

U.S. Department of Labor

Office of Inspector General—Office of Audit

REPORT TO THE WAGE AND HOUR DIVISION



COVID-19: THE PANDEMIC HIGHLIGHTED THE NEED TO STRENGTHEN WAGE AND HOUR DIVISION'S ENFORCEMENT CONTROLS

DATE ISSUED: SEPTEMBER 30, 2021
REPORT NUMBER: 19-21-008-15-001



BRIEFLY...

COVID-19: THE PANDEMIC HIGHLIGHTED THE NEED TO STRENGTHEN WAGE AND HOUR DIVISION'S ENFORCEMENT CONTROLS

September 30, 2021

WHY OIG CONDUCTED THE AUDIT

In January 2020, the Secretary for Health and Human Services declared a nationwide public health emergency in response to COVID-19. Since then, millions of Americans contracted COVID-19 and many public schools and child care facilities closed temporarily, leaving parents without child care to work. In response, Congress passed the Families First Coronavirus Response Act (FFCRA) to ensure American workers would not be forced to choose between their paychecks and the public health measures needed to combat the virus.

Wage and Hour Division (WHD) was responsible for implementing and enforcing the new law, while also making critical operational decisions during the COVID-19 pandemic. As part of the OIG's Pandemic Oversight Response Plan, this report presents the results of our audit of the WHD's enforcement of the paid leave provisions of the FFCRA.

WHAT OIG DID

We conducted a performance audit to answer the following question:

Has WHD implemented effective controls for enforcing its FFCRA paid leave compliance?

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

READ THE FULL REPORT

<https://www.oig.dol.gov/public/reports/oa/2021/19-21-008-15-001.pdf>

WHAT OIG FOUND

WHD implemented controls for enforcing FFCRA paid leave compliance. However, we found that these controls could be strengthened.

WHD relied on incoming complaints to enforce FFCRA paid leave. The agency does not require staff to document all incoming complaints and did not implement additional complaint handling controls specific to the FFCRA. As a result, WHD cannot ensure the agency took proper action on all FFCRA complaints, and could have turned away employees whose employers violated their right to obtain paid leave benefits through the FFCRA. Because WHD incorporated the FFCRA into its existing processes, these control deficiencies also apply to non-FFCRA labor laws enforced by the agency.

In addition, WHD did not ensure FFCRA complainants received the leave payments they were owed. WHD also did not have a method for analyzing trends regarding conciliation outcomes or a conciliation performance measure to determine if WHD was meeting agency objectives. As a result, WHD cannot determine how effective the agency was at securing FFCRA payments for workers when using conciliations.

Lastly, we found WHD continued to experience enforcement challenges such as increasing the amount of remote investigations and limiting direct investigations of other labor laws, such as the Fair Labor Standards Act (FLSA), due to COVID restrictions.

WHAT OIG RECOMMENDED

While the paid leave provisions of the FFCRA are no longer in effect, WHD should address the control weaknesses we identified in its complaints and conciliation processes for the other enforcement programs. We made five recommendations to the Acting Administrator of WHD. WHD generally agreed with our recommendations and indicated the agency has already taken action to implement some recommendations.

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INSPECTOR GENERAL'S REPORT

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This report presents the results of the Office of Inspector General's (OIG) audit of Wage and Hour Division's (WHD) enforcement of the paid leave provisions of the Families First Coronavirus Response Act (FFCRA). It also raises key areas of concern with WHD's enforcement of other labor laws.

In a prior audit, we identified challenges as WHD implemented and enforced the paid leave requirements of the FFCRA, such as conducting enforcement activities (e.g., investigations), while maximizing telework, maintaining social distancing, and ensuring appropriate eligibility for FFCRA's emergency paid leave benefits. We also found that WHD's COVID-19 operating plan did not address planned future actions related to its COVID-19 response.

With approximately 60 million employees in the U.S. covered by the FFCRA's paid leave provisions and 22 million COVID cases in the working aged population, WHD must have reasonable assurance they effectively enforced FFCRA paid leave compliance and did its part to ensure the safety of workers in the U.S.

We conducted this performance audit to answer the question:

Has WHD implemented effective controls for enforcing FFCRA paid leave compliance?

To answer this question, we conducted interviews with WHD officials, surveyed WHD's Regional and District Office Managers, and reviewed WHD's policies, procedures, and enforcement data.

We found WHD did have existing controls that the agency used when enforcing FFCRA paid leave compliance; however, these existing controls were not always effective when enforcing the paid leave provisions of the FFCRA and could have been stronger. WHD implemented FFCRA paid leave enforcement strategies using its existing framework without fully considering the difference between the FFCRA paid leave and other labor laws or pandemic related organizational changes. WHD did not require staff to document all incoming inquiries and did not implement controls to ensure the proper handling of all complaints. Also, WHD did not ensure FFCRA complainants received the back wages they were owed. While the paid leave provisions of the FFCRA are no longer in effect, WHD should address the control weaknesses we identified in its complaint intake and conciliation processes for the other enforcement programs.

BACKGROUND

To help the U.S. slow the spread of COVID-19, in March 2020, Congress passed the FFCRA. The FFCRA provided paid leave benefits to workers for specified reasons related to COVID-19. These portions of the legislation were meant to ensure workers were not forced to choose between their paychecks and the public health measures needed to combat the virus; at the same time, other provisions of the FFCRA provided for tax credits reimbursing businesses for the costs of providing this required paid leave. The FFCRA's paid leave requirements applied to private employers with fewer than 500 employees, as well as most public employers.

