

Negotiating Vision and Reality:
The U.S. Department of Labor Wage and Hour Division and
Its Role in Human Trafficking Casework

by

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ABSTRACT

Interviews of nine managers within the U.S. Department of Labor's Wage and Hour Division's Western Region were conducted by a researcher who also works as a Wage and Hour Investigator. The intention of this research was to survey the differences in trafficking-related training and experience throughout the region, to examine the role of the Wage and Hour Division in human trafficking casework, and to explore potential areas for growth. This thesis recommends that upper level agency management produces standards for training, interagency engagement, and procedures and also provides suggestions for best practices and effective enforcement.

DEDICATION

This work is dedicated to Anne Norberg, my mother. Mom's commitment to our family has seen no limits. Her tireless emphasis on the value of producing quality work was tireless, whether it was regarding the layout of a school poster or the delivery of how one reads a storybook to a child. Through these ways of being and boundless energy, she massaged integrity into the very ways her family endeavors to tackle each and every opportunity to produce something of quality. Throughout all stages of life, Mom has demonstrated great courage and tenacity in making the journey very much her own in a practically perfect way. Her courage, too, instilled in her children the understanding that any path is possible and no mountain too high, even if you are quite small.

I am sorry you did not complete the last pieces of your master's degree, Mom. I know that your sacrifice was always putting us first, move after move, and that that contributed to the trouble with finishing that program. I hope that this work of mine in some small way honors you and all that you have accomplished.

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LIST OF TERMS

AUSA: Assistant United States Attorney

CFR: Code of Federal Regulations

CMP: Civil Monetary Penalty; fines assessed for willful, repeat, or child labor violations

DOL: U.S. Department of Labor

Employer: section 3(d) of the Fair Labor Standards Act (FLSA) defines the employer as an individual who acts in the interest of an employer in relation to an employee and who is responsible for the day to day activities of the firm

FBI: Federal Bureau of Investigations

FLSA: Fair Labor Standards Act

FOH: Field Operations Handbook; this resource provides Wage and Hour Investigators (WHIs) with interpretations of regulations, investigative procedures, and general guidance in their enforcement efforts

Human Trafficking Task Force (or Task Force): local interagency networks that meet as forums for agencies such as United States Attorney's Office (USAO), FBI, Immigration and Customs Enforcement (ICE), DOL and non-profits to share information and coordinate approaches to local human trafficking cases

ICE: Immigration and Customs Enforcement

NO: the National Office, here referring to that of the Wage and Hour Division (WHD), located in Washington, D.C.

OIG: Office of Inspector General, here referring specifically to that of the DOL

Peonage: involuntary servitude or slavery where workers are compelled to work and controlled by debt

RO: Regional Office, here referring to that of the Western Region of the WHD, located in San Francisco, California

Statute of Limitations: a limitation of the maximum amount of time after an event one can initiate legal proceedings under a particular law

“Suffer or permit”: if an employee is suffered or permitted to perform work which benefits the employer, that time is compensable and therefore considered to be hours worked under the FLSA

USAO: United States Attorney’s Office

WHD: Wage and Hour Division of the U.S. Department of Labor

WHI: Wage and Hour Investigator

GENERAL INTRODUCTION

The Wage and Hour Division has always been an important player in the statutes that relate to human slavery because we have investigators who are out in the field. They are in work places all over the country and sometimes at very remote work sites. So where there is the potential and where there are vulnerable employees who may be subject to exploitation, that is where Wage and Hour typically is with respect to achieving our mission. That's where you see the nexus between the Wage and Hour Division and the human slavery statutes (IN5 2011).

Slavery is the most extreme form of labor exploitation that has manifest on this planet. Currently, in an era when popular perception understands slavery to be a thing of the past, enslaved workers produce clothes that we wear, tires of cars that we drive, harvest food that we eat, and much more around the world. There are slaves working away in the darkest, most hidden places on Earth, and we interact with them in our daily lives without even knowing it. The United States is no stranger to this modern horror. An estimated 14,500 to 17,500 slaves are trafficked into the U.S. each year (U.S. Department of State 2010). “While no one knows for sure how many people are enslaved in America, a conservative estimate would be around fifty thousand and growing” (Bales and Soodalter 2009, 7). And many slaves in the U.S. are Americans, born and raised (U.S. Department of State 2010). Regarding both domestic and foreign-born slaves, “Between 1999 and 2004, documented slavery cases were reported in at least ninety U.S. cities” (Bales and Soodalter 2009, 14).

When learning that slavery exists in some facet of probably every industry in the U.S., it is logical to wonder what the federal government is

doing about it. “Prior to October 2000, prosecutors filed human trafficking cases under several federal laws, including the Mann Act¹ and various involuntary servitude and labor statutes” (U.S. Department of Justice 2010a, 2). In October 2000 the Trafficking Victims Protection Act (TVPA) was signed into law by U.S. President Bill Clinton. This law, 22 U.S.C. § 7102(8), defined human trafficking as, “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age” or “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”

The TVPA also articulated the Three P’s to delineate the Government’s distinct aims related to trafficking, which are Prevention, Protection, and Prosecution. The government’s course of action is often criticized, particularly by victim advocacy groups, for being so heavily focused on criminal prosecutions of the traffickers, and they are criticized for the number of prosecutions being as low as they are, that it occurs at the expense of victims’ wellbeing (Bales and Soodalter 2009).

Criticisms specific to the Department of Labor (DOL) are also common, in part because slavery is, at heart, a labor issue. In 2009 Kevin

¹ The White-Slave Traffic Act of 1910, named after U.S. Representative James Robert Mann, “prohibits the interstate transportation of women for sexual purposes” (DeStefano 2007, 48).

Bales and Ron Soodalter published The Slave Next Door: Human Trafficking and Slavery in America Today, which highlighted the DOL's Wage and Hour Division (WHD) as particularly inept at protecting those most vulnerable workers trapped in the clutches of slavery. The picture painted of the "inspectors," as the authors called them, was of employer-friendly, careless, and largely clueless government employees, making it seem that the government was not even trying. Between the excessive emphasis on punishing traffickers and the seemingly hapless and hopeless government employees, the reader observes an inexcusable and outrageous orchestration of bureaucracy and vengeance.

Presidential administration to administration, the DOL's enforcement policies and procedures shift. That, along with the Trafficking Victims Protection Reauthorization Acts of 2003, 2005 and 2008 (U.S. Department of Justice 2010a, 2-3), has resulted in the need for various government departments and agencies to learn new laws, new regulations, and new procedures, and to develop new skills and improved networks. As the 2010 "Attorney General's Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons" concludes, "The U.S. Government's campaign against trafficking is one of its highest priorities for ensuring justice domestically and around the world" (U.S. Department of Justice 2010a, 98). With the present administration's shift of focus toward labor and worker protections, and in this particularly strapped economy, upper management is asking quite a

lot of the small agency that is Wage and Hour. Even though human trafficking cases only represent a very small percentage of the investigative work performed by the agency, the fact of the matter is that the WHD is encountering human trafficking in a significant role. This is a uniquely poignant time, ripe with the potential for change and growth, to reflect on the nature of that encounter, to discuss where the WHD is, to explore how its work related to human trafficking is going, and evaluate its engagement in human trafficking-related work, both what is expected of it from various entities and what it is actually able, prepared, and most apt to do.

Now a year and a half of training, exposure, networking, investigations, and a couple of calculators into my employment as a Wage and Hour Investigator (WHI), I find myself somewhat uniquely poised to question the role of the DOL and specifically the WHD in the federal government's efforts to combat human trafficking. The intent of this research is to tap the knowledge bank of some of the most experienced and wise Wage and Hour employees to explore those very questions and what Bales and Soodalter might have missed in their very summary assessment of the WHD. Instead of the observations of one graduate student-investigator mix, this research will primarily examine the observations of some of the minds most expert in this exact subject matter and most apt to be able to understand and articulate the delicate nuances of problem-solving in this context of a crime most difficult to identify and prosecute while navigating the intricacies of the federal government. As such, this

paper will not delve deeply into the history or nature of human trafficking itself and will assume that the reader is familiar enough with these issues to understand the research presented here².

This research focused on the experiences and ideas that originated in the Western Region of the DOL. The primary source of information was nine WHD managers from this region, with supplemental information garnered from various resources, all of which are public information. As the majority of those interviewed are current employees, in order to safeguard their personal interests, there was a high desire on my own part to maintain their confidentiality to the greatest extent possible, while still being able to utilize their statements. It is stressed that the sentiments shared by these individuals are expressly their personal thoughts and observations and so do not represent the position of the agency in any way. Truly, the agency's readiness and willfulness to allow and support this research indicate its eagerness for self-reflection and improvement.

The experience of the nine managers who were interviewed for this research is vast. The following information will give the reader an idea of the high value of the managers' input. The nine managers' net experience with the WHD spans a total of about 190 years, or an average of about 21 years each. About 120 of those 190 total years were spent working in the

² For helpful background information on the topic of human trafficking, the author suggests the following works from the References section: DeStefano's The War on Human Trafficking: U.S. Policy Assessed and the U.S. Department of State's 2010 TIP Report, as well as David Brion Davis's 2006 work entitled Inhuman Bondage: The Rise and Fall of Slavery in the New World.

Western Region, or an average about 13 years each. And, finally, of those years, the managers worked for over 90 years as WHIs, or on average a little over 10 years each. The range of experience working on human trafficking cases also varied quite a lot. While some managers had next to no experience with actual cases, others would have had to do a lot of digging to figure out the number of the cases they had been involved in. Likewise, some managers had no experience with human trafficking criminal prosecutions, while others had been involved in such litigation multiple times.

The nature of this research being exploratory instead of insistent, interview questions were designed with the intention to voice the reflections of those interviewed with as minimal obstruction as possible. Several common threads developed throughout the course of the interviews, and the author has attempted to thematically draw those together as transparently as possible, so that the readers may see for themselves what the experts, not what the author, have to say about the subject at hand. It is the Towards Conclusions section of this document that the author has reserved for her own opinions and responses to the interviews.

In order to discuss these themes and the findings of this research at the appropriate level, a certain amount of education is necessary. Hence, the first chapter of this paper provides background information regarding the nature of human trafficking and particularly the mission, jurisdiction,

procedures, enforcement responsibilities, and makeup of the WHD. Once that context has been provided the research findings will be presented in two chapters. The first of the two chapters overviews the managers' ideas about areas such as relationships, responsibilities and policies that could use improvement, while the second presents the managers' suggestions for possible changes. As stated, this paper will draw to a close in the final chapter with the author's assertions based on the research data.

Again, it is the belief of the author that those interviewed are some of the most apt to provide feedback to the public and the agency's leaders as to how the agency is doing in regards to human trafficking work, and to provide input as to challenges, possible improvements, and even suggestions of changes that are worthy of consideration. Therefore, a hope of the author is that this research will provide a source of insight and reflection to the public, to those engaged in the local, on the ground, day to day work of and with the agency, and to those who make decisions concerning the agency's nature, position, and direction.

Chapter 1

BACKGROUND

The Face of Human Trafficking

According to Bales, human trafficking is "the total control of one person by another for the purposes of economic exploitation" (Bales and Soodalter 1999, 6). The 2010 T.I.P. Report paints the landscape of labor trafficking in the U.S.:

Trafficking occurs primarily for labor and most commonly in domestic servitude, agriculture, manufacturing, janitorial services, hotel services, construction, health and elder care, hair and nail salons, and strip club dancing. Vulnerabilities remain even for legally documented temporary workers who typically fill labor needs in the hospitality, landscaping, construction, food service, and agricultural industries. In some human trafficking cases, workers are victims of fraudulent recruitment practices and have incurred large debts for promised employment in the United States, which makes them susceptible to debt bondage and involuntary servitude (U.S. Department of Justice 2010a, 338).

