategies, and to draw on the specialized knowledge of partner institutions. **They should continuously collect enforcement information, evaluate the effectiveness of particular strategies, and adjust their work accordingly.**

Beyond the need to leverage resources and expertise, an effective, federally coordinated enforcement policy must include several elements. **First, WHD must draw on an exhaustive range of information to identify industries that violate labor standards at high rates, to determine the nature of**

the violations, and to map the structure of fissured industries and the incentives of different employers within them. WHD should publicize its findings in order to increase public awareness, accountability, and support for its work

Relevant data sources should include CPS, federal and state complaint databases, investigator reports, government and outside studies, and relatively nonintrusive probabilistic sampling (including review of payroll records) to determine the nature, incidence, and geographic concentrations of violations.

WHD should expand random, investigation-based surveys, which will allow it to set benchmarks at the beginning of enforcement initiatives, and to gauge the success of its enforcement programs.[250]

Agency data, particularly complaint databases, should be mined for information on problem industries and sectors and patterns of violations. The WHISARD database should collect information on business affiliations and employment relationships in investigated worksites, be able to recognize patterns of violations and other anomalies, and interface with other federal and state labor standards databases. WHD should commission reports on particular industries, industry sectors, and business clusters with the goal of identifying the corporations that can pressure and influence others within their ambits to comply with the law.

Reports, studies, and database mining should be supplemented by investigations that include interviews with affected workers in their primary languages and consultation with stakeholders that enjoy access to and the confidence of low-wage workers.

Strategies to gain information on potential violations should be as unintrusive as possible, consistent with the need to ensure compliance. WHD should conduct probabilistic (random) sampling of employers in industries thought to violate the law at high rates in order to identify patterns of violations, behaviors used to evade the law, and incentives for both violating or complying with the law.[251]

In targeting its resources, WHD should devote more support to states with relatively weak labor laws and enforcement systems. It should also prioritize enforcement in cases of employers that have been assessed penalties for violations of the law but have failed to pay them.

Second, WHD should draw on the full range of educational and enforcement tools at its disposal in order to maximize compliance with the law and to deter violations. In the case of law-abiding employers, voluntary compliance can typically be achieved by educating them on the relevant legal requirements and through graduated, proportional penalties for occasional violations. For employers that willfully, repeatedly, or severely violate the law, enforcement agencies should seek significant civil monetary penalties, liquidated damages, injunctive relief, and criminal sanctions. The agencies should pressure lead or dominant corporations within industries, industry sectors, and business clusters to monitor employers within their ambit for compliance. WHD should extend "hot goods" penalties, including the seizure and embargo of goods, to "fissured" industries, certain "lean retailers," and others that violate labor standards at high rates.[252]

WHD should target problem industries and practices through cross-cutting task forces made up of federal and state labor standards enforcement and related agencies. Task forces allow WHD to draw on additional investigative expertise, legal resources, and information on particular industries and business practices.

Third, WHD and state enforcement agencies should establish metrics that reflect and support

250 Weil, "Improving Workplace Conditions," 92.

251 Probabilistic sampling will also allow WHD to explore anomalies in broader datasets, like firms with low self-reported accident rates in industries with high rates of injury and fatality.

252 Just Pay Working Group, *Just Pay: Improving Wage and Hour Enforcement,"* 12.

the goal of maximizing compliance and deterring violations; they should formally evaluate their programs at least annually; and they should make programmatic adjustments on a regular basis. The Office of the Inspector General and GAO should evaluate WHD's performance in enforcing the law based on these metrics.

6. Status-Blind Enforcement

USDOL and INS/DHS have long recognized the need to coordinate their work so that the enforcement activities of one agency do not compromise the operations and goals of the other. In March 2011, USDOL and DHS entered a MOU on worksite enforcement which, like the 1998 WHD/INS MOU, provides that ICE will refrain from immigration enforcement in worksites with pending labor investigations, with certain exceptions. The MOU does not detail how ICE will assess whether the "tips and leads it receives" are motivated by a desire to "manipulate a pending labor dispute, retaliate against employees for exercising labor rights, or otherwise frustrate the enforcement of labor rights."

USDOL and DHS should regularly evaluate the effectiveness of the MOU, should issue regulations that codify its main provision, and should give high priority to training and instructing their staffs in its requirements.[253]

7. Misclassification of Employees as "Independent Contractors"

Many employers misclassify employees as independent contractors to avoid the requirements of federal laws, including FLSA, OSHA, and NLRA. Others do so by mistake. The standards used to classify workers as "employees" vary by statute and can be complex.

To the extent possible, Congress, the Department of Justice, and relevant federal and state agencies should attempt to harmonize the standards governing what constitutes "employees" and what is meant by independent contractors. WHD, in coordination with the USDOL Office of the Solicitor, should bring legal actions to clarify the boundaries of the employer/employee relationship in major industries.[254] USDOL, IRS, and other federal agencies should coordinate a nationwide effort to educate workers, employers, and the general public on these standards. As USDOL has proposed, Congress should pass legislation to shift the burden of proof to employers, requiring them to demonstrate that their employees are correctly classified.