The FFCRA created two new emergency paid leave requirements, which were in effect from April 1 to December 31, 2020:

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

On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which appropriated \$15 million to DOL to prevent, prepare for, and respond to coronavirus, including enforcing worker protection laws and regulations, of which, WHD received \$2.5 million.

RESULTS

WHD did implement controls for enforcing FFCRA paid leave compliance, but these controls could be strengthened. WHD relied on incoming complaints to enforce FFCRA paid leave. While WHD worked to prioritize customer service, revamping its operations to deal with an increased call volume related to the FFCRA and answering most calls live, the agency did not require staff to document all incoming complaints and did not implement additional complaint handling controls specific to the FFCRA. As a result, WHD cannot ensure the agency took proper action on all FFCRA complaints, and could have turned away employees whose employers violated their right to obtain paid leave benefits through the FFCRA. Because WHD incorporated the FFCRA into its existing processes, these control deficiencies also apply to the non-FFCRA labor laws the agency enforces.

In addition, WHD did not ensure FFCRA complainants received the leave payments they were owed¹. By not always requiring staff to follow up with complainants, WHD did not verify payments were made. In addition, WHD did not have a method for analyzing trends regarding conciliation² outcomes or a conciliation performance measure to determine if WHD was meeting agency objectives. As a result, WHD cannot determine how effective the agency was at securing FFCRA payments for workers when using conciliations. WHD has increasingly used conciliations to enforce non-FFCRA labor laws. However, WHD's current conciliation policy makes it difficult for WHD to adequately assess the effectiveness of conducting conciliations in its enforcement of other labor laws as well.

Lastly, we found WHD continued to experience enforcement challenges such as increasing the amount of remote investigations and limiting directed investigations of other labor laws, such as the Fair Labor Standards Act (FLSA),

¹According to WHD, FFCRA conciliations and investigations could have led to back wages paid to the employee, the employer approving future paid leave, avoidance of retaliatory conduct, or reinstating a worker improperly fired.

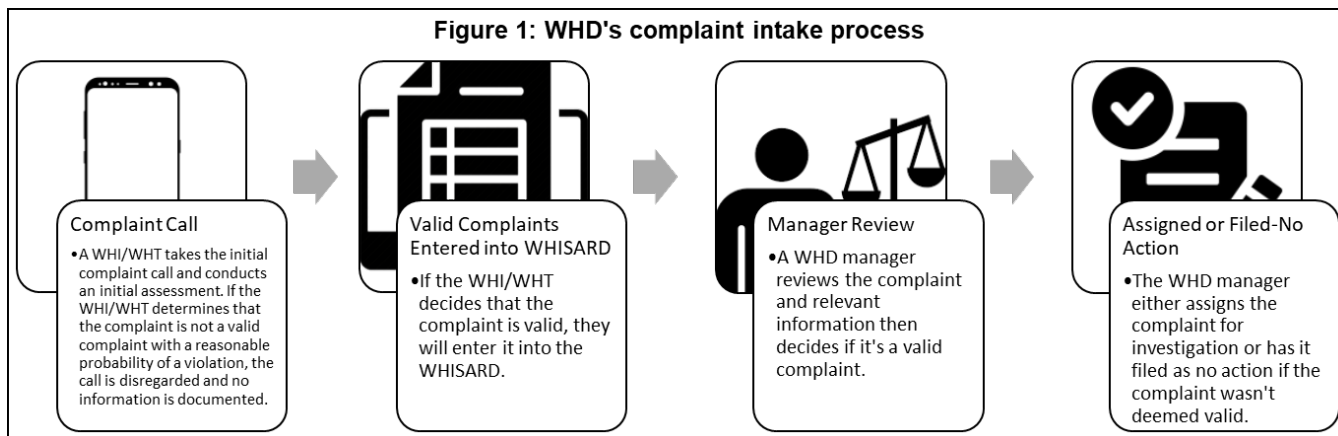
² WHD's policies defined a conciliation as an enforcement action limited to the correction of minor violations consisting of a single issue affecting only one or a few employees that does not require any fact-finding.

due to COVID restrictions. With the uncertainty of the pandemic, we recognize that the WHD needs to maintain a balance to fulfill their mission and to value the safety of their workers.

WHD DID NOT ENSURE ALL FFCRA COMPLAINTS WERE PROPERLY HANDLED

Although WHD had controls in place to ensure the agency took timely action on FFCRA complaints, WHD's controls were not sufficient to ensure the agency took the proper action for all complaints. If WHD staff who handled complaint calls determined the complaint did not meet its complaint requirements, WHD protocols instructed staff not to record any information from the call. Although WHD's policy is to record all valid complaints with a reasonable probability of a violation, WHD could not ensure that all these complaints were actually invalid. Both GAO and OIG previously identified flaws in WHD's complaint process. Adding FFCRA paid leave enforcement to that process was risky because the FFCRA was an unprecedented, new law containing various coverage scenarios. In addition, District Office managers stated WHD did not provide its staff with adequate and timely FFCRA guidance. This could have led to WHD ignoring valid complaints and turning away vulnerable employees whose employers have violated their right to obtain paid leave benefits through the FFCRA.