The interviewed managers stated they had personal experience with or were aware of WHD involvement in human trafficking cases in the Western Region of the U.S. in the following industries and areas: domestic service, elderly care, sex, garment, H-visa workers, various types of work with animals, Asian-American restaurants, agriculture, night club, landscaping, hotel/motel, flower growing, nail salons, flooring, and nursing homes, massage parlors, construction, and karaoke bars. The managers also identified the following as the trafficking victims' countries of origin: Thailand, China, Vietnam, Indonesia, the Philippines, Peru, Croatia, Mexico, Haiti, and the U.S. Multiple managers also identified victims in some instances as being homeless at the time they were initially trafficked.

To give the reader some concrete examples and to shed a little more light on the face of human trafficking that is encountered in the Western Region, two nationally groundbreaking human trafficking cases will be briefly reviewed here. The first instance, known as the El Monte Thai Worker Slave Case, involved garment workers in California. The second

instance is known as the Daewoosa Case; it too involved garment workers in American Samoa. Both cases had Wage and Hour involvement and both were prosecuted criminally.

On August 2, 1995, a multi-agency task force led by the California Department of Industrial Relations raided a fenced seven-unit apartment complex in El Monte, California, a small community near Los Angeles. What they found was one of the most horrendous U.S. sweatshops in modern times (Smithsonian Institution's National Museum of American History 2011). Inward-facing razor wire lined the perimeter of the Chinese-Thai family-run compound, which severely controlled the day to day existence of 72 Thai nationals, most of whom were women, bent about the production of brand name garments. One interviewed manager, reflecting on the facts of this historic case, stated, "They were slaves, and the relationship of the proprietors to them was much like the relationship of a traction company to a draft horse. They were allowed to eat and sleep enough to keep them productive" (IN7 2011). The criminal case was prosecuted by the Department of Justice, several defendants were convicted of trafficking-related charges, and they were sentenced to prison terms and ordered to make restitution to the victims (IN7 2011; IN8 2011).

The Daewoosa case similarly involved captive garment workers, many of whom were Thai and Vietnamese nationals who paid exorbitant fees to work for Daewoosa, Ltd. and the opportunity to migrate to and work in American Samoa. Workers were fed so sparingly that they had to

sneak away from the compound in search of food (472 F.3d 638 2011). The abuses in this case were drawn to a head by an event later covered by the media, where the firm's owner, Mr. Kil Soo Lee, ordered workers to be severely beaten if they were not productive enough. The bloody aftermath was later described by some as a massacre. An early 2001 FBI raid unveiled brutal slavery conditions, which eventually resulted in both civil and criminal prosecutions. Through these cases workers were paid back wages and Kil Soo Lee was "convicted of extortion, money laundering, conspiring to violate the civil rights of others, and holding workers to a condition of involuntary servitude" (472 F.3d 638 2011) and sentenced to prison, restitution to victims, and court fees.

The truth is, in all fairness, that the U.S. Government is still in the midst of what has been and will probably continue to be a long and challenging learning curve. As the aforementioned cases exemplify, U.S. slavery cases began to surface in the mid-1990s (DeStefano 2007, 16-29). Simultaneously, the world's eye started to seriously examine modern day slavery. In October, 2000 President Bill Clinton signed the Trafficking Victims Protection Act (TVPA) into law (DeStefano 2007), which was followed shortly thereafter by the passage of the U.N.'s three Palermo Protocols, one of which deals with the prevention, suppression and punishment of trafficking in persons (DeStefano 2007). This Palermo Protocol and the TVPA identified human trafficking as the modern manifestation of slavery. Within this label two main manifestations were

distinguished: sex and labor. Sex trafficking is, in essence forced prostitution, particularly that of minors who cannot consent to such a thing, while labor trafficking is distinguished where the person is exploited for their forced labor within any industry (DeStefano 2007).

An Overview of the Mission and Organization of the Wage and Hour Division

The DOL's scope of work is divided among several agencies and offices, one of which is the WHD (Appendix C). The WHD is divided into five regions that have jurisdiction over its responsibilities for all states and territories of the United States of America: the Northeast, the Southeast, the Midwest, the Southwest, and the West. The Western Region is responsible for the following states and territories: Alaska, American Samoa, Arizona, California, the Commonwealth of the Northern Marianas Islands, Guam, Hawaii, Idaho, Oregon, Utah, Washington, and other smaller Pacific islands. The region is led by its Regional Office in San Francisco, California and is divided up into district offices. Each district office can have jurisdiction over multiple states and territories, a single state, or part of a state. District offices' geographic zones of jurisdiction are further broken down into areas that are the primary responsibility of the staff of the district office, and those areas primarily attended to by sub-offices, which are either area offices or field stations. District offices are managed by district directors and area offices are managed by assistant

district directors, under the supervision of their district directors, while field stations have no permanent management on site.

Non-management WHD staff include assistants, technicians, and investigators. While assistants primarily handle the office's administrative work, technicians and investigators apply and enforce the law in their daily activities, largely with segregated responsibilities. The investigators are those who are primarily responsible for carrying out the day to day work of the agency through conducting various forms of investigations, whether independently or collaboratively with other WHD staff. Investigators are to be considered senior when they have been promoted to the GS-12 level, commonly achieved after three and a half or four years of experience as an investigator. With promotions in grade level also comes the responsibility of serving as the lead investigator in additional laws. At the GS-12 level, an investigator is expected to be proficient in the enforcement of all laws enforced by the agency.

To begin a discussion of the current WHD makeup, mostly focusing on WHIs and managers, and their knowledge and abilities related to human trafficking, it is helpful to directly access what the surveyed managers had to say:

I think that when investigators start to understand the business practices of certain industries they realize that there's a greater likelihood of trafficking in certain industries.... But, ...it would depend a lot upon a person's experience and knowledge and whatever training that they have had. I don't think that there is an extensive training on human trafficking but there's information out there and there are certain district offices that will make it more of a point than others. They can make it part of their routine—or they

might have an annual training on it, or every couple of years they might do a training on it. It just depends. ...But it's not a super point of emphasis (IN4 2011).

Most managers cited their very large percentages of new staff and, to a lesser degree, the lack of standardized training, as reasons that many of their staff could use increased or improved trainings related to human trafficking.

The format, content, provision and extent of training provided to WHD personnel varies significantly. The sources of training most commonly mentioned by the interviewed managers were the Department of Justice (IN1 2011; IN2 2011; IN5 2011), local non-profits (IN2 2011; IN8 2011; IN9 2011), WHD managers (IN1 2011; IN5 2011), making printed materials available, such as those of "Look Beneath the Surface" and "The Crime of Human Trafficking" (IN1 2011; IN7 2011), and the WHD PowerPoint regarding the role of the agency in human trafficking cases (IN5 2011; IN8 2011). Also, one office mentioned a training provided by the Department of Interior (IN1 2011).

Some managers seem to present a more dynamic approach to their staff: "Just about any case that involves large numbers of people from other countries that were previously underpaid, there's always a question of trafficking. It's an ongoing subject in which we review what goes on and what to look for and how to handle it" (IN7 2011). The same manager related the independent and informal nature of providing such training by saying, "We use what [training] we can get where we can get it" (IN7 2011).

The training provided to staff in one office seems more informal. Their manager, beginning with speaking to the level of the staff's knowledge about human trafficking, said the following:

I would say it's limited. As far as what they know, I think that they understand that if someone's being held against their will they need to notify or contact someone immediately. ...We haven't had any formal training in trafficking, I think, other than letting them know that this is what the FOH [Field Operations Handbook] says and this is what national management or national upper leadership wants us to do" (IN6 2011).

One other manager provided a unique example of a functional approach to assist WHI personnel in weeding through red flags, "we have provided some sample questionnaires, the key questions to ask for or some key indicators" (IN9 2011). Investigators and technicians can use these questionnaires as a sort of cheat-sheet to assist with screening potential trafficking situations.

One manager summarizes the underlying, functional approach to training investigators regarding human trafficking, stating that investigators should know "to look for it and understand what it is in the very generic and general sense" (IN6 2011). According to this perspective, what is most essential is identifying red flags and reporting those findings so that they reach the appropriate criminal entities and so that in turn those experts can explore the possibility of human trafficking.

Quantifiable data is a valuable aid for evaluating system programs and procedures. However, the quantifiable data captured regarding the WHD's entire scope of involvement with human trafficking situations is

little more than negligible. This is due to the minimal reporting required of managers and the lack of any required reporting for investigators or technicians. One manager provides a useful overview of the reporting required of managers:

Our national office through our regional offices prepares a quarterly criminal case report. I have a name for this report..., it's Criminal Cases, per Region. And it is all cases that have involved other law enforcement agencies that we have worked with on a particular case. So this has been ongoing for several years, this report. It would be reported if we actually had a case, if we had an investigation file set up, and we were working with that other agency (IN5 2011).

All interviewed managers expressed a similar understanding of this protocol. Another manager clarified that “It wouldn't be listed [in the report] if we just had conversations about a potential case” (IN5 2011).

The entirety of the purpose or use of this data is unclear. For example, the interviewed managers did not speak to what the NO might do with the data compiled through these reports from the various regions. As far as the interest of the Region, one manager expressed beliefs regarding the purpose of this reporting, “I think [they] want to know what’s going on but ...also kind of to capture what’s going on, and—[they] always want the timely resolution of cases” (IN4 2011). This reporting allows upper management to be aware of all criminal litigation the agency is involved in, which allows them to play a role in managing how the case is handled if need be (IN4 2011).

In addition to the formal reporting, some managers expressed an informal but regular practice of contacting the RO when they come across

a case of suspected or probable human trafficking. One manager says that in this situation “...the Regional Office will then give us some guidance on notifying our partners in the city from law enforcement. You know, how we can work together through a criminal path or we can pursue this on a civil path” (IN9 2011). When this occurs a manager will typically keep the RO informed of any case developments (IN9 2011).

Thus, there is a significant gray area when it comes to determining at what point the RO should be notified of a potential human trafficking situation. One manager comments, “I would think that certain situations that don’t pan out, [the RO] might get a heads-up, [they] might not. Certainly when it becomes an issue that involves [the Region] or involves trafficking [they] do get notification” (IN4 2011). The same manager goes on to reflect, “so we do keep some form of tracking but I’m not sure how perfect it is” (IN4 2011). The FOH, which exists to provide baseline guidance to WHD personnel, does not provide any instruction about intra-agency reporting in this matter (IN6 2011; U.S. Department of Labor n.d.).

Whereas non-management WHD personnel are typically the front line of interaction with the public, there is no form of reporting that they do related to human trafficking. One potential place to capture such data would be in WHISARD³. However, there is no such intent or manner for

³ WHISARD is a software program through which investigators and technicians log all information related to casework. There are currently places in WHISARD where a case’s lead manager must record specific data if the case is related to garment, agriculture, or construction work, or if the employer employs minors, before being able to close each case.

capturing similar data on instances of human trafficking, even when the case is being criminally prosecuted as such (IN7 2011). There is no additional place for non-management staff to report such information.

Therefore, the data that is captured here will only report on situations in which criminal litigation is attempted or at least considered. Information from sources such as telephone calls into the office or investigative casework that either outright suggested human trafficking or staff suspected could be trafficking is not captured in any form (IN3 2011; IN4 2011; IN5 2011). This information could help national or regional management understand the true volume of trafficking-related work that goes through WHD offices, alert management to any potential resource needs related to this work, and provide valuable insight as far as the training needs of WHD personnel. And without this information, it is not clear how WHD leadership might respond in an informed way to the National Office's desires for reporting on trends and issues relevant to this high enforcement priority.

