



New York State Office of the State Comptroller
Thomas P. DiNapoli

Division of State Government Accountability

Wage Theft Investigations

Department of Labor



Report 2013-S-38

June 2014

Executive Summary

Purpose

To determine whether the Department of Labor (Department) is efficiently utilizing its resources to undertake and complete wage theft investigations timely and whether these efforts are successful in recovering funds for injured workers. Our audit covered the period April 1, 2011 through December 20, 2013.

Background

The Department's mission is to protect workers, assist the unemployed and connect job seekers to jobs. Its Division of Labor Standards (Division) is committed to safeguarding New York State workers through vigorous enforcement of State Labor Laws, including the 2011 Wage Theft Prevention Act, established to reinforce protection of workers against unfair and/or illegal employment and wage practices. By enforcing these laws, the Division seeks to promote future compliance by the employers under investigation.

As the investigative and restitution arm of worker and wage protection, the Division conducts wage theft investigations on behalf of workers who file wage dispute claims against employers, and helps to collect unpaid wages, withheld wages, and illegal deductions. In 2013, the Division recouped nearly \$23 million in wages and interest on behalf of more than 12,700 employees.

Key Findings

- The Division does not complete wage theft investigations timely. As of August 26, 2013, the Division had a caseload of 17,191 cases, including 9,331 active investigations and 7,860 cases pending payment. Of these, 12,938 cases (75 percent) had been open more than one year since the initial claim was received.
- The Division's Workforce Protection Management system does not provide management with accurate or useful case management reports.
- Employers may be allowed a payment plan for restitution, but the Division has not established criteria to guide eligibility or payment terms.
- The Division does not maintain a centralized record of all payment plans in effect, and neither the Division nor its districts have adequate controls in place to track and monitor employer compliance.

Key Recommendations

- Develop effective strategies to reduce the case backlog and complete new cases sooner.
- Work with Information Technology Services to correct the current case management reports and develop new reports to better manage the current cases and backlog.
- Develop criteria for investigators to use to determine if a payment plan should be granted.
- Establish specific payment plan procedures and update the policies and procedures manual accordingly.

Other Related Audits/Reports of Interest

[Department of Agriculture and Markets: Food Safety Monitoring \(2013-S-27\)](#)

[Department of Labor: Assessment and Collection of Selected Fees and Penalties \(2010-S-70\)](#)

State of New York
Office of the State Comptroller

Division of State Government Accountability

June 6, 2014

Mr. Peter M. Rivera
Commissioner
Department of Labor
Building 12, State Office Campus
Albany, NY 12240

Dear Commissioner Rivera:

The Office of the State Comptroller is committed to helping State agencies, public authorities and local government agencies manage government resources efficiently and effectively and, by so doing, providing accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit entitled *Wage Theft Investigations*. This audit was performed pursuant to the State Comptroller's authority under Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

Office of the State Comptroller
Division of State Government Accountability

Table of Contents

Background	5
Audit Findings and Recommendations	6
Investigation Case Management	6
System/Process Deficiencies	7
Recommendations	10
Audit Scope and Methodology	11
Authority	12
Reporting Requirements	12
Contributors to This Report	13
Agency Comments	14
State Comptroller's Comments	20

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This report is also available on our website at: www.osc.state.ny.us

Background

The Department of Labor's (Department) mission is to protect workers, assist the unemployed and connect job seekers to jobs. Its Division of Labor Standards (Division) is committed to safeguarding New York State workers through vigorous enforcement of State Labor Laws, including the 2011 Wage Theft Prevention Act, established to reinforce protection of workers against unfair and/or illegal employment and wage practices. By enforcing these laws, the Division seeks to promote future compliance by the employers under investigation.

As the investigative and restitution arm of worker and wage protection, the Division conducts wage theft investigations on behalf of workers who file wage dispute claims against employers, and helps to collect unpaid wages, withheld wages, and illegal deductions. It also enforces labor laws that forbid employers from taking illegal kickbacks from wages or appropriating employee tip earnings. In 2013, the Division recouped nearly \$23 million in wages and interest on behalf of more than 12,700 employees.

