

Testimony of  
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**The H-2B Guestworker Program and Improving The Department of Labor's  
Enforcement of the Rights of Guestworkers.**

**Domestic Policy Subcommittee  
Oversight and Government Reform Committee  
United States House of Representatives  
Thursday April 23, 2009  
10 am in Rayburn House Office Building 2154**

My name is Cathy Ruckelshaus, and I am the Legal Co-Director of the National Employment Law Project (NELP), a non-profit organization that promotes access to and keeping good jobs for low-income workers. I submit my testimony today to urge that we redirect the Wage and Hour Division (WHD) of the United States Department of Labor (DOL) back to its roots, and reinvigorate its commitment to workers' rights, paying special attention to the barriers to enforcement faced by low-wage and immigrant guestworkers in this country.

In the last half of my twenty years of working with low-wage workers and advocates around the country, we have lost a partner in the DOL. Once a potent ally when it intervened to crack down on sub-par jobs, DOL has become at best a nonentity and at worst a pariah in low-wage workers' worlds. It was not always so. During the Clinton years and before, DOL initiated affirmative and strategic programs aimed at combating the worst workplace abuses, and tracked its impact on working people. With the new Administration and the Secretary of Labor's assertion of support for workers' rights, I am hopeful that the WHD will once again resume that role.

For the third time in less than a year, the U.S. Government Accountability Office (GAO) reports that protections guaranteed by the wage-and-hour laws are non-existent for many low-wage workers in this country, due in large part to failings of the DOL in recent years. In testimony to the House Education and Labor Committee last month, the GAO announced the results of its undercover investigation into the DOL's enforcement of wage and hour protections for these workers, and the news is disturbing.<sup>1</sup>

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<sup>1</sup> U.S. Government Accountability Office, *Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low-Wage Workers Vulnerable to Wage Theft*, GAO-09-458T, March 25, 2009.

## **Introduction and Summary of Recommendations.**

Labor-intensive jobs in our increasingly dominant service sectors have long been fertile terrain for employers bent on cheating workers of their wages, but now the nose-diving economy is impelling even more firms into desperate cost-cutting modes. Some employers simply don't pay their workers. Others use schemes that obstruct enforcement, like calling employees "independent contractors," inserting fly-by-night subcontractors, and using payrolling or leasing companies in an attempt to shield themselves from liability and confuse the workers. Some employers seek out and hire guestworkers and undocumented workers, knowing they will not complain of underpayments. Competing firms feel pressured to adopt similar practices to stay in the game. As the recent GAO undercover investigation reveals, there's very little risk that these employers will be held accountable.

Guestworkers are "Exhibit A" in the thick of these trends, and face extra barriers to enforcing their rights to fair pay and safe working conditions because of their indebtedness to, and reliance for work status and often housing on the sponsoring employer.

This is bad for workers and their families -- and for the economy. Without a solid wage floor and strong wage protections, our janitorial, hospitality, retail, home health care, restaurant and construction jobs will not boost the economy in any way.

Last summer, the GAO issued two reports lambasting DOL's WHD for its abject failure in the preceding years to enforce basic minimum wage, overtime, and child labor rules. One of these reports was a devastating set of case studies, highlighting the agency's failure to pursue worker complaints and its utter disregard for deadlines and employer evasions. Now we learn that with its report to be released in May, GAO will document that those most vulnerable to underpayment of wages -- low wage workers -- found little solace at the Department of Labor.

Thankfully, though, the tide is turning, with the new Secretary of Labor, Hilda Solis, declaring at her swearing-in ceremony, "there's a new sheriff in town!" Secretary Solis has emphatically stressed that enforcing our wage and hour laws is a top priority, and President Obama's 2010 budget proposes the first real increase in Wage and Hour Division funding in nearly a decade. Secretary Solis has already taken a strong stand in favor of guestworkers by rescinding some of the more punitive new regulations issued by the Bush Administration under the H2A guestworker program.