When Congress gave WHD the responsibility of enforcing the paid leave provisions of the FFCRA, the agency incorporated the new law into its existing enforcement operations, which is shown in Figure 1. For the period April 1, 2020 through October 26, 2020, WHD performed 3,586 FFCRA compliance actions. Of those compliance actions, 3,573 (99.6 percent) were initiated as a result of a complaint.



Source: OIG analysis of complaint process outlined in WHD's Field Operations Handbook

WHD staff received FFCRA complaints by phone through the agency's Virtual Call Center (VCC).³ The VCC dispersed calls to an available Wage and Hour Technician (WHT) or a Wage and Hour Investigator (WHI). WHT/WHIs conducted an initial assessment. During the initial assessment, the WHT/WHI should obtain pertinent information to determine if the complaint met the agency's complaint requirements. To meet the requirements, the complaint must:

- 1) Be provided directly to the WHD by a person outside of the WHD;
- 2) Be provided by a person who is familiar with the employment practices of the employer or has substantial reason to believe a violation has occurred;
- 3) Support a conclusion that there is a reasonable probability of a violation of one or more of the laws enforced by the WHD that affects one or more employees;
- 4) Support a conclusion that there is a reasonable probability of coverage;
- 5) Identify the employer and/or the place of employment; and
- 6) Support a conclusion that the statute of limitation has not run out.

According to the policy, once the assessment is completed, all complaints that meet the agency's complaint requirements are registered into Wage and Hour's Investigative Support and Recording Database (database). Complaints registered into the database are subject to processing controls, such as managerial reviews, which were intended to ensure the agency took timely and appropriate action on complaints. However, complaints that did not make it past the screening process were not subject to these controls. According to WHD's Field Operations Handbook, if the WHT/WHI determined the complaint did not meet these requirements, the WHT/WHI does not document any of the information received from the caller in the database.

As stated above, this was WHD's policy for complaint intake even prior to the FFCRA. However, in 2008 and in 2009, both OIG and GAO reported issues with WHD's complaint intake policy. In response to those reports, WHD told OIG officials that documenting the reasons for calls would not be the best use of its resources. WHD further stated that maintaining all records of inquiries would create needless impediments and unnecessary privacy issues for those who seek to contact WHD. This would also be detrimental to WHD's ability to provide assistance to employees who may be reluctant to complain because they are fearful of providing their name to a government authority and uncertain of whether their concerns have merit.

WHD staff receive thousands of calls per day through the VCC. According to

³ FFCRA complaints could also be filed through mail and e-mail.

WHD, the pandemic and the FFCRA led to a significant increase in incoming calls, as much as 9,000 calls in one day compared to approximately 2,000 on a normal pre-pandemic day. However, the agency has not developed a method for identifying the reason for these calls and therefore cannot determine how many calls were potential complaints and how many were for various other inquiries.

Although it may not be practical for WHD to document every phone call the agency receives, the sheer volume of calls the agency receives makes it imperative that WHD seek strategies to help the agency determine how many of these calls are potential complaints and to monitor the effectiveness of the agency's complaint intake process.

GAO's Standards for Internal Controls in the Federal Government states that management should identify, analyze, and respond to significant changes that could impact the internal control system. This control deficiency also applies to the other 11 labor laws the agency enforces. However, when determining how to incorporate the enforcement of the FFCRA paid leave provisions into the agency's existing processes, WHD should have considered the changes brought on by the new law as well as the pandemic.

The paid leave provisions of the FFCRA were unprecedented, new requirements that included statutory language regarding which employees could or could not be exempt from coverage. Initially, WHD's regulations, as written, allowed exemptions for a wide range of health care providers. However, as a result of a legal challenge, the Department made regulatory changes almost 6 months after the FFCRA's implementation, narrowing which health care providers employers could treat as exempt. Therefore, during the first 6 months of the FFCRA, certain health care providers could be considered exempt when, in the last 3.5 months of the FFCRA, they could not be considered exempt. This could have led to confusion for WHT/WHIs regarding exemptions. Additionally, because WHD's policy is to only document complaints when there was a reasonable probability of a violation, the agency had no data to determine how many workers were originally exempt under the old regulations and were now able to receive benefits.

In addition, WHD hired over 90 new staff members during the pandemic and had to overhaul its existing training program due to pandemic restrictions, eliminating in person, on-the-job training, and job shadowing. WHD officials stated new staff members were often put in a position of taking calls as part of their training program, whereas, experienced investigators spent less time taking calls.⁴

⁴ During certain weeks of high call volume WHD implemented an all hands on deck approach with both WHT and most of the WHI answering calls.

We surveyed 35 District Office managers to ask about the quality of FFCRA paid leave guidance and training WHD management provided to its staff.

Of the 35 District Office managers surveyed, 57 percent reported concerns with the FFCRA paid leave guidance and training WHD's leadership provided. For example, six managers stated WHD leadership should have provided more FFCRA training. Five managers stated it took too long for leadership to provide answers to critical FFCRA related questions and that leadership was slow to provide enforcement staff with updated FFCRA guidance when the FFCRA regulations were revised. Inadequate and untimely training and guidance could have also led to difficulties in accurately screening complaints.

WHD utilized their existing complaint intake process, which had already been under OIG and GAO scrutiny, and applied it to the FFCRA paid leave without making any changes to strengthen its controls. WHD's policy did not require staff to capture information from all complaints and the agency has no other method for tracking the reasons for the calls received. As a result, WHD cannot accurately assess the impact of the FFCRA, the impact of the changes made to the regulations, or provide complete FFCRA complaint information to lawmakers and stakeholders.

