

U.S. Department of Labor

Office of Inspector General—Office of Audit

**REPORT TO THE WAGE AND HOUR
DIVISION**



**COVID-19: WHD NEEDS TO CLOSELY
MONITOR THE PANDEMIC IMPACT ON
ITS OPERATIONS**

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BRIEFLY...

COVID-19: WHD NEEDS TO CLOSELY MONITOR THE PANDEMIC IMPACT ON ITS OPERATIONS

August 07, 2020

WHY OIG CONDUCTED THE AUDIT

On March 18, 2020, Congress passed the Families First Coronavirus Response Act (FFCRA) in response to the COVID-19 pandemic to ensure American workers would not be forced to choose between their paychecks and the public health measures needed to combat the virus.

As part of Phase 1 of the OIG's Pandemic Oversight Response Plan, this report presents the results of our audit of the Wage and Hour Division's (WHD) initial response to the pandemic.

WHAT OIG DID

We conducted a performance audit to answer the following question:

To what extent has COVID-19 affected WHD's ability to implement its FFCRA responsibilities and conduct investigations, and what plans and guidance has WHD developed to address challenges encountered?

To answer this question, we conducted interviews with agency officials and reviewed the FFCRA, the temporary rule resulting from it, guidance and training documents, addendum to the agency operating plan, and WHD data.

READ THE FULL REPORT

<http://www.oig.dol.gov/public/reports/oa/2020/19-20-009-15-001.pdf>

WHAT OIG FOUND

Even though WHD acted quickly after Congress passed the FFCRA by issuing guidance, training staff, and conducting oversight, the agency continues to face challenges as it implements and enforces the requirements of the FFCRA.

One challenge is conducting enforcement activities while maximizing telework and maintaining social distancing. WHD's efforts should help control the spread of COVID-19. However, reduced or eliminated on-site investigations is impacting WHD's oversight of the FFCRA, as well as its existing programs, most notably those related to the Fair Labor Standards Act (FLSA).

Another major challenge is ensuring appropriate eligibility for FFCRA's emergency paid leave benefits. The Department issued a temporary rule with a broader definition for health care providers than the definition established by the Family and Medical Leave Act of 1993. The definition expands the types of occupations potentially exempt from FFCRA benefits. Additionally, the temporary rule includes an estimate of 9 million health care providers potentially impacted by the exemptions. The estimate provided to the public and other stakeholders could be understated because it does not include all the occupations in the Department's expanded definition for health care provider.

We also found WHD did develop a COVID-19 specific addendum for its operating plan. However, it focuses on past efforts and does not sufficiently address the agency's planned future actions, including how it intends to use the additional \$2.5 million it received in CARES Act funding to fulfill its obligations under the FFCRA.

WHAT OIG RECOMMENDED

The OIG made recommendations to WHD on how to improve its FFCRA-related strategies to plan and operate more effectively. WHD agreed with our recommendations.

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INSPECTOR GENERAL'S REPORT

Cheryl Stanton
Administrator
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U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

This report presents the results of the Office of Inspector General's (OIG) audit of Wage and Hour Division's (WHD) plan for the implementation, enforcement, and oversight of the Families First Coronavirus Response Act (FFCRA). It also raises key areas of concern with WHD's implementation and enforcement of the FFCRA.

Congress passed the FFCRA on March 18, 2020, in response to the COVID-19 pandemic, to ensure American workers would not be forced to choose between their paychecks and the public health measures needed to combat the virus. The FFCRA, which will expire on December 31, 2020, created two new emergency paid leave requirements:

- The Emergency Paid Sick Leave Act (EPSLA) requires employers to provide 2 weeks (up to 80 hours) paid sick leave to employees who are unable to work (or telework) because of one of six qualifying reasons. (Refer to Exhibit 1 for details.)
- The Emergency Family and Medical Leave Expansion Act (EFMLEA) requires employers to provide up to an additional 10 weeks of expanded paid family and medical leave to employees who are unable to work due to caring for a child whose school or place of care is closed, or whose childcare provider is unavailable as a result of COVID-19 precautionary measures. (Refer to Exhibit 1 for details.)