Meanwhile, during a period of relative inaction at the federal level, several state labor departments and related agencies picked up the mantle and enacted innovative enforcement strategies aimed at the most persistent sweatshops, including those found in guestworker sectors, like agriculture, hospitality, and construction. Community workers centers and unions often joined these efforts, providing the "eyes and ears" for the agencies, and in some cases bringing lawsuits against scofflaw employers. In janitorial and construction jobs, creative labor-management partnerships resulted in employer-

funded efforts to ensure wage compliance by all firms, by leveraging enforcement by state agencies and private actors.

This kind of redundancy in enforcement brings needed reinforcement to law-abiding firms in industries that have operated with impunity for too long. And these public and private initiatives provide solid models for reinvigorated federal enforcement.

But there is much to do. The newly re-energized DOL should use the full array of tools and penalties at its disposal to crack down on problem industries, repeat violators, companies that brazenly abuse our guestworker programs, and firms that perpetrate "independent contractor" scams costing the government billions each year in tax theft. Congress can aid this effort by fully funding the Administration's 2010 budget request for DOL, urging it to reform its enforcement policies to ensure enhanced compliance, and enacting common-sense improvements to the Fair Labor Standards Act that will better enable workers to pursue their legal remedies.

Any comprehensive immigration reform proposals must include robust labor standards enforcement for all workers, to take away perverse economic incentives to seek out and exploit foreign labor, and to shore up the wage floor for all workers in this country.

At times like these, when workers are at their most vulnerable and economic pressures create incentives to cut corners among even the best of employers, it is critical that the Department aggressively embrace and advance its mission of promoting opportunities for all workers, including guestworkers. That means making sure that law-breaking employers fear the DOL as much as an IRS audit. When that happens, the wage floor will mean something to low-wage workers, their families, and our economy.

## **I. Guestworkers: Low-Wage Workers with Much to Fear.**

For more than seventy years, our country has permitted U.S.-based employers to recruit and hire temporary foreign workers to labor in certain jobs in the U.S. Other immigrants migrate here without work authorization, and work in low-paying and dangerous jobs as undocumented workers. Both sets of workers face barriers to enforcing their legal rights to be paid minimum wage and overtime and to other workplace-based protections.

Guestworkers often face abuse before they ever leave home at the hands of labor contractors and recruiters. These intermediaries can impose significant recruitment fees and high interest rates on loans as a condition to entry into the job-applicant pool in the foreign country.<sup>2</sup>

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<sup>2</sup> Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (2007), available at <http://www.splcenter.org/legal/guestreport/index.jsp>.

Once arriving in the United States, employers' promises of steady work at lucrative wages frequently go unmet, with many workers kept idle or stranded here. Guestworkers are not entitled to unemployment compensation or Social Security benefits, and any workers' compensation benefits flowing from an injury at work are often cut off when they return to their home countries.

Guestworkers are reluctant to seek remedies for their illegal working conditions for a number of reasons. Because a guestworker is only allowed to work for the employer who sponsors the work visa, if an employer decides to fire a complaining worker, that worker loses the right to remain in the United States. Moreover, as with many low-wage workers, the threat of reprisals keeps guestworkers from complaining. Our labor standards complaint-driven system means that rampant violations go unheard.

Further, there is frequently no one to complain to: U.S. DOL until recently took the position that it cannot legally enforce the contractual rights of H2B guestworkers; this may change. Private non-profit and for-profit lawyers cannot meet the need and sometimes will not take the case if the damages are too low. Many legal services organizations are not permitted to represent guestworkers under explicit restrictions in the federal Legal Services Corporation Act.

In sum, guestworkers face the same labor standards enforcement barriers that other U.S. workers do, plus some. Guestworkers are dependent on the employer for both housing and employment, are isolated by language and geography, and sometimes kept working by the implicit or explicit threat of deportation. Because many guestworker programs prohibit employees from taking their work visa to another job, employers have control of workers' immigration status. Employer exploitation and lack of accountability of the employers' recruiters and subcontractors put workers in extremely vulnerable situations.

## **II. Holding up the Wage Floor for Workers and Their Families**

### **A. No Minimum Wage Floor in Too Many Jobs**

In the bottom half of our economy, almost every growing sector—health care, child care, retail, building services, construction and hospitality—is plagued by bad jobs. In addition to providing paltry benefits, if any, employers in these sectors routinely violate bedrock employment rights like the right to be paid fully for work and the right to a safe workplace.

