

**CITY AND COUNTY OF SAN FRANCISCO
BOARD OF SUPERVISORS**

BUDGET AND LEGISLATIVE ANALYST

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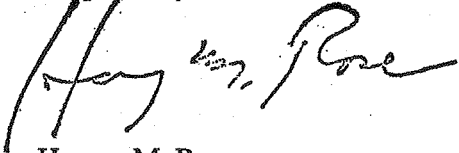
April 27, 2011

Honorable David Campos
and Members of the Board of Supervisors
Room 279, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

Dear Supervisor Campos and Members of the Board of Supervisors:

Pursuant to your request, the Budget and Legislative Analyst's report is hereby transmitted regarding enforcement of the City's Minimum Wage Ordinance. We are also transmitting a memo to you issued April 19, 2011 addressing a number of follow up questions and issues generated by our initial report.

Respectfully submitted,



Harvey M. Rose
Budget & Legislative Analyst

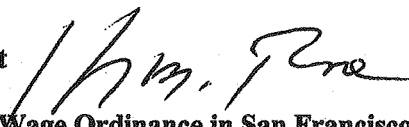
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LEGISLATIVE ANALYST REPORT

To: Supervisor Campos
From: Budget and Legislative Analyst 
Date: January 13, 2011
Re: Enforcement of the Minimum Wage Ordinance in San Francisco
(Project 100152.1)

SUMMARY OF REQUESTED ACTION

Your office requested that the Budget and Legislative Analyst provide an analysis of minimum wage enforcement in San Francisco. Specifically, you requested a comparative analysis of the investigation and hearing process for employee wage claims made to the San Francisco Office of Labor Standards Enforcement (SF OLSE) and the State Division of Labor Standards Enforcement (State DLSE). You directed the Budget and Legislative Analyst to identify best practices and any inefficiencies at both agencies. You also asked for recommended changes that the SF OLSE should implement to make their wage claim process more efficient, including any changes the department can make to mirror identified best practices at the State DLSE.

EXECUTIVE SUMMARY

- The San Francisco Office of Labor Standards Enforcement is responsible for the administration of several labor standards ordinances (listed in Table 1 below) including the City's Minimum Wage Ordinance. The City's Minimum Wage Ordinance was approved by the voters in November 2003.
- The primary activities performed by SF OLSE in enforcing the Minimum Wage Ordinance are to: (a) review employee claims for merit; (b) conduct investigations of violations of private businesses in San Francisco (referred to as 'audits' by OLSE management and staff); (c) conduct audits of employee back wages owed; (d) negotiate settlement agreements; (e) collect and disperse back wages; and (f) present cases at hearings when employers maintain the Office's investigative conclusions are not valid. SF OLSE also has the authority to issue administrative citations as well as impose penalties and assess costs in instances where accused employers are uncooperative with the Office's attempts to investigate.
- SF OLSE processing of cases can be significantly slowed when employers are not cooperative with investigations, specifically when such employers refuse to provide or do not retain payroll records. SF OLSE case processing can be further slowed due to the Office's policy of investigating for any additional employees besides the claimant who may have been underpaid while working for the employers under investigation. While

this often results in identification of additional employees who are owed back wages, it extends the time until the case is disposed of and the original claimant receives any back wages owed. While each case file has an activity sheet recording case developments and timelines, such records are not aggregated and analyzed by Office management to track the true cause of caseload delays, which could also be due to staff inefficiency in some cases.

- Under the current hearing and investigative process, if an employer ignores an SF OLSE Letter of Determination informing the employer that an investigation found that violations had occurred, SF OLSE *must* proceed through the formal, labor-intensive hearing process in order to enforce the findings. This differs from the SF OLSE administrative citation process whereby employers must actively appeal a citation in order to avoid being assessed a citation penalty.
- Minimum Wage Ordinance investigations conducted by SF OLSE have ranged from one day or less to over four years in length. Claims received in 2009 and resolved after the completion of an investigation were completed in an average of 67 days, with a median length of 23 days. Cases that were received in 2009, and closed without a complete investigation¹, were completed in an average of 131 days with a median length of 58 days. While the State DLSE was unable to provide directly comparable data, SF OLSE's average investigation cycle time appears reasonable given the Office's caseload and steps necessary to carry out and complete an investigation, though long delays are occurring in some investigations.
- Only approximately one percent of Minimum Wage Ordinance cases, or five cases since the Ordinance was enacted in 2003 out of nearly 500 total cases, have gone through a full hearing with a hearing officer's decision. It takes SF OLSE an average of 788 days, or over two years, and a median of 524 days, between the employee's initial claim filing and the hearing date. Comparatively, during 2009, it took the San Francisco District of the State DLSE an average of 260 days from initial claim filing to the hearing date or approximately one third of the elapsed time that SF OLSE takes. A main factor leading to the difference in hearing timelines between the City and the State is the additional documentation and hearing process requirements stipulated by the City Attorney for SF OLSE hearings. Another cause of the extended timeline for the City is SF OLSE's policy, mentioned above, of investigating payroll records for all employees who have worked for the employer under investigation for the previous three years rather than just the records of the employee who filed the claim.
- Approximately 350, or 87 percent, of the 402 formal hearings held in calendar year 2009 in the San Francisco District of the State DLSE resulted in a favorable outcome for the employee. Comparatively, all five of the SF OLSE cases that have gone to a hearing since 2003 have resulted in favorable outcomes for the employee(s).² The only exception

