

**SUPPORTING STATEMENT
EMPLOYMENT INFORMATION
FORMS WH-3 AND WH-3 SP**

The Wage and Hour Division (WHD) is publishing a Notice of Proposed Rulemaking: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees. The Department proposes a revision to this ICR to adjust for a potential increase in the number of complaints we anticipate since an additional number of employees may be covered by minimum wage and overtime. This ICR is being submitted as a revision for approval to reflect the estimated slight increase in burdens associated with rulemaking. The Department requests OMB file comment on this ICR after the 30-day period for public comments to be submitted to OMB ends.

A. Justification

1. Circumstances Necessitating Information Collection

This information collection provides a method for the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) to obtain information from complainants regarding alleged violations of the labor standards the agency administers and enforces. The law of most general application regarding wages and hours of work is the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et. seq.* FLSA section 11(a) provides that the Secretary of Labor may investigate and gather data regarding the wages, hours, or other conditions and practices of employment in any industry subject to the FLSA, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters deemed necessary or appropriate to determine whether any person has violated any provision of the FLSA. 29 U.S.C. § 211(a).

Other Federal laws the WHD administers provide similar authority. These Acts include the: Walsh-Healey Public Contracts Act (41 U.S.C. § 38); McNamara-O'Hara Service Contract Act (41 U.S.C. § 353(a)); Davis-Bacon Act (40 U.S.C. § 3141 *et seq.*, pursuant to Reorganization Plan No. 14 of 1950, and Related Acts); Consumer Credit Protection Act (15 U.S.C. § 1676); Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. § 1862(a)); Employee Polygraph Protection Act (29 U.S.C. § 2004(a)(3)); Family and Medical Leave Act (29 U.S.C. § 2616(a)); Immigration and Nationality Act H-2A program (8 U.S.C. § 1188(g)); the Immigration and Nationality Act H-2B program (8 U.S.C. 1184(c)(14)(B) and the Immigration and Nationality Act H-1C program (8 U.S.C. § 1182(m)(2)(E)(ii)). The regulatory provisions authorizing the filing of complaints under these laws and how the agency acts upon the concerns can be found at 29 C.F.R. §§ 4.191, 5.6, 10.41, 500.1(e), 501.1(c), 501.5, 801.7(a)(3), 825.401; 41 C.F.R. § 50-201.1202; and 20 C.F.R. § 655.1200(b). The Department also takes complaints and enforces regulations promulgated in relation to Executive Order 13658, Establishing a Minimum Wage for Contractors (see 29 C.F.R. Part 10) and Executive Order 13706, Paid

Sick Leave for Establishing Paid Sick Leave for Federal Contractors (see 29 C.F.R. Part 13).

The Department takes complaints as part of conducting an administrative action or investigation specific to individuals or entities as part of its enforcement mission with respect to the laws cited. Such actions meet the Paperwork Reduction Act (PRA) exemption found in 5 C.F.R. 1320.4. However, the Department submits this collection in response to circumstances similar to Hurricane Katrina, when cell phone service and computer connections were disrupted. A paper WH-3 form allows the agency to perform its mission without respect to power outages and/or disruptions in a particular part of the United States.

2. Use

WHD staff use Form WH-3 as a guide for obtaining optional information from complainants (e.g., current and former employees, unions, and competitor employers) about alleged employer violations of the labor standards provisions of the above-cited Acts. Complainants generally provide the optional information requested on the form to WHD staff over the telephone or in-person. Where the information provided does not support a potential WHD enforcement action, complainants are advised and referred to the appropriate agency for further assistance. When the WHD schedules a complaint-based investigation, the agency makes the completed Form WH-3 part of the investigation case file. The form is printed in both English and Spanish.

3. Technology

The DOL has considered developing an automated complaint system or making Form WH-3 available on the Internet and determined it would have a negative effect on the ability of the WHD to provide quality, timely service to potential complainants and be impractical to implement. The ability to screen complaints during the intake process is critical to effectively meeting the potential complainants' needs. Experience shows that well over half of the potential complainants contacting the WHD complain of problems that the WHD cannot resolve for a variety of reasons. These reasons include lack of a federal Wage Hour law covering their complaint, an employer not covered by federal Wage Hour laws, an employee exempt from otherwise applicable Wage Hour law provisions, violation(s) past the statute of limitations for WHD action, or the issues involved are better serviced by another federal or state agency.