Misclassification issues should continue to be a central priority in WHD and in state planning and investigative work. Misclassification initiatives highlighted in USDOL's FY 2011 budget deserve support, including:

- ***Creation of a joint USDOL/Department of Treasury initiative to identify, deter, and enforce the prohibition against misclassification***
- ***Funding to train WHD field investigators on misclassification issues***
- ***Grants for state initiatives on this issue and support for the Solicitor of Labor to coordinate with states in pursuing misclassification litigation, including multistate litigation***
- ***Revision of OSHA's training curriculum so that compliance officers can better identify misclassified employees.***

253 Section 274A(b)(3) of IRCA required employers to retain employment verification records and make them available to INS or USDOL. In other words, it contemplated a role for USDOL in checking whether employers had adequately screened employees to determine their legal eligibility to work. Congress may need to revisit this provision in order to ensure "status-blind" labor standards enforcement.

254 Weil, "Improving Workplace Conditions," 80.

8. Tracking Possible Secondary Effects of Increased Labor Standards Enforcement on the Informal Economy

The United States imposes comparatively modest nonwage obligations on US employers. In addition, labor and workplace safety and health laws have not been rigorously enforced in recent years. The Obama administration's short-term goal has been to restore federal enforcement resources to 2001 levels. As a result, it is unlikely that enhanced labor standards enforcement will prove enough of a burden or risk to cause substantial numbers of employers to "informalize" their workforces.

That said, USDOL should commission a comprehensive analysis of the industries and sectors that employ substantial numbers of workers off the books. It should match these industries with those that employ unauthorized workers at high rates. Since such employers are more likely to violate labor, tax, and other laws, WHD should target these industries for enforcement. Finally, USDOL should analyze whether current economic turmoil has led to growth in the informal economy and, if so, in which industries and industry sectors. It should also monitor the potential effect of heightened labor standards enforcement on the informal economy.

9. Effect of Labor Standards Enforcement on Illegal Hiring and Migration

Both sides of the US immigration debate have claimed that enhanced labor standards enforcement will lead to a decline in unauthorized employment and migration. To date, no study has established this link.

USDOL should assess the impact of improved labor standards enforcement on illegal immigration and employment. In the alternative, this responsibility could fall under the mandate of a standing commission on labor markets and immigration.[255] Under MPI's proposal, a standing commission would analyze labor market conditions and trends and propose adjustments in immigration policies to Congress.

In February 2009, MPI released *DHS and Immigration: Taking Stock and Correcting Course.* The report recommended that the Obama administration set up a task force to develop a comprehensive immigration enforcement plan, assess its effectiveness at regular intervals, and recommend adjustments in the mix of strategies and the level of resource allocations.[256]

If USDOL or a standing commission found that increased enforcement of labor and workplace safety and health laws resulted in decreased illegal hiring and immigration, the proposed task force could recommend diverting immigration enforcement resources to labor standards enforcement activities.

B. Conclusion

Labor and workplace safety and health laws need to be strengthened. Current laws set significant standards for minimum wage, overtime pay, child labor, safe and healthy workplaces, antidiscrimination, and freedom to organize and to bargain collectively; but effective enforcement of these laws will require a sustained and coordinated commitment from successive administrations, Congress, relevant federal and state agencies, and other stakeholders. Among other priorities, these entities will need to:

- Devote sufficient resources to this work
- Identify industries and firms that substantially violate labor and workplace safety and health

255 Doris Meissner, Deborah W. Meyers, Demetrios G. Papademetriou, and Michael Fix, *Immigration and America's Future: A New Chapter* (Washington, DC: Migration Policy Institute, 2006): 41-3, www.migrationpolicy.org/task_force/new_chapter_summary.pdf.

256 Meissner and Kerwin, *DHS and Immigration:* 96-7.

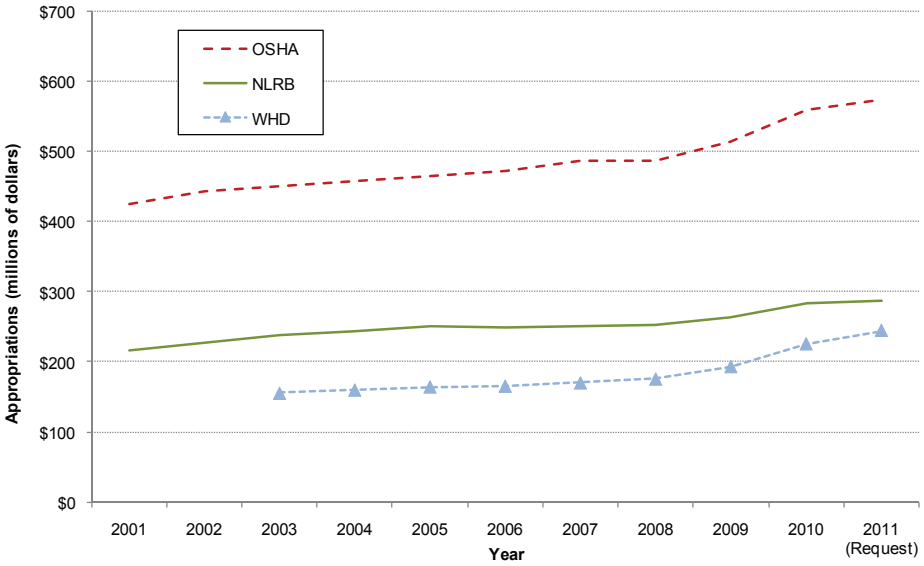
laws, particularly those that also employ unauthorized immigrants at high rates

- Pursue high-impact, status-blind enforcement strategies that deter violations and target problem industries and business practices that avoid coverage under the law
- Leverage additional resources and information-sharing through partnerships that maximize the resources and knowledge of participating agencies
- Continually evaluate and improve enforcement strategies.