Within the Division, there are 13 districts that are charged with regional non-monetary and monetary investigations of potential employment violations concerning minimum wage, payment of wages and wage supplements, child labor, hours of work, farm labor, apparel industry registration, and industrial homework (i.e., work in a residential establishment). When their investigations are completed, district investigators then oversee employer restitution.

Wage theft investigations are, by nature, generally complex and thus labor- and time-intensive. Components of a thorough investigation include historical examination of employee records, employer files and data systems, as well as interviews with the employer and claimant(s). Investigations increase in complexity and length when obstructions to fact-finding (e.g., inaccurate, incomplete, or missing records; employees whose whereabouts become unknown; non-compliant employers) arise, as often occurs. The likelihood of such complications increases as investigations age.

Audit Findings and Recommendations

From 2008 to 2013, the Division's cumulative wage theft investigation caseload has been on the rise, with yearly increases ranging from 21 percent to 35 percent, including a slight reversal in 2013. We determined that the Division has not been able to keep pace with the rising demands, resulting in a growing backlog of aging cases awaiting completion and a corresponding increase in lag time until cases are settled and claimants receive payment. The backlog buildup is occurring largely because district offices have many cases to investigate and a limited number of staff to perform the work. However, we also found inefficiencies in Division procedures and its use of resources that, if corrected, could improve productivity.

Wage theft investigations are, by nature, generally complex and time-intensive. Although the Division does not impose time limitations on the length of investigations, it is imperative the Division strive for efficient case completion in order to minimize claimants' wait time for compensation. As investigations lag, there is also a greater risk that complications will arise that will interfere with fact-finding and case settlement (e.g., records become lost, employees cannot be found due to job change or relocation), further impeding progress and increasing the possibility that employees may not receive the full compensation to which they are entitled. For the 2013-14 fiscal year, Division officials established a goal to complete an average investigation within six months.

Investigation Case Management

The Department's cumulative wage theft investigation caseload has been increasing steadily from 2008 through 2012, with new open cases outnumbering cases closed by an average of 27 percent each year. There was a slight reversal in this trend in 2013, as detailed in the following table.

<u>Year</u>	<u>Cases Opened</u>	<u>Cases Closed</u>	<u>Caseload Change</u>
2008	8,414	5,500	+2,914
2009	7,588	5,758	+1,830
2010	7,510	5,491	+2,019
2011	7,336	5,767	+1,569
2012	6,996	4,999	+1,997
2013	6,533	6,794	-261
<u>Total</u>	<u>44,377</u>	<u>34,309</u>	<u>+10,068</u>

Our audit revealed that, as of August 26, 2013, the Division had a total of 17,191 cases, an increase of about 150 percent from the approximately 7,000 cases on hand at the start of 2008. The current caseload consists of 9,331 active investigations and 7,860 cases pending payment. Of these, 12,938 (75 percent) were at least one year old from initial claim date.

As the backlog has increased, so too has the caseload per investigator. As of August 2013, we estimate that the Division's staff of 98 investigators was responsible for an average of 95 active investigations each. The Division has not analyzed its investigation process to determine the optimum caseload of active investigations per investigator, and we acknowledge the challenge this increased workload presents for the Division. However, by making time-saving adjustments elsewhere (as discussed later in this report), more time could be allocated to conducting investigations, thereby bringing the Division closer to its goals of timely completion of cases.

One factor driving the growing investigation backlog is the Division's required investigative scope period. Prior to May 2013, the Division mandated that all cases cover a standard six-year investigative scope period. Such depth of examination adds considerably to the length of the investigation. In an attempt to stem the rising backlog and to conduct investigations more timely, in May 2013 the Division reduced this investigative scope period from six years to three years. The Division also no longer investigates certain types of wage claims, including cases where more than three years have lapsed since employment ceased or date of violation occurred; complaints received from a private attorney representing a claimant; and cases involving non-monetary issues, which are now handled via letter to the employer and claimant.

During our audit the Division also instituted other procedural changes to streamline its work and reduce the backlog. For instance, the Division is now identifying additional cases that can be resolved through compliance conferences, and closing cases that are unlikely to reach settlement (e.g., cases where the employer has no known assets in the State) or that involve uncollectable claims less than \$500.

