

**SUPPORTING STATEMENT
EMPLOYMENT INFORMATION
FORMS WH-3 AND WH-3 SP
PAYROLL AUDIT INDEPENDENT DETERMINATION (PAID)**

This ICR was most recently submitted to the Office of Management and Budget (OMB) on March 22, 2019 in conjunction with a Notice of Proposed Rulemaking (NPRM)- Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (RIN 1235-AA20). On May 20, 2019, OMB concluded and continued until submission at the time of the Final Rule. The ICR is now being submitted in conjunction with the publication of the final rule.

This ICR is also being submitted for extension of this collection. On March 12, 2019, a sixty day notice was published in the Federal Register to extend this collection (84 FR 8902). The comment period concluded May 13, 2019.

This ICR is also being submitted for revision to the ICR to add the Payroll Audit Independent Determination (PAID). A sixty day notice was published in the Federal Register with respect to a proposed revision on May 2, 2018 (83 FR 19300-19301) and a correction and extension of the comment period was published in the Federal Register May 14, 2018 (83 FR 22292) inviting public comments on the proposed revision to the ICR.

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.

Additionally, the Wage and Hour Division (WHD) is conducting a nationwide pilot program, titled Payroll Audit Independent Determination (PAID). The Department hopes to facilitate resolution of potential minimum wage and overtime violations under the Fair Labor Standards Act (FLSA) with this new program. Under the PAID program, employers are encouraged to conduct audits and, if they discover minimum wage or overtime violations, to self-report and correct their mistakes. The pilot program is similar to any other self-audit conducted by Wage and Hour, except that a respondent must be eligible to participate and there is no underlying employee complaint prompting action by the Department, and WHD supervises the settlement between the employer and employee. This ICR is being submitted for approval for the addition of the PAID program.

The PAID program imposes an educational component burden and a certification burden on the respondent. The respondent employer may voluntarily review the PAID website materials, starting with relevant FLSA compliance assistance materials. Once completed, the respondent audits their compensation practices to determine compliance. Once the respondent identifies any potential violations they wish to resolve, the respondent makes contact with the WHD. The respondent proposes the scope of the self-audit, including an explanation of the potential violations for possible inclusion in a release of liability, and provides a certification that the respondent has reviewed the compliance assistance materials available on the PAID website. WHD provides information for submission of back wage calculations.

As a result, the respondent burden associated with the pilot program is limited to time to review the compliance assistance materials and time to complete the certification that the

respondent has reviewed the compliance assistance materials.

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.

WHD is conducting a nationwide pilot program, titled PAID. The Department hopes to facilitate resolution of potential minimum wage and overtime violations under the FLSA with this new program. Under the PAID program, employers are encouraged to conduct audits and, if they discover minimum wage or overtime violations, to self-report and correct their mistakes. In the pilot program, potential respondents who have conducted (or intend to conduct) a self-audit of their payroll records contact WHD to discuss the issues for which they seek resolution. Eligible respondents must certify they have reviewed compliance assistance materials.

The District Office manager determines whether the respondent is eligible to participate in the PAID program. If the respondent is eligible to participate in PAID, the case is registered in WHISARD, and an acceptance letter goes out to the respondent asking for its back wage computations and methodology, an explanation of the potential violations for possible inclusion in a release of liability, a certification that the respondent reviewed the compliance assistance information. The respondent then conducts the self-audit (if they have not already done so). This will be used to establish the respondent's compliance with FLSA requirements and to facilitate payment of back wages to employees. Generally the documents should be forwarded within 10 days to the District Office. Once the District Office receives these documents from the respondent, the case is assigned to a technician, an investigator, or a manager.

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).

With respect to the PAID pilot program, the records utilized by the employer in conducting the self-audit are the records they are already required to keep (approved under OMB control number 1235-0018). The Department has no requirement with respect to which format the respondent utilizes in meeting the records requirements. It may be paper or electronic, depending on the individual needs of the respondent.

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.

The PAID pilot program is a voluntary initiative by the respondent employer. Any employer subject to the Fair Labor Standards Act who meets eligibility requirements and

certifies review of compliance assistance materials may participate, subject to WHD's ultimate discretion.

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.

With respect to the PAID pilot program, response is voluntary. The respondent employer initiates the action.

7. Special Circumstances

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

With respect to the PAID program, it is a pilot program and may be extended, eliminated, or expanded upon review of the pilot program.

8. Public Comments

In accordance with the Paperwork Reduction Act, the Department solicited comments on the Employment Information Form collection (1235-0021) in the NPRM published March 22, 2019 (see 84 FR 10900), as the NPRM was expected to affect this collection. The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the information collection in accordance with 44 U.S.C. 3507(d). On May 20, 2019, OMB issued a notice for the collection that continued the previous approval of the Employment Information Form collection. No comments were received on this collection as part of the NPRM.

The Department published a sixty day notice related to the extension of this ICR on March 12, 2019 inviting public comments. (84 FR 8902). No comments were received.