If successful, a well-resourced and coordinated labor standards enforcement system will reduce unfair competition, lift wages, and improve working conditions for all Americans while addressing longstanding labor market concerns related to unauthorized immigrants.

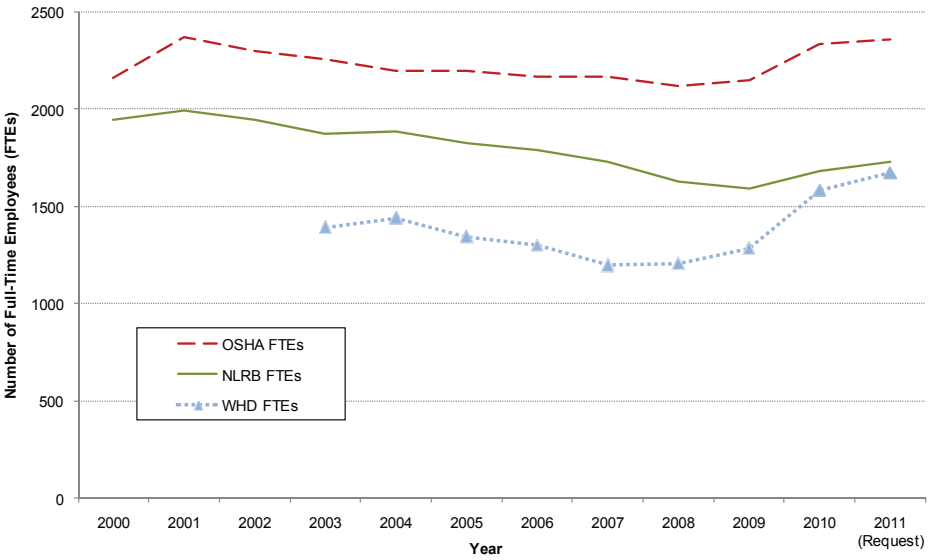
Appendices

Appendix A-1. USDOL WHD, OSHA, and NLRB Appropriations, FY 2001-11*



* The FY2011 figures are requested budgets.
Sources: USDOL, *FY 2011 Congressional Budget Justification Wage and Hour Division:* 14; USDOL, *FY 2011 Congressional Budget Justification Occupational Safety and Health Administration:* 19; NLRB, Justification of Performance Budget for Committee on Appropriations, Fiscal Year 2011: 43.

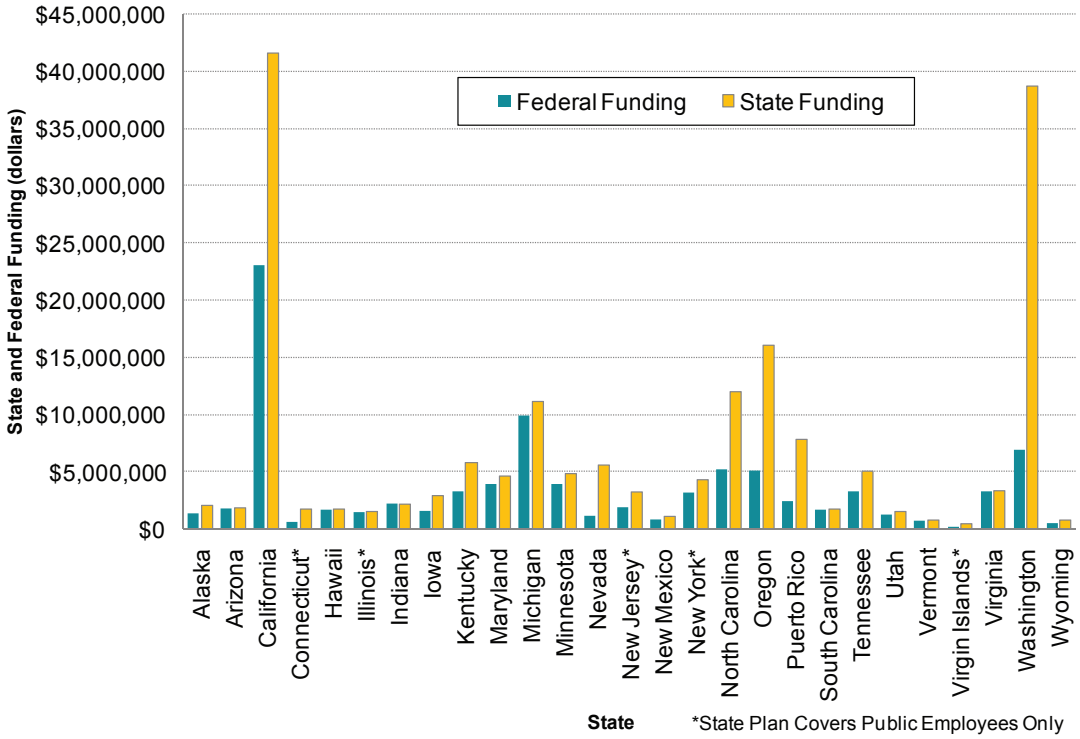
Appendix A-2. Full-Time Equivalents for OSHA, WHD, and NLRB, FY2000-11