Finally, during the later stages of our audit (November - December 2013) the Division decided to no longer accept and investigate claims from commission salespersons and to establish a new policy for handling minimum wage complaints by former employees. These investigations are now conducted primarily by mail or telephone, and the employers are given just 21 days to respond to the Division's request for records. Furthermore, to achieve a more balanced distribution of workload, the Division now plans to have staff from its upstate districts conduct these mail/phone investigations for the New York City area, where the majority of these claims are filed. Prior to this policy change, cases generally remained in their originating districts. At the time of our audit, it was too soon to determine the extent that these efforts would be successful in reducing caseloads and backlogs.

System/Process Deficiencies

We found that certain Division resources and processes for investigating wage theft claims are not appropriately structured for optimum efficiency and effectiveness to assist the Division in overcoming its caseload challenges. In fact, some actually serve as impediments to orderly,

timely investigation, including shortcomings in the Division's case management computer system and a lack of controls over payment collection and tracking.

Worker Protection Management System Reports

For optimum efficiency and effectiveness in managing investigations, the Division's data management system must be able to make effective and accurate use of all data to produce a range of criteria-specific, routine (e.g., quarterly) summary reports. The Division's information resource for case management, including payment collection, tracking, and disbursement, is the Worker Protection Management (WPM) system.

We found that this system, developed by a consultant in the late 2000s at a cost of about \$812,000, lacks the necessary functionality and flexibility to meet the Division's reporting needs. WPM is capable of producing only a few case management summary reports and can only present data for the Division as a whole. Standard reports cannot be generated for subsets of data based on individual district activities or on other variables that may be critical to meaningful data analysis.

According to Division officials, management reporting capability was an intended deliverable of the WPM system; however, due to complications and contract disputes with the developer, this functionality was never fully developed. In the absence of this deliverable, Division staff have had to develop work-around measures to create the range of reports it needs for case management. These measures range from requesting that specialized reports be created on an as-needed basis by the State's Informational Technology Services (ITS) office, to having each district or user manually create their own reports from data drawn from the WPM system and then parsed by specific criteria (e.g., case age, investigation type, investigator).

The WPM is further flawed in that the few case management reports that it does produce are not reliably accurate. To assess WPM reliability and accuracy, we had ITS produce a report of all cases as of August 26, 2013 and compared the results with those from WPM's August 2013 summary report. The WPM report identified 14,155 cases, an incorrect number that Department officials relied upon as the basis of testimony in a fall 2013 New York State Assembly hearing. In contrast, the ITS report showed the actual number of cases was 17,191. Further, Division officials told us they routinely have to request reports directly from ITS in order to obtain accurate information.

Without easy, immediate access to accurate case information suited to data analysis, investigators and supervisors will continue to unnecessarily spend energy and time on case management instead of investigating cases, completing them more timely, and reducing the backlog. Even though a 2009 Department internal audit pointed to some of these problems in the WPM system as contributors to inefficiency in the investigative process, they have yet to be corrected. Division officials stated that, due to other priorities, ITS has not taken action to remedy the problems. We recommend that the Division work with ITS to correct the deficiencies in the WPM system, both to improve case management and to achieve greater efficiency.

Payment Procedures

Employers who are unable to pay the total amount owed to employees may be eligible for a payment plan arrangement. However, the Division's policies and procedures manual, last updated in July 2013, has no policy regarding payment plans, nor any established criteria for determining eligibility or payment plan terms. Without a firm policy in place, there is an increased risk that payment plans may be put in place that have a greater risk of default.

In response to our inquiries, Division staff provided us with draft procedures that they indicated were being considered for a future version of the manual. According to the draft, investigators could offer employers up to a three-month payment plan. Plans could also be extended to six months with approval from the Senior Labor Standards Investigator. For large underpayment sums, supervisors could approve agreements of up to one year, but any further extensions would be handled on a case-by-case basis and only for very large sums. In all cases, investigators should attempt to make the installments as large as possible and cover the shortest period of time. With any installment payment agreement, an initial payment of one-third or one-half should be obtained and the remaining balance paid in installments. The substantial initial payment would be obtained to ensure receipt of a majority of the funds in the event of later default.