Recent government and private studies show many of our fastest-growing service jobs have appalling minimum wage and overtime compliance rates:<sup>3</sup>

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<sup>3</sup> For more statistics and information on the numbers of workers in the growing job sectors, see NELP, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* (2006), [http://nelp.3cdn.net/95b39fc0a12a8d8a34\\_iwm6bhbv2.pdf](http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf).

- A majority of restaurants in New York City are out of compliance;<sup>4</sup>
- 60% of nursing homes are out of compliance;<sup>5</sup>
- Poultry processing has a 100% noncompliance rate;<sup>6</sup>
- Garment manufacturing has a 50% noncompliance rate.<sup>7</sup>

Additionally, in many sectors, including construction and day labor, employers misclassify employees as “independent contractors,” to avoid responsibilities under labor standards laws. If an employer is successful in characterizing an employee as an “independent contractor,” the worker has no rights to labor and employment protections, including the right to be paid the minimum wage and overtime or the right to form a union.<sup>8</sup> Jobs where independent contractor abuses are common routinely violate basic fair pay and other workplace rules.<sup>9</sup>

What does all of this mean? It means we have an underclass of hard-working men and women who cannot make ends meet for their families. In 2004, 7.8 million people in our country were classified as “working poor,” working at least twenty-seven hours a week but still making below the federal poverty level.<sup>10</sup> Two million workers make at or below the minimum wage, according to the Bureau of Labor Statistics, and the Urban Institute found that 2.2 million immigrant workers make less than the minimum wage.<sup>11</sup> The employer-backed Employer Policy Foundation estimated that workers would receive an additional \$19 billion annually if employers obeyed workplace laws.<sup>12</sup>

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<sup>4</sup> Restaurant Opportunities Center of New York and New York City Restaurant Industry Coalition, *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry*, p. 2, Jan. 25, 2005.

<sup>5</sup> Employment Standards Administration, U.S. Department of Labor, *Nursing Home 2000 Compliance Fact Sheet*, available at <http://www.dol.gov/esa/healthcare/surveys/nursing2000.htm>

<sup>6</sup> U.S. Department of Labor, *FY 2000 Poultry Processing Compliance Report* (2000).

<sup>7</sup> Bureau of National Affairs, Daily Labor Report 87 (May 6, 1996) U.S. Department of Labor, *Labor Department: Close to Half of Garment Contractors Violating Fair Labor Standards Act*.

<sup>8</sup> See Testimony of Catherine K. Ruckelshaus, National Employment Law Project, before the House Committee on Education and Labor, Subcommittee on Workforce Protections, March 27, 2007, available at <http://edlabor.house.gov/testimony/032707CatherineRuckelshaustestimony.pdf>

<sup>9</sup> *Id.*

<sup>10</sup> Bureau of Labor Statistics, U.S. Department of Labor, *A Profile of the Working Poor, 2004* (2006), available at <http://www.bls.gov/cps/cpswp2004.pdf>.

<sup>11</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Characteristics of Minimum Wage Workers: 2002*, Aug. 8, 2003; Randolph Capps, Michael E. Fix, Jeffrey S. Passel, Jason Ost, & Dan Perez-Lopez, *Profile of Low-Wage Immigrant Workforce*, Urban Institute, Oct. 27, 2003.

<sup>12</sup> Suzanne M. Crampton and Jitendra N. Mishra, FLSA and Overtime Pay, 32 Public Personnel Mgmt., 331 (2003), available at [www.findarticles.com/p/articles/mi\\_qa3779/is\\_200310/ai\\_n9309306](http://www.findarticles.com/p/articles/mi_qa3779/is_200310/ai_n9309306).

Our economy is hurt, too, by rampant workplace violations. Sub-par wages below even the minimum wage fail to drive our economy, and independent contractor abuses result in billions of dollars in lost tax and payroll revenues for our federal and state governments.<sup>13</sup>

## **B. U.S. DOL Has Failed to Enforce its Laws.**

A lack of a strong public enforcement presence on workplace standards has certainly contributed to these dismal conditions. But even in the face of persistent and seemingly intractable sub-par jobs that have persisted for years, the DOL has not made it a priority to stem these abuses. Three GAO reports in the last year alone make this point.