Due to weaknesses in WHD's complaint intake process, WHD could have unknowingly turned away vulnerable employees whose employers violated their right to obtain paid leave benefits through the FFCRA.

WHD DID NOT ALWAYS ENSURE EMPLOYERS PAID WORKERS THE FFCRA BACK WAGES THEY WERE OWED

WHD's policy regarding conciliations did not require staff to follow up with complainants to ensure they received payments due. As a result, WHD cannot determine how effective the agency was at securing FFCRA wages for workers when using conciliations.

WHD conducted four types of compliance actions when enforcing the FFCRA: conciliations, office audits, limited and full investigations. WHD's policies defined a conciliation as an enforcement action limited to the correction of minor violations consisting of a single issue affecting only one or a few employees that does not require any fact-finding. With conciliations, the focus is on seeking a timely resolution between the employer and the complainant with minimal enforcement time expended.

When WHD first implemented the FFCRA, the agency determined the new law would be conducive to using conciliations to handle complaints. FFCRA conciliations accounted for 3,102 (87 percent) of the 3,586 FFCRA cases concluded between April 1, 2020, and October 26, 2020, making up \$1.98 million in back wages to be paid to 1,701 workers.

WHD did not track conciliation back wage payments, have a method for analyzing trends regarding conciliation outcomes, or have a performance measure to determine if WHD was meeting agency objectives by using conciliations for enforcement. In addition, over the past four years, WHD has increasingly used conciliations to enforce non-FFCRA labor laws; however, WHD cannot ensure employers who violated non-FFCRA laws such as the Fair Labor Standards Act (FLSA) paid workers the \$6.4 million due to their employees.

According to WHD's conciliation policy, once the employer verbally agreed to pay back wages, WHD staff advised the complainant of the pay date and instructed the complainant to notify WHD if their employer did not make the payment as agreed. For other investigative tools, such as full or limited investigations, WHD utilized a financial management system to track back wage payments and required proof of payment in order to ensure workers received their back wages and employers were held accountable. According to WHD's policy, staff should conclude conciliations as "paid" when the payment date has passed unless the complainant called and said otherwise. However, WHD otherwise would not know if workers received the wages they were owed.

Because WHD conducted the vast majority of FFCRA cases without following up on complaints, the agency is unable to accurately measure how effectively the new law was enforced. WHD's policy puts an unnecessary burden on workers to follow up with WHD, some of whom may have been reluctant to even file the initial complaint.

In addition, WHD could not determine conciliation outcomes when using the "conclude reasons" code in the database. When WHD closed cases, WHD managers chose the most relevant "conclude reason." We found 67 percent of FFCRA conciliations were closed with the "conclude reason" listed as "conciliated" or "unresolved conciliation." Other options for "conclude reason" included outcomes such as "full compliance all monies paid," "no coverage," and "employer bankrupt." These other options would have provided WHD management with more information to analyze the outcomes of conciliations and determine if conciliations were effective for obtaining payments to complainants.

Lastly, WHD excluded conciliations and all FFCRA paid leave compliance actions from its productivity performance measures. Of the 29 WHD performance measures, none were designed to gauge back wages assessed for FFCRA

conciliations or conciliations conducted for any other law the agency enforces.

According to WHD officials, because of the immediate and short-term nature of the FFCRA program, WHD monitored progress in real time through data reports on a range of activities. WHD officials stated performance measures with trend data may be better suited for a program lasting more than a year.

However, while the measures strictly monitored the timeliness of conciliations (those completed within 15 days), they did not measure the effectiveness of conciliations.

WHD did not require proof of back wage payments resulting from conciliations, nor did they have a method for analyzing trends regarding the outcomes of conciliations or a performance measure to determine if WHD was meeting agency objectives. By reviewing the data, we found that, although it was not policy, some WHIs followed up with complainants before closing out conciliations. However, it was difficult to determine how many followed up and how many did not, because the information was documented in a text field within the database.

GAO's Standards for Internal Controls in the Federal Government states management should design control activities and information systems to achieve objectives and respond to risks while also identifying, analyzing, and responding to significant changes that could impact the internal control system. Through its organizational mission and Operating Plan, WHD stated their agency supports the Department of Labor's Strategic Goal to "Secure lawful wages and working conditions for America's workers." However, without implementing a follow up procedure to ensure complainants received their back wages, WHD has no way to ensure utilizing conciliations helps the agency achieve its mission.

WHD increased its use of conciliations for other laws without updating the policy for measuring back wages.

Over the past four years, WHD has increasingly used conciliations to enforce non-FFCRA labor laws. We used WHD's database to analyze conciliation data between Fiscal Year (FY) 2017 and FY 2020. We found, in FY 2017, WHD only used conciliations for 29 percent of its concluded cases while in FY 2020, the agency increased conciliation use to 34 percent. Some of this increase can be attributed to pandemic restrictions; however, since FY2017, the percent of conciliations have steadily increased as shown in Table 1.

Table 1: WHD Increased Conciliation Usage

Compliance Action Type	2017	2018	2019	2020*
Total Cases	31,334	30,977	29,328	26,313
Conciliations	9,173	9,197	9,123	8,838
Percent using Conciliations	29%	30%	31%	34%

*Table excludes 3,586 FFCRA cases in FY2020.