Subsequent to our audit, on January 10, 2014, the Division formalized its payment plan policy and provided us with a copy. This policy does not contain any of the payment plan terms outlined in the draft version. Rather, the policy only states that payment plans are generally discouraged but, if requested, investigators must discuss the request with their supervisor or direct the employer to their supervisor to make arrangements. We do not believe this policy provides sufficient guidance for investigators or supervisors, nor does it address important factors such as the employer's need or eligibility for a payment plan, down payment requirements, or payment plan terms or structure.

Given the Division's lack of payment plan guidelines, we sought to determine what criteria and processes districts were actually using to implement and track payment plans. The Division, however, was unable to provide us with relevant payment plan data, including the total number of payment plans in effect, total amounts owed, monthly payment amounts and due dates, and remaining balances due. Instead, officials told us that each district office administers its own payment plans and is responsible for receiving payments, updating the payment plan records and following up on delinquent payments, and should thus likewise keep summary payment plan records. However, the Division is ultimately responsible for payment plan management and should be able to provide this information. Such data is integral to the Division's effective oversight and accountability of its regional operations.

The largest number of payment plans is maintained by the Monetary Services District, which is responsible for collecting on "Orders to Comply" and judgment cases. To obtain data on a sample of payment plans, we requested records from the Monetary Services staff. However, they could not provide us with a listing of all payment plans currently in effect. According to Monetary Services staff, payment plan data is maintained in WPM but the system does not have the capability to produce a report, so such records must be compiled manually. Because staff do

not require this information in the course of normal business, nor does Monetary Services believe they need to know the number and value of their payment plans, these records are not produced.

As a result, to obtain an estimate of the number of Monetary Services plans in effect, a Division employee had to manually review all the payment plans recorded in the WPM database by date of deposit, and then apply several additional steps and further criteria to parse out the information our auditors needed. This complicated, time-intensive process resulted in only an estimate of 157 active payment plan cases totaling \$13.8 million in original claim amounts. The data did not identify the number of employees receiving payments as a result of these plans.

In general, all district offices have their own way of devising payment plans and of recording and tracking payment transactions. We sampled 47 payment plans at six district offices and found that generally the district offices were following the criteria identified in the draft procedures, except in terms of the amount of acceptable down payment. Only 12 of the 47 plans we tested (26 percent) included a down payment of one-third or more as stipulated in the draft procedures. We also found that two of the 10 payment plans we sampled from Monetary Services were not actually payment plans, but rather cases where businesses had failed to remit their payments and for which there will be a judgment referral. This situation further demonstrates the need for a centralized record-keeping system.

In 2009 the Department's Internal Audit Unit issued a report on the Division's Minimum/Prevailing Wage Audit efforts that identified similar problems and inconsistencies with payment plan details and criteria. The report recommended the Division move to a centralized system for collecting and recording payment plan transactions to increase efficiency and strengthen controls over cash receipts. Despite the evidence presented in the audit, Division officials disagreed and supported the current system of district-level control as the more efficient process, preferring to assign the investigator who already has intimate knowledge of the case responsibility for all payment-related activities, including collection, recording of transactions, payment authorization, and distribution. However, these duties are incompatible in an effective system of internal control over payment transactions. Management's failure to separate these key functions, combined with its inability to monitor and assess day-to-day payment plan operations, substantially increases the risk of errors or irregularities that may occur and remain undetected.

We concluded that the Department's performance in this area falls considerably short of the minimum requirements established by the Comptroller's Standards for Internal Control in New York State Government. As a result, we concur with the internal audit recommendations and believe a more centralized system of payment plan management would not only improve internal control and reduce the risk of irregularities, but also increase efficiency by freeing up staff to focus on the actual work of investigations, thereby completing cases more timely and reducing the backlog.

Recommendations

1. Continue efforts to close the oldest wage investigation cases and strive to investigate and resolve newer cases more timely.