The Wage and Hour mission is "to promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation's workforce" (U.S. Department of Labor 2011c). Here we will explore the meaning and extent of "workplace protection." One manager shares:

I think that there's no doubt the concept or the idea of protection means that someone else is trying to take advantage of someone. If you take it and splice it out what protection means and who needs protection, I think that we do, we are a Worker Protection Agency, but I don't know that every action that we do involves protecting workers. There are a lot of employers that aren't necessarily taking

advantage of workers; it's just that they don't know. So I don't know that I would characterize everybody in the category of needing protection. But generally, we're a worker protection agency, there's no doubt about it. But I also think that in some instances we're an employer protection agency. ...There are instances in what we do protects people's safety, particularly with regards to agriculture: the safety elements of the transportation and housing of migrant workers, I think that is absolutely protection. Protection with regards to people's wages, yeah I think that that's a protection. It might not be a safety but it's a quality of life issue. I think that the agency is a protection agency, though I think that there's a lot more than just protecting workers that goes on in what we do (IN6 2011).

Therefore, while it does seem to make sense that the WHD is understood to be a Worker Protection Agency, that title does not necessarily describe the entire body of work of the agency nor does it necessarily the agency's principle aim or purpose.

Jurisdiction is limited to work performed on U.S. soil, including its territories, and is determined by whether or not the business in question is covered by one of the laws enforced by the agency. The WHD and its employees can only act where and as they have jurisdiction, managed direction, and where such actions are in line with its enforcement responsibilities. The WHD does not typically work on sex trafficking cases simply because it does not have jurisdiction, as there is no formal business for them to investigate (IN4 2011).

Purposes of the WHD's law enforcement efforts, depending on the pertinent law, are generally to interact with the employer to the extent where the employer agrees to future compliance in all aspects of that law. A secondary purpose of those efforts is to attempt to gain for employees any monies or benefits due them due to those violations committed by the

employer. For purposes of improving and encouraging efficiency and efficacy, WHIs are evaluated and promoted according to multiple standards, and ever important are the number of cases they lead, close, and conclude with positive and effective results. Particularly under the present administration, investigators are being held to more rigorous standards with higher expectations for efficiency and output than perhaps ever before.

The task before the WHD is immense. Of the approximate 7,300,000 businesses in existence in the U.S.A., and with the number of WHIs currently at approximately 1,000, and approximately 40,000 investigations conducted each year, a business has a .006% chance of being investigated in any given year (Weil 2010). Therefore, strategic enforcement, incentivizing compliance through means other than direct investigations, and, of course, conducting many and quality investigations is an incredible pressure, expectation, and aim of the WHD and all WHIs.

WHD enforces all or parts of over 60 acts. In order to understand the workings of the agency, its priorities, and what level of engagement in human trafficking work would be appropriate, one must have an idea first of the content of these laws. A review of the pertinent aspects of these laws will begin chronologically with the Davis Bacon Act (DBA) of 1931. This law was created to protect local wages in the construction industry in regards to federal construction contracts worth over \$2,000. The idea is that if an out of town contractor wins the bid for such a federal project,

this rules out a large incentive for him to bring in cheap, outside labor. The functioning of this law rests on wage surveys conducted by the WHD that determine the average rate of pay for mechanics and laborers by county. Each federal contract is required to include and pay according to the wage determination that is the result of these wage surveys. Davis-Bacon and Related Acts (DBRA) is an extension of this law, because DBA only applies to projects with direct federal funding, while DBRA includes all federal acts written since the DBA that have the application of the DBA written into its requirements. These laws, such as the Housing and Urban Development (HUD) Act, for example, have indirect federal funds of at least \$2,000 in them, and therefore the DBA fully applies.

The Fair Labor Standards Act (FLSA) of 1938 has four main components: minimum wage, overtime, record keeping, and child labor. The FLSA does not automatically apply to all employers or all individual workers, but requires that there be an employer-employee relationship and either the employer must gross over \$500,000 per year for the law to cover all employees or they might be individually covered based upon the extent to which through their duties they engage in interstate commerce. The minimum wage was created to ensure a healthy and working workforce. Overtime, however, was created as a penalty to the employer who chooses to work an employee over 40 hours in a workweek instead of hiring a second employee, which would avoid the overtime premium rate as well as decrease the nation's unemployment. The records required by

this act are those which are necessary to determine compliance with this law.

One of the greatest strengths of the FLSA as far as enforcement tools is that in Section 11 it states that when maintained on-site the required records are to be made available for inspection to the WHD upon request, meaning that no warrant should be necessary, and for those records maintained off-site the employer has 72 hours to make them available. The second strongest enforcement tool of this law is that there is a provision of “hot goods” which declares any goods hot that are produced in violation of the wage payments or child labor sections of the law, and therefore the agency can seize these goods, restricting them from traveling in interstate commerce while still hot. The largest percentage of investigations conducted by the WHD is of FLSA investigations.

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) of 1983 establishes protections for migrant and seasonal agricultural workers regarding wages, record-keeping, housing, transportation, and disclosures. The law also requires that Farm Labor Contractors (FLCs) register with DOL. Hot goods is also applicable in this law, which is a very significant enforcement tool, as most goods are being prepared for immediate travel in interstate commerce. This law also does not automatically cover all workers, but applies depending largely on the size of the farm on which they are working.

In the mid-1990s the WHD was given a new branch of enforcement responsibilities relating to the H-visa programs, namely the H-1B, H-2A and H-2B programs. H-1B visas are designed for temporary, highly-skilled, non-agricultural workers, H-2A are for temporary, unskilled agricultural workers, and H-2B are for temporary, unskilled non-agricultural workers. These visa programs are designed with heavy penalties for the employer, as they are intended to only be used after significant attempts have been made at finding U.S. workers to perform the work.

For purposes of providing a comprehensive background review, it is important to also discuss the Wagner Act of 1935, commonly known as the National Labor Relations Act, even though it is not a law enforced by the WHD:

Congress enacted the National Labor Relations Act ("NLRA")⁴ in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy (National Labor Relations Board 2011).

This law is enforced by the National Labor Relations Board, an independent federal agency charged with enforcement of this act (National Labor Relations Board 2010). Here it is important to note that this law is not in any way the principle or a comprehensive labor law as far as affording worker protections. Instead, this statute should be understood

⁴ 29 U.S.C. §§ 151-169

as being but one aspect of the entire body of federal labor laws. This act and its contents will be referenced in the discussion of Field Work.

Political and agenda changes across administrations have clear and challenging effects for the agency. Specific to human trafficking, as one interviewee states, “the problem is that every administration has different focuses. The Bush administration’s constituency was on the sex side of things. The Clinton, was, well we were evolving, at that time it was brand new. The current administration is more focused on labor” (IN3 2011). One manager provides the insight that, “just like anything else, it takes time, once the law is written it takes time to work on how to make it happen to the best that we can make it happen as regulatory agencies and law enforcement agencies and NGOs and service providers” (IN5 2011). Thus, the WHD, just as probably any other federal agency, finds its own work contingent upon the whims and limitations of political and administration agendas, budget priorities, jurisdiction, mission, and resources. In order to increase efficacy, the WHD’s role should be clear, definite, and focused. However, when it comes to new or less explored territory such as that of human trafficking work, the role of the agency is not as clear as it could be to critics in the public, or, as we will see, to those within the agency and to those other players who work with it.

Wage and Hour Operations

As explained, not only is human trafficking work not an inherent part of the WHD’s enforcement responsibilities, but also it is not a

substantive portion of the entire body of work in which the agency is involved. The WHD's engagement in human trafficking work, then, is indirect, and represents a very small part of its regular activities (IN5 2011). However, the WHD has always had an important role in human trafficking work, due to their fieldwork and exposure to vulnerable workers, which allows for victim identification (IN5 2011).

Since the passage of the original TVPA in 2000, however, the agency has had a new, formal role in the prosecution of human trafficking cases (IN5 2011). The TVPA added six articles to Chapter 77 of Title 18 U.S. Code, "addressing the definitions, criminal sentences, and federal agency roles with respect to human trafficking. Among these new articles is 18 USC Section 1593, mandatory restitution..." (IN5 2011). This section requires that restitution be ordered for the full amount of the victim's losses, which are to be "determined by either the larger of the gross income or the value gained by the trafficker via the victim's labor or the value of the victim's labor as guaranteed under the Fair Labor Standards Act" (IN5 2011). This requirement directly involves the WHD in the criminal prosecution of these cases, as they are the agency responsible for FLSA enforcement. Thus, one manager sums up the WHD's role as "an accounting role..." (IN7 2011).

While all of the managers I spoke with acknowledge the undeniable opportunity to identify instances of trafficking when in the field, they were able to express an understanding of why that opportunity is much more

limited than it has the potential to be, often due to limitations of purpose, training, abilities and jurisdiction (IN4 2011; IN5 2011; IN6 2011). As far as purpose, one manager says, “They don’t send us to these locations to be able to track [human trafficking] down. I think that we are observers and we are recognizers of it, but I don’t know that we’re pursuers of it” (IN6 2011). The WHD has certain enforcement responsibilities, just as other agencies have theirs, and the answer is not necessarily for the WHD to take on additional areas of responsibility but perhaps, instead, to develop more effective relationships with other enforcement entities.

Many of the managers highlight the unlikelihood of achieving trust in their brief interaction with employees as a fundamental challenge as a key example of why WHIs in the field do not do much victim identification beyond noting obvious red flags (IN4 2011; IN6 2011). One manager explains the limitations of training when it comes to the ability to identify trafficking situations:

It doesn’t matter how well- trained you are, really, in my estimation, because you could talk until you’re blue in the face, but if somebody doesn’t trust you they’re not going to talk about those things because they’re under a lot of fear. ...That’s the thing that they can’t change, no matter how trained we are (IN4 2011).

These managers understand the limitations of their responsibilities and abilities.

When WHD personnel have reason to believe they might have identified such a situation, a referral is made to a criminal law enforcement entity to screen for and potentially instigate a criminal

investigation into such. The solitary official guidance given to the WHD, Chapter 50(f)(17-18) of the FOH similarly instructs personnel to make an immediate telephone referral to the FBI upon receipt of an allegation of “slavery and peonage.” The agency doesn’t have the same high level of investigatory access and abilities as some of the criminal enforcement agencies (IN3 2011). The agency has “...a certain skill set ...but ...[is] not sophisticated enough on the investigatory level” (IN3 2011). As one manager summarizes, “...Criminal law is a funny thing. We like to leave it to the professionals” (IN7 2011).

Therefore, while trafficking is at heart a labor issue and WHIs should operate in the field with an awareness of the dynamics of trafficking and how to identify it, the agency cannot and should not be expected to do much if anything beyond surface-level detections; that is fundamentally not in line with what they are intended or trained to do (IN3 2011; IN4 2011; IN6 2011).

The U.S. Attorney’s Office (USAO), or, more specifically, Assistant U.S. Attorneys (AUSAs) prosecute cases of human trafficking, as the TVPA is federal law. Typically the USAO will manage the course of the overall investigation and interagency interaction (IN8 2011). In criminal cases, it is the court’s responsibility to impose restitution orders on the guilty party. In other words, once an individual is identified as a victim in a criminal court of law, the court must seek restitution on their behalf. This is again distinguished from civil matters where restitution in and of itself

does not exist. Instead, laws enforced by the WHD allow for payment of back wages to employees, which can be doubled as liquidated damages if pursued in a court of law, and fines may be assessed, which are known as CMPs or civil monetary penalties.