As part of our efforts towards Phase 1 of the OIG's Pandemic Oversight Response Plan, we conducted this audit to answer the following question:

To what extent has COVID-19 affected WHD's ability to implement its FFCRA responsibilities and conduct investigations, and what plans and guidance has WHD developed to address challenges encountered?

To answer this question, we conducted interviews with WHD officials and reviewed the FFCRA, the Department's resulting temporary rule, WHD's guidance and training documents, the FY 2020 WHD Operating Plan: COVID-19 Addendum, and WHD's enforcement data.

We found that WHD acted quickly by issuing multiple guidance documents to its stakeholders within days of Congress passing the FFCRA. WHD performed training for its enforcement staff and adjusted its operations in preparation for the additional workload anticipated from the new law. However, we identified challenges that have an impact on WHD's operations, specifically issues related to conducting enforcement with maximized telework in place and required social distancing; broadening the definition exempting health care providers; and, not addressing future FFCRA-related activities in the agency's existing operating plan.

RESULTS

Even though WHD acted quickly after Congress passed the FFCRA by issuing guidance, training staff, and conducting oversight, the agency continues to face challenges as it implements and enforces the requirements of the FFCRA.

One challenge is conducting enforcement activities while maximizing telework and maintaining social distancing. WHD's efforts should help control the spread of COVID-19. However, reduced or eliminated on-site investigations is impacting WHD's oversight of the FFCRA, as well as its existing programs, most notably those related to the Fair Labor Standards Act (FLSA).

Another major challenge is ensuring that all those who are eligible for FFCRA's emergency paid leave benefits are able to take advantage of those benefits. The Department, in conjunction with the agency, issued a temporary rule with a broader definition for health care providers than established by the Family and Medical Leave Act of 1993 (FMLA). The definition expands the types of occupations that might be exempt from FFCRA benefits options. Additionally, the temporary rule includes an estimate of 9 million health care providers impacted by the exemptions. The estimate provided to the public and other stakeholders

could be understated because it did not include all of the occupations in the Department's expanded definition for health care providers.

Finally, we found WHD did develop a COVID-19 specific addendum for its operating plan. However, it focuses on past efforts and does not sufficiently address the agency's planned future actions. This includes not accounting for how it intends to use the additional \$2.5 million it received in CARES Act funding to fulfill its obligations under the FFCRA.

Additional details on WHD's actions to implement the FFCRA are provided in Exhibit 2.

REDUCED OR ELIMINATED ON-SITE INVESTIGATIONS

WHD faces challenges in conducting investigations due to COVID-19 related restrictions. For the safety and health of WHD employees, the agency transitioned to telephone-only contact with the public and maximized its telework policy. This impacts WHD's oversight of the FFCRA, as well as its existing programs, most notably those related to the Fair Labor Standards Act (FLSA).

WHD generally conducts four types of compliance actions:

- Conciliations – Limited to the correction of minor violations consisting of a single issue affecting only one or a few employees and does not require any fact-finding. The focus is on seeking a timely resolution between the employer and the complainant with minimal enforcement time expended.
- Office Audits – Some fact-finding conducted, such as employee interviews and a review of records, but the investigator does not visit the establishment. Normally, the employer produces any requested records either electronically or in hard copy. Initial and final conferences are conducted either at the WHD office or remotely via telephone or video conference.
- Limited Investigations – Fact-finding is conducted on-site, such as the initial conference, employee interviews, review of records, etc. A limited investigation is narrow in scope, such as to a specific employee or department, employment practice, timeframe, or section of a specific Act, such as the FLSA.

- Full Investigations – Fact-finding is conducted on-site and the investigator examines all aspects of the employer’s compliance with a specific Act, such as the FFCRA, in regards to all of the employees at the establishment for the entire period that the law has been applicable to the employer, subject to the law’s statute of limitations.