2. Monitor the newly implemented strategies discussed in this report and continue to pursue additional initiatives to reduce the wage investigation case backlog and complete new wage investigation cases sooner.
3. Work with ITS to correct WPM system flaws and develop its capability to create meaningful reports to better manage the current cases and backlog.
4. Establish specific payment plan procedures and include them in the policies and procedures manual.
5. Develop criteria for investigators to use to determine if a payment plan should be granted.
6. Ensure that each district office follows the payment plan procedures and keeps similar records.
7. Develop a centralized payment collection system to effectively separate incompatible duties and to manage all payment plan information and transactions.

Audit Scope and Methodology

We audited whether the Department is efficiently utilizing its resources to undertake and complete wage theft investigations and whether these efforts are successful in recovering funds for injured workers. Our audit covered the period April 1, 2011 through December 20, 2013.

To accomplish our audit objectives, and determine whether associated internal controls are adequate, we interviewed Department and Division officials and attended Legislative hearings relevant to implementation of the Wage Theft Protection Act. We also reviewed other relevant laws, the Division's policies and procedures manual, and the Department's internal audit report of Minimum/Prevailing Wage Audit efforts issued in 2009. We requested and analyzed the Division's caseload statistics as of August 26, 2013, and analyzed the capabilities of the Workforce Protection Management computer system.

We also made site visits to five Division district offices in Albany, Manhattan, Brooklyn, Queens, and Syracuse. We selected these districts based on the number of cases each had and on their geographical coverage. We interviewed supervisors and investigators at each office. We reviewed a judgmental sample of 49 cases that were over two years old, as well as 47 payment plans (39 drawn from the five district offices and eight from Monetary Services).

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

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and

statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

Authority

The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

Reporting Requirements

We provided a draft copy of this report to Department officials for their review and formal comment. We have considered the Department's comments in preparing this report and have included them in their entirety at the end of it. Department officials substantially agreed with most of our recommendations and indicated that certain actions will be taken to address them. Officials indicated they will not be implementing the recommendation regarding the centralization of payment collections. Also, our comments addressing certain Department statements are included on the report's State Comptroller's Comments.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the Commissioner of the Department of Labor shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons why.

Contributors to This Report

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Vision

A team of accountability experts respected for providing information that decision makers value.

Mission

To improve government operations by conducting independent audits, reviews and evaluations of New York State and New York City taxpayer financed programs.

Agency Comments



New York State Department of Labor
 Andrew M. Cuomo, Governor
 Peter M. Rivera, Commissioner

April 14, 2014

VIA FIRST CLASS MAIL AND E-MAIL

John Buyce, Audit Director
 Division of State Government Accountability
 Office of the State Comptroller
 110 State Street
 Albany, New York 12236

Re: Department of Labor Response to Wage Theft Investigations Audit

Dear Mr. Buyce:

Enclosed please find the New York State Department of Labor's ("the Department") response to your office's Report 2013-S-38 regarding Wage Investigations. While we agree with many of the recommendations of your auditors, there are several parts of the audit report that are mistaken or misleading.

As you are aware, the Department has the second largest staff in the nation dedicated to the investigation of unpaid and/or underpaid wages and has tasked its staff with a broad mission unmatched by other states or the federal government. Namely, the Department is committed to investigate the vast majority of claims of unpaid or underpaid wages that is filed with the Department.

Moreover, the Department is extraordinarily successful in fulfilling its mission and is effectively returning recovered wages to unpaid or underpaid workers. In 2013, the Division of Labor Standards opened 6,533 cases and closed 6,794 investigations, returning \$22.6 million to claimants.

Put simply, the Department's record of wage investigations and wage recovery is exemplary. The audit's suggestion to the contrary – that the Department does not "conclude wage theft investigations timely" – is belied by the results achieved for claimants. The audit's mistaken conclusion in this regard is the result of several flawed audit methods.

First, in analyzing operations in the Division of Labor Standards, auditors examined only 49 cases state-wide, all of which were over two years old. The audit team failed to analyze a random sample of cases, which would have generated a representative sample of cases with respect to age. Focusing on a narrow unrepresentative sample of cases necessarily inhibited the audit team's ability to accurately determine whether investigations are completed in a timely fashion and whether operational challenges exist. Indeed, within the past year the Department

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 Comment
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* See State Comptroller's Comments, page 20.