Source: OIG Analysis of WHD Investigations Data

Through this analysis, we found WHD’s use of conciliations in FLSA cases was significantly higher than with other laws (other than FFCRA). In FY2020, the agency used conciliations to enforce the FLSA in 42 percent of the cases concluded, making up \$6.4 million in back wages to be paid to 8,351 workers (see Table 2).

Table 2: WHD’s Conciliation Usage for Enforcing Different Laws

Compliance Action Type	Total Cases	Conciliations	Percentage of Conciliations	Back Wages from Conciliations	Number of Employees Affected
FFCRA	3,586	3,102	87%	\$1,982,362	1,701
FLSA	20,834	8,651	42%	\$6,422,000	8,351
All Other Acts	5,479	187	3%	\$ 55,940	35

Source: OIG Analysis of WHD Investigations Data

WHD’s use of conciliations allows the agency to prioritize limited resources towards the most effective and efficient activities for carrying out its mission. However, with WHD relying heavily on conciliations to enforce the FFCRA and increasing its use of conciliations for non-FFCRA laws, it is important WHD follow GAO’s internal control guidance by analyzing and responding to significant changes that could impact the internal control system. WHD must ensure its controls surrounding this enforcement tool are still effective.

Due to WHD’s policy regarding back wage follow up for conciliations, the agency cannot determine if the \$1.98 million in FFCRA payments were paid to 1,701 workers or the \$6.4 million in FLSA back wages were paid to 8,351 workers. This weakness, in combination with the deficiencies in the

database for documenting conciliation conclude reasons, could make it difficult for WHD to adequately assess the effectiveness of conducting conciliations.⁵

WHD IMPLEMENTED ENFORCEMENT CHANGES DURING THE PANDEMIC AND ASSESSED \$66.8 MILLION LESS BACK WAGES COMPARED TO THE PRIOR YEAR

During our audit of WHD's FFCRA paid leave enforcement, we identified another reportable condition regarding WHD's enforcement of non-FFCRA labor laws. In addition to the FFCRA, WHD was responsible for enforcing 11 other labor laws as shown in Exhibit 2. In a prior report, we reported that WHD changed its enforcement strategy because of pandemic restrictions.

During this audit, we found WHD conducted fewer investigations in FY2020 for these 11 laws than it had in prior years, including a reduction in agency-initiated investigations, and utilized remote investigations more often. This led to WHD assessing \$66.8 million (or 21 percent) less in back wage payments compared to the prior year. During this time, WHD prioritized its FFCRA-related activities including swiftly developing regulations and sub regulatory guidance; conducting outreach and revamping operations to focus on customer service. We also acknowledge that the reduction in oversight and the decrease in back wages can be attributed to pandemic restrictions, however at the onset of the pandemic, WHD did not assess its use of remote investigations or develop a plan for continuing agency-initiated investigations in a remote environment. As a result, WHD risked not achieving its mission and protecting wages earned by those still working during the economic disruption.

WHD completed fewer compliance actions, including fewer agency-initiated investigations

We analyzed WHD's data from FY2019 and FY2020 and determined WHD completed 3,015 fewer cases in FY2020. At the onset of the pandemic, to ensure the safety of its employees, WHD maximized telework for its staff. In addition, WHD instructed staff to employ flexibilities in the use of investigative tools such as using telephone, video conferencing, and mail and stopped agency-initiated

⁵ WHD recently transitioned from documenting conciliations in the database to a new case management system. However, the new system was not part of our audit scope and therefore was not reviewed.

investigations that were not conducive to remote handling.

For agency-initiated investigations, we analyzed WHD's data and determined WHD completed 2,061 fewer agency-initiated investigations in FY2020 than it had in the prior year as shown in Table 3.

Table 3: Agency-Initiated and Complaint Based Investigations

	Agency-Initiated	Complaint-Based	Total*
FY 2019	10,025	19,127	29,152
FY 2020	7,964	18,333	26,297
Difference	2,061	794	2,855

*Table excludes 176 cases in FY2019 and 16 cases in FY2020 for Davis-Bacon Agency Investigations-Non Enforcement.

Source: OIG Analysis of WHD Investigations Data

WHD decreased on-site investigations and increased remote investigations

Through our data analysis, we found WHD decreased on-site investigations by nearly 5,000 cases in FY 2020 while they conducted about 2,100 more remote cases (see Table 4).

Table 4: Remote and On-Site Investigations

	Remote Investigations	On-Site Investigations	Total*
FY 2019	9,365	19,634	28,999
FY 2020	11,537	14,652	26,189
Difference	2,172	(4,982)	2,810

*Table excludes 329 cases in FY2019 and 124 cases in FY2020 for housing inspections, self-audits, Davis-Bacon Agency Investigations Non Enforcement, and No Further Action.

Source: OIG Analysis of WHD Investigations Data

Remote investigations include office audits and conciliations. According to WHD's Field Operations Handbook, conciliations, as discussed above, are to be used for minor violations and are conducted remotely through phone calls with employers and complainants. Office audits are also conducted remotely. According to WHD's Field Operations Handbook, an office audit is essentially a limited investigation conducted completely remotely and does not include any visits to the employer's establishment. In FY 2019, WHD rarely used this tool,

however in FY2020 WHD conducted 11 times more office audits than in the prior year.

Due to the overall decrease in cases and the increase in remote investigations, WHD assessed \$66.8 million less in back wages in FY2020 as compared to FY2019 (excluding FFCRA cases).