The laws enforced by the WHD are strictly civil laws. Assistance with restitution computation is therefore the only reason for the WHD to be brought to the table in most human trafficking cases in which it participates. “If it were a court case and we were to testify, we would not be able to testify on anything but FLSA standards” (IN4 2011). So it is a unique role that a WHI plays when partaking in a criminal investigation, and not at all a part of her or his usual activities.

Actual restitution can in no way be guaranteed. Restitution is to be paid by those who are found guilty of the prosecuted crime, and in many instances there are no assets to be seized at the time law enforcement is able to do so. The same standards for determining what is and is not compensable time under the FLSA were applied to trafficking victims. One manager thus explains, “During the time that I was out there my approach to it wasn’t so much from the human trafficking criminal prosecution. My idea was to start to count the hours that someone was controlled as hours worked, under the ‘suffer or permit’ concept” (IN1 2011).

Civil and criminal investigations do occur concurrently on occasion. Three managers related instances where this did happen in an attempt on

the civil side to secure back wages for workers. In these instances, the civil investigation pursued violations under the FLSA and the criminal investigation pursued trafficking charges. One manager had experienced this as an unsuccessful approach as the defendant got rid of all assets by the time the criminal restitution was ordered (IN3 2011). A second manager worked a case where the WHD obtained a civil judgment in case the criminal case did not go through (IN7 2011). A third manager related an extremely successful case where the bifurcated cases worked alongside one another, but the civil investigation concluded quickly and the WHD was able to negotiate with upstream beneficiaries of the slave labor to have the back wages paid to the victims before the criminal case concluded (IN1 2011).

Title 18 U.S.C. Chapter 77, Section 1593 makes it clear that the WHD does not necessarily need to be included in the process of determining restitution for trafficking victims, as restitution does not need to be based on the FLSA (IN1 2011; IN3 2011; IN4 2011; IN5 2011). “But I think that is why they come to us more, because we’re giving them a precise figure and we have the skill set to provide that information and it works out very well for them” (IN4 2011).

Chapter 2

THE PROBLEM

A discussion of interagency relationships will begin to open up some of the hurdles involved in successfully moving forward with human

trafficking cases that the WHD encounters. Following that is a discussion covering the confusion that exists, both within the agency and outside of it, concerning its role in human trafficking work. In the chapters that follow subsequently, strategic enforcement practices will be discussed and recommendations will be raised.

Interagency Relationships

“We're playing in this world between criminal and civil, and they're two different worlds. And unless you take the time to figure out how to connect the dots, a lot of the cases that are truly trafficking will fall apart because the players don't understand each other. They don't understand their capabilities, the resource commitments, and there is just a long list of variables that have got to be in play in order for this thing to work” (IN3 2011).

The entities most fundamentally involved in the process of determining whether or not and how a situation might be moved forward for potential litigation, except for situations of sex trafficking (IN4 2011; IN5 2011), are the USAO, FBI, ICE, and the WHD (IN6 2011). Less fundamental but extremely important are any number of NGOs, as will be discussed shortly. Managers also mentioned receiving referrals from other governmental entities, such as OSHA (IN1 2011) and state labor commissions (IN7 2011; IN8 2011). The heart of the relationship among these agencies comes down to its joint purpose of working together to

identify and screen potential violations and to respond to them appropriately (IN1 2011).

The most effective manifestation of this relationship to date has been the Human Trafficking Task Forces. These Task Forces are funded through Department of Justice (DOJ) grants and are typically orchestrated through the local USAO. One consistent element that seems to be important to the success of the Task Forces is frequency of meetings, with regular, monthly meetings identified as most helpful (IN2 2011; IN4 2011; IN5 2011; IN9 2011). One manager comments, “If meetings are too infrequent, relationships wane and the ease of communication among the agencies weakens” (IN2 2011). Staffing turnovers also were reported to play a role, not only in the mere occurrence of regular meetings but also in the degree of awareness of other agencies’ roles (IN9 2011).

The criminal enforcement agencies only rarely have need to interact with a civil law enforcement agency, and so educating those agencies on the WHD’s enforcement responsibilities and the ways the agency might assist those other entities is a major hurdle in human trafficking casework (IN1 2011; IN2 2011; IN4 2011; IN5 2011; IN9 2011):

That’s really the main thing, making people understand [the WHD’s role], because ...sometimes there is that misunderstanding and they’ll go with something that looks like a criminal situation and it doesn’t pan out, and if there’s not a good relationship between the agency that received it and us, we don’t get their referral at any point in time(IN4 2011).

This need to educate others on the role the WHD can play extends also to working with NGOs, particularly those that also sit on Task Forces (IN4 2011; IN5 2011; IN9 2011).

One significant gap in connecting the WHD with the criminal enforcement agencies is a lack of understanding of the organization and functions of the DOL on a grander scale. Often times criminal investigators will identify that there is a need for the involvement of a labor-related government entity, but in some instances they turn to the criminal arm of the DOL, the Office of Inspector General (OIG), not knowing that entity's limitations (IN3 2011; IN4 2011; IN9 2011). OIG agents have gone so far as to compute back wages in human trafficking cases (IN9 2011) even though they have no training or expertise on how to do so. Even the OIG itself seems not to have a clear understanding of its role and limitations, especially specific to human trafficking cases:

“Recently ...one of the managers at OIG said that they're a little bit unclear about where they stand with trafficking and what their role is” (IN9 2011).

This affects some locations more than others due to the location of OIG offices (IN3 2011), but is something that certainly hinders the process for some. Without more clearly defined roles and the proper education among the involved agencies, trafficking cases will not move forward with the ease that is possible.

Confusion of Wage and Hour's Role Regarding Human Trafficking and the Need for More Comprehensive Policy

Weighing critiques is always important for the growth of any organization. Therefore, we will begin this section with a look at scholarly confusion of the agency's role as it relates to trafficking, as this confusion exists both within and outside of the WHD and its counterparts. One illustration of such confusions can be found in the research of Kevin Bales and Ron Soodalter in their summary review of the WHD as it relates to human trafficking.

Bales, considered by many to be the top expert in the world on the topic of modern day slavery (Soodalter 2011), and Soodalter, a historian, educator and author, certainly offer a significant contribution to the public in their collaborative work (Bales and Soodalter 2009). However, the weaknesses of some sections of this work are more than troublesome, particularly given Bales' reputation as an authority and the impact of his work. Here a glimpse at these authors' critique will be followed by illuminating insights into the experience of WHD field work provided by those who know best.

Bales and Soodalter argue that the WHD, not to mention the Government as a whole, should be doing much more to identify situations of human trafficking through their work in the field:

There is no point in looking to the government for help: farm labor is practically the only type of work not covered by the National Labor Relations Act of 1935, the law that protects workers, gives them the right to organize without fear of retaliation, and fixes wage, health, and safety rules. Yes, farmworkers can organize a union or strike for better pay, but they can be fired for doing so. This exclusion of farm workers from the rights given to almost all other American workers came from the power of Deep South congressmen in 1935,

when the law was passed. These Dixiecrat politicians were adamant that black field hands should never be allowed to organize. Not surprisingly, household servants were also excluded from full rights. Some DOL wage and hour rules do apply to farm workers, but with only two wage and hours inspectors for the entire Southwest Florida region – which includes tens of thousands of farmworkers, as well as other types of laborers – there is little hope of help there either. For years, the local inspector for that section of Florida generally spoke only English – in the midst of workers who did not – and spent more time in the grower’s office than in the fields, where he might witness firsthand the treatment of the pickers. With the law on their side, the crew leaders and the growers hold all the cards (Bales and Soodalter 2009, 47).

As indicated in the Background section of this paper, the NLRA is not a comprehensive law for agricultural or domestic worker protections, even more so with regards to wage and safety protections. True experts of this topic, managers with decades of experience in this exact line of work, provided feedback that Bales and Soodalter might find interesting in regards to the content of the rest of that quote.

In contrast to the dismissive and harsh criticism of Kevin Bales (Bales and Soodalter 2009) that appears to have been levied after only very superficial research, Dr. David Weil of Boston University gathered data on the work of the WHD for ten years. The resulting report, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division*, was published last Spring. This resource provides a wealth of knowledge on the inner workings the agency and delineates invaluable and constructive recommendations for strategic improvements in the agency’s enforcement efforts. These

recommendations are largely reflected in the DOL's 2011-2015 Strategic Plan (U.S. Department of Labor 2010b; Weil 2010).

Where they do reference federal labor laws and particularly where they reference the WHD, Bales' and Soodalter's understanding of the WHD is too superficial to be constructive. So many people around the globe follow Bales' work (Free the Slaves 2011) that the unnecessarily inflammatory and, again, under-researched writing does a particular disservice to everyone by contributing to the abyss of bad public information. While there are benefits to interest groups swinging wildly in their criticisms and calling for change, at times, as in this situation, these sorts of criticisms are fundamentally unhelpful. There is a utility to critiques which take into consideration that the government is not monolithic, but has independent working parts, each with their own interests. However, criticisms of the sort presented here have the serious potential to do more harm than good, with real consequences for WHIs and WHD managers. Suggesting that these employees pursue a single, independent agenda above and beyond the agency's directed jurisdiction and responsibilities could lead to serious consequences for acting outside of one's authority, individual performance standards, and also the public's trust in the agency. What is needed is sound, thorough and constructive review and critique of the Government which, fortunately, is provided by the managers interviewed here.

Some of the interviewed managers have heard and certainly understand such critiques but also understand the reality of the agency's work (IN9 2011):

I certainly believe that Wage and Hour, because we are on the ground every day, we could potentially be in a position to identify situations of trafficking, and we have, and have had very significant cases over time. ...The number of establishments that we enter every year, I think we do 25,000 investigations every year as an agency, maybe 25 to 30,000 investigations per year as an agency. If you compare that to the actual number of establishments that are out there... then you have to look at that [assessment] again (IN5 2011).

One statistic provided by the work of Dr. David Weil is that in a single year any given U.S. business has a .006% chance of being investigated by the WHD (Weil 2010). Thus, it is widely understood and accepted that many businesses are never investigated by the WHD, which is why DOL leadership has taken significant strides to be more strategic in its enforcement work (U.S. Department of Labor 2010a) and why it is so important for the agency to continually re-focus its energies on its intended purposes. However, specific to human trafficking, "Wage and Hour has to be a whole lot more sophisticated to do really much beyond what we're already doing" (IN3 2011).

Many of the managers themselves related some form of confusion on the limits of the WHD's role in human trafficking work and quite a few communicated a desire for expressly articulated policies that provide clear direction to agency personnel. As mentioned earlier, the only formal guidance provided to agency personnel is that in the FOH, which requires staff to make a referral to the FBI if peonage is alleged by a member of the

public such as an interviewed employee or a third party. This guidance, written in 1983, cites the Constitution's 13th Amendment and 18 USC 1851, 1853, 1854, 241 and 242 as legal backing and also defines slavery and peonage per these regulations as the following: "Compulsory service not provided by law; because of a debt, either real or pretended; against the victim's will" (FOH 50(f)17-18). The understanding of modern day slavery and the agency's roles related to the criminal process have evolved so much that it is necessary that official guidance and training reflect the same.

The following comments from managers reflect the gray areas of policy and practice that exist within the WHD:

In terms of leadership, Wage and Hour has kind of had two competing philosophies. One being: we're only civil, we only have one place in this world, we don't want to be near anything related to Immigration, because it can hurt us. And there are valid perspectives there. And then there's the other philosophy that says, "how can we turn away from this? We're in the workplaces, we have the resources, how can you say don't ask questions when it's in front of you?" ...The other conflict is, with limited resources, trafficking cases take a huge amount of time, which takes us away from serving other customers. And that tension has never really been resolved (IN3 2011).

