

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 JESSICA LOOMAN
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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

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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.

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