According to WHD, the agency is reducing most on-site activities. Most cases are initiated by complaints, with the most significant warranting limited or full on-site investigations. The agency is performing investigations on-site only for complaints affecting the health and safety of workers. To increase social distancing, WHD is generally performing conciliations, typically used to address minor violations, instead of limited or full on-site investigations. WHD is also conducting some limited and full investigations remotely. WHD officials acknowledged conducting investigations remotely could impact efficiency due to communicating and receiving documents and records via email and having to conduct telephone interviews with employers and workers.

This reduction of limited or full on-site investigations is impacting WHD’s oversight of the FFCRA, as well as its existing programs, most notably those related to the FLSA. Table 1 shows the types of compliance actions performed since the FFCRA was passed on March 18, 2020.

Table 1: FFCRA and FLSA Cases (March 18, 2020 – May 26, 2020)¹

Type of Compliance Action	FFCRA	Percentage	FLSA ²	Percentage
Conciliations	892	85.0%	1394	52.2%
Office Audits	154	14.6%	760	28.5%
Limited Investigations	4	0.4%	173	6.5%
Full Investigations	0	0%	343	12.8%
Total	1,050	100%	2,670	100%

Source: OIG analysis based on WHD data.

As shown in Table 1, 19.3 percent of the FLSA cases during the period were limited or full on-site investigations. In comparison, between October 1, 2019 and March 17, 2020, 53.5 percent of the FLSA cases were limited or full on-site investigations, i.e., a reduction of 34.2 percent in the two months that followed.

WHD officials also said social distancing restrictions are hindering the agency’s ability to initiate certain investigations and complete some on-going investigations, as follows:

- Remote action is not always feasible and the agency will have to delay some investigations until restrictions are lifted and investigators are able to travel to conduct their work on-site. In these situations, WHD needs to maintain a backlog of delayed on-site investigations and develop a plan to manage the backlog once full operations resume.
- Agency-initiated investigations are being reduced. Agency-initiated investigations target employers based on internal risk assessments. They are critical to ensuring compliance in high-priority industries.

¹ Table includes FFCRA and FLSA ongoing cases. Per WHD, based on the facts of the cases, compliance actions may be converted to another type of compliance action before the conclusion of cases.

² The FLSA cases exclude 12 self-audit. Self-audits include an employer reviewing WHD’s compliance materials, auditing their pay practices and agreeing to correct the pay practices at issue going forward.

The reductions are significant. For example, 799 agency-initiated investigations were initiated in April 2019 compared to 213 in April 2020, a reduction of 73 percent. As a result, WHD had to revise its related performance goal since the agency would be unable to meet the goal.

- Business closures are impeding the agency’s ability to complete investigations and secure back pay owed to workers. According to WHD, the closures affected a number of priority industries where WHD concentrates the majority of its investigative work, such as restaurants, day care facilities, and hotels. WHD stated it is planning an increase in notifications to workers of their right to back wages related to business closures.

Fewer on-site investigations are being performed and some investigations are not being initiated or completed. Despite these challenges, WHD did not discuss in the addendum to its operating plan how COVID-19 restrictions and the agency’s workload directly impacted its enforcement activities. With business closures and widespread economic uncertainty, it is imperative for WHD to know how this will affect its enforcement actions, especially the FLSA, so the agency can strategically plan for optimal coverage on its high-risk programs.

WHD’s operating plan is discussed in more detail on page 9.

**WHD’S HEALTH CARE PROVIDER
DEFINITION IS BROADER THAN THE
DEFINITION ESTABLISHED BY THE FAMILY
AND MEDICAL LEAVE ACT**

Another major challenge is ensuring that all those who are eligible for FFCRA’s emergency paid leave benefits are able to take advantage of those benefits. The Department, in conjunction with the agency, posted a temporary rule on April 1, 2020, with a broader definition of health care providers than established by the FMLA. The definition includes a broad set of occupations that might be exempt from FFCRA benefits.³ Additionally, the temporary rule includes an estimate of 9 million health care providers impacted by the exemptions. This estimate may

³ The broad definition of health care provider set forth in the Temporary Rule resulted in the New York Attorney General filing a lawsuit against DOL. On August 3, 2020, the United States District Court for the Southern District of New York issued its decision holding that the definition was overly broad. DOL is assessing its legal options in response to the decision.

understate those impacted because it does not include all the occupations in the Department’s definition for health care providers.