¹ Cases may be closed without a full investigation when SF OLSE either loses contact with a claimant, a claimant withdraws their claim, or when it is determined that the claim does not have sufficient merit to proceed.

² One of the five SF OLSE cases that went to a hearing resulted in the denial of claimed wages for one claimant. The claimant was one of seven employees who were claiming unpaid wages. The hearing officer denied the wages and associated interest and penalties to this one claimant due to a lack of credible evidence. The other employees were awarded back wages.

to this outcome was one employee out of seven, identified by SF OLSE as potentially underpaid by an employer, who was denied claimed wages.

- State and City administrative codes both require employers to post the respective minimum wage notices in a conspicuous place at workplace/job sites where any employee works. However, unlike the State Administrative Code, the City's Administrative Code does not include an administrative penalty or citation for non-compliance by the employer. Administrative citations are used by both the State and City as a tool to encourage employer cooperation with investigations and to expedite case processing.
- Administrative Code procedures governing imposition of administrative citations and penalties against employers violating the City's Minimum Wage Ordinance are very detailed and include specific timelines for SF OLSE. On the contrary, the Administrative Code sections pertaining to the investigation and hearing process for the City's Minimum Wage Ordinance violations are vague and lack timeline requirements.
- SF OLSE collected slightly less than 50 percent, as of November 2010, of the amounts assessed to employers in 2010. SF OLSE management states that much of the remaining approximately 50 percent of the uncollected amount are from cases with signed settlement agreements and will be paid in the future in accordance with their payment plans. However, SF OLSE does not track its collections relative to an accounts aging schedule to be able to readily report if payments are being made timely by all employers who are in violation of the City's Minimum Wage Ordinance.
- The SF OLSE has not provided annual reports to the Board of Supervisors each year presenting caseload, case outcomes, processing time and other performance measures, despite being required to do so by Section 12R.26 of the City's Administrative Code.
- The State DLSE formally collects and reports statistics on a monthly basis covering the outcomes of minimum wage hearings, citation hearings, settlements, and collections. The SF OLSE does not have formal procedures for collecting and analyzing similar data. Further, SF OLSE does not measure or analyze the amount of time expended in processing Minimum Wage Ordinance claims (including the investigation, hearing if needed, and collections) nor does SF OLSE measure or analyze the number of cases processed per SF OLSE employee in a given time period, other than on an individual basis for staff performance appraisals. Additionally, there is no formal process for measuring or reporting actual collections and related information, including payment performance. Such a formal process should be used for SF OLSE internal performance measurements and should be provided to the Board of Supervisors for oversight purposes.

RECOMMENDATIONS

In order to expedite case processing, the Board of Supervisors should:

- 1) Request the City Attorney to work with the Director of SF OLSE to draft amendments to the City's Administrative Code sections pertaining to Minimum Wage Ordinance investigations, hearings, and collections in order to formalize the processes, including timelines for (a)

initiating investigations, (b) concluding investigations, and (c) concluding the hearing process, similar to the language in Sections 12R16 through 12R24 of the City's Administrative Code that outlines procedures for issuing and enforcing administrative citations.

- 2) Request the City Attorney to work with the Director of SF OLSE to reform the hearing process by:
 - a) Simplifying the hearing process by reducing the recommended hearing preparation requirements necessary to request a hearing;
and,
 - b) Drafting amendments to the City's Administrative Code to shift the burden of effort from the SF OLSE to the employer who is in violation of the City's Minimum Wage Ordinance. Specifically, the amendments should allow for default judgments against employers who ignore SF OLSE Letters of Determination which find that violations of the Minimum Wage Ordinance have occurred.³
- 3) Consider amending the City's Administrative Code to add a penalty for employers who do not post at their place of business the current San Francisco minimum wage rate and employee rights in accordance with the City's Administrative Code Section 12R.5. Such a penalty could provide an additional tool to encourage employer cooperation with OLSE investigations.