Making the Form WH-3 available on the Internet and allowing submission of forms completed without WHD consultation would generate tens of thousands of complaints filed in the erroneous belief the WHD can help with a problem outside of WHD jurisdiction. These non-actionable complaints will require extensive WHD follow-up to secure additional information, or notification of complainants that they should have

contacted another federal or state agency, or that WHD is unable to assist them with their problem. These individuals are better and more timely served through an initial, personal (by phone or in-person) consultation with the WHD. Potential complainants are encouraged to call (using a toll-free number) or visit the nearest WHD office in virtually all WHD compliance assistance materials, Web site programs, and guides.

Implementation of an automated complaint system using the WH-3 would be impractical given available technology and agency resources. An automated system would greatly decrease the quality of customer service provided to potential complainants while increasing the burden on the public (i.e., providing information where the WHD can provide no assistance).

4. Duplication

This information collection does not duplicate existing WHD requirements. No similar information is available from any other source, since the WHD has enforcement authority over the various labor standards laws previously identified. A separate statutorily mandated information collection, OMB Control No. 1205-0310, covers the filing of complaints under the H-1B program of the Immigration and Nationality Act, and this information collection does not duplicate that data.

5. Minimizing Small Entity Burden

While this information collection does not have a significant economic impact on a substantial number of small entities, it does infrequently involve small businesses, as in the case of competitor complaints. Form WH-3 provides an easy way for the WHD to obtain the information necessary to determine whether it is likely that a violation of the law has occurred and to schedule an investigation.

6. Consequence of Failing to Collect and Obstacles to Reducing Burden

Respondents are asked to provide information relevant to this information collection only when they seek WHD assistance in addressing one or more alleged labor standards violation(s); consequently, there is no way to request the information less frequently and still collect it. Complaints provide the basis for the overwhelming majority of WHD compliance actions, and the agency would lose an efficient and reliable tool for assessing violations were there no means to obtain information from complainants.

7. Special Circumstances

There are no special circumstances involved in this information collection with respect to the Employment Information Form, WH-3.

8. Public Comments

Concurrent with the submission of this ICR, the Department published a NPRM in the Federal Register that included a request for comments on all aspects of the information collections as they would be revised by the rule. The agency will address any public comments in the ICR submitted at the final rule stage.

9. Payment or Gifts to Respondents

The DOL offers no payments or gifts to respondents.

10. Assurances of Confidentiality

The DOL gives an assurance of confidentiality on the form, which provides that the agency will keep the respondent's identity confidential to the maximum extent possible under existing law. Information gathered during the course of an investigation of a complaint is disclosed only in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552; the Privacy Act, 5 U.S.C. § 552a; and attendant regulations, 29 C.F.R. parts 70 and 71. The FOIA provides an exception from its disclosure requirements for records or information compiled for law enforcement purposes to the extent that release of the information could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution that furnished information on a confidential basis. 5 U.S.C. § 552(b)(7)(D).

11. Sensitive Questions

These information collections ask no sensitive questions.

12. Estimated Annual Respondent Burden Hours

WHD estimates it annually receives about 35,577 complaints via the WH-3 form. The DOL notes that in 2016 the Department submitted this ICR along with its Final Rule: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act (81 FR 32391, May 26, 2016). In that submission to the OMB, the Department estimated an additional 2,017 complaints per year as a result of the Final Rule. On June 29, 2016, the OMB issued a Notice of Action approving the revised burden estimates.

On July 26, 2017, the Department of Labor published a Request for Information (RFI) regarding the Overtime Final Rule, which was published on May 23, 2016, asking for public input on what changes the Department should propose. That comment period has ended and the Department is reviewing those submissions. On August 31, 2017, U.S. District Court Judge Amos Mazzant granted summary judgment against the Department

of Labor in consolidated cases challenging the Overtime Final Rule. The court held that the Final Rule's salary level exceeded the Department's authority, and concluded that the Final Rule is invalid. On October 30, 2017, the Department of Justice, on behalf of the Department of Labor, appealed the district court's decision to the U.S. Court of Appeals for the Fifth Circuit. On November 6, 2017, the Fifth Circuit granted the government's motion to hold the appeal in abeyance while the Department of Labor undertakes further rulemaking to determine what the salary level should be.