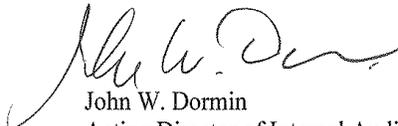
made several changes to its policies and operations to ensure that it successfully concludes all wage investigations within six months by the end of the next fiscal year. The Department is on track to meet this performance goal.

Second, while the audit purported to examine the Department's record on wage investigations, it relied upon the gross number of "open cases", which includes all wage matters in both the investigation stage and in the post-investigation stage. This methodology is flawed because it conflates cases that were within the scope of the audit (*i.e.*, cases that are actively being investigated), with cases in the post-investigation phase (*e.g.*, cases involved in payments, judgments, settlements, and appeals). The majority of post-investigation matters are outside the purview or control of the Division of Labor Standards. Accordingly, it is misleading, and indeed in error, to present the audit as an examination of the Division of Labor Standard's investigation of wage cases, when the audit is in fact a much broader analysis including events and statistics outside of the Division's control.

Similarly, while the audit claims that 12,938 cases "ha[ve] been open for more than a year," the investigation in the majority of those cases are complete. Again, the discrepancy is due to the conflation of cases in the investigation and post-investigation stage. The Department is on track to repeat its 2013 achievement of closing more than 200 cases than were opened over the course of a one year period. Indeed, within the past year the Department has been able to conclude more than 67% of all new investigations within six months.

The audit's recommendations regarding improvement to the Department's technology and tracking systems will be closely considered. We appreciate the time and effort of your staff and look forward to any and all opportunities to improve on our performance.

Very truly yours,



John W. Dormin
Acting Director of Internal Audit

enclosure

* Comment 3

Department of Labor Response to the
Wage Theft Investigation Audit by the Office of State Comptroller

The New York State Department of Labor (the “Department”) has reviewed the recommendations set forth by the Office of the State Comptroller (“OSC”) in the Report 2013-S-38, dated March 2014 (“OSC Report”). While the Department agrees with some of OSC’s recommendations, the Department objects to the audit methodology, as well as some conclusions resulting from that flawed methodology.

The Department has the second largest staff in the nation dedicated to the investigation of unpaid and/or underpaid wage claims and has tasked its staff with a broad mission unmatched by other states or the federal government. Namely, the Department is committed to investigate the vast majority of claims of unpaid or underpaid wages that are filed, whereas the United States Department of Labor and other states pick and choose a very limited number of cases to investigate. As a result, the Department’s Division of Labor Standards (the “Division”) opens thousands of new wage investigations each year; however it also closes thousands of cases each year. Indeed, in 2013, the number of cases closed by the Division exceeded the number of cases opened by more than 200 cases – 6,533 cases were opened whereas 6,794 cases were closed.

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Comment
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Moreover, the Division is overwhelmingly successful at fulfilling its mission, effectively disbursing recovered wages to unpaid or underpaid workers – nearly \$23 million were recovered for workers in 2013 alone. Put simply, the Department’s record of wage investigations and wage recovery is exemplary. The audit’s suggestion to the contrary – that the Division’s investigations are not completed timely – is belied by the results achieved for claimants. The audit’s mistaken conclusion in this regard is the result of several flawed audit methods.

First, the audit’s finding that the Division “does not complete wage investigations timely”, (OSC Report at p. 1), is an erroneous conclusion drawn from an incomplete, unrepresentative dataset. Specifically, the auditors examined only 49 open investigations statewide, all of which – at the request of the audit team -- were over two years old. (See OSC Report at page 11). The audit team did not analyze a random sample of cases, which would have generated a representative sample of cases with respect to age. Focusing on a narrow unrepresentative sample of cases necessarily inhibited the audit team’s ability to accurately determine whether investigations are completely in a timely fashion *and* whether operational challenges exist. Indeed, within the past year, the Department made several changes to its policies and operations to ensure that by the end of the next fiscal year it successfully concludes all wage investigations within six months. The Department is on track to meet this performance goal and within the past year alone has concluded more than 67% of all new investigations within the six month benchmark.