* The FY2011 figures are requested budgets. USDOL budgets for 2001 and 2002 do not provide information on WHD staffing or budget. The Congressional Budget Justification for 2011 lists the WHD budget and FTEs for 2001 and 2002 as zero.[257]
Source: USDOL, OSHA, *FY 2011 Congressional Budget Justification:* 23, www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V2-11.pdf; USDOL, WHD, *FY 2011 Congressional Budget Justification:* 14; NLRB, *Justification of Performance Budget for Committee on Appropriations, Fiscal Year 2011:* 45.

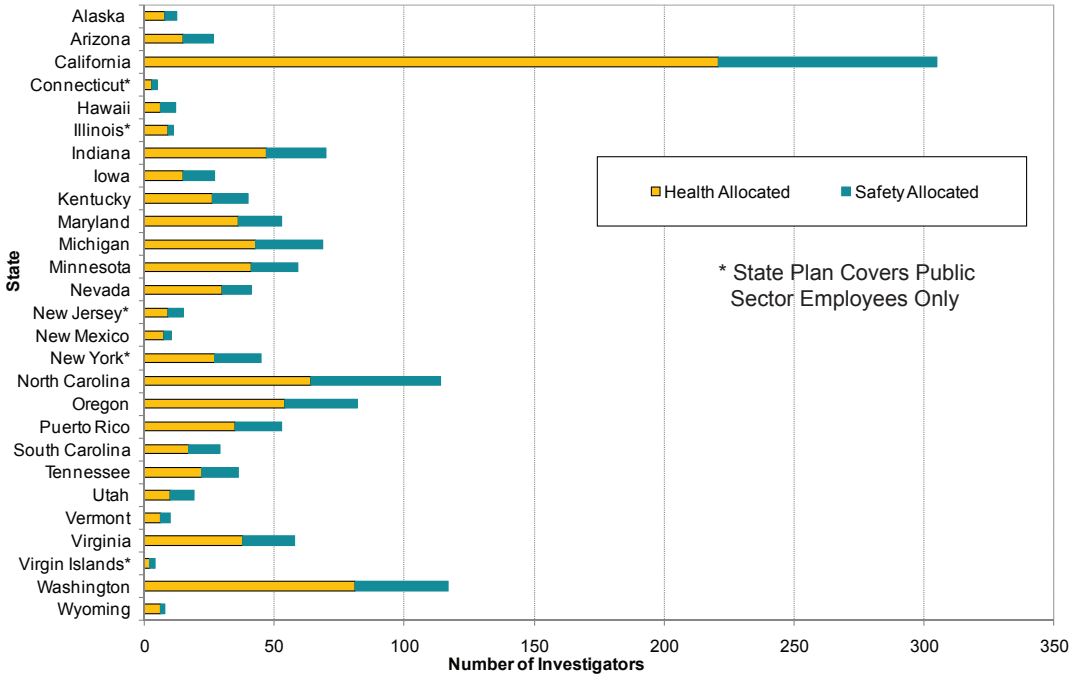
257 USDOL, *FY 2011 Congressional Budget Justification:* 18.

Appendix B-1. State and Federal Funding for State Plans, FY2009



Source: Budget information provided by the Occupational Safety and Health State Plan Association.

Appendix B-2. State Plan Health and Safety Investigators Allocated, FY 2010



Source: Investigative staffing information provided by OSHSPA.

Appendix C. Research on Immigrant Employment in Dangerous Low-Wage Jobs

In 2008, Pia Orrenius and Madeline Zavodny found that higher percentages of foreign-born workers earn subminimum wages (4.8 percent for the foreign-born versus 3 percent for natives); the foreign born also disproportionately earned wages within 125 percent of the minimum (12.1 percent of foreign-born workers compared with 8 percent of natives).[258]

Of the nearly 2 million hourly workers earning subminimum wages, according to 2008 Current Population Survey data, nearly 1.4 million (72 percent) worked in service occupations like food preparation and personal care,[259] which are filled at high rates by unauthorized workers.[260] Immigrants are also concentrated in jobs in which FLSA standards are often not observed or do not apply. Eighty-nine percent of in-home child care workers — not covered by minimum-wage laws — surveyed in 2008 in Chicago, Los Angeles, and New York earned less than their state's minimum wage.