As such, the lack of direction leaves the extent of WHD work on human trafficking cases or possible leads up to the discretion of individuals (IN2 2011; IN3 2011; IN4 2011; IN6 2011; IN7 2011).

One manager explains, "Ultimately, it comes down to the district director and what the district director believes is the value of being involved in trafficking" (IN3 2011). Another manager explains how the

discretion is farther stratified, going to the level of the individual investigators:

A lot of [how involved we get pursuing potential human trafficking cases] depends on the individual investigator wants to do. And the ADD. You know ADDs run this agency like sergeants run the Army. Okay? It all depends what they want to do, how involved they want to be. If all you're interested in is collecting back wages and moving on, you're not going to get that involved in this (IN7 2011).

This not only leaves these hefty decisions to the independent judgment of individuals, but without the proper training, it also leaves them without any official reference for how to make the right decisions in these situations. One manager explains the complexity of these instances, saying, "If there are allegations of trafficking, because of safety concerns and things of that nature, and because we don't have the expertise in those areas ...that stuff should be handed off to the appropriate agencies once we get wind of that possibility. It's just, at what point do you do that?" (IN6 2011). The same manager goes on to detail the difficult position in which the lack of guidance leaves managers:

I don't know that I've got the tools, tools mostly meaning I don't have the knowledge base in some instances, nor do we have the individuals ...to look at it and address it... I don't know that [we have the] jurisdiction. ...[A]nd what law do we pursue it under? ...It's not under the Fair Labor Standards Act.... So, what statute is it that we pursue it under? (IN6 2011).

Additionally, another manager brings up the need for guidance for how the WHD should handle instances where a trafficking criminal case dies on the vine and the WHD is left with what is left of the case and the statute of limitations (IN9 2011).

In conclusion, there are questions within and outside of the agency as far as the WHD's role in human trafficking. A comment by one manager sums things up well when discussing interagency roles in regards to human trafficking casework, saying, "I have had talks with key people in AUSA and FBI, and they are confused, we are confused, and I think OIG is confused" (IN9 2011). The agency does encounter these cases and does at least have the opportunity to identify its occurrence in the field. Agency and DOL leadership need to close this gap in guidance.

Chapter 3

TOWARDS IMPROVEMENTS

We can be encouraged that the WHD has already responded to problems that this thesis identifies. Specifically, at this moment a new pilot project is being launched known as ACTeams (IN3 2011; IN4 2011; IN9 2011). So here we will review what is currently underway, and then we will be well-prepared to continue with the managers' insights and recommendations for steps the agency could take in moving forward.

In the Works

February 4, 2011 the Attorney General, Secretary of Homeland Security, and Secretary of Labor announced the creation of ACTeams, describing the teams as a "national human trafficking enhanced enforcement initiative, intended to streamline federal investigations and prosecutions of human trafficking cases" (U.S. Attorney's Office 2011). Set to begin any day in Los Angeles, Phoenix, and Seattle, there is word that

the ACTeams pilot programs may soon expand to additional cities (IN4 2011). This program includes the WHD as one of the agencies central to the process of collaboratively working human trafficking cases.

It will be interesting to see who participates in the ACTeams as far as whether it will be WHD managers or investigators. Where the typical practice in the Task Forces is to have WHD managers directly engage with the Task Force (IN1 2011; IN2 2011; IN3 2011; IN4 2011; IN5 2011; IN6 2011; IN7 2011; IN8 2011; IN9 2011), one manager highlighted an incongruity with this, which has the potential to be corrected through the ACTeams:

The problem with that policy is the Task Forces are mainly comprised of agents. FBI agents, ICE agents, investigators. And there's a disconnect between those individuals who are out in the field doing the day to day work and a manager from Wage and Hour who comes in (IN3 2011).

Also as part of the ACTeams initiative, its coordinators issued a sort of interagency memorandum outlining the work of the various agencies and delineating the circumstances in which it would be appropriate for their inclusion in a human trafficking case (IN4 2011). And so, the ACTeams can be considered a positive initiative engaged in learning how to improve the work of the Human Trafficking Task Forces and crucial interagency communication. One manager discusses how this single program could have an effect on many of the issues addressed in this paper:

There might be a greater focus on trafficking now that we're at the table, formally working on these teams. That might mean more

training; that might mean more focus, more emphasis. I'm not exactly sure how that's going to work or what the expectations are, but I think there's a potential for us to become a little more versatile (IN4 2011).

Training is one area in which the managers can provide a unique perspective, having overseen the training and development of WHD personnel in their offices.

As one manager reflects, "I think, personally, it's just a matter of awareness and interest. Trafficking is everywhere but it's so subtle in most instances" (IN3 2011). If identifying instances of human trafficking is truly a priority of this department and administration, identifying instances of human trafficking cannot be left to the whim or interest level of individual investigators (IN2 2011; IN3 2011; IN4 2011; IN6 2011; IN7 2011). Not only does this do nothing to ensure efficacy, but it also leaves investigators with the predicament of having no express guidance for how to act in a particular situation; there are severe limitations on what an individual can and cannot do when acting as a representative of the government, and acting outside of those limits could easily be judged as misconduct.

Policies should be in place to provide baseline education for investigators and procedural methods of following up if certain red flags present themselves. The last thing managers need is more requirements mandated down to them (IN6 2011), so it is of the utmost importance that the chosen training methodology be strategic to ensure efficiency and efficacy. Particularly for new WHIs, "[Newer staff] have so much that they need to know as investigators already that we don't want to bog them

down with additional information” (IN2 2011). Training should be two-pronged for the two potential roles the WHD can play in human trafficking cases: that of identification and that of making trafficking victims whole, whether through civil or criminal casework. These ideas reflect the words of the 2010 Trafficking in Persons Report when it says, “Prioritizing trafficking cases and continued training are required to increase the number of cases prosecuted and victims identified” (U.S. Department of State 2010). Once employees have a baseline knowledge of trafficking as it relates to their work, then they will be able to apply skills that will allow them to appropriately look deeper into that area of concern (IN2 2011).

As far as identifying the occurrence of human trafficking, the managers provide helpful suggestions for improvements. For all staff to have comprehensive knowledge of the topic seems impractical and unnecessary. They need to understand the legal concepts generally, particularly in that a person being held against their will can include force, fraud, or coercion. And then beyond that basic understanding, training should narrow and be emphasized for enforcement work of the agency, for example that regarding MSPA or a work visa program. Instruction on how trafficking might manifest in a particular industry or among a particular population should draw WHIs’ focus to typical red flags for those areas (IN1 2011; IN2 2011; IN3 2011; IN4 2011; IN5 2011; IN6 2011; IN9 2011). Another manager had an FBI agent provide a training specific to trafficking who taught “to look for certain signs we should be looking for

when we're doing an investigation, regardless of the type of investigation we're doing, and to just kind of to ask probing questions," (IN2 2011). Other managers gave similar instructions on a case by case basis (IN6 2011) or provided WHIs with a list of standard questions to assist in the initial screening.

Strategic Enforcement

The DOL Strategic Plan ("the Plan") effective for 2011 through 2015, published in May, 2010, largely in response to Weil's research findings (Weil 2010), is centered upon the idea of strategic enforcement (U.S. Department of Labor 2010b). This creates a lot of structure and direction for managers, emphasizing low-wage industries and vulnerable workers as WHD priorities (U.S. Department of Labor 2010b). The Plan lists bundling⁵, media use, and a focus on fissured industries⁶ as part of its strategic enforcement priorities. These strategies are intended to improve

⁵ *Bundling* is a strategic enforcement approach intended to increase compliance at the level of a corporation, geographic locality or industry through increasing employers' perceptions of the likelihood of a WHD investigation of their firms. This is achieved through bundling together multiple single-establishment or single-firm investigations into one coherent enforcement initiative carried out in a short period of time (Weil 2010).

⁶ *Fissuring* indicates a situation in which "the key employment relationship has been 'fissured' or splintered apart" (Weil 2010, 20). Fissuring, also sometimes called devolution, is "Accomplished via the growing use of a wide variety of organizational methods: subcontracting, franchising, third-party management, changing workers from employees to self-employed contractors, and related contractual forms that alter who is the employer of record or make the worker-employer tie tenuous and far less transparent" (Weil 2010, 21).

general compliance levels with little or no resource expenditure increases through the agency's intentional exercise of these tools.

The Plan strongly encourages the use of press releases as one avenue for using media to “[enhance] deterrence through transparency” (Weil 2010, 3) and to publicize future or current initiatives or resolved cases. Many managers expressed strong support of this emphasis and explained the various forms their press releases take. Common sources are newspapers, radio stations, and, probably less likely to take the story, television stations. An important aspect of these releases, in order to be effective, is that they are released in the appropriate languages and to the appropriate communities (IN9 2011). One manager offers the idea of working with employer associations to publicize relevant investigations and share compliance materials, possibly through the associations’ newsletters.

Issuing press releases can have multiple benefits for the agency. It fits in line with the findings of Weil (Weil 2010), which suggest that there is geographic and industry-related sensitivity of employers to enforcement actions. The idea is that publicizing WHD investigations makes employers more aware of the possibility of being investigated themselves and therefore incentivizes remaining compliant. Press releases educate the public about the agency and what it enforces, and it also informs the public, most notably employers, of potential consequences of non-compliance (IN2 2011). As far as consumer awareness, “Getting more of

the public to be aware of these bad actors or constant, chronic violators... I think that will help curb the non-compliance level out there” (IN9 2011). Not only does it educate consumers, it also brings shame to the businesses and its members (IN2 2011).

Specific to human trafficking cases, one manager reflects on the importance of media releases:

I think if we’re to make a difference, [we need to be] educating the NGOs, educating the public, and really gaining some kind of trust that there’s some mechanism out there to deal with this. I think that’s really important too because all of the education and outreach itself doesn’t really change behavior at the level that we’d like to. ...[T]he more presence you have the more activity you have (IN4 2011).

The threat of suffering these consequences can certainly serve as a tool to incentivize the compliance of employers who have not yet been investigated, making it a very robust strategic enforcement tool.

Another strategic enforcement approach encouraged by the Plan and that the managers support is looking into fissured industries, both fissuring up and fissuring down (IN1 2011; IN4 2011; IN7 2011). One manager explains how this might apply in a trafficking scenario:

[It’s] like what we’re doing in fissured employment where we’re looking at who is benefiting from labor even though they’re not directly involved, and naming them, or approaching them and saying, “Do you realize that there are people performing work that you’re benefiting from that is not in compliance with the Fair Labor Standards Act? And what do you plan to do about it as somebody who is involved in this?” I think that’s another way that we have to keep sending the message. Because it is possible in a certain scenario you may have human trafficking and fissured employment. It could be some janitorial company who is three levels removed from some retailer. And so I think you have to keep all the options open and you have to be able to engage people who can make a difference. Because

really the big, big companies who are benefiting from labor really can make a difference. Now whether they choose to or whether they do enough to make an impact, that remains to be seen (IN4 2011).

These comments mirror the success related earlier in this paper where a WHD investigation resulted in back wage checks for employees before the parallel criminal investigation was even concluded (IN1 2011).

When asked if one might anticipate whether or not the Plan would result in an increased number of identified human trafficking situations, one manager comments:

I like some of the directions, or, I guess, new priorities, that the agency is looking at: bundling cases, focusing on fissured industries. We're already doing that, because now the focus is more on that, so resources are being shifted to these initiatives. Yeah, definitely I think some [human trafficking] cases will come up to surface (IN9 2011).