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Comment
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Second, while the audit purported to examine the Department’s record on wage investigations, it relied upon the gross number of “open cases”, which includes all wage matters in both the investigation stage and in the post-investigation stage. This methodology is flawed because it conflates cases that were within the scope of the audit (*i.e.*, cases that are actively

Department of Labor Response to Report 2013-S-38
April 14, 2014

being investigated), with cases in the post-investigation phase (e.g., cases involved in payments, settlements, judgments, and appeals). The majority of post-investigation matters are outside the purview or control of the Division. Accordingly, it is misleading, and indeed in error, to present the audit as an examination of the Division's investigation of wage cases, when the audit is in fact a much broader analysis including events and statistics largely outside of the Division's control.

Similarly, while the audit claims that 12,938 cases "ha[ve] been open for more than a year," the truth is that the investigation in the majority of those cases is complete. Again, the discrepancy is due to the conflation of cases in the investigation and post-investigation stage. The Department is on track to repeat its 2013 achievement of closing more than 200 cases than were opened over the course of a one year period. Indeed, as set forth above, within the past year, the Department has been able to conclude more than 67% of all new investigations within six months.

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Comment
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Finally, it bears mention that while OSC noted that "[p]rior to 2013 the Division mandated that all cases cover a standard six-year investigative scope period" (OSC Report at p. 7), that practice was hurting, not helping, the wage recovery effort. The Department's previous application of an expanded look back period of six years for all cases – which was inconsistent with federal practice (2 year look back period) and the practice in almost all states (1 to 2 year look back period) – slowed investigations by forcing investigators to find older documents, which often times were no longer in existence, as well as expand the number of individuals to be interviewed, many of whom could not recollect events more than a couple of years past. Accordingly, the Department adopted a three-year look back period for the majority of cases (a period longer than the federal government and almost all other states), with the flexibility to apply a six-year look back period for egregious cases. The newly adopted policy has enabled workers to quickly recover the wages owed to them.

OSC Recommendation No. 1:

Continue efforts to close the oldest cases and strive to investigate and resolve cases timely.

Department Response No. 1:

The Department agrees with this recommendation. The Division is continuing its ongoing efforts to close the oldest cases, investigate and resolve cases timely, and complete new cases within an average of six months. Strategies have been implemented since May 2013 to ensure that investigations are completed more quickly. Further, the Division has instituted practices to ensure the investigation phase of the oldest cases is brought to a conclusion as soon as possible. This has resulted in staff concluding investigations on all 2008 and 2009 cases, with only 10 cases from 2010 remaining in active investigation status as of the end of the 1st quarter 2014.

Notably, the OSC Report does not offer recommendations for changes in field operations. The Department is quite confident that our continued drive to improve field operations will allow us to attain the performance goals outlined above.

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Comment
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*Department of Labor Response to Report 2013-S-38
April 14, 2014*

OSC Recommendation No. 2:

Monitor the newly implemented strategies discussed in this report and continue to pursue additional initiatives to reduce the wage investigation case backlog and complete new wage investigation cases sooner.

Department Response No. 2:

The Department agrees with this recommendation. The Division currently monitors, and will continue to monitor, our innovations for success and seek more efficient processes. As we progress, the Department will regularly examine policies in order to expand our reach and protect more workers.

OSC Recommendation No. 3:

Work with ITS to correct WPM system flaws and develop its capability to create meaningful reports to better manage the current cases and backlog.

Department Response No. 3:

The Department agrees with the import of this recommendation and is eager to correct all system flaws. However, it bears mention that several improvements to the system have been given priority. For example, the Department has made the following changes a priority: adding automated liquidated damages to audits and claims, adding penalty and violation functions pursuant to the new Fair Play Act, adding automated and semi-automated claimant letters, and improving monetary disbursement functions. These improvements to WPM were given priority in an effort to respond to the needs of workers.

Moreover, the Division currently works with ITS to produce needed management reports on a regular basis. In addition, Division staff meets weekly with ITS to discuss programming priorities, evaluate progress on programming, and plan for future upgrades and improvements. The deficiency noted in the OSC Report – that the WPM case statistics report produced discrepancies – was fixed as of March 26, 2014.