A 1989 random survey by the Immigration and Naturalization Service of 6,200 legalization applicants found that 9 percent earned subminimum wages compared with 2 percent of all US workers. While raising the possibility of labor violations, this finding did not "prove the existence of [a] direct link between illegal status and the underpayment of wages," given the concentration of unauthorized workers in jobs not covered by FLSA.[261]

Industry-specific studies, such as those of the meatpacking industry, have linked growth in the immigrant workforce (including unauthorized workers) to lower wages, higher rates of employee injury, and lower rates of union membership.[262]

More recently, Orrenius and Zavodny compared American Community Survey data on the distribution of foreign- and US-born workers across industries and occupations, with data on work-related injuries and fatalities from the Bureau of Labor Statistics between 1992 and 2005. They concluded that immigrants experience 1.79 more work-place fatalities per 100,000 workers than natives (by industry), and 1.6 more deaths per 100,000 workers than natives (by occupation).[263] These differences translate into more than 300 work-related immigrant deaths per year that might not have occurred if immigrants were distributed across industries and occupations in the same way as natives.[264]

Similarly, Orrenius and Zavodny found immigrant-native differences in average *industry* injury rates of 8.19 per 10,000 workers, which translate into 16,389 more nonfatal immigrant injuries per year. They reported a difference in average *occupation* injury rates of 30.86 per 10,000 workers, translating into 61,720 more immigrant injuries annually.[265]

According to the authors, these figures may underestimate differences in injury and fatality rates because they assume that rates within industries and occupations apply equally to natives and immigrants. If immigrants work in riskier jobs *within* industries or occupations, the actual gap between native and

258 Pia Orrenius and Madeline Zavodny, "The Effect of Minimum Wages on Immigrants' Employment and Earnings" (working paper 0805, Federal Reserve Bank of Dallas, April 2008): 33, www.dallasfed.org/research/papers/2008/wp0805.pdf.

259 BLS, "Characteristics of Minimum Wage Workers: 2008," (Washington, DC: BLS, 2009), www.bls.gov/cps/minwage2008.htm.

260 Passel and Cohn, *A Portrait of Unauthorized Immigrants in the United States:* 14. Passel and Cohn estimate that 30 percent of unauthorized workers work in service-sector jobs.

261 USDOL, *Employer Sanctions and US Labor Markets: Second Report*: 8-9.

262 GAO, *Workplace Safety and Health: Safety in the Meat and Poultry Industry, while Improving, Could Be Further Strengthened* (Washington, DC: GAO, 2005): 75; Deborah Fink, *Cutting into the Meatpacking Line: Workers and Change in the Rural Midwest* (Chapel Hill, NC: University of North Carolina Press, 1998).

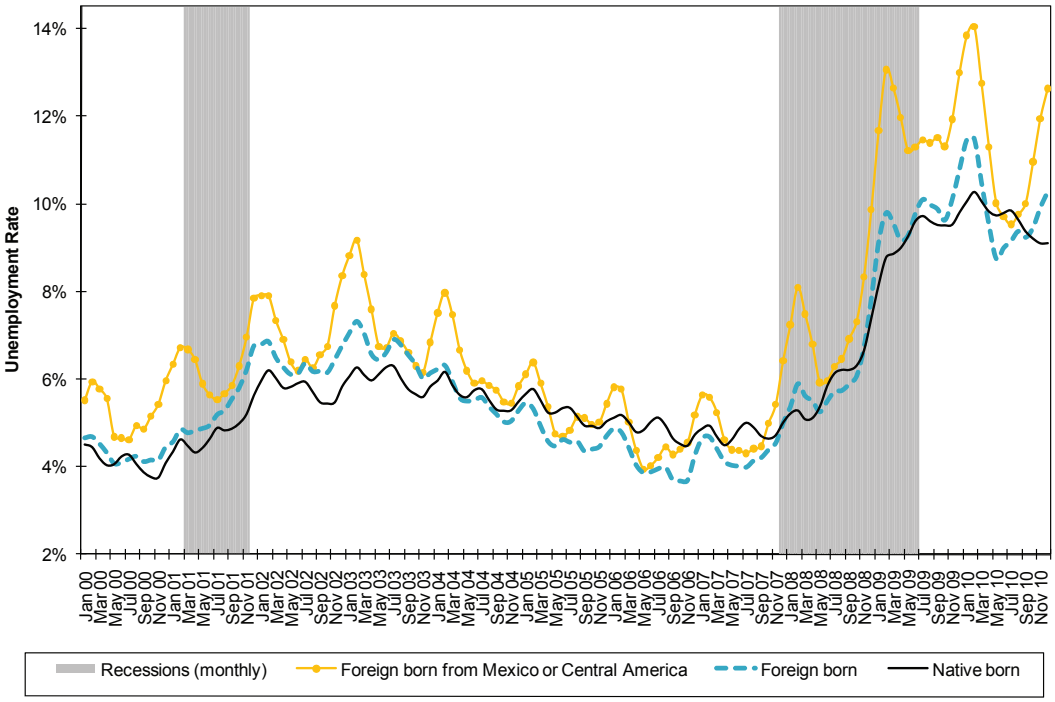
263 Pia Orrenius and Madeline Zavodny, "Do Immigrants Work in Riskier Jobs?" (working paper 0901, Federal Reserve Bank of Dallas, January 2009): 19, http://dallasfed.org/research/papers/2009/wp0901.pdf.

264 Ibid. Between 1992 and 2005, homicide represented the leading cause of workplace fatalities for immigrants. More than 3,000 foreign-born persons were murdered on the job during these years.