The FFCRA grants the Secretary of Labor the authority to issue regulations, as necessary, to carry out the purposes of the FFCRA. Both the EFMLEA and the EPSLA grant authority to the Secretary of Labor to exclude certain health care providers from the definition of eligible employees. However, while granting DOL this authority, the EPSLA specifically states that the term “health care provider” has the meaning given that term in Section 101 of the FMLA. The FMLA defines health care providers as “(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (B) any other person determined by the Secretary to be capable of providing health care services.” The regulations implementing FMLA further emphasize that health care providers refers to those who are “authorized to diagnose and treat physical or mental health conditions.”

The Department’s temporary rule to execute the purposes of the FFCRA significantly broadened the definition of health care providers whom an employer might exempt from the FFCRA’s requirements as opposed to the original definition established by the FMLA. The Department explained in the temporary rule that the FMLA’s definition is used when determining if an employee has a qualified reason to use paid sick leave. For example, one qualified reason to receive EPSLA benefits is if the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

However, in the preamble to the temporary rule, the Department explained that the reference to health care providers in the FFCRA as those employees who could be determined exempt from the benefits of either the EPSLA or the EFMLEA should have a broader definition and should include “any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency.” Specifically, for purposes of exempting an employee from leave under either the EFMLEA or the EPSLA, the Department in its temporary rule defined a “health care provider” as:

. . . anyone employed at any doctor’s office, hospital, healthcare center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

(ii) This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

This broadened definition of health care providers has led to not only various stakeholder groups communicating concerns to the Department, but also a formal lawsuit alleging that the Department exceeded its authority under the FFCRA when defining health care providers in such broad terms. On April 14, 2020, the Attorney General for the State of New York filed a legal challenge. Among other issues, the Attorney General claimed that by including large classes of otherwise eligible health care workers in the definition of the term "health care provider," the Department's temporary rule denied them FFCRA's paid leave benefits, and this conflicts with the legislative action's intended purpose and plain language requirements of the FFCRA.

Stakeholder arguments that the temporary rule definition is overly broad address at least two distinct reasons:

- First, the definition is in direct conflict with the text of the FFCRA. The FFCRA directly states: "[a]n employer of an employee who is a health care provider or emergency responder may elect to exclude such employee" from eligibility for the EFMLEA or the EPSLA. Furthermore, although, the Secretary of Labor has the authority to issue regulations "to exclude certain health care providers and emergency responders from the definition of employee," the FFCRA is silent as to limiting the coverage of employers who are health care providers. The granting of authority is with respect to defining eligible employees, not covered employers.
- Second, as it relates to the EPSLA, the Department has exceeded its authority because the EPSLA specifically states that the definition of health care provider is that which is contained in the original FMLA, which is a much narrower definition.

Additionally, the temporary rule includes an estimate of 9 million health care providers potentially impacted by the exemptions. The Department further noted that its estimate is likely to be the maximum possible number of exempt health care industry workers since it could include workers who may not be employed at an institution covered by the exemption. With 9 million individuals working in

environments where they are most vulnerable to COVID-19 exposure and yet may be excluded from the emergency leave provisions of the FFCRA, we found the estimate might be an understated figure.