We analyzed WHD's data to determine which labor laws had been most impacted by WHD's enforcement changes. The overall decrease in back wages was primarily attributed to a reduction in FLSA cases—which resulted in a decrease of \$48.8 million in back wages and a decrease of nearly \$20 million from Service Contract Act (SCA) due to a large reduction in average back wages for SCA cases as shown in Table 5.

Table 5: Laws with the Largest Reduction in Back Wages in FY 2020

Concluded Cases/Back Wages per Act	2019	2020	Difference
Number of Reported FLSA Cases	23,261	20,834	(2,427)
FLSA Back Wages Assessed	\$226,068,509	\$177,257,319	(\$48,811,190)
Average Back Wages Per FLSA Case	\$9,719	\$8,508	(\$1,211)
Number of Reported SCA Cases	913	822	(91)
SCA Back Wages Assessed	\$65,283,408	\$45,313,663	(\$19,969,745)
Average Back Wages Per SCA Case	\$71,504	\$55,126	(\$16,378)

Source: OIG Analysis of WHD Investigations Data

WHD officials maintained that the agency was required to move into maximized telework posture for the health and safety of its staff and the public. The agency prioritized FFCRA work and continued to engage in directed investigations through the pandemic. Many priority industries identified for directed enforcement including restaurants and hospitality were also affected by the pandemic.

GAO's guidance for internal controls in the federal government states management should design control activities and information systems to achieve objectives and respond to risks while also identifying, analyzing, and responding to significant changes that could impact the internal control system. However, at the onset of the pandemic, when WHD stopped most agency-initiated investigations and instructed staff to employ flexibilities in conducting investigations, WHD did not assess the effectiveness of its remote investigations

or develop a plan for continuing the agency-initiated investigations they had put on hold.

U.S. workers may be in jeopardy of not receiving the lawful minimum wage and overtime pay as a result of WHD's reduction in FLSA enforcement. Additionally, the agency risks not achieving its mission and protecting wages earned by those still working during the economic disruption. With the uncertainty of the pandemic, we recognize that the WHD needs to maintain a balance to fulfill their mission and to value the safety of their workers.

WHD is taking some steps to update and assess its enforcement strategies. In its FY 2021 Operating Plan, WHD stated it was changing its initiative planning for agency-initiated investigations to better reflect the pandemic environment. In addition, WHD stated they plan to conduct an assessment on the effectiveness of remote investigations and to use lessons learned, even post-pandemic.

Through this audit, OIG identified control weaknesses related to WHD's complaint intake and conciliation processes as they relate to the agency's enforcement of the FFCRA. Although the FFCRA has expired, because WHD applied these processes to its enforcement of other labor laws, such as the FLSA, we are making recommendations for WHD to strengthen controls over these processes to benefit other labor laws as well as any future laws WHD will use these processes to enforce.

OIG'S RECOMMENDATIONS

We recommend the Acting Administrator for the Wage and Hour Division:

1. Implement a control to perform periodic reviews to determine if staff properly handled potential complaints in accordance with WHD's complaint requirements.
2. Develop a mechanism to enable the agency to determine how effective conciliations are at getting back wage payments to workers, and address any weaknesses identified in ensuring complainants received owed back wages prior to closing conciliations.
3. Update its policy for selecting a conclude reason in its database to require staff to use a reason that would allow WHD to determine the outcome of the conciliation.
4. Assess the effectiveness of remote investigations and incorporate best practices into its operating procedures.
5. Develop a plan to monitor the results of the agency's updated directed investigation plan as identified in the FY2021 operating plan.

SUMMARY OF WHD'S RESPONSE

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

The agency disagreed with recommendation number 2 and stated its established policy properly records the effectiveness of WHD conciliations in getting back wages to workers. However, WHD's current policy does not require follow-up with the complainant, proof of back wage payments resulting from conciliations, nor do they have a method for analyzing trends regarding the outcomes of conciliations to determine if WHD was meeting agency objectives. Therefore, we continue to assert this recommendation is needed to ensure WHD is meeting its mission to secure wages using conciliations.

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



Carolyn R. Hantz
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 FFCRA expired December 31, 2020.

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

1. The employees were subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee had been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee was experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee was caring for an individual who was subject to orders as described in reason 1 above or had been advised as described in reason 2 above.
5. The employee was caring for a son or daughter whose school or place of care was closed, or the child care provider of such son or daughter was unavailable, due to COVID-19 precautions.
6. The employee was 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 required employers to provide 2 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 who requested leave for qualifying reasons 1 through 3. It required 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 who requested leave for qualifying reasons 4 through 6.

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

EXHIBIT 2: ADDITIONAL LAWS ENFORCED BY WHD

WHD was responsible for enforcing 11 laws in addition to the FFCRA:

- Fair Labor Standards Act (FLSA)
- Family and Medical Leave Act (FMLA)
- Davis-Bacon Act
- Walsh Healey Public Contracts Act
- Contract Work Hours and Safety Standards Act
- McNamara – O’Hara Service Contract Act
- The Federal Wage Garnishment La –Title III of the Consumer Credit Protections Act
- Immigration and Nationality Act
 - H-1B (Specialty Occupations) Program
 - H-1C (Nurses) Program
 - H-2A (Temporary Agricultural Workers) Program
 - H-2B (Temporary Non-Agricultural Workers) Program
 - D-1 (Crewmembers) Program
- Employee Polygraph Protection Act
- The Migrant and Seasonal Agricultural Worker Protection Act
- OSHA Field Sanitation Standards

APPENDIX A: SCOPE, METHODOLOGY, & CRITERIA

OBJECTIVE

This audit's objective was to determine if WHD implemented effective controls for enforcing FFCRA paid leave compliance.