OSC Recommendation No. 4:

Establish specific payment plan procedures and include them in the policies and procedures manual.

Department Response No. 4:

The Department agrees with this recommendation. These policies and procedures will be included in the new Senior Investigator manual.

OSC Recommendation No. 5:

Develop criteria for investigators to use to determine if a payment plan should be granted.

*Department of Labor Response to Report 2013-S-38
April 14, 2014*

Department Response No. 5:

Investigators are not responsible for making determinations about payment plans and employer eligibility. Rather, determinations concerning payment plans are the responsibility of Senior and Supervising Investigators. These determinations are entirely case specific and are driven with the goal of ensuring payment of recovered wages to workers. Criteria for consideration in making the discretionary decision to establish a payment plan will be included in the Senior Investigator manual discussed above.

OSC Recommendation No. 6:

Ensure that each district office follows the payment plan procedures and keeps similar records.

Department Response No. 6:

The Department agrees with the recommendation.

OSC Recommendation No. 7:

Develop a centralized payment collection system to effectively separate incompatible duties and to manage all payment plan information and transactions.

Department Response No. 7:

The Department disagrees with the recommendation. Payment plans are most effectively monitored and enforced at the district level, and only account for approximately 10% of the cases assigned to a district office. Moreover, a centralized payment plan collection unit would require a vast re-allocation of resources.

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Comment
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State Comptroller's Comments

1. Department officials are correct that in 2013, for the first time in more than five years, the Division closed slightly more cases than it opened. This is illustrated in the table on page 6 of our report. However, the fact remains that the Department's caseload is still almost two and a half times the level it was in 2008 and, as a general trend, backlogs have continued to increase even though the number of new cases opened each year has been declining. Even after discounting for the number of cases that are only awaiting payment (7,860), the Department's inventory of active cases where the investigation phase is still incomplete (9,331) was more than 40 percent higher than the total number of new cases opened during all of 2013 (6,533).
2. The Department's characterization of our audit methodology is inaccurate and misleading. As detailed in the Audit Scope and Methodology section of our report, our conclusions about caseloads, backlogs and overall delays in finalizing cases are based primarily on our review of the Division's policies and procedures, our analysis of data on all of the Department's caseload activities, and an evaluation of the accuracy and capabilities of its caseload management system. Our visits to district offices, and the selection of the associated cases reviewed in detail with regional staff, serve to verify procedural compliance and consistency among the districts and to identify possible causes for extraordinary delays, such as cases that were active for more than two years. In fact, many of these cases go back as far as 2008, a clear indication that investigations are not completed timely, thereby contributing to the increasing backlog.
3. The Department's response also mischaracterizes the scope and objectives of our audit, which was directed at its efforts to recover funds for workers, not just the Division's role in undertaking and completing individual investigations. In the end, the measure of the success of the program must be the extent to which injured workers receive the wages they are due, not simply whether one Division involved in the process performed its assigned tasks.
4. Throughout the course of the audit the Department has represented its wage theft caseload as more than 14,000, including during testimony in a fall 2013 New York State Assembly hearing. In contrast, in an effort to provide a more balanced view of case progress, our report makes a point of distinguishing the difference between active cases under investigation (9,331) and cases pending payment (7,860).
5. On the contrary, our report specifically acknowledges several improvements that the Department put in place based upon information we presented during the course of our audit. However, we also caution that it is too soon to determine the extent to which these efforts will reduce current backlogs.
6. The Department's response demonstrates a fundamental lack of understanding of the purposes of internal control and management's responsibility to adequately safeguard public assets. We consider this to be a significant deficiency and a material deviation from the minimum requirements established by the Comptroller's Standards for Internal Control in New York State Government. These duties are incompatible in an effective system of internal control over payment transactions. Individuals who are responsible for record keeping and/or billing should never have direct access to payments. Management's failure

to separate these key functions, combined with its inability to monitor and assess day-to-day payment plan operations, substantially increases the risk that errors or irregularities may occur and remain undetected.