In order to improve transparency and general management practices including caseloads and collections, the Board of Supervisors should:

- 4) Request the Director of SF OLSE to implement stronger management reporting practices including providing an annual report to the Board of Supervisors, as required by Section 12R.26 of the Administrative Code, on the implementation of the Minimum Wage Ordinance. Such reports should assist SF OLSE in managing caseloads and such reports should include an analysis of caseload and collections data, as follows:
 - o Caseload amounts;
 - o Case processing timelines, including reasons for delays;
 - o The average and median number of cases processed per worker;
 - o Case outcomes;
 - o Number and type of administrative citations;
 - o The amount of wages and penalties assessed and collected;
 - o The payment performance of employers on payment plans (i.e., actual vs. plan);
and,

³ Under the current process, if an employer ignores a SF OLSE Letter of Determination informing him or her that the investigation found violations had occurred, SF OLSE *must* proceed through the formal hearing process in order to enforce the findings. The Budget and Legislative Analyst recommends considering amending this process to allow for a specified time period for the employer to exercise an *option* for a hearing or face a default judgment.

- Established performance standards for investigations and collections with a comparison of actual performance.

Policy option

To allow for more expedited case processing so employee claimants can receive any back wages owed sooner than is the case under current investigation and hearing procedures, the Board of Supervisors should:

5. Consider requesting that the Director of SF OLSE revise investigative procedures to allow for claimants to choose whether SF OLSE should: (1) proceed with an investigation limited to their individual claim; or, (2) proceed with a more time-consuming investigation that proactively seeks any additional harmed employees, as is current SF OLSE policy for all investigations.

BACKGROUND

San Francisco- Office of Labor Standards Enforcement

San Francisco voters adopted the Minimum Wage Ordinance through Proposition L in November 2003, thereby establishing a minimum wage higher than those set by the Federal government or by the State of California. Unlike the federal or State minimum wage laws, the City's ordinance is tied to inflation. Therefore, every January 1st the City adjusts the minimum wage consistent with the prior year's increase in the Consumer Price Index. As of January 1, 2011, the San Francisco minimum wage is \$9.92 per hour, which is \$1.92 higher than the California minimum wage and \$2.67 higher than the federal minimum wage.

The SF OLSE was created in 2001 to work with City departments that award public works contracts in order to effectively enforce prevailing wage laws. The enforcement responsibilities of the SF OLSE have since continued to grow due to the adoption of new labor laws. The most substantial expansion came after the Minimum Wage Ordinance was adopted in 2003. SF OLSE management states that since the Minimum Wage Ordinance became effective in February 2004, the Office has recovered over \$3,916,631 in back wages for 2,452 workers.⁴ Table 1 below shows the timeline of ordinances that the SF OLSE is responsible for enforcing as well as the employers covered by such ordinances:

Table 1
Ordinances that SF OLSE is Responsible for Enforcing

Law	Year Enacted	Application
Prevailing Wage	1963 ⁵	City Contractors Only
Minimum Compensation Ordinance	2000	Contractors with Airport Leases and all City Service Contractors
Health Care Accountability Ordinance	2001	City Contractors Only
Minimum Wage Ordinance	2003	All Employers
Sweatfree Contracting Ordinance	2005	City Contractors Only
Healthcare Security Ordinance	2006	All Employers with 20 or More Employees
Paid Sick Leave Ordinance	2006	All Employers

Source: SF Administrative Code and City Attorney's Office

State- Division of Labor Standards Enforcement

The State DLSE, within the California Department of Industrial Relations, is responsible for enforcing the State's labor standards laws, including its minimum wage. The State DLSE includes the Office of the Labor Commissioner, a Governor appointed position that serves as the Chief of the Division, and seven functional units. Two of these units: (1) Wage Claim Adjudication and (2) the Bureau of Field Enforcement, carry primary responsibility for enforcing the State's minimum wage.

⁴ As of November 18, 2010

⁵ Approximate

The Wage Claim Adjudication unit arbitrates wage claims on behalf of workers who file individual claims⁶ for nonpayment of wages, overtime, or vacation pay. State DLSE deputies from this unit hold informal conferences between employers and employees to resolve wage disputes. Unlike the SF OLSE, State DLSE does not conduct an investigation prior to the informal settlement conference and the settlement agreements may not always reflect the true amount owed to the claimant. If a matter cannot be resolved at an informal conference, an administrative hearing is held to make a final determination.