The WHD enforces many laws, including the Fair Labor Standards Act (FLSA), which sets the minimum wage and overtime rules, prohibits retaliation against complaining workers, and restricts child labor.<sup>14</sup> WHD also enforces the Davis-Bacon Act and Service Contract Act, the Family & Medical Leave Act and the Migrant and Seasonal Agricultural Worker Protection Act, among others.

The GAO found that over 130 million workers are covered under labor laws enforced by the WHD.<sup>15</sup> DOL has 5 regional offices, 74 district and field offices with approximately 730 investigators in the summer 2008.<sup>16</sup> While public agencies are by their nature underfunded and understaffed, DOL has been particularly under-subsidized in recent years. In addition, it has failed to use its resources strategically, as it has in the past, to have the broadest impact.

From 1975-2004, the budget for DOL Wage and Hour investigators decreased by 14% (to a total of only 788 individuals nationwide), and enforcement actions decreased by 36%, while the number of businesses covered by wage and hour law increased from

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<sup>13</sup> See Testimony of Catherine K. Ruckelshaus, National Employment Law Project, before the House Committee on Education and Labor, Subcommittee on Workforce Protections, March 27, 2007, available at <http://edlabor.house.gov/testimony/032707CatherineRuckelshaustestimony.pdf> (citing a 2000 national study commissioned by the DOL showing decreased unemployment tax receipts by \$200 million over the period 1990-1998, and state studies in NY and MA finding that noncompliance with payroll tax laws resulted in losses as large as \$1 billion each year in NY workers compensation taxes, and annual losses of up to \$278 million in uncollected income taxes, unemployment insurance taxes, and worker's compensation premiums in MA).

<sup>14</sup> 29 U.S.C. 201 *et seq.*

<sup>15</sup> U.S. GAO, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, GAO-08-962T, July 15, 2008.

<sup>16</sup> GAO-08-962T at 6. The WHD was just allotted approximately \$21 million in additional stimulus provisions, providing a much-needed boost, but these positions are for wage determinations and Davis-Bacon enforcement related to the infrastructure investments in the Recovery Act .

7.8 million to 8.3 million.<sup>17</sup> The GAO's 2008 report found that from 1997-2007, the number of WHD enforcement actions decreased by more than a third.<sup>18</sup>

WHD has focused its attention on employer compliance and education over the last eight years,<sup>19</sup> and has deemphasized audits and affirmative investigations. DOL's wage and hour law enforcement is nearly wholly conducted based on worker complaints, and low-wage and immigrant workers face serious barriers to enforcement.<sup>20</sup> In 2001, WHD conducted as many as 55% of its investigations by fax or phone, even though it is five times more likely to find violations of recordkeeping requirements when it visits a workplace.<sup>21</sup> Workers are afraid to come forward to complain.<sup>22</sup> Workers fear retaliation (including termination) by their employers, which may cause them to quietly accept substandard conditions.<sup>23</sup>

Undocumented workers and guestworkers are particularly vulnerable to workplace abuse, discrimination, and exploitation as well as the fear of being turned over to immigration authorities.<sup>24</sup> Recent ICE raids on workplaces with pending workplace violation investigations creates confusion and fear among workers, and sends a message that the U.S. government will enforce immigration laws against workers, but not labor standards laws against employers.<sup>25</sup>

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<sup>17</sup> Annete Bernhardt and Siobhan McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004* (September 2003).

<sup>18</sup> GAO-08-962T, at p. 1.

<sup>19</sup> See, e.g. DOL Officials Travel to Provide Compliance Assistance on New Overtime Rules, <http://www.dol.gov/opa/media/press/esa/ESA20041081.htm>

<sup>20</sup> For example, in 2004, 74% of all WHD enforcement was from worker complaints. David Weil and Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, Comp. 27 Labor Law & Policy Journal 59, 60 (2006).