SCOPE

The audit covered WHD's enforcement of the FFCRA's paid leave provisions between April 1, 2020, and October 26, 2020, as well as other challenges WHD faced related to non-FFCRA enforcement due to 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 objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

To achieve our objectives, we conducted interviews with WHD officials and reviewed the CARES Act, FFCRA, and corresponding temporary rule. In addition, we surveyed regional and district offices. Furthermore, we reviewed the guidance documents the agency provided to its staff, the FY 2020 WHD Operating Plan: COVID-19 Addendum, and the FY 2021 WHD Operating Plan. Lastly, we also reviewed the agency's FFCRA complaint and enforcement data through October 26, 2020 as well as its data for the other labor laws that WHD enforced for the FY 2017 through FY 2020.

RELIABILITY ASSESSMENT

We assessed the reliability of WHD's FFCRA data and non-FFCRA by 1) performing electronic testing, 2) reviewing existing information about the data and the system that produced them, and 3) interviewing agency officials knowledgeable about the data. We determined that the data were sufficiently reliable for the purposes of this report.

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. We also considered standards pertinent to our audit objective found in the GAO Yellow Book and the DOL Office of Audit Handbook. We assessed the following internal control areas relevant to the audit objective: Control Environment, Control Activities, Agency Risk Assessment, Information and Communication, and Monitoring. We evaluated the controls that WHD had in place to see if internal control activities are designed accordingly to contribute to the achievement of the agency's mission, goals, and objectives. We determined there is MEDIUM RISK for the effectiveness of controls and determined significant controls are effective. 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
- GAO's Standards for Internal Controls in the Federal Government, September 2014

APPENDIX B: AGENCY'S RESPONSE TO THE REPORT

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210



September 23, 2021

MEMORANDUM FOR: CAROLYN HANTZ
Assistant Inspector General for Audit

FROM: JESSICA LOOMAN
Acting Administrator, Wage and Hour Division

JESSICA LOOMAN

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

Digitally signed by JESSICA
LOOMAN
Date: 2021.09.24 10:21:02
-04'00'

The Wage and Hour Division ("WHD") appreciates the opportunity to respond to the August 31, 2021 draft report of the Office of Inspector General ("OIG") titled *COVID-19: The Pandemic Highlighted the Need to Strengthen Wage and Hour Division's Enforcement Controls* ("COVID-19 Report").

WHD agrees in part with the recommendations made by the OIG in the COVID-19 Report. This response summarizes several critical factors that informed the agency's position. WHD agrees that the agency's implementation and enforcement of the paid leave program of the Families First Coronavirus Response Act (FFCRA) afforded many opportunities to evaluate the efficacy of existing internal controls. WHD largely relied on expedited adaptations to its existing infrastructure, policies, and procedures to meet the critical timelines dictated by the government-wide coordinated response effort. WHD recognizes that in carrying out these responsibilities, the agency needed to evaluate and balance a range of considerations related to internal controls. WHD believes the recommendations in the COVID-19 Report do not adequately account for those considerations, which the agency documented and described at length as part of the audit process. Additionally, WHD is concerned that the expanded scope of the audit's recommendations, which generalize FFCRA-specific findings to overall WHD enforcement operations, is not adequately supported by evidence collected through the audit process.

It is important to restate that WHD efforts to incorporate the administration of the new paid leave provisions of the FFCRA and the associated priority limited-term enforcement program were swift, coordinated at the highest levels of the organization, and fully leveraged WHD's existing infrastructure. In addition to enforcement, critical features of the WHD leveraged infrastructure include regulations and sub regulatory guidance development and implementation; dedicated resources for outreach and education in the field; and enhanced capacity for data analytics. Combined with the paid leave program's urgency and priority within the Department, maximizing WHD's strengths allowed the agency to accomplish in a matter of weeks what typically involves months or years. These accomplishments and organizational strengths are largely missing in the report.

For example, within days of FFCRA's enactment, WHD published frequently asked questions on its website and continued to publish additional guidance in the weeks that followed. Within the

first week of enactment, WHD posted a sample Notice of Rights for employers to send employees, which was subsequently published in more than 10 languages. By FFCRA's effective date on April 1, 2020, WHD drafted and issued a rule providing guidance to employees and employers, and more than 25 million people visited WHD's website seeking information. WHD conducted more than 500 remote outreach events to educate workers and employers about the benefits and protections of the FFCRA. WHD prioritized customer service throughout the program answering as many as 9,000 incoming calls live daily. As a result of these efforts, during the pandemic workers received paid leave benefits to care for themselves and their families. WHD has resolved 4,645 FFCRA paid leave conciliations and helped more than three thousand workers under the paid leave program.

It is also important to restate the ways in which WHD adapted its strategies to respond to the impacts of COVID-19 on the agency in order to ensure the health and safety of its own staff. WHD had to modify the way that it conducts enforcement activities and staff were subject to the same conditions and health and safety concerns affecting operations of the regulated community. Nonetheless, WHD sustained enforcement program performance by expanding and piloting the use of remote and hybrid investigations and prioritizing the FFCRA paid leave program. During this time, WHD collected promising practices and lessons learned for the field and has systematically incorporated remote protocols and accounted for pandemic conditions in the design and implementation of initiatives focused on essential workers and priority industries. From the start, WHD recognized that the agency should learn from the challenges and opportunities posed by the pandemic response. These pandemic related efforts are largely unaccounted for in the recommendations.