The chance that more trafficking cases will surface is primarily due to the agency's renewed emphasis on low-wage industries and vulnerable workers. Media exposure specifically increases the chance of human trafficking cases surfacing because it increases the chances that a trafficking victim will learn of the WHD and how their pay is protected through the agency's laws and therefore might be more likely to contact law enforcement (IN5 2011).

Another manager discusses the effect of a focus on low-wage industries and vulnerable workers:

When you look into low-wage industries there is a higher likelihood of trafficking. I think that in real low-wage industries where you have undocumented workers or workers who may not be knowledgeable in the rules and regulations of the country, I think you have a greater chance of running into a trafficking case.

Domestic service is a priority for us, it's one of the priorities, because it's a low-wage industry, even though we don't focus a lot on it. Restaurants, of course, and the construction industry. So I think that in a lot of different industries you're going to be in the field of where trafficking can take place, and forced labor cases. Working with low-wage workers, it can't hurt. ...I would think it only has the potential to create more trafficking cases (IN4 2011).

Thus, considering these reasons to believe that more human trafficking cases will rise to the surface due to the new enforcement priorities outlined in the Plan, this would be an apt time for the agency to take measures to ensure that its staff is well prepared to identify and respond to this.

Incentivizing Compliance

This sub-section explores means of increasing the probability that employers will be compliant with federal labor laws that might be seen as tougher enforcement. The need for the agency to consider this approach is apparent:

[T]here's no mechanism for us to really enhance the deterrence outside of looking at willful violations or liquidated damages or a consent judgment. When you have the case with egregious violations, there are tools and remedies and we need to use them all (IN4 2011).

Though the repertoire of these sorts of options is quite limited, they can have significant effects. These means primarily consist of civil monetary penalties (CMPs), which are fines, and litigation. One other method, which is perhaps not as tough but still very important, is increasing the referrals made from the WHD to other agencies so that there is increased compliance in other federal laws in addition to those enforced by the WHD, such as tax laws, for example (IN9 2011). An employer facing a first

investigation typically sees no financial penalty for paying workers illegally beyond being asked to pay the back wages that the investigation finds should have been paid in the first place.

Traditionally, CMPs have only been assessed sparingly. They are usually assessed only in instances of exact repeat violations upon a second investigation of the same employer, but in some instances they have also been assessed where it was very clear that an employer knowingly and willfully committed violations (IN2 2011). The other principle avenue of tougher enforcement is litigation, through which a court can order an employer to take certain actions. The main reasons this occurs so sparingly are the expense, the many resources required, and that federal attorneys are very careful in choosing which cases they will pursue.

Looking to records, several remedies are available to the agency, related to obtaining records in the first place and to the keeping of proper records. Of course, investigators are encouraged to be vigilant in their pursuit of access to FLSA-required records. However, recently they are being told that if they meet too much resistance the agency will seek subpoenas or warrants to force the access to records. Also, currently there is no financial incentive for employers to maintain accurate records. “We routinely see that every time there’s a minimum wage violation or an overtime violation, there’s always a record-keeping violation” (IN9 2011). Another manager adds the belief that record-keeping violations should be assessed, “maybe not the first time, but definitely, if you don’t keep

records the second or the third time” (IN4 2011). Several managers hope to see a record-keeping CMP in the near future (IN4 2011; IN9 2011). Some managers also simply support more substantial CMPs for FLSA violations in general, one stating, “There’s always that economic incentive. But if more and more people are being subject to sanctions, I think that that’s going to raise the bar” (IN4 2011). On the other hand, one manager provided an alternative perspective of the usefulness of CMPs, saying “I don’t believe in CMPs for certain things because it doesn’t really do anything to solve the issue,” (IN8 2011) referring to criminal litigation.

Limitations on both civil and criminal litigation are difficult because of extremely limited resources and because of attorneys’ willingness to take cases specifically because court decisions are precedent setting. While civil litigation is possible, it is rare to say the least. There are DOL attorneys located at regional Solicitors’ Offices who prosecute cases on behalf of the DOL for the laws enforced by all of the department’s agencies. For aforementioned reasons, the Solicitor’s Office will only pursue very solid cases, typically with very large back wage findings and in which the local office was unable to resolve the case themselves. Several managers would like to see their attorneys take more of their offices’ cases and perhaps have lower thresholds in their selection of cases (IN4 2011; IN5 2011; IN9 2011). This is mostly to force back wage payments and to make troublesome employers accountable to the WHD and hopefully thus more likely to be compliant in the future. Civil litigation is also important

because in court the FLSA provides for the award of liquidated damages up to double the amount workers are due, which serves as an additional financial incentive for compliance (IN4 2011; IN9 2011).

Pursuing criminal litigation of an employer is potentially the strongest action the WHD can take to create an incentive for an employer and the greater community of employers to comply with WHD laws. Criminal litigation involves very different actors than civil action, as it could potentially be pursued under city, county, state, or federal laws, which all have their own respective legal bodies. As discussed previously in the Interagency Relationships sub-section, there have traditionally been managers and investigators opposed to involvement with criminal investigations (IN3 2011). However, in the name of tougher enforcement, managers are increasingly turning to what are perhaps the most fundamental criminal charges available to the WHD, those of Title 18 U.S.C. 1001 (IN4 2011; IN5 2011; IN8 2011). “It’s a statute that says if you lie to a federal agency or you lie to a federal government official, or, there’s another separate one that says if you lie on a federal form, you can do five years in jail” (IN8 2011). As over time they are developing and improving relationships with the right legal entities, managers are finding that attorneys are taking WHD cases that do not meet traditional thresholds (IN4 2011; IN8 2011). One manager, speaking of Title 18 U.S.C. 1001, says “You know, it is changing. If we talk to the right U.S. Attorney they’ll bring [the charge] for us” (IN8 2011).

Policy Suggestions

This section was made distinct from the previous two for the reason that it contains a much more diverse body of suggestions that reflect truly innovative thinking. Some of the following ideas are more in line with those of prior sections than others. However, considering the sources, I believe them all to be worth pondering. I will begin with those that seem to have most in common with what has already been discussed.

Additional training regarding human trafficking and criminal casework processes, particularly for investigators, is something it seems most managers would welcome (IN3 2011; IN5 2011; IN9 2011). As mentioned earlier, it will not be helpful to already overburdened offices if this training is not strategic and exact in its focus (IN6 2011). Earlier sections of the paper contained manager suggestions to provide general knowledge training and then specialized training for various industries and agency-enforced laws. Managers also suggest that periodic trainings provided to all staff would be helpful, as the knowledge and understanding of human trafficking continues to grow, to help keep staff informed, up-to-date, and to keep trafficking on their radars (IN5 2011). Other managers specifically state that they are looking for protocols or official guidance, such as an update to the FOH, to be developed at the level of the Regional or National Offices so that staff may know what is expected of them in these sorts of situations (IN9 2011). Again, another reason for creating a universal training is that it removes the independent discretion of

investigators and managers from the determination of whether or not and to what extent to engage (IN9 2011).

Making exactly those kinds of determinations was certainly a gray area for some managers, most likely due to the lack of policy and training for management. Managers receive little or no training on the criminal process and how to work through it (IN3 2011). While the same can be said for investigators (IN3 2011), their involvement in criminal casework can be directed from a management level, and if the managers understand criminal laws, the important actors, and key processes, then they can share that information with their investigators as need be. Another element that could be drawn into this training is how to financially manage their offices' involvement in human trafficking litigation. To this end, one manager discusses how the agency, which, again, operates on a very limited budget, has not made it a point to proactively pursue funds available for this work, saying, "Trafficking Task Forces get annual grants, you know, half a million dollars. And in those grants they'll pay for transportation, they'll pay for overtime, they'll pay for a lot of these things. To my knowledge we've never tapped into those resources" (IN3 2011). These seem to be sound and practical ideas to be explored when moving forward in the future.

As part of their involvement in criminally pursuing human trafficking cases, each interviewed manager at some level discussed the importance of the interagency relationships. As discussed earlier, it would

probably not be going too far to say that the fluidity of these relationships is pivotal in determining the extent and nature of the WHD's involvement in these cases (IN1 2011; IN3 2011; IN4 2011). To a large degree the quality of these relationships and their communication is always going to be an essential component that will need to be developed at the local level (IN1 2011; IN4 2011):

Maybe it shouldn't be just about relationships or personalities; it goes beyond that. ...[I]t also is nice if the rebar is there: the things that you don't see that's in the road that keeps it together that requires them to do a check-in [with Wage and Hour] without it being a big deal.... Because, frankly, me going out there years ago and trying to lay the groundwork that this is also about labor and making people whole, it took a while for some people to let it sink in (IN1 2011).

It would be helpful for the success of these cases to not be so entirely dependent on local actors.

Creating a built-in structure by which agencies could get in contact with one another for collaboration would also achieve a second aim expressed by several managers, which is early involvement in trafficking cases. There is strong agreement among the managers interviewed that this interest boils down to two main purposes: first, the ability to obtain the evidence they need in order to produce the most precise findings as possible, and second, ensuring restitution is at the forefront of the criminal investigators' minds from the outset. As one investigator puts it:

...We have to be involved because we have to educate the other staff on the things that are important for us to look at, and then as information is coming in we have to be able to process what that information means for our purposes. And we have to be able to talk to folks when the time is right, because you have to be engaged at all

levels of the case, even though you may not be putting in a lot of time or resources (IN3 2011).

Other managers add that it might be the agency's restitution-centered perspective that makes the WHD's early engagement in these cases most important. One manager explained that while criminal enforcement agencies are often preoccupied with establishing probable cause, seizing assets and forfeitures may not be an obvious early priority for them (IN5 2011), which in the end can make a world of difference for these victims (IN3 2011; IN4 2011; IN5 2011; IN7 2011).

One manager suggests a more proactive approach to aiding trafficking victims, which involves changing the way some employers do business. The concept includes increasing or improving the regulation of certain entities or industries, potentially adjusting or being more aggressive with record-keeping enforcement, a strong emphasis on the correct classification of employees versus sub-contractors, and closely following industry fissures. The hope is that human trafficking is then easier to identify and potentially less likely to occur. The manager thus explains:

We have certain things, whether by government or in certain industries, that make [human trafficking] happen very easily. If we target ...for example, cash payment facilities. Why can people get away with paying cash? ...In the garment industry ...when the manufacturer pays the contractor they pay him in check; there's always a paper trail. But yet then how can the contractor turn around and pay the employees in cash? ...There's a reason for that. Certain entities are out there selling false documents, for example, 1099s. Instead of this company saying they have 300 employees, maybe they show they only have five employees and 295 sub-contractors. That's how they get around paying them in cash or at

certain cash-checking facilities. These are something that ...we should go after... but the thing is, how do we go after them? ...There has to be a money trail. So if we go in and look carefully at the money trail we should be able to identify these major industries. Like the Strategic Plan says, fissuring industries—these fissuring points, these pressure points—we go after these pressure points. That will be a game changer for certain industries (IN8 2011).

The main idea is that when industries and businesses are not regulated and their books are largely off-the-record, workers are more vulnerable to the whims of their employers and trafficking has a greater chance of occurring (IN6 2011; IN8 2011).