<sup>21</sup> United States General Accounting Office (GAO), *Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance*, GAO 02-925, September 2002, at p. 18-19.

<sup>22</sup> The GAO observed in a report on day labor in the U.S. that government agencies are unable to do their job with respect to day laborers because they do not find out about violations. U.S. General Accounting Office, *Worker Protection: Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance*, GAO 02-925, 14 (September 2002).

<sup>23</sup> See, e.g. *Mitchell v. Robert de Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1058-59 (N.D. Cal. 1998).

<sup>24</sup> See, e.g. *Rivera v. NIBCO*, 364 F.3d 1057, 1064 (9th Cir. 2004), cert. denied, 125 S.Ct. 1603 (2005).

<sup>25</sup> See The Oregonian, *Fresh Del Monte Subject of Worker Safety Probes*, June 13, 2007 (describing an ICE raid on a Del Monte plant that had two pending OSHA investigations underway, where workers were rounded up and detained.) [http://blog.oregonlive.com/business/2007/06/fresh\\_del\\_monte\\_subject\\_of\\_wor.html](http://blog.oregonlive.com/business/2007/06/fresh_del_monte_subject_of_wor.html). For

Unions are an important protective buffer for workers seeking to improve their jobs, and a lack of union presence in the workplace causes workplace standards to decline.<sup>26</sup> Ninety percent of workers in this country are unrepresented by a union, even though most workers (57%) would vote for a union if an election was held at their worksite.<sup>27</sup>

### C. GAO Reports Paint a Dire Picture

Last July, the GAO issued two reports, delivering a one-two punch to the WHD's enforcement practices, depicting an agency that was almost wholly ineffective.<sup>28</sup>

Last month's GAO's testimony describes its follow-up undercover work, where GAO sent individuals posing as aggrieved employees and violating employers to the WHD over an eight-month period.<sup>29</sup> The testimony described delays in investigating complaints, a failure to record complaints in the WHD database, a failure to use enforcement tools, and a general failure to follow-up with workers and non-responsive employers.

In particular, the GAO reports found that:

- Half of the complaints GAO representatives filed with USDOL field offices were never recorded in the WHD database at all, and some were not recorded until and unless the conciliation with the employer was successful,<sup>30</sup>

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a catalogue of recent ICE raids connected to labor standards enforcement, *see* National Employment Law Project, [The Politics of Immigration: Has ICE Abandoned Its Practice of Staying Out of Labor Disputes?](http://thepoliticsofimmigration.blogspot.com/2008/09/has-ice-abandoned-its-practice-of.html), available at: <http://thepoliticsofimmigration.blogspot.com/2008/09/has-ice-abandoned-its-practice-of.html>.

<sup>26</sup> *See e.g.* David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. REL. 21, 22 (1) (Winter 1991); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 362 and *passim* (describing the important role unions play in monitoring worksite conditions in today's era of "chronic under enforcement" of workplace standards) (March 2005).

<sup>27</sup> *See* Frank Swoboda, *Labor Unions See Membership Gains*, Washington Post, p. E2, January 20, 2000; Peter D. Hart Research Associates, *The Public View of Unions* (2005).

<sup>28</sup> *Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, GAO-08-962T, July 15, 2008, and *Case Studies from Ongoing Work Show Examples in Which Wage and Hour Division Did not Adequately Pursue Labor Violations*, GAO-08-973T, July 15, 2008.

<sup>29</sup> GAO, *Department of Labor: Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft*, GAO-09-458T, March 25, 2009.

<sup>30</sup> GAO-09-458T, at p. 8-9; GAO-08-962T at 14.