The Bureau of Field Enforcement is responsible for civil and criminal investigations and enforcement of group claims involving the minimum wage and overtime. The Bureau is also responsible for investigation and enforcement of statutes covering workers' compensation insurance coverage, child labor, cash pay, unlicensed contractors, and Industrial Welfare Commission orders.

Additionally, the Division's Economic and Employment Enforcement Coalition partners with federal agencies to target enforcement against unscrupulous businesses participating in the "underground economy"⁷ that treat workers illegally. The unit does this by, among other methods, conducting statewide sweeps⁸ of such businesses to test for compliance with minimum labor standards.

SF OLSE Investigative & Hearing Process Overview

General Implementation and Enforcement

The SF OLSE investigative and hearing process is established and generally defined by Chapter 12R of the City's Administrative Code. The Chapter provides SF OLSE with broad discretion to administer the Minimum Wage Ordinance, stating that the Office "may promulgate appropriate guidelines or rules" for implementation and enforcement of the minimum wage. However, the Code does not include timelines or required steps for the investigative process. The SF OLSE has written guidelines, last updated in 2007, and follows the State DLSE enforcement manual to implement the Minimum Wage Ordinance and other labor standard ordinances. The semi-formal process for enforcement of the Minimum Wage Ordinance is illustrated by Chart 1 below. As shown, there are two primary segments of the process:

- (1) investigations; and,
- (2) hearings, for some cases.

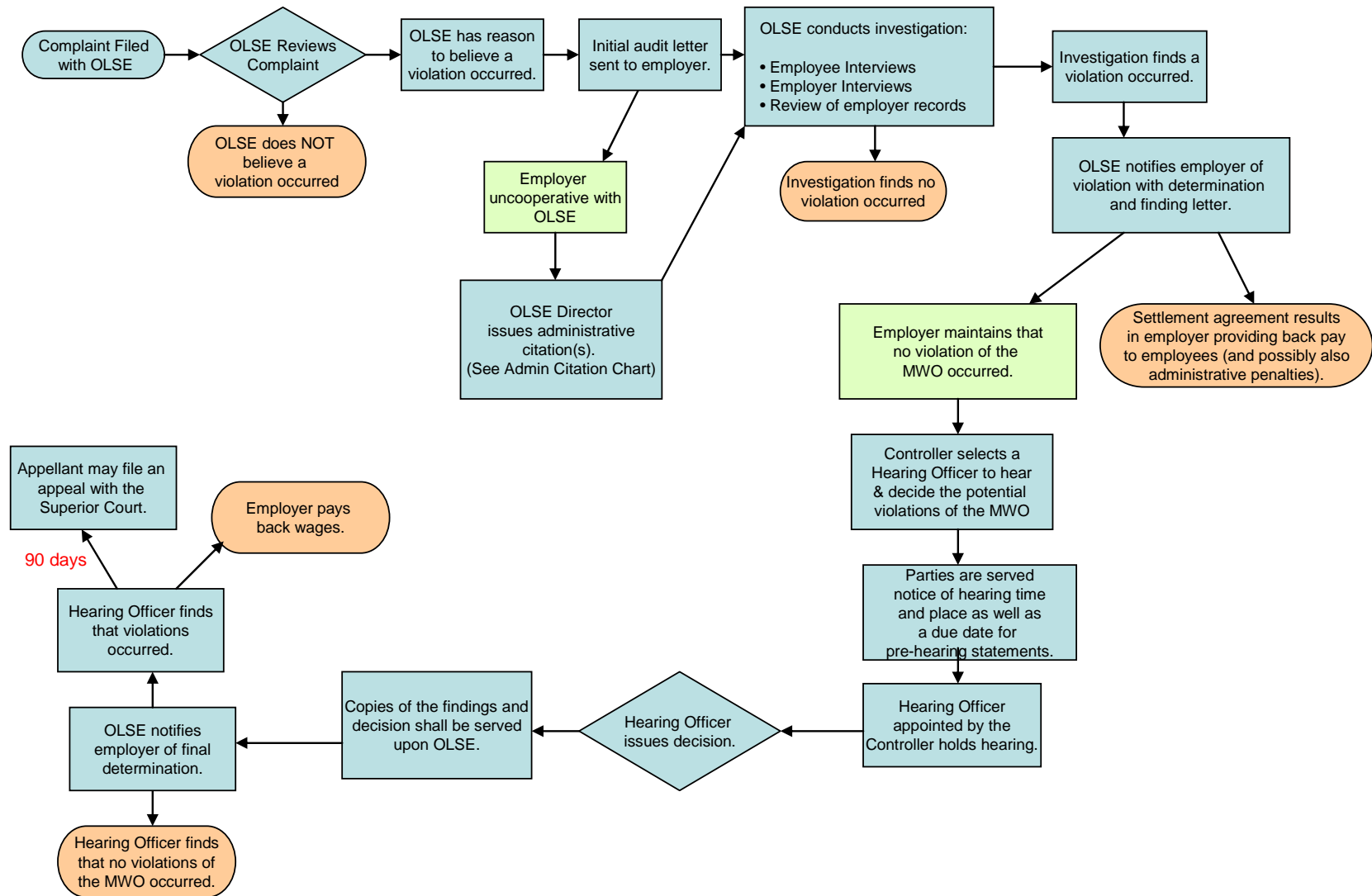
Generally, hearings occur when employers disagree with the results of the Office's investigation and refuse to enter into a settlement agreement.