265 Ibid.

immigrant injury and fatality rates would be higher.[266] The authors attributed the disparities in injury and fatality rates, in part, to limited proficiency in English, less education, and insufficient training.[267]

Appendix D. Monthly Unemployment Rate of the Native- and Foreign Born, and the Foreign Born from Mexico and Central America, January 2000 to November 2010



Note: Three-month moving average. Unemployment rates not seasonally adjusted.
Source: Migration Policy Institute analysis of US Census Bureau, Current Population Survey (CPS), January 2000 to November 2010.

Appendix E. The Georgia Case: Unauthorized Workers and Firm Survival

Advocates on both sides of the immigration debate have long argued that certain employers gain an advantage over their competitors by hiring workers whose lack of immigration status limits their work options and makes them vulnerable to exploitation. Papers from June 2008 and June 2009 by Julie L. Hotchkiss and Myriam Quispe-Agnoli, and a January 2009 paper by J. David Brown, Hotchkiss, and Quispe-Agnoli, test several assumptions under this scenario. The papers explore whether firms exercise "monopsony power" (roughly translated as near exclusive "buying" power) over unauthorized workers. In particular, they examine whether:

- Firms pay unauthorized workers less than authorized workers despite similar levels of productivity
- The unauthorized have more limited employment opportunities
- Firms that employ the unauthorized gain a competitive advantage over law-abiding firms.[268]

The studies analyze data from Georgia's Employer File and Individual Wage File from 1990 to 2006,

266 Ibid.
267 Ibid., 20.
268 J. David Brown, Julie L. Hotchkiss, and Myriam Quispe-Agnoli, "Undocumented Worker Employment and Firm Survival" (IZA Discussion Paper No. 3936, revised January 12, 2009): 25, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329574.

data collected by the state's Department of Labor in order to administer its unemployment insurance (UI) program.[269] The Employer File contains records on all UI-covered firms, as well as information at the establishment-level on the number of employees, total wage bill, and North American Industry Classification System (NAICS) code. Workers in certain agricultural, domestic service, and nonprofit jobs excluded from UI coverage are not represented in the data.

The longitudinal data allowed the researchers to calculate firm age, turnover rates, worker tenure, and when firms ceased operations. The Individual Wage File includes quarterly earnings data on employees of these establishments but not information on individual worker demographics, their jobs, or their immigration status. An analysis of social security numbers, cross-checked against the geographic distribution of relevant ethnic and racial groups, served as a proxy for unauthorized laborers.

The June 2008 study by Hotchkiss and Quispe-Agnoli found a significant wage differential between authorized and unauthorized workers in Georgia during this period.[270] The January 2009 study by Brown, Hotchkiss, and Quispe-Agnoli explored the correlation between employment of the unauthorized workers and firm survival, which served as the study's measure for competitive advantage.[271] It found that the probability of a firm closing in a given year, as measured by a quarter of positive employment followed by four quarters of no employment, was roughly 2 percent. Thus, a 1 percent reduction in the average likelihood of a firm's closing would diminish the overall likelihood of closing by one-half. The study concluded that employment of unauthorized workers reduced the likelihood of a firm closing by:

- 0.2 percent in the education and health services, 0.5 percent in leisure and hospitality, 1.3 percent in other services industries;

- 0.5 percent in the manufacturing sector, 0.7 percent in agriculture, and 0.8 percent in construction and business services.[272]

The June 2009 paper by Hotchkiss and Quispe-Agnoli found lower labor supply elasticity among unauthorized workers, as measured by worker separation due to reductions in wages.[273] The study sampled two subsets of the broader UI database: (1) all workers between 1995 and 2000; and (2) a far smaller subset of unauthorized workers, from 1997 to 2000, with Social Security numbers that follow the Individual Taxpayer Identification Numbers (ITIN) numbers scheme.[274] The study assumed that the flow of new hires equaled the flow of separations. This assumption would not be valid in recent years. However, in the years studied, the percent of workers separating and being hired differed by a maximum of three percent.

The study also cross-checked worker's Social Security numbers with employer identification numbers

269 Ibid., 5-6.

270 Julia L. Hotchkiss and Myriam Quispe-Agnoli, "The Labor Market Experience and Impact of Undocumented Workers" (working paper 2008-7c, Federal Reserve Bank of Atlanta, June 2008): 23-7, 40, 43, A1, www.frbatlanta.org/filelegacydocs/wp0807c.pdf. The differential equaled -23.2 percent over all industries, -20.9 percent in the construction industry, and -15.9 percent in the leisure and hospitality industry.

271 J. David Brown et al., "Undocumented Worker Employment and Firm Survival," 13, 20-2, 26, 30. The study also found that: (1) larger firms are more likely to employ at least one unauthorized worker, but that the average size of firms employing unauthorized person has come down over time; (2) multi-establishment firms are more likely to employ unauthorized workers, with the exception of construction, financial services, and other services; (3) firms in all sectors, with the exception of transportation and utilities, are more likely to employ undocumented workers if they experience greater workforce churning or turnover; (4) firms are more likely to employ unauthorized workers if their competitors do; and (5) firms in broad product markets are less likely to employ unauthorized workers.