- The WHD's database did not have information on basic details of complaints, including amount of back wages claimed, and DOL does not require all complaints to be recorded, making it impossible to determine how effective it is;<sup>31</sup>
- DOL often changed how it measured its progress, making it impossible to determine its effectiveness;<sup>32</sup>
- DOL failed to use available information and tools, including external collaboration with groups, to inform its planning and enforcement strategies;<sup>33</sup>
- DOL failed to pursue liquidated damages and penalties in its investigations;<sup>34</sup>
- DOL failed to pursue claims further after the employer refused to pay admitted monies due;
- DOL failed to follow-up with employees to make sure they got paid when the employer promised to pay. In some cases, the employee never got paid, but the DOL logged the complaint in as having been resolved;
- DOL's complaint procedures were confusing and difficult, with voicemail-only available in 76% of the calls, and no voicemail at all in 2 of the offices;
- Potential claimants were screened out at the initial call phase, and discouraged from filing a complaint, sometimes getting wrong information about their employer's coverage;<sup>35</sup>
- Delays were common; some as long as 6 months. This is particularly troubling because the statute of limitations is running and the workers are losing potential backpay while the investigation is ongoing.<sup>36</sup>

When the risk of enforcement is small, systemic violations of wage and hour laws become the norm in these sectors, and sweatshop conditions prevail.<sup>37</sup>

### III. A DOL Renaissance.

When the DOL does enforce its workplace laws, it makes a difference in the wage levels of more than just the workplaces it chooses to target.<sup>38</sup> Workplace enforcement of basic fair pay laws should be at a level to send a message that America will not

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<sup>31</sup> GAO-09-962T at 11, 14.

<sup>32</sup> GAO-08-962T at 1.

<sup>33</sup> GAO-08-962T at 1.

<sup>34</sup> GAO-08-962T at 11.

<sup>35</sup> *Id.* At p. 10.

<sup>36</sup> *Shandelman v. Schuman*, 92 F.Supp. 334 (E.D. Pa. 1950); GAO-09-458T at 23.

<sup>37</sup> David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & LAB. REL. REV. No. 2, 238-257 (January 2005).

<sup>38</sup> See David Weil, *Compliance with the Minimum Wage: Can Government Make a Difference?*, May 2004.

tolerate non-payment and underpayment for work, and that all workers should feel free to come forward.

While the list of possible DOL reforms is long, in this testimony I emphasize strategies that have been done before, either at DOL itself, or at innovative state departments of labor.<sup>39</sup>

**A. Administration & Organization of WHD Enforcement.**

1. Provide WHD with more resources for its enforcement efforts.
2. Use new resources – stimulus funds, increased budget, and future resources – to recruit new investigators, including those with a commitment to worker protection; experience in law enforcement; language skills, and cultural proficiency.
3. Make the WHD investigation process more transparent, provide workers with clear information about the status of their claims, their right to bring a private action, and attorney referrals.
4. Provide information to workers regarding the statute of limitations for making formal wage complaints. *See* GAO-09-458T at 23.
5. Keep detailed data on incoming complaints and their resolution, including wages and hours claimed by each worker, regardless of whether DOL “takes the case,” and keep data on results obtained by DOL, in case of enforcement. *See* GAO-09-458T at 18. In addition, establish metrics for success, and report regularly on results.
6. Designate staff to act as liaisons to immigrant worker groups to build relationships with the department, like the New York State DOL’s Bureau of Immigrant Workers’ Rights.

**B. WHD Enforcement Discretion and Strategic Initiatives**

1. Proactively target and investigate employers in high-violation industries to send a strong signal across the labor market that employment and labor laws will be vigorously enforced. DOL has done this in the past, with initiatives in garment, agriculture, health care, and other low-wage jobs. In its *1999-2000 Report on Initiatives*, the DOL’s WHD outlined a comprehensive compliance strategy for collecting data and ensuring future compliance.<sup>40</sup> DOL also launched a “No Sweat” Campaign, for which DOL had more

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<sup>39</sup> For a broader list of proposed DOL reforms, *see* NELP, *Rebuilding a Good Jobs Economy: A Blueprint for Recovery and Reform* (November 2008), available at: [http://www.nelp.org/page/-/Federal/NELP\\_federal\\_agenda.pdf?nocdn=1](http://www.nelp.org/page/-/Federal/NELP_federal_agenda.pdf?nocdn=1)

<sup>40</sup> U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, *1999-2000 Report on Initiatives*. (hereafter “1999-2000 DOL Report”) *See* attached report in Word format.

than 100 garment firms sign its Compliance Monitoring Agreement, and it developed partnerships with community groups.<sup>41</sup> It also launched health care<sup>42</sup> and “Salad Bowl”<sup>43</sup> initiatives.