⁶ The Wage Claim Adjudication Unit only handles claims for nonpayment of wages when an employee contends that they *singularly* were not paid adequate wages. The unit does not handle claims involving two or more workers.

⁷ These businesses include those that have historically abused the workforce in the garment manufacturing, auto body, agriculture, car wash, construction, pallet, and restaurant industries.

⁸ Sweeps are coordinated, unannounced visits by State DLSE staff (sometimes together with federal Department of Labor staff) to inquire as to the level of compliance and record keeping by businesses in industries that historically have abused their workforce. Staff may issue violations during such sweeps.

Chart 1
San Francisco Minimum Wage Ordinance Enforcement Processing Overview



1) The SF OLSE **investigative** process includes the following steps:

1. SF OLSE investigations of minimum wage violations are initiated when the Office receives a complaint from an employee.
2. SF OLSE investigative staff members (Compliance Officers and Supervising Compliance Officers) conduct an initial review of the complaint that usually includes an interview with the employee and a site visit to their place of work.
3. If there is reason to believe a violation occurred, SF OLSE staff will proceed with an investigation by sending an 'initial audit letter' to the employer. The initial audit letter informs the employer that the SF OLSE has received a complaint alleging violation of the Minimum Wage Ordinance and requests documentation necessary for a determination.
4. The investigation that follows will generally include interviews with the employee who made the complaint as well as other potentially affected employees, interviews with the employer and/or owner, and a review of employer records such as the business license registration, time cards and other payroll records, and pay stubs.
5. At the completion of the investigation SF OLSE staff sends the business owner a letter of determination informing him or her whether or not the investigation found that violations occurred as well as amount of back wages owed and amount of City costs and potential penalties if the case is to go through the hearing process.

Office policy calls for investigations to review payroll and related records not only for the claimant, but all other employees employed by the claimant's employer over the previous three years. This investigation approach requires a higher level of staff resources and results in investigations taking longer than if the investigation were only focused on the claimant's case. It can also prolong the time until the case is resolved and the claimant receives any back wages due. However, the Office reports that most of its investigations identify a greater number of employees than just the claimant who have been underpaid and are owed back wages.

Under the current hearing and investigative process, if an employer ignores an SF OLSE Letter of Determination informing him or her that an investigation found violations occurred, SF OLSE *must* proceed through the formal, labor-intensive hearing process in order to enforce the findings. This differs from the SF OLSE administrative citation process whereby employers must actively appeal a citation in order to avoid being assessed a citation penalty.

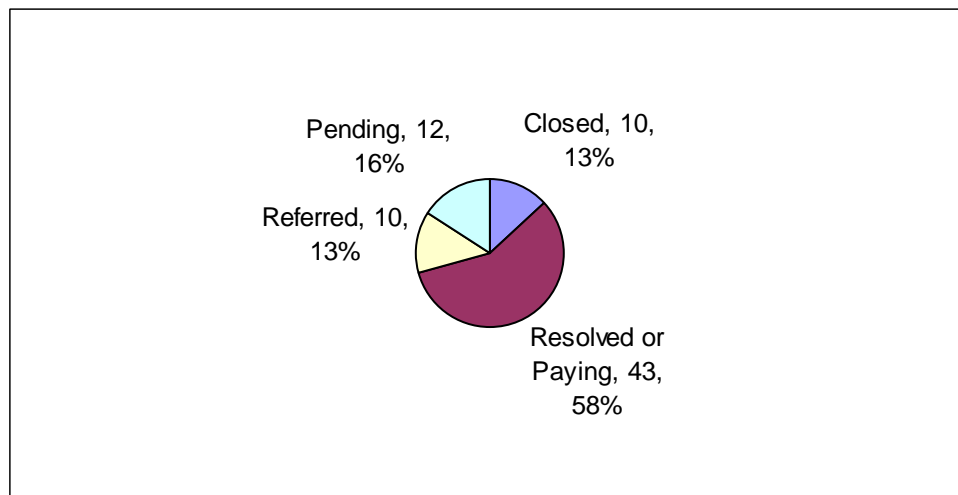
2) The SF OLSE **hearing** process includes the following steps:

1. The SF OLSE hearing process for minimum wage violations is initiated if an employer maintains that no violation occurred despite SF OLSE's findings, through an investigation, that violations did occur.
2. The Director of SF OLSE requests the Controller to select a Hearing Officer to hear and decide the potential violations of the Minimum Wage Ordinance. The Hearing Officer serves notice to all involved parties of the time and place of the hearing. The notice includes requests to SF OLSE and to the employer to submit a pre-hearing statement with a detailed statement of issues presented to the Hearing Officer for findings at the hearing.

3. The Hearing Officer selected by the Controller holds the hearing⁹. At the hearing the SF OLSE and the employer are given an opportunity to present evidence to support whether or not a violation occurred. The burden is on the SF OLSE to provide sufficient evidence that a violation occurred. If the employer does not appear at the hearing, the Hearing Officer will review the evidence presented by SF OLSE and make a determination based on that evidence.
4. The Hearing Officer issues a Statement of Findings generally within a month of the hearing date.
5. OLSE issues a notice of final determination informing the employer of the hearing officer's decision. If the Hearing Officer determines that a violation occurred, the employer must either pay the back wages or file an appeal with the Superior Court within 90 days. If the employer refuses to pay back wages and does not file an appeal, the SF OLSE may pursue other methods of forcing payment such as initiating a civil action and requesting that City agencies or departments revoke or suspend any registration certificates, permits or licenses held or requested by the employer or person until the violation is remedied.

According to data provided by SF OLSE, as of October 14, 2010, 43 of the 75 claims, or about 57 percent, received by SF OLSE in calendar year 2009 were either completely resolved or the employer had entered into a payment plan to pay the employee(s) unpaid wages. An additional 10, or about 13 percent of the claims received in 2009, were referred to another agency such as the State DLSE. Another 10, or about 13 percent of claims received in 2009, were closed by SF OLSE in favor of the employer and 16 percent were still pending (investigations were still ongoing). Chart 2 below illustrates this breakdown of SF OLSE's 2009 caseload status.

Chart 2
Breakdown of SF OLSE Caseload Status by Number and Percent
Claims Received in Calendar Year 2009 as of October 2010