As a result of this litigation, the rule submitted is not in effect, and so the Department revises the number of complaints downward by the same number submitted in conjunction with the Final Rule (2,017).

Current approved responses for the WH-3 form is 37, 594. The Department revises downward removing the previous estimated number for the Final Rule (not in effect). The resulting calculation is $37,594 - 2,017 = 35,577$ **complaints WH-3**.

With this NPRM, the Department begins with the formerly approved responses, deletes the 2016 Final Rule estimated responses and now adds in the new estimated responses associated with this NPRM. The Department estimates in its economic analysis at approximately 484,000 workers (who work overtime) will be reclassified as overtime eligible as a result of this rule. The Department notes that approximately .05 percent of the number of employees who will be newly eligible for overtime pay will file a complaint. ($484,000 \text{ employees} \times .0005 = 242$).

This produces a burden of $35,577 + 242 = 35,819$ **complaints** x 20 minutes = 714,480 minutes/60 min per hour = **11,940 hours (rounded)**.

Total burden hours 11,940

Complainants alleging violations of WHD-enforced labor standards may be employees of any of a wide variety of businesses, from small farms or retail stores to large manufacturing plants. Absent specific wage data regarding complainants, the DOL has used the average hourly rate for all employees on private nonfarm payrolls for May 2018, of \$26.92 to estimate respondent costs. See *The Employment Situation, May 2018*, at 32, Table B-3, DOL, Bureau of Labor Statistics. This document is uploaded into ROCIS as a supplementary document. The DOL estimates total monetized value of the burden hours to be \$321,425 (rounded). ($\$26.92 \times 11,940 \text{ hours}$).

TOTAL ESTIMATED ANNUALIZED RESPONDENT BURDEN AND COSTS

11,940 hours (WH-3) for a cost of \$321,425

Total Hours = 11,940
Total Cost = \$321,425

13. Estimated Annual Respondent Capital/Start-Up/Operation/Maintenance Costs

Because the WHD orally obtains the relevant information from the complainant and fills out the Form WH-3, complainants incur no costs, other than the value of their time, in filing a complaint. See Item 12.

14. Estimated Annual Federal Costs

The information collected to file a complaint is almost always taken via phone and entered directly into the WHISARD case tracking system utilized by WHD. However, on occasion, a paper form is used when the e-system is unavailable or in the case of emergency such as during Natural Disasters, where investigators would be in the field collecting the data.

The DOL annually prints approximately 1,000 copies of this information collection, at the cost of \$45. 1,000 copies x \$0.045 per copy.

A GS 11, step 4 Investigator needs approximately 20 minutes to complete a Form WH-3 for the initial screening of the complaint, incurring a cost of \$385,293 (rounded). 35,819 forms (online and paper) x 20 minutes x \$32.27 per hour (GS 11, step4, Rest of U.S). See *Salary Table 2018*, Office of Personnel Management. This is uploaded into ROCIS as a supplementary document.

Approximately 25,000 responses require additional evaluation. In those cases, a GS 13, step 4 supervisor needs about 15 minutes to analyze each to determine whether a potential violation of the law exists, producing a cost of \$287,438 (rounded). 25,000 forms x 15 minutes x \$45.99 per hour (GS 13, step4, Rest of U.S). *Id.*

TOTAL ESTIMATED ANNUALIZED FEDERAL COSTS (WH-3) = \$672,776. (\$45 + \$385,293 + 287,438).

TOTAL ESTIMATED ANNUALIZED FEDERAL COSTS = **\$672,776**

15. Reasons for Program Changes or Adjustments Affecting Public Burdens

The Department estimates a slight increase in burden associated with a potential increase in complaints associated with the newly eligible for overtime pay workers in this NPRM.

16. Publishing Data From Information Collection

The DOL does not publish the results of this information collection.

17. Display of OMB Approval Expiration

Title: Employment Information Form

OMB Control Number 1235-0021

The DOL does not seek an exception to the requirement to display the expiration date on this information collection.

18. Exceptions to Certification Statement

The DOL is not requesting an exception to any of the certification requirements for this information collection. This request complies with 5 C.F.R. § 1320.9.

B. Employing Statistical Methods

There are no statistical methods in this collection.