272 Ibid., 22, 31-2, 35-6.

273 Julie L. Hotchkiss and Myriam Quispe-Agnoli, "Employer Monopsony Power in the Labor Market for Undocumented Workers" (working paper 2009-14a, Federal Reserve Bank of Atlanta, June 2009), www.frbatlanta.org/filelegacydocs/wp0914a.pdf.

274 The study treats the use of Social Security numbers (SSN) within one employer as referring to the same person, but the use of the same SSN across employers as referring to different workers. It assumes that Individual Taxpayer Identification Numbers (ITIN) are used by the same employee over multiple employers.

to ensure that it was observing the same person within an employer. It assumed that Social Security numbers (which matched ITIN number schemes) could identify a worker across multiple employers. It also assumed that a worker had separated if his or her Social Security number disappeared from the employer's file for four consecutive quarters.

The study found unauthorized workers less likely than authorized workers to leave their jobs due to wage reductions. In the 1995 to 2000 sample, a 1 percent decrease in wages led to a .49 percent reduction in unauthorized workers, versus .57 percent for authorized workers.[275] Unauthorized workers in the lowest quartile were least likely to separate (.085 percent) compared with authorized workers (.13 percent). In each NAICS sector, except the construction and leisure and hospitality sectors, unauthorized workers were less likely to separate.[276] In the 1997 to 2000 sample (unauthorized workers with ITIN numbers), a 1 percent decrease in wages increased separation by .62 percent of documented and .475 percent of unauthorized workers.[277]

The question arises whether the results of these studies can be applied beyond Georgia. Among US states, Georgia's immigrant population experienced the second highest percent growth from 1990 to 2000 (233 percent, representing a 404,147-person increase) and again from 2000 to 2008 (58 percent, and a 333,200-person increase).[278] Like many states in the southeastern United States, Georgia relies almost entirely on the federal government to enforce labor standards. The state devotes modest resources to child labor violations, but it does not have a state wage-and-hour division and its minimum wage falls below the federal level.[279]

In combination, these facts — Georgia's rapidly growing immigrant population, the relatively recent entry of high numbers of immigrants into its workforce, and its lack of a robust labor standards enforcement regime — may make the state's unauthorized workers less able to leave their jobs and more vulnerable to labor standards violations than unauthorized workers in other states. However, this dynamic also applies in other new immigrant gateway states.

Appendix F. OSHA Data Collection and Challenges in Identifying Problem Employers

The challenge of effective data collection and the identification of industries that violate safety and health standards at high rates have been underscored in a recent GAO report on OSHA. The Bureau of Labor Statistics (BLS), the principal federal agency in the field of labor economics and statistics, produces an annual Survey of Occupational Injuries and Illnesses (SOII). The survey draws on data from employer logs at 241,000 worksites.[280] OSH Act and USDOL regulations require select employers to record all work-related injuries and illnesses requiring medical treatment beyond first aid.[281] This requirement applies to 17 percent of private-sector worksites. It does not apply to worksites with fewer than 11 employees or those that OSHA has exempted due to their historically low rates of work-related injuries and illnesses.[282] In addition, it does not cover state or local government employees or the self-employed.[283]

SOII relies on employer-reported injury and illness data, which BLS does not verify.[284] However, BLS

275 Hotchkiss and Quispe-Agnoli, "Employer Monopsony Power," 18.
276 Ibid., 20. These exceptions may be due to the abundant job opportunities in these sectors during the years studied.
277 Ibid., 33.
278 Migration Policy Institute, Data Hub, "Georgia: Social and Demographic Characteristics," www.migrationinformation.org/datahub/state.cfm?ID=GA.
279 GAO, *Workplace Safety and Health: Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data* (Washington, DC: GAO, 2009): 5, www.gao.gov/new.items/d1010.pdf.
280 GAO, *Workplace Safety and Health: Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data* (Washington, DC: GAO, 2009): 5, www.gao.gov/new.items/d1010.pdf.
281 Ibid., 4.
282 Ibid
283 Ibid., 15.
284 Ibid., 11.

recently added data on state and local government workers to the SOII and has adopted some quality assurance measures.[285]

Under the OSHA Data Initiative (ODI), the agency collects employer-reported data from roughly 80,000 of 130,000 worksites with 40 or more workers in high hazard industries. The 130,000 worksites include manufacturing and 22 other high-hazard industries, as determined by injury/illness rates from the BLS's SOII report. OSHA uses ODI data to target employers for enforcement actions, outreach, and technical assistance, as well as to measure its success in reducing workplace injuries and illnesses.[286] OSHA and some state-plan states annually audit the records of a representative sample of 250 ODI worksites to verify the accuracy of employer-recorded data.