Source: SF OLSE

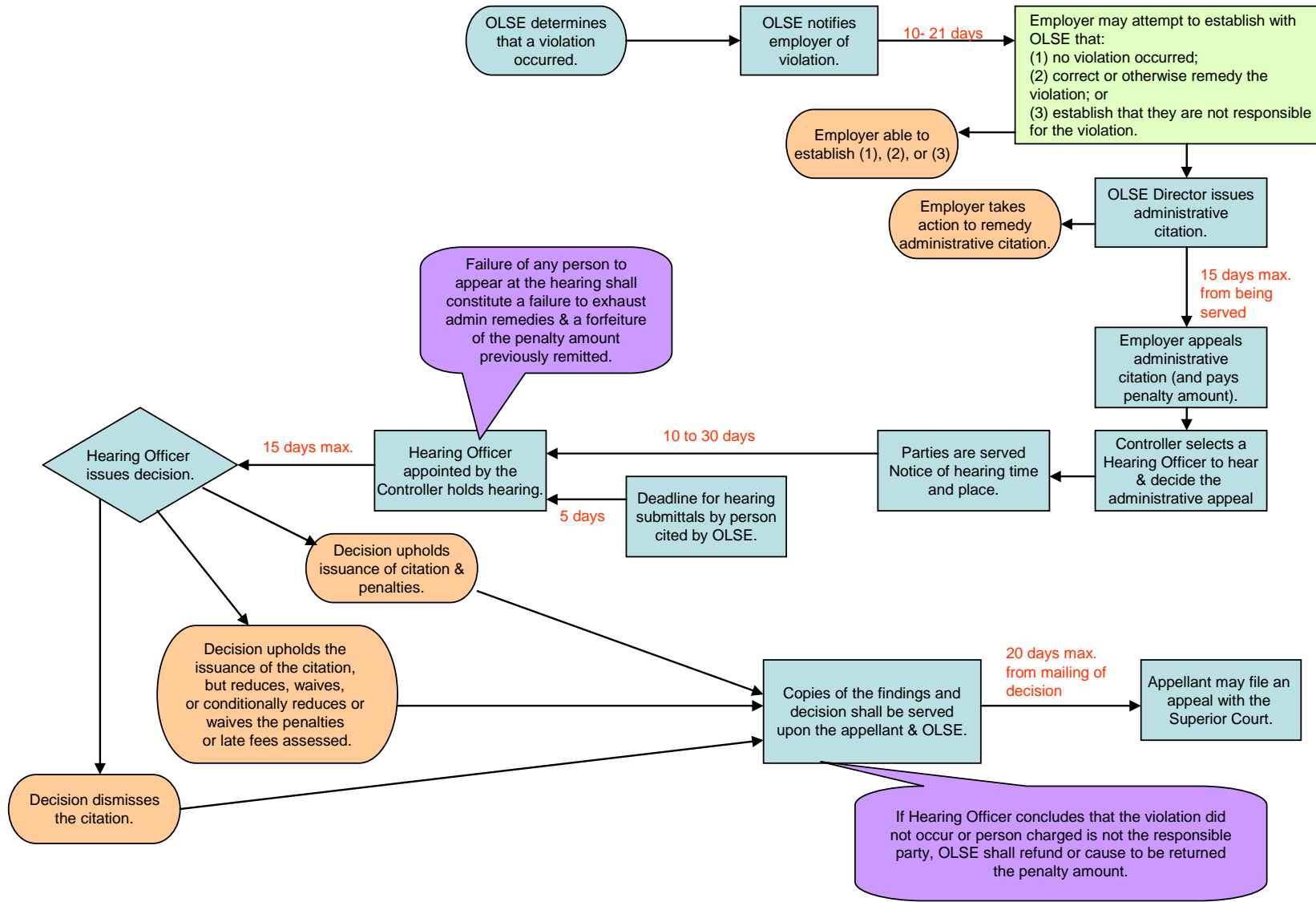
⁹ The Controller is delegated authority to select hearing officers for minimum wage administrative appeals in the Administrative Code.

Administrative Citations and Penalties

Contrary to the general implementation and enforcement of the Minimum Wage Ordinance found in Section 12R7, Section 12R16 through 12R24 sets out a very specific and formal process for the issuance and enforcement of administrative penalties and citations.¹⁰ This is due to the fact that the Minimum Wage Ordinance was adopted directly from the November 2003 voter approved Proposition L, which did not include administrative details such as timelines, while Sections 12R16 through 12R24 governing administrative penalties and citations were adopted as an addition to the Code by the Board of Supervisors in 2006. The sections pertaining to administrative penalties and citations provide for timelines and specific steps to support an expeditious process that affords the suspected violator due process. The formal process for administrative penalties and citations, as defined by the Administrative Code, is illustrated by Chart 3 below.

¹⁰ Administrative penalties and citations may be assessed for various violations of Administrative Code Chapter 12 including (1) failure to maintain payroll records for four years; (2) failure to allow the SF OLSE to inspect payroll records; and (3) retaliation for exercising rights under the Minimum Wage Ordinance. According to SF OLSE management, administrative penalties and citations are used by the Director of SF OLSE as a tool to encourage cooperation from the employer in order to expedite investigations.