The Department derived the 9 million total using the 2017 Annual Data Table by Establishment Industry from census data on statistics of U.S. businesses. According to that data, employers with fewer than 500 employees⁴ in the health care and social assistance industry employ approximately 9 million workers. However, as acknowledged by WHD, this 9 million does not include employees who may provide services to the health care industry which are covered by the Department's definition. The Department's expanded definition for health care providers includes anyone employed at:

- Any doctor's office, hospital, healthcare center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider;
- Any facility that performs laboratory or medical testing, pharmacy, or any similar institution;
- Any facility involved in research, development, and production of equipment, drugs, vaccines, and other items needed to combat the pandemic; and,
- Any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

In the FY 2020 WHD Operating Plan: COVID-19 Addendum, WHD acknowledged the lawsuit and that it would be addressed in court while the agency simultaneously ensures paid leave for workers. However, WHD did not mention how the legal challenge might affect the agency or the 9 million plus workers who could be denied paid emergency leave during the pandemic. As noted, the court has now issued its decision holding that the definition is overly broad. In response to the court decision DOL is assessing its legal options.

⁴ The FFCRA only applies to employers with fewer than 500 employees.

WHD'S UPDATES TO ITS OPERATING PLAN LACKED DETAILS ON FUTURE FFCRA EFFORTS

Although WHD acted quickly to implement its FFCRA responsibilities, the agency did not finalize its FY 2020 WHD Operating Plan: COVID-19 Addendum until the end of May 2020, which was over two months after the FFCRA was signed. The FY 2020 WHD Operating Plan: COVID-19 Addendum focuses more on what the agency has already accomplished rather than thinking proactively and describing how it will continue to ensure FFCRA compliance while still maintaining enforcement coverage for the FLSA. Despite receiving an additional \$2.5 million from the CARES Act to implement and enforce the FFCRA, WHD did not address in the addendum how the agency intends to use the funding.

In its FY 2020 WHD Operating Plan: COVID-19 Addendum, WHD indicated the agency will have FFCRA-related work to do well past the FFCRA's expiration date, and developed three performance measures related to its FFCRA oversight:

- Percent of FFCRA conciliations concluded in 15 calendar days
- Number of outreach events involving the FFCRA
- Percent of public calls answered live

However, WHD did not provide any goals or details in the addendum on how the agency plans to conduct its work in these areas. In addition, there are no requirements for WHD to track and report FFCRA-related activities. With the predicted surge of COVID-19 cases nationwide in upcoming months as more Americans return to work and as a consequence, an anticipated increase in complaint call volume to WHD, it would be expedient of the agency to devise a detailed plan as to how it intends to address this issue.

WHD has established an FFCRA workgroup to oversee components of its FFCRA efforts such as education and outreach. The internal group consists of representatives with expertise in areas such as policy, compliance, communications, enforcement, training, and data analytics. The workgroup's primary objective is to provide field support as WHD's staff work towards educating communities impacted by COVID-19. WHD has not included in the COVID-19 related addendum details on how this workgroup will assist with the unique needs of the agency.

Also, the addendum to the operating plan does not address the various scenarios of how WHD will return to operations when social distancing rules are lifted or when the need for FFCRA-related activities decrease, increase, or fluctuate.

Under the CARES Act, WHD received an additional \$2.5 million on June 18, 2020, to enforce worker protection laws and regulations, and to oversee and coordinate FFCRA-related activities. WHD officials explained that the agency had utilized preexisting funds to cover all the upfront work it had conducted for the FFCRA and the agency would use the \$2.5 million from the CARES Act for future activities. There is no mention of this in the FY 2020 WHD Operating Plan: COVID-19 Addendum and therefore, no insight as to how the agency plans to leverage these funds to carry out its FFCRA responsibilities.

While the agency has notably addressed its ability to be agile in response to COVID-19, having more forward-looking updates to its operating plan will better position WHD for future circumstances regarding the pandemic and decrease the chances of resources being misdirected or misused.