In October 2009, GAO issued a report on OSHA's efforts to verify the accuracy of employer records on worker illnesses and injuries. GAO interviewed OSHA and BLS officials and nongovernmental stakeholders and surveyed 1,187 occupational health practitioners. It concluded that the accuracy of employer-recorded injury and illness data was compromised by disincentives that keep workers from reporting work-related injuries and illnesses and that discourage employers from recording them.[287]

Two-thirds of the health practitioners interviewed had witnessed employees that did not report injuries and illnesses due to their fear of disciplinary actions.[288] Certain employers, in turn, did not record injuries due to concerns that their workers' compensation costs would increase, and that their ability to compete for contracts would be compromised.[289] More than one-third of health practitioners reported being asked by company officials or workers not to provide treatment that would result in an injury or illness being recorded.[290]

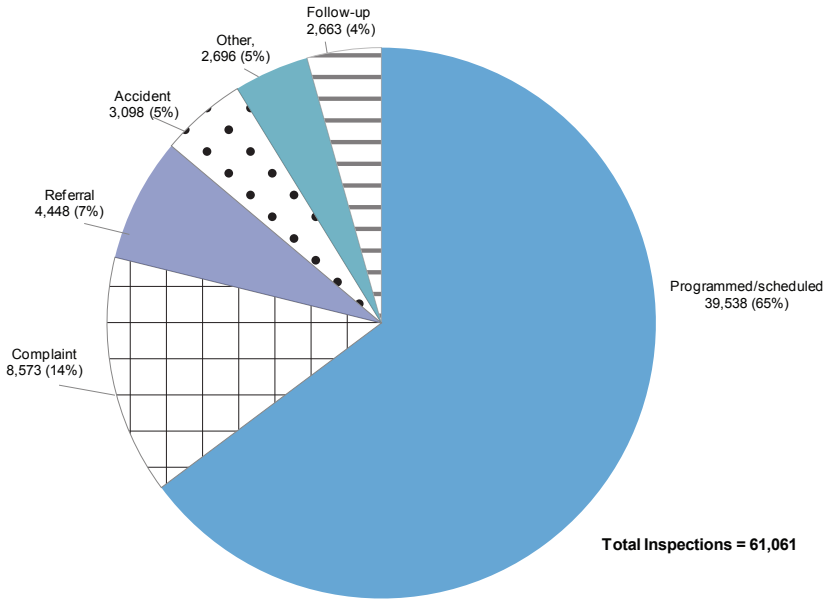
OSHA performs scheduled and unscheduled inspections of employers with the highest numbers of worksite injuries and illnesses. It conducts unscheduled inspections, which it views as more effective, in response to fatalities, formal complaints, referrals, and other situations that threaten safety and health. [291] Its programmed inspections include high-hazard injuries selected by its Site-Specific Targeting program.[292] Between FY 2003 and FY 2007, OSHA conducted roughly 40,000 inspections per year, 59 percent of them programmed and 41 percent unscheduled.[293] As Figure F-1 indicates, state-plan states conducted 61,016 investigations in 2009, a higher percentage of which (65 percent) were programmed.

GAO found OSHA audits of ODI worksite records to be inadequate. First, OSHA inspectors were not required to interview workers about injuries and illnesses. Between 2003 and 2005, it interviewed workers in only about one-half of the audits.[294] In addition, records audits typically took place more than two years after injuries and illnesses occurred when many injured workers were no longer employed. Finally, OSHA had not reviewed the injury and illness records for worksites in eight high-hazard industries because it had not updated its list of high-hazard industries in the ODI (using the most recent BLS SOII data) since 2002.[295] The eight industries were steam and air-conditioning supply; coastal and

285 Ibid., 16.
286 Ibid., 8.
287 Ibid., 17.
288 Ibid.
289 Ibid., 18.
290 Ibid., 19.
291 Ibid., 4.
292 Ibid., 4-5.
293 Ibid., 5.
294 Ibid., 12.
295 Ibid., 24. OSHA is required to use an injury classification system, the Standard Industrial Classification (SIC), to report injury and illness rates. It differs from the North American Industry Classification System (NAICS), which is used by BLS. OSHA agreed to pursue a rule to use the NAICS system, which would ensure that its records audits cover emerging high-risk industries. In addition, in 2002 OSHA switched the criteria it uses to measure injuries/illnesses from "lost workday injury and illness rates" (LWDII) to "days away from work, restricted activity, or job transfer" (DART). OSHA needs to identify DART rates that are comparable to its 2002 LWDII rate.

Great Lakes freight transportation; truck, utility trailer, and recreational vehicle rental and leasing; general rental centers; amusement parks and arcades; skiing facilities; linen supply; and industrial launderers.[296]

Figure F-1. Compliance Inspections Performed by State-Plan States, FY 2009



Source: Occupational Safety & Health State Plan Association (OSHSPA), *Grassroots Worker Protection, 2010 OSHSPA Report, State plan activities of the Occupational Safety and Health State Plan Association* (Washington, DC: OSHPA, 2010), www.osha.gov/dcsp/osp/oshspa/grass2010.pdf.

GAO recommended that OSHA update its list of high-hazard industries and adopt a formal policy on how and when to update the industries included in the ODI.[297] Its FY 2011 budget includes $1 million to support a recordkeeping initiative that promotes accurate recording of injuries and illnesses by employers.[298]

As the GAO report indicates, OSHA should adopt protocols for testing and verifying employer-recorded data. These protocols should include worksite investigations and timely interviews with injured and ill workers. It should also update its list of high-hazard injuries and target these industries for records audits, inspections, and other enforcement actions. It should also adopt a formal policy on how and when to update the industries included in its data initiative.

296 Ibid., 14.
297 Ibid., 13, 23.
298 USDOL, "FY 2011, Congressional Budget Justification, Occupational Safety and Health Administration," 15.

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