Along similar lines, several managers believe the H-visa programs, now enforced by the WHD, may even invite the occurrence of trafficking (IN2 2011; IN4 2011; IN6 2011; IN8 2011). “We see that these visa programs lend themselves to human trafficking or at least to people becoming victims” (IN2 2011). Another manager explains:

We don't find the problem in the H-1B program. But the H-2A and the H-2B is where the Immigration and Customs Enforcement thinks if there is going to be a problem that it could be potentially in those areas. And that people are being brought in..., obtaining visas, not necessarily for the purpose of work. They're just getting the visas ...here and then doing whatever they need to do with those workers. So that's what their concern is with the H-2B program and that ...the employers are taking advantage of workers in the H-2A program (IN6 2011).

Another manager shares similar sentiments in the context of broader experience with visas in general:

Well it's certainly a possibility in any situation where you'd have visas involved. I wouldn't say it's typical. Most of the [human trafficking] cases I've seen have been non-H-visa related. They've typically been on a tourist visa or a student visa maybe and they've overstayed their welcome. ...But I think the H-program ...it's a means for somebody to come in here on a temporary basis. So

there's always a potential for that to occur. ...They're not from this country, so there's a greater likelihood that they could be taken advantage of (IN4 2011).

A specific point for potential improvement regarding enforcement of the H-visa programs is a procedural loop hole in the authority of the WHD. A manager states that a trouble “with the H-visas is that we have no subpoena rights and that’s a problem for us. We can’t use our FLSA to go in and to request records under the H-program” (IN2 2011). In other words, if an H-visa employer denies a WHI access to the firm’s records, the agency is not equipped with any tool by which she or he might force access to those records. The regulations could be amended to include this authority, as DOL solicitors have indicated that it is simply an element not written into the laws when originally passed by Congress (IN2 2011).

Others argue that the H-programs are flawed from very early on due to a lack of investigative work at the front-end to prevent visa fraud (IN2 2011; IN8 2011). While the WHD is responsible for investigating in regards to compliance with H-visa workers, it is the U.S. Citizenship and Immigration Services (USCIS)⁷ that is responsible for approving applications for H-visa workers (IN8 2011) and the Education and Training Administration (ETA)⁸ processes the applications. The Department of State, however, has the final say on whether or not a visa will be granted to an individual. A manager suggests that even occasional inspections of random employers in advance of approving their

⁷ USCIS is a Department of Homeland Security agency.

⁸ ETA is a DOL agency.

applications would help to incentivize the legitimacy of applications (IN8 2011). If nothing else, “It takes a lot more resources to investigate the company after the fact than it does just to verify that what they said is true” (IN8 2011).

The same manager continues, “[I]t is a frustrating thing at the investigation level. In most cases we’re issuing H-1Bs to job agencies,” (IN8 2011). What is more, “A lot of times when we go and visit these companies, they’re a whole in the wall or a P.O. Box; there is no physical location of these companies or they are operating out of their home. They are not telling the truth, essentially, on those forms” (IN8 2011). Whereas it doesn’t seem there is any talk of the screening authority of these programs switching from USCIS and ETA to WHD (IN4 2011; IN8 2011), potential systemic or regular abuses could be examined at the national level or through the DOL OIG (IN4 2011).

It does seem that these agencies should collaboratively develop comprehensive strategies for attending to these issues if they are not already doing so. OIG would be the entity to investigate potential organized misuse of these visas or the abuse of these visas to begin the process of trafficking in persons (IN4 2011). The OIG’s broader role would be to work with the Task Forces for cases “involving organized crime groups” (U.S. Department of Justice 2010a, 47).

When speaking of the WHD’s limited role, particularly in situations related to human trafficking, two managers shared their personal ideas of

how to move toward solutions that are a significant deviation from the tradition of the agency. The first is a suggestion that at least some WHIs have arrest authority. The manager says, "When an emergency situation arises, we will have to be at the mercy of the local law enforcement agency" (IN8 2011). Part of the reason for this suggestion is that WHD enforcement efforts often take investigators to isolated areas (IN8 2011). The other main reasoning behind this idea is that in order to be as prepared as possible to respond to a situation in which there is trafficking, a WHI would either need to be able to detain an employer-trafficker themselves or have a criminal law enforcement agent with them to detain that individual until another entity could arrive and take custody of that person (IN8 2011). Detaining traffickers as soon as they are discovered is important not only for their prosecution but also for the protection of the victims (IN8 2011).

An entirely different perspective concerns the only way that one manager sees that human trafficking will become much more of a priority for the WHD. Besides a significant cash infusion, the manager says:

The organizational commitment that we would need is basically an office at the national level that focuses on trafficking. And then it creates a structure in the same way that agriculture has its structure. FLSA has its structure. Government contracts has its structure. Within Wage and Hour there's got to be that group. And there needs to be a home for it. And from that home they need to be competing for the resources and providing the level of legitimacy that is required for everybody to get on board. Right now people say, "I mean, yeah, this is really bad and we'll do something." But it doesn't have the same level of legitimacy as doing government contracts

under ARRA⁹ has, or that going out and doing agriculture and doing H-2A (IN3 2011).

This departure from the more traditional structure of the agency and its objectives would be appropriate for serious consideration if making human trafficking enforcement work or detection is what agency leadership desires. Another point to take away from this suggestion is that if human trafficking is not given that level of priority, then, with the exception of perhaps only minute tweaking, the agency is currently operating at its maximum capacity as far as available resources and directives. This and other ideas included here reflect the keen thinking and profound perspectives provided by these very experienced managers, the kind it takes to create innovative solutions for great challenges such as those contemplated in this paper.

Chapter 4

TOWARDS CONCLUSIONS

This is an extremely exciting time for those with a particular interest in the work of combating human trafficking within the U.S. National leadership priorities are more attuned to the issue of human trafficking perhaps than ever before, and research and resources are falling in line. It is especially a time of growth in recognition and

⁹ The American Recovery and Reinvestment Act of 2009. This act is widely known as the Stimulus or The Recovery Act, which designated over \$750,000,000,000 for boosting the American economy. Much of this money is earmarked for federally funded construction projects; the WHD increased its DBA and DBRA enforcement efforts to ensure these funds were being used properly.

understanding within the federal government of the great extent to which human trafficking is a labor issue. Identifying human trafficking as a labor issue focuses attention on the process and experience of worker exploitation specific to this issue and as a whole. This perspective also grounds solutions-centered thinking in practical approaches by being in tune with the federal entity most familiar with the day to day abuses of the most fundamental labor laws that afflict vulnerable and low-wage workforces. This simple shift in perspective has the possibility of significantly improving the approach and aims of the government's efforts and so could truly change the occurrence and also the face of human trafficking in this nation.

The knowledge and reflections shared by the nine interviewed managers could provide uniquely and distinctly helpful input for readers with various interests. Entities external to the WHD, such as other federal agencies, non-profits, and even academics seeking to understand the agency, would gain much from a careful review of the sub-sections of Chapter 1 that explain the nature and inner-workings of the WHD before exploring the research findings. This will improve the reader's understanding of the WHD as a resource as well as the manner in which one might best interact with and call upon the agency.

After analysis of the interview data and background research, it is very clear to me that the ACTeams represent a promising initiative and a very much needed advance for the agency and for collaborative human

trafficking casework efforts as a whole. Certainly, it is understandable that as changes are made in administrations, policies, or jurisdiction, all parties that must work together need time to learn the new processes and to cultivate the necessary relationships. However, with some of the ongoing challenges mentioned, such as staff turnovers, something that could potentially close that transitional gap in historical knowledge would be the creation of a basic manual for the involved parties that they can turn to each time a case arises. This manual could cover information such as operating timelines, relevant entities and their purposes, resources, and contact information. Encouragingly, it sounds like the ACTeams will be doing just that.

Similarly, it is also clear to me that training needs to be improved for both managers and other WHD staff. It seems that all WHD personnel would benefit from at least the periodic updates that were suggested (IN5 2011), if not from the more comprehensive training that was discussed in the Background section of this paper. It does appear that the best training would be to provide a general introduction to human trafficking and then to train staff specifically for what they should look for and might find when enforcing certain laws or investigating particular industries. Managers also need to be educated on the criminal process in a standard way so that when human trafficking and other significant cases arise they and their managers can assure that they are fully prepared to appropriately handle the situation. This additional training should also present updated and

more comprehensive guidance regarding protocols and procedures. This guidance should be provided at least in the FOH, if not also in required training materials and perhaps a memorandum to the agency's employees.

Although I think it is very important to continue the kind of innovative thinking provided by some of the managers, I do think that the agency would do well to keep its focus as narrow as possible. This is now commonly understood to be a successful business model and could well apply here also: do what you do extremely well, and do not take on additional roles that are not central to your mission. Systems can be instilled, like rebar, to help fortify the base for interagency relationships, which would be the responsibility of the agency and perhaps the ROs. From there, managers at the district office level need to be supported and directed in building relationships with other agencies, not just for human trafficking enforcement, but to improve all areas of their enforcement, as is suggested in the Incentivizing Compliance section of this paper.

It is essential to keep in mind that these efforts to improve and focus how the WHD is involved in human trafficking cases are not happening in a vacuum and distinct from its other enforcement efforts. As the agency is currently structured, assistance in human trafficking cases can be viewed by the WHD only through its lenses of worker exploitation under the FLSA, MSPA, DBA, DBRA, SCA or the H-visa programs. Human trafficking is part of the swath of worker exploitation, and the agency's aim in human trafficking casework is more or less the same as it

is in all the rest of its casework: to make victims whole from a pay perspective.

REFERENCES

- “472 F.3d 638: United States of America, Plaintiff-appellee, v. Kil Soo Lee, Defendant-appellant. United States Court of Appeals, Ninth Circuit. - 472 F.3d 638.” 2011. Justia.com U.S. Law. Accessed April 25, <http://law.justia.com/cases/federal/appellate-courts/F3/472/638/473342/>.
- Bales, Kevin, and Ron Soodalter. 2009. *The Slave Next Door: Human Trafficking and Slavery in America Today*. Berkeley, California: University of California Press.
- Buffalo Expat. 2011. “DOJ Launches New Enhanced Enforcement Initiative,” The Human Trafficking Project (blog), February 4 (5:00 a.m.), <http://www.traffickingproject.org/2011/02/doj-launches-new-enhanced-enforcement.html>.
- DeStefano, Anthony. 2007. *The War on Human Trafficking: U.S. Policy Assessed*. New Brunswick, New Jersey: Rutgers University Press.
- Free the Slaves. 2011. “Kevin Bales’ Biography.” Accessed April 5, <http://www.freetheslaves.net/Page.aspx?pid=382>.
- Human Rights Center University of California, Berkeley. 2004. *Hidden Slaves: Forced Labor in the United States*. Berkeley, California: University of California Berkeley.
- IN1. 2011. Interview of Anonymous Wage and Hour Division Manager, interview by Katherine Norberg, March 7, transcript, Arizona State University, Phoenix, A.Z.
- IN2. 2011. Interview of Anonymous Wage and Hour Division Manager, interview by Katherine Norberg, March 14, transcript, Arizona State University, Phoenix, A.Z.
- IN3. 2011. Interview of Anonymous Wage and Hour Division Manager, interview by Katherine Norberg, March 8, transcript, Arizona State University, Phoenix, A.Z.
- IN4. 2011. Interview of Anonymous Wage and Hour Division Manager, interview by Katherine Norberg, March 16, transcript, Arizona State University, Phoenix, A.Z.
- IN5. 2011. Interview of Anonymous Wage and Hour Division Manager, interview by Katherine Norberg, March 10, transcript, Arizona State University, Phoenix, A.Z.