WHD does not agree with the OIG assertion that the absence of data, for example, confirmation of payment directly from workers for every conciliation, equates to a finding, particularly when WHD has other long-standing procedures in place for confirming case resolution. As previously stated, WHD agrees that the FFCRA paid leave program highlighted areas where WHD's current systems could not provide complete information. However, given the scope of laws enforced by WHD and the size of the regulated community, WHD must continuously prioritize limited resources towards the most effective and efficient activities for carrying out the mission. WHD laws cover roughly 10.2 million workplaces and over 148 million workers. During a typical year, WHD fields more than 1.3 million calls from the public seeking guidance on WHD and other matters and concludes over 20,000 compliance actions. In carrying out these responsibilities, WHD relies on an extensive range of internal controls, and the agency disagrees with the findings that these same internal controls were inadequate for the paid leave program.

Lastly, WHD is concerned that an audit designed to assess the internal controls for the FFCRA paid leave provisions produced recommendations for the overall WHD enforcement program. WHD disagrees that the unique features of a limited-term program designed to address an urgent national public-health need translate to WHD operations broadly, particularly when evidence gathered during the audit does not support that conclusion. Additionally, the fact that the FFCRA paid leave program was incorporated into the existing infrastructure does not mean that any findings tied to the program automatically apply to that broader infrastructure. The responses below reflect all of these concerns, and in some cases, WHD has provided information to support closing the recommendation.

The report provides five recommendations, and WHD's responses to these recommendations are set forth below.

Recommendation 1: Implement a control to perform periodic reviews to determine if staff properly handled potential complaints in accordance with WHD's complaint requirements.

Response: WHD agrees with this recommendation. WHD receives more than one million calls per year and is committed to providing excellent customer service. Call monitoring of all WHD calls would be too resource intensive. However, WHD is currently developing a call-monitoring program to enhance our customer service efforts and to ensure all potential complaints are handled in accordance with WHD's Complaint Policy. The goal of this program is to provide quality customer service, ensure consistency in how calls are triaged and how complaints are taken, identify performance outliers, and identify coaching and training opportunities. Results of the call-monitoring program will be used to provide office and individual performance feedback, and to perform a SWOT (Strengths, Weaknesses, Opportunity, Threats) analysis to identify training and technical needs to ensure maximum customer service and complaint intake efforts.

Recommendation 2: Develop a mechanism to enable the agency to determine how effective conciliations are at getting back wage payments to workers, and address any weaknesses identified in ensuring complainants received owed back wages prior to closing conciliations.

Response: WHD disagrees with this recommendation. Under WHD established policy, a conciliation is used to correct a minor violation involving a last paycheck or a single issue affecting one of few employees. WHD seeks resolution between the employer and the complainant with a minimal expenditure of resources. In a successful conciliation, the complainant is advised of the pay date and instructed to notify WHD if payment is not made as agreed. The conciliation is not concluded as paid until payment has been verified with the complainant or the payment date has passed with no further contact from the complainant. If the complainant advises that payment was not received, WHD concludes the conciliation as not paid and a manager determines whether additional action should be taken. WHD believes the established policy properly records the effectiveness of WHD conciliations in getting back wage payments to workers.

Recommendation 3: Update its policy for selecting a conclude reason in its database to require staff to use a reason that would allow WHD to determine the outcome of the conciliation.

Response: WHD agrees with this recommendation. As part of WHD's modernization of its case management system, we will explore improvements to data capture in order to increase the usability and analytical value of data, including determining the best way to report on the outcome of compliance actions.

Recommendation 4: Assess the effectiveness of remote investigations and incorporate best practices into its operating procedures.

Response: WHD agrees with this recommendation. WHD will incorporate evaluation of remote investigation effectiveness into its Accountability Review Program. In addition, remote investigation guidance and best practices have already been housed in the Resource Library and incorporated into our strategic enforcement plans.

Recommendation 5: Develop a plan to monitor the results of the agency's updated directed investigation plan as identified in the FY2021 operating plan.

Response: WHD agrees with the recommendation, however notes that this is outside the scope of the administration of the FFCRA paid leave program. WHD initiatives, which are summarized in the FY 2021 operating plan, each address the effects of the pandemic through ongoing implementation efforts and plans for the next fiscal year. Initiatives include remote enforcement protocols for the field, emerging data and research on the effects of COVID-19 on businesses and essential workers, lessons learned from enforcement and outreach to date, and stakeholder engagement and outreach to understand worker and business experiences. These initiatives are coordinated through workgroups comprised of representatives from across the agency who regularly meet to share information, review data, and discuss experiences carrying out initiatives in an evolving pandemic environment.

WHD is also engaging in creative, expanded approaches to outreach, including virtual events and innovations in how the agency disseminates compliance assistance materials. For example, the agency has provided over 37,000 participants information about their wage and hour rights through its Essential Workers, Essential Protections webinar and on-line listening session events. Similar to enforcement, WHD will maintain these efforts even as COVID-19 restrictions are lifted throughout the country. Although, the FFCRA expired on December 31, 2020, WHD positioned itself to expand efforts in 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.

Cc: Patricia Davidson
Deputy Administrator

Michael Kravitz,
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APPENDIX C: ACKNOWLEDGEMENTS

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