The Department published the sixty day notice related to the revision for the PAID program on May 2, 2018 (83 FR 19300) and a subsequent correction and extension of the comment period on May 14, 2018 (83 FR 22292). No comments were received.

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).

With respect to the PAID pilot program, payment of back wages to an employee will alert the employee to the existence of the respondent's audit of its records.

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 2016 rule previously 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 2016 final rule (not in effect). The resulting calculation is $37,594 - 2,017 = 35,577$ **complaints WH-3**.

This produces a burden of $35,577$ **complaints** x 20 minutes = 711,540 minutes/60 min per hour = **11,859 hours (rounded)**.

Following this adjustment for the 2016 final rule that did not go into effect, the Department adds in the estimated burden for this final rule. The Department estimates this by taking the number of affected workers from Table 9 of the final rule (1.41 million workers). As in the 2016 final rule, the Department multiplies the number of affected workers by .05% to estimate the number of new complaints the Department will receive from employees now entitled to overtime pay. $1,301,800 \times .05\% = 651$ new complaints as a result of this rule. The Department adds this figure to the 35, 577 to come to the new figure. $35,577 + 651 = 36,228$ complaints.

$36,228$ complaints x 20 minutes = 724,560 minutes/60 min per hour = 12,076 burden hours. Note that from the complaints resulting from this rulemaking are 651. 651×20 minutes = 13,020 minutes/60 min per hour = 217 burden hours from this rulemaking.

Total Respondents and Responses 36,228
Total burden hours 12,076

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 April 2019*, of \$27.77 to estimate respondent costs. See *The Employment Situation, April 2019*, at 32, Table B-3, DOL, Bureau of Labor Statistics. This document is uploaded into ROCIS as a supplementary document. To the base wage rate of \$27.77, the Department has added 46% for benefit cost and 17% for overhead cost. This amount equals \$45.26. The DOL estimates total monetized value of the burden hours to be \$546,560. (rounded). ($\$45.26 \times 12,076$ hours).

With respect to the PAID program, the Department estimates that approximately 50 employers will take advantage of the program annually.

Respondent burden associated with the pilot program is limited to time to review the compliance assistance materials and time to complete the certification that the respondent has reviewed the compliance assistance materials. The Department estimates that it will take the respondent ninety minutes to review the PAID program eligibility requirements

and the compliance assistance materials and five minutes to complete the certification. This is a total of 95 minutes per respondent. The calculation is:

50 respondents x 95 minutes = 4,750 minutes/60 minutes per hour = 79 burden hours (rounded).

The Department estimates that the PAID program participation will be conducted by a mid-level Human Resources Professional. The Department used the average professional and business services hourly rate for all employees on private non-farm payrolls for April 2019 to estimate costs. See *the Employment Situation*, April 2019 at \$33.40, Table B-3, Bureau of Labor Statistics. This document is uploaded into ROCIS as a supplementary document. To the wage rate of \$33.40, the Department has added 46% benefit cost and 17% overhead. ($\$33.40 + \$15.36 + \$5.67 = \54.43)

79 hours x \$54.43 = \$4,299.97

TOTAL ESTIMATED ANNUALIZED RESPONDENT BURDEN AND COSTS

Total Respondents = 36,278 (36,228 + 50 PAID).

Total Hours = 12,076 + 79 (PAID) = 12,155

Total Cost = \$546,559 + \$4,299.97 = \$550,860

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.

With respect to the PAID program, the respondent incurs a cost by printing the certificate.

50 certificates x \$0.045 per copy = \$2.25

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 \$397,230 (rounded). 36,332 forms (online and paper) x 20 minutes x \$32.80 per hour (GS 11, step 4, Rest of U.S). See *Salary Table 2019*, 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 \$292,188. (rounded). 25,000 forms x 15 minutes x \$46.75 per hour (GS 13, step4, Rest of U.S). *Id.*

TOTAL ESTIMATED ANNUALIZED FEDERAL COSTS (WH-3) = \$689,463. (\$45 + \$397,230 + 292,188).

PAID pilot program

As noted in item #12, the Department estimates approximately 50 employers annually will submit under the PAID pilot program.

In most cases, a GS 13, step 4 supervisor needs about 15 minutes to analyze each to determine whether a potential violation of the law exists and an additional 5 minutes to determine pilot program eligibility, producing a cost of \$795. (rounded). 50 forms x 20 minutes = 17 hours (rounded) x \$46.75 per hour (GS 13, step 4, Rest of U.S). *Id*

TOTAL ESTIMATED ANNUALIZED FEDERAL COSTS (PAID) = 795

TOTAL ESTIMATED ANNUALIZED FEDERAL COSTS = **\$690,258**

(\$795 + \$292,188 + \$397,230 + \$45)

15. Reasons for Program Changes or Adjustments Affecting Public Burdens

The Department estimates a slight decrease in burden as the number of affected workers from the 2019 final rule is below the number of affected workers from the 2016 final rule (that was approved in the collection submitted to OMB but never went into effect due to litigation).

16. Publishing Data From Information Collection

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

17. Display of OMB Approval Expiration

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

Not applicable.