2. Seek all remedies available to address workers’ claims – including liquidated damages and civil money penalties. See GAO-08-962T at 17.
3. Hold subcontracting employers (joint employers) accountable for wage-and-hour violations of their subcontractors.<sup>44</sup>
4. Identify employers who misclassify workers as independent contractors or pay them off-the-books, and hold them accountable for employment law violations.
5. Use the agency’s authority to pursue immediate and emergency injunctive relief in situations where complaining workers are fired or otherwise subject to retaliation.
6. Make better use of hot goods remedies to further strengthen subcontractor accountability.

### **C. Coordination with Workers’ Advocates and Other Partners.**

1. Consult and partner with community groups, worker centers, unions, state departments of labor, and other worker advocacy organizations to leverage their expertise and relationships with workers and to target proactive enforcement resources – perhaps through a formal task force.<sup>45</sup> See GAO-08-962T at 114, 18.
2. Create a regional Gulf Coast task force, and perhaps task forces in other regions of the country with little or no public enforcement partners, including those states in the southeastern U.S. with no state minimum wage acts. See GAO-08-962T at 15.
3. Institute an inter-agency enforcement task force, combining workplace standards oversight with the IRS and state department of labor analogs, as several states have implemented in independent contractor reforms, including MA, OH, NY and IL.

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<sup>41</sup> [http://www.dol.gov/wb/info\\_about\\_wb/sub2000.pdf](http://www.dol.gov/wb/info_about_wb/sub2000.pdf)

<sup>42</sup> <http://www.dol.gov/esa/media/press/esa/esa98185.htm>

<sup>43</sup> <http://www.dol.gov/opa/media/press/esa/archive/esa99073.htm>

<sup>44</sup> See, e.g. DOL Report on agricultural initiatives, including FYI 1998 strategy to vigorously apply the joint employment standard under the AWPA and the FLSA (1998), [http://www.dol.gov/wb/info\\_about\\_wb/sub2000.pdf](http://www.dol.gov/wb/info_about_wb/sub2000.pdf).

<sup>45</sup> One example of this is the Employment Education and Outreach (EMPLEO) partnership. EMPLEO is an alliance of organizations and government agencies that assist Spanish-speaking workers and employers with work-related concerns in California.

4. Promote private enforcement of wage-and-hour laws by partnering with private attorneys and groups with the capacity to bring litigation – especially around well-chosen strategic cases on contested issues.
5. Set up private attorney referral lists for workers needing private counsel.

#### **D. Strengthening Worker Protections**

1. Strengthen policies and procedures to protect workers asserting their rights under wage and hour laws from retaliation – whether such retaliation is employment- or immigration-related.
2. Reinforce the firewall between the USDOL and the Department of Homeland Security / ICE.<sup>46</sup>
3. Clarify that FLSA recordkeeping requirements apply to independent contractors and enhance damages for employers who misclassify workers as non-employees.<sup>47</sup>
4. Toll the statute of limitations for all similarly-situated employees as of the date an investigation is opened (through an employee complaint or proactive investigation). GAO-09-458T at 23.
5. Amend the FLSA to permit class actions, so complaining workers are protected from virulent employer retaliation.

#### **Conclusion**

Immigrant guestworkers are among the most vulnerable workers in our society. Our nation's immigration system permits employers to sponsor them when necessary, and it is incumbent upon us, for policy and humane reasons, to treat them with the respect and dignity they deserve. The U.S. Department of Labor is the frontline agency charged with ensuring that fair pay standards are met for all workers, and it must step in to fulfill its charge. With the community and state partners across the country ready to work with the DOL, we can make our country's jobs good jobs again.

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<sup>46</sup> See U.S. Department of Labor, *Memorandum of Understanding*, <http://www.dol.gov/esa/whatsnew/whd/mou/nov98mou.htm>.

<sup>47</sup> *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 33, 35. Legislation has been introduced to amend the FLSA's recordkeeping rules to require employers to keep records of independent contractors. See, e.g., Woolsey-Andrews bill.