OIG'S RECOMMENDATIONS

The OIG recommends that the Administrator for Wage and Hour Division:

1. Develop a plan to monitor the effectiveness of the agency's oversight of the FFCRA and the FLSA programs so that the agency can identify if or when operational adjustments are necessary to most effectively utilize resources.
2. Maintain a backlog of delayed on-site investigations and develop a plan to manage the backlog once normal operations resume.
3. Determine the impact of the decision issued by the United States District Court for the Southern District of New York to the agency and its mission; and take appropriate action to address its impact.
4. Update its COVID-19 operating plan addendum regarding the agency's oversight of the FFCRA to include:
 - a. Specific performance goals;
 - b. Agency plans to use the \$2.5 million received from the CARES Act;
 - c. Enforcement and outreach plans for the FFCRA once COVID-19 restrictions are lifted; and,
 - d. Enforcement plans for the FFCRA after it expires on December 31, 2020.

SUMMARY OF WHD'S RESPONSE

WHD agreed with our recommendations. WHD's response discusses the efforts the agency has already taken and continues to implement the recommendations during the COVID-19 pandemic. WHD's written response to our draft report is included in its entirety in Appendix B.

We appreciate the cooperation and courtesies WHD extended us during this audit. OIG personnel who made major contributions to this report are listed in Appendix C.



Elliot P. Lewis
Assistant Inspector General for Audit

EXHIBIT 1: FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The FFCRA created two new paid sick leave requirements: The Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA).

The EPSLA requires employers to provide paid sick leave benefits to employees unable to work (or telework) due to one of the following qualifying reasons:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in reason 1 above or has been advised as described in reason 2 above.
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The EPSLA requires employers to provide two weeks (up to 80 hours) paid sick leave at 100 percent of the employee's pay, up to \$511 per day and \$5,110 in the aggregate, to employees requesting leave for qualifying reasons 1-3. It requires employers to provide paid sick leave at 2/3 the employee's regular rate of pay, up to \$200 per day and \$2,000 in the aggregate, to employees requesting leave for qualifying reasons 4-6.

The EFMLEA requires employers to provide up to an additional 10 weeks of expanded paid family and medical leave at 2/3 the employee's regular rate of pay, up to \$200 per day and \$10,000 in the aggregate, to employees who are unable to work due to qualifying reason 5 above.

EXHIBIT 2: WHD'S FFCRA ACTIVITIES

WHD prioritized its FFCRA-related activities and began executing its responsibilities soon after the FFCRA was signed. Congress passed the FFCRA on March 18, 2020, and on April 1, 2020, the Department, in conjunction with WHD, issued a temporary rule to implement public health emergency paid leave under the FFCRA. WHD also issued multiple FFCRA guidance using various methods of communication such as WHD's website, interviews on media outlets, social media postings, and webinars. Some were issued prior to the temporary rule.

In addition to educating the public, WHD provided FFCRA training to its own enforcement staff. The agency performed multiple training webinars at different times to ensure that all WHD staff were able to attend and developed training materials such as complaint intake guides, conference guides, and interview worksheets. WHD also updated its policies and instructed staff to prioritize FFCRA cases.

A large part of WHD's FFCRA efforts focused on customer service. According to WHD, between October 1, 2019, and February 28, 2020, the agency received an average of 2,300 calls per day from the public compared to 9,000 calls in just one day during the COVID-19 pandemic. WHD revamped its operations making the following changes to deal with an increase in expected workload related to the FFCRA:

- Reassigned staff to handle the expected influx of FFCRA-related calls and adjusted schedules to accommodate peak times to enable live answering of phone calls.
- Set up Virtual Call Centers to enable live answering of calls while adhering to social distancing guidelines.
- Set up a public email account for FFCRA-related questions.
- Accelerated the hiring of new staff to facilitate in processing back wage payments.

In addition, WHD performed over 500 FFCRA-related outreach events, ranging from webinars to telephone calls, and conducted approximately 1,000 FFCRA cases.⁵

Media reports indicate WHD has performed oversight with some success. For example, on May 21, 2020, DOL secured \$1,000 in back wages for a school

⁵ WHD provided data, which included enforcement actions through May 26, 2020.

employee who needed to spend five weeks at home caring for her children whose school closed due to the coronavirus. The district stated they were unfamiliar with the law but would fully comply and pay the employee. In another report on May 12, 2020, DOL secured \$3,017 in back wages for a truck driver denied emergency paid sick leave while experiencing coronavirus symptoms and seeking a medical diagnosis.