- IN6. 2011. Interview of Anonymous Wage and Hour Division Manager, interview by Katherine Norberg, March 6, transcript, Arizona State University, Phoenix, A.Z.
- IN7. 2011. Interview of Anonymous Wage and Hour Division Manager, interview by Katherine Norberg, March 9, transcript, Arizona State University, Phoenix, A.Z.
- IN8. 2011. Interview of Anonymous Wage and Hour Division Manager, interview by Katherine Norberg, March 3, transcript, Arizona State University, Phoenix, A.Z.
- IN9. 2011. Interview of Anonymous Wage and Hour Division Manager, interview by Katherine Norberg, March 16, transcript, Arizona State University, Phoenix, A.Z.
- National Labor Relations Board. 2011. *National Labor Relations Act*. Accessed April 8, <http://www.nlr.gov/national-labor-relations-act>.
- . 2010. *What We Do*. Accessed April 8, 2011. <http://www.nlr.gov/what-we-do>.
- Smithsonian Institution's National Museum of American History. 2011. "Sweatshops in America" Exhibition Web site. Accessed April 25, <http://americanhistory.si.edu/sweatshops/elmonte/elmonte.htm>.
- Solis, Hilda. 2010. "The TVPA Decade: Progress and Promise." Presentation at the 2010 DOJ National Conference on Human Trafficking, Washington, DC, May 3.
- Soodalter, Ron. 2011. "Behind the Books." Accessed April 5, <http://www.ronsoodalter.com/book/behind.asp>.
- "The Role of WHD in Combating Human Trafficking". 2011. Presentation by James Kessler, Washington, DC, accessed March 15, <http://www.osce.org/what/trafficking/62946>.
- U.S. Attorney's Office: Eastern District of California. 2011. *U.S. Attorney's Report to the District*. February 2011. Issue No. 12. http://www.justice.gov/usao/cae/us_attorney/Archive/Docs/DistrictReportFeb2011.pdf

U.S. Department of Homeland Security. "U.S. Citizen and Immigration

Services”. U.S. Department of Homeland Security. Accessed on April 12, 2011. <http://www.uscis.gov/portal/site/uscis>.

U.S. Department of Justice. 2010a. *Attorney General’s Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons: Fiscal Year 2009*. U.S. Department of Justice, Office of the Attorney General. <http://www.justice.gov/ag/annualreports/tr2009/agreporthumantrafficking2009.pdf>.

----- 2010b. *Report on the Tenth Anniversary of the Trafficking Victims Protection Act*. U.S. Department of Justice, Civil Rights Division. http://www.justice.gov/crt/about/crm/trafficking_newsletter/tvpaanniversaryreport.pdf.

U.S. Department of Labor. 2010a. *A New Approach to Measuring the Performance of U.S. Department of Labor Worker Protection Agencies*. Washington, DC: U.S. Department of Labor. http://www.dol.gov/_sec/stratplan/newapproach.pdf.

----- 2010b. *FY 2011-2016 Strategic Plan*. Washington, DC: U.S. Department of Labor. http://www.dol.gov/_sec/stratplan/StrategicPlan.pdf.

----- 2011a. “FY 2010 Annual Performance Report.” Washington, DC: U.S. Department of Labor, Center for Planning and Results. <http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V1-01.pdf>.

----- 2011b. “Organizational Chart.” Accessed April 6, <http://www.dol.gov/dol/aboutdol/orgchart.htm>.

----- 2011c. “Wage and Hour Division Mission Statement.” Accessed April 6, <http://www.dol.gov/whd/about/mission/whdmiss.htm>.

----- n.d. *Field Operations Handbook*. Chapter 50(f)17-18).

U.S. Department of State. 2010. *Trafficking in Persons Report*. <http://www.state.gov/g/tip/rls/tiprpt/2010/>.

Weil, David. 2010. *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division*. Boston University.

APPENDIX A

From: Susan Metosky <Susan.Metosky@asu.edu>

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Katie Norberg <norberg.katie@gmail.com> ,

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Date: Mon, Feb 21, 2011 at 1:13 PM

Subject: Worker Protections and the Deterrence of Human Trafficking
within the U.S. Department of Labor

Your study “Worker Protections and the Deterrence of Human Trafficking
within the U.S. Department of Labor” was determined to be exempt in
accordance with Federal Regulations 45CFR46.101(b)(2). Research may
begin.

Susan Metosky, MPH

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APPENDIX B

1) How often have you encountered human trafficking through your work with the Wage & Hour Division?

2) I would like you to briefly describe the circumstances. If you have encountered more than one instance of human trafficking, please describe each:

a) (Identify the geographic location:) Which district office did such incident(s) pertain to? Specifically, in which state and city was the incident located?

b) What sort of work was the trafficking victim performing? How would you name this sort of work, or which industry would the scope of work fall under? Please provide any such specifics that you might recall.

c) Please identify the ethnicity of the trafficked person and the trafficker, as well as other key individuals, to the best of your recollection and understanding. Were there any linguistic or cultural barriers that affected the situation, whether in the occurrence of the trafficking or in its identification by or engagement with law enforcement?

d) Were the crimes in these instances prosecuted? And were they prosecuted as human trafficking?

3) (Context:) Are you aware of any indication that in this particular instance there was a correlation between the occurrence of the violation

and the time frame of something else going on? An example might be a season of the year, the onset or close of the school year, the time of year when the budget for a particular industry takes effect, new onset of new industry priorities, or changes in state or local laws or local enforcement of those laws.

4) Which department, agency or organization first identified the situation as human trafficking?

a) How did it come to the attention of that entity?

5) Please briefly explain how you became involved in each encounter. If your involvement was related to a particular WHD enforcement effort, please identify which it was (for example, the routine enforcement of a particular law, follow-up on a complaint, or whether or not it was specific to the incidence of human trafficking, etc.).

6) Please describe your experience(s) of interacting with other law enforcement agencies in the identification and processing of human trafficking cases.

a) Was there a local Task Force in place at the time of your involvement with human trafficking cases? If there was, what role did it play?

b) Do you have any ideas or suggestions for improving such interactions with other law enforcement agencies?

- 7) Please provide any additional details regarding the encounter(s) that you have not yet discussed that you believe might be pertinent to this research.
- 8) How knowledgeable are your staff regarding human trafficking?
- a) Have they all received human trafficking training?
- 9) Please discuss whether or not you believe you and your staff have the resources available to effectively provide or enforce worker protections that will protect trafficking victims.
- a) Please discuss any ideas you might have for additional resources that might help you and your staff in these efforts.
- 10) Can you provide any other information on the occurrence, identification of or prevention of human trafficking in your area or region?
- 11) Is there any required reporting for WH Investigators or managers to capture WHD involvement with human trafficking cases or to track when and how worker protections protect human trafficking victims?
- 12) The Department of Labor's 2011 Strategic Plan identifies the various DOL agencies as Worker Protection Agencies.
- a) What do you understand this to mean?
 - b) How would you define or describe a Worker Protection?
 - c) Do you think of the WHD as a Worker Protection Agency?
- 13) Please describe any worker protections provided or enforced by the WHD that you understand might serve as a protection for trafficking victims, whether current victims or potential victims.

- a) Can you identify any worker protections that pertained to the instance(s) of human trafficking that you identified earlier?
- b) What were the benefits, or what barriers hampered the efficacy of the protection?

14) Practically speaking, where does the deterrence of human trafficking fall among your many priorities?

- a) Why is this so?
- b) How is human trafficking prioritized in your office's work?

15) As “worker protection agencies have differing parameters within which they can pursue violators and potential violators” (New Approach to Measuring Performance, p.4) what effects on human trafficking do you believe the WHD could have beyond immediate interventions?

- a) Do you have any input for other possible worker protections within the WHD jurisdiction?!
- b) Can you think of any under-optimized or under-utilized opportunities to ensure greater protections for trafficking victims?

16) The 2011 DOL Strategic Plan discusses strategies such as bundling, media use, and a focus on fissuring. It also discusses maximizing resources “by targeting those regulated entities in which violations are most likely to be found,” and suggests focused work in H-2A, janitorial, construction, and hotel/motel industries. Do you expect these efforts will have an effect for human trafficking victims? How?

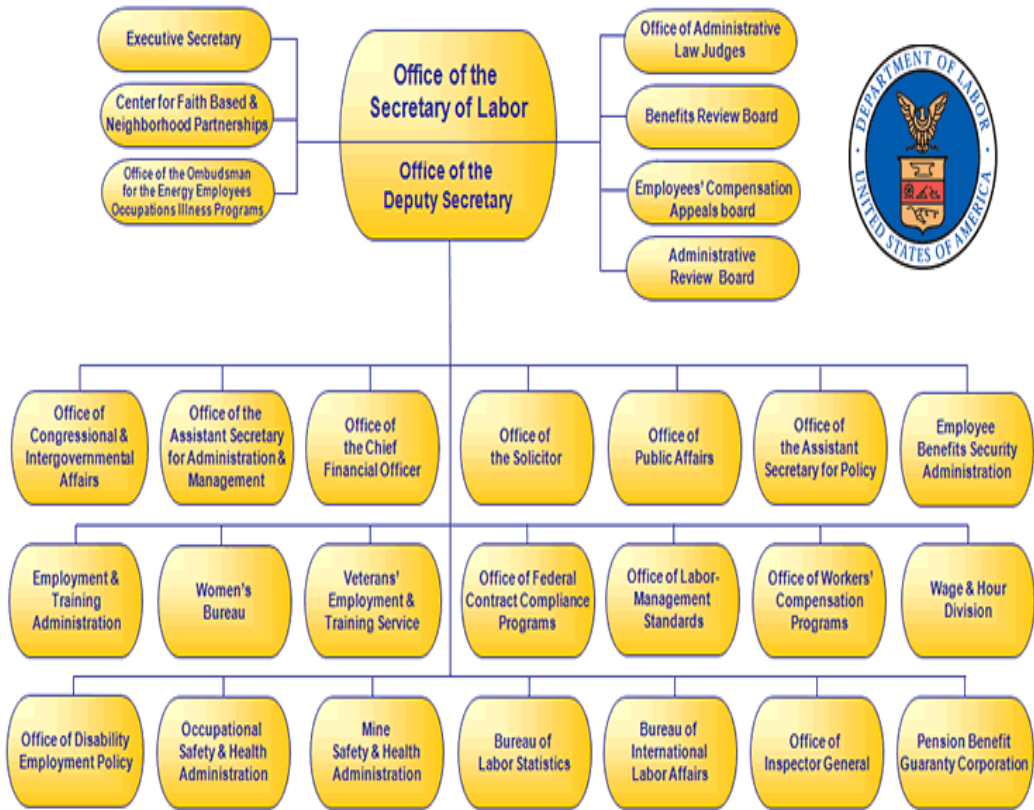
a) Can you think of other ways to bundle your priorities that affect many workers to also give the best chance of those protections also extending to trafficking victims, current and potential?

17) Speaking to the worker protections that to extend to human trafficking victims, it seems that the next step is to figure out how to get those protections to be priorities, not just responsibilities.

a) Do you believe this is possible or practicable?

b) Do you think that efforts focused up in fissured industries or publicizing WHD work through the media might do this?

APPENDIX C



(U.S. Department of Labor 2011b)

ABOUT THE AUTHOR

Katherine studied Religious Studies and Spanish at the University of Virginia, and has a pipe dream of someday attending law school. Katherine has enjoyed working for the Wage and Hour Division for one and a half years and is looking forward to continuing to learn and explore the work of this wonderful agency. In a small way this work marries the subject most central to her graduate studies, human trafficking, with her professional life, and she is very thankful for such an opportunity to delve more deeply into topics she cares so much about. Katherine currently resides in Phoenix, Arizona but does not expect the desert to be her permanent home.