APPENDIX A: SCOPE, METHODOLOGY, & CRITERIA

SCOPE

This audit covered WHD's plan to implement and enforce the FFCRA and respond to challenges presented by the COVID-19 pandemic.

METHODOLOGY

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

To achieve our objectives, we conducted interviews with WHD officials and reviewed the FFCRA and CARES Act. In addition, we reviewed the Department's resulting temporary rule, the guidance WHD issued and published on its website, training documents the agency provided to its staff, lawsuit documents, and the FY 2020 WHD Operating Plan: COVID-19 Addendum. We reviewed the agency's FFCRA enforcement data as well as its data for the other labor laws that WHD enforced for the current fiscal year through May 26, 2020.

INTERNAL CONTROLS

In planning and performing our audit, we considered WHD's internal controls relevant to our audit objective by obtaining an understanding of those controls and assessing control risks for the purpose of achieving our objective. The objective of our audit was not to provide assurance of the internal control; therefore, we did not express an opinion on WHD's internal controls. Our consideration of internal controls related to WHD's response to the COVID-19 pandemic would not necessarily disclose all matters that might be significant deficiencies. Because of the inherent limitations on internal controls, or misstatements, noncompliance may occur and not be detected.

CRITERIA

- 29 U.S.C. § 201, Fair Labor Standards Act of 1938
- 29 U.S.C. § 2601, Family and Medical Leave Act of 1993

- 29 CFR Part 826, Paid Leave Under the Families First Coronavirus Response Act
- Coronavirus Aid, Relief, and Economic Security Act, Public Law 116-136, March 27, 2020
- Families First Coronavirus Response Act, Public Law 116-127, March 18, 2020

APPENDIX B: AGENCY'S RESPONSE TO THE REPORT

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210



July 20, 2020

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: CHERYL M. STANTON *Cheryl M. Stanton*
Administrator, Wage and Hour Division

SUBJECT: Response to the Office of the Inspector General's Draft Report:
COVID-19: WHD Needs to Closely Monitor the Pandemic Impact
on its Operations

The Wage and Hour Division ("WHD") appreciates the opportunity to respond to the July 14, 2020 draft report of the Office of Inspector General ("OIG") titled *COVID-19: WHD Needs to Closely Monitor the Pandemic Impact on its Operations*. The report provides four recommendations, and WHD's responses to these recommendations are set forth below.

While WHD agrees with the recommendations presented in the report, it is important to restate the context of the overall findings. As the report acknowledges, WHD responded quickly after Congress passed the Families First Coronavirus Response Act (FFCRA) by issuing guidance and training to all staff at the national and field levels, conducted public webinars for employers and employees, established and launched a COVID-19 and the American Workplace public website. In these unprecedented times, WHD's priority remains and will continue to be that of the American workforce.

Recommendation 1: Develop a plan to monitor the effectiveness of the agency's oversight of the FFCRA and the FLSA programs so that the agency can identify if or when operational adjustments are necessary to most effectively utilize resources.

Response: WHD agrees with this recommendation and has developed a robust, flexible infrastructure for closely monitoring the FFCRA and FLSA programs, including system-wide impacts from the pandemic. Through sustained, frequent communications; evolving cross-functional teams; and comprehensive data reporting, WHD is well-positioned to adapt to changes in the regulated community as a result of the pandemic. WHD continues to refine and improve custom data reports and visualizations supporting effective and efficient case management in the field. Case inventory reports ensure all levels of management receive up-to-date information in order to adjust strategies and resources as needed. WHD is closely monitoring time spent across enforcement activities and the level of resources dedicated to delivering responsive customer service. WHD is adjusting resources based on peak call times and trends in order to determine optimal staff levels to maintain exceptional customer service.

WHD established cross-functional workgroups to mitigate and manage the impacts of

COVID-19 on operations, enforcement, and outreach activities as well as to implement responsibilities under the FFCRA. WHD is also leveraging these experiences to develop and advance promising practices around the use of technology and coordinated national responses. For example, WHD is developing and sharing models for conducting virtual investigations, supplemented complaint intake guidance to prioritize FFCRA case actions, and issued special guidance to ensure consistency in enforcement. WHD has identified and is managing FFCRA-related risks as part of the DOL enterprise risk management program. WHD has emphasized data-driven decision-making, coordination across offices, and flexibility to effectively respond to this rapidly changing environment. WHD leadership regularly issues updates to guidance internally and externally based on emerging trends and performance analysis. Consistent with this recommendation, WHD will continue building upon these systems and infrastructure moving forward.

Recommendation 2: Maintain a backlog of delayed on-site investigations and develop a plan to manage the backlog once full operations resume.

Response: WHD agrees with this recommendation and is leveraging existing case management systems, which already track case backlogs. WHD is able to monitor impacts to the case inventory through measures on case hours and status. Due to the widespread and unprecedented impact of the pandemic, WHD is monitoring the potential effects on all cases, rather than narrowly defining a subset tied to FFCRA. WHD has remained fully operational and sustained enforcement activity throughout the pandemic response. Resources were re-aligned to meet the emerging priorities, for example responding to an unprecedented call volume. WHD began pivoting planned enforcement strategies to account for impacts to local economies. As local conditions permit, WHD will strategically prioritize on-site enforcement, while also applying lessons learned from virtual investigations. Consistent with current case management practices, WHD reviews a range of data reports to support management of case backlogs, such as the case inventory report, and will continue to timely address near-and long-term impacts on case backlogs.

Recommendation 3: Identify the potential impact of the New York Attorney General’s lawsuit to the agency and its mission; and *if needed*, take appropriate action to mitigate its impact.

Response: WHD will administer and enforce the rule according to the current health care provider definition unless and until the court vacates the regulation; if that occurs, WHD will assess its legal obligations and options.

Recommendation 4: Update its COVID-19 operating plan addendum regarding the agency’s oversight of the FFCRA to include:

- a. Specific performance goals;
- b. Agency plans to use the \$2.5 million received from the CARES Act;
- c. Enforce outreach plans for the FFCRA once COVID-19 restrictions are lifted; and,
- d. Enforce outreach plans for the FFCRA after it expires on December 31, 2020.

Response: WHD agrees with the recommendation and will clarify the agency’s approach to each of the above identified areas. WHD established performance measures in the FY 2020 COVID-19 Operating Plan addendum that will be baselined for the remainder of FY 2020 and monitored moving forward. Given the need for flexibility and the short-term nature of the program, WHD does not intend to establish annual targets for these measures and will rely on a proven mix of data analytics, cross-functional teams, and continuous communication to ensure effective and efficient case management. WHD has incorporated FFCRA related goals into the existing performance framework and will continue developing supplemental plans and reports consistent with DOL and government-wide guidance. The additional resources from the CARES Act were incorporated into the agency’s spending plan. WHD submitted a plan to the Departmental Budget Center stating that the funds will be used for enforcement, IT system modification, rulemaking, training, and public awareness outreach.

WHD is committed to maintaining the visibility of FFCRA among the public and stakeholders. Following an unprecedented rulemaking effort and customer service response, WHD has moved to implement a widespread FFCRA public awareness campaign, including Public Service Announcements. WHD is encouraging creative, expanded approaches to outreach, including virtual events and innovations in how the agency disseminates compliance assistance materials. Similar to enforcement, WHD will maintain these efforts even as COVID-19 restrictions are lifted throughout the country. After the FFCRA expires on December 31, 2020, WHD will transition resources from educational outreach efforts toward ensuring ongoing enforcement actions are resolved. Progress will be monitored as part of the agency’s performance framework, including the Department-wide enterprise risk management system.

Thank you again for the opportunity to comment on this report.

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