Chart 3
San Francisco Administrative Penalties and Citations Processing Overview



Memo to Supervisor Campos
January 13, 2011

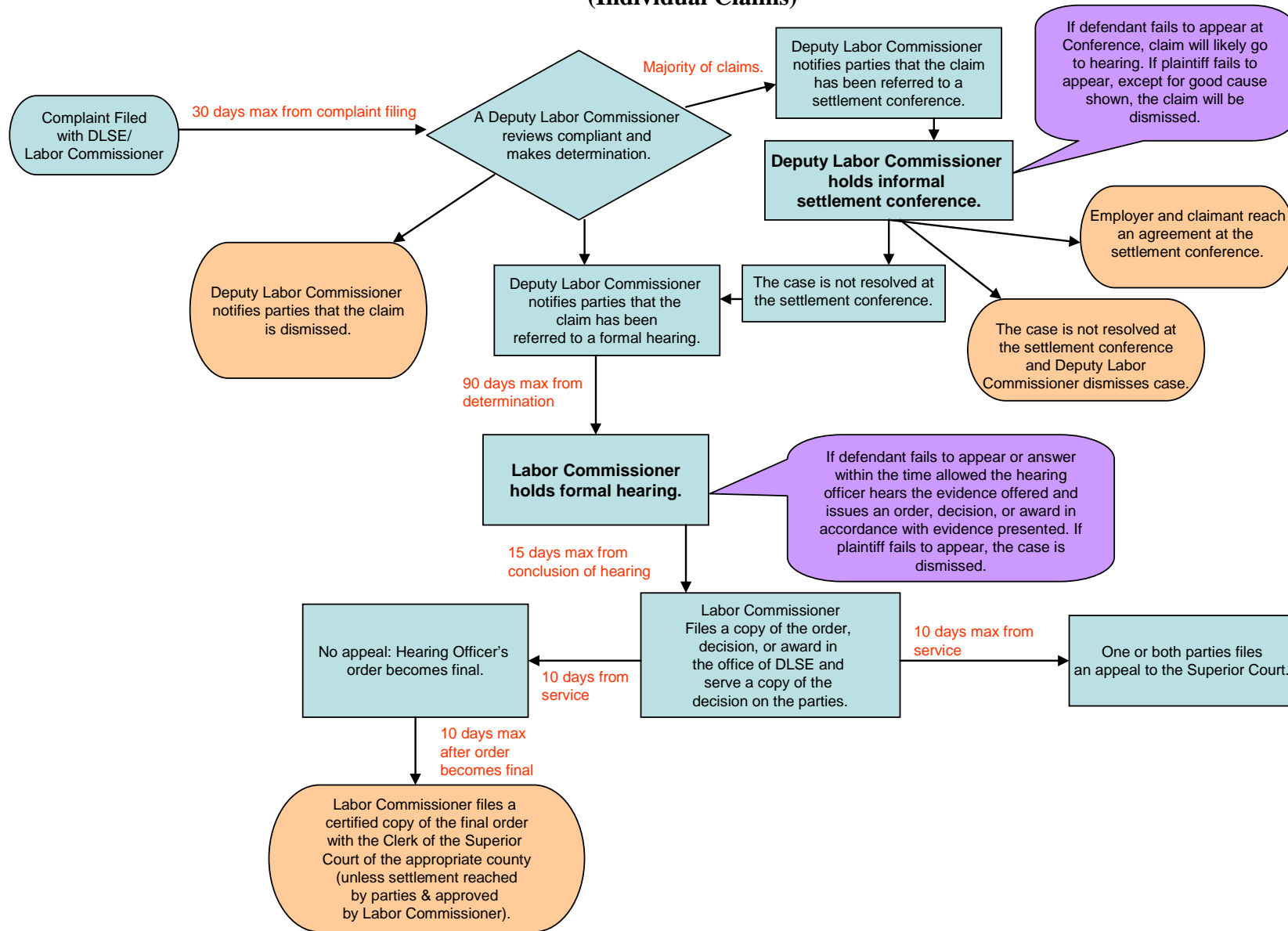
SF OLSE does not track how many administrative citations the Office issues as a whole, though information is recorded in individual staff records and used for their annual performance reviews. However, the Office does track the total dollar amount of penalties assessed and collected, as recorded in FAMIS, the City's financial information system. The SF OLSE Director states that only one citation has ever been appealed by an employer and that no administrative citation hearings have yet been held.

State DLSE Investigative & Hearing Process Overview

State DLSE- Wage Claim Adjudication Unit

As previously mentioned, the Wage Claim Adjudication Unit of the State DLSE adjudicates wage claims on behalf of workers who file claims on behalf of themselves for nonpayment of wages (including non compliance with the State Minimum Wage) overtime, or vacation pay. According to the California Labor Code, the Labor Commissioner must review employee complaints and determine whether a hearing will be held within 30 days of the filing of the complaint. Further, the Labor Code requires a formal hearing, if deemed necessary by the Labor Commissioner, within 120 days of the filing of the complaint. However, in practice the vast majority of employee claims that are handled through the Wage Claim Adjudication Unit are first directed to informal settlement conferences between the employee and the employer. Of the 1,816 settlement conference outcomes in the San Francisco District of State DLSE in calendar year 2009, 976, or 54 percent, were referred to a formal hearing, 445, or 24 percent, were dismissed, and 22 percent resulted in a settlement. Chart 4 shows the steps for investigating and resolving employee complaints by the Wage Claim Adjudication Unit.

Chart 4
California Wage Adjudication Case Processing Overview
(Individual Claims)



The following is an overview of the basic steps taken in processing Wage Claim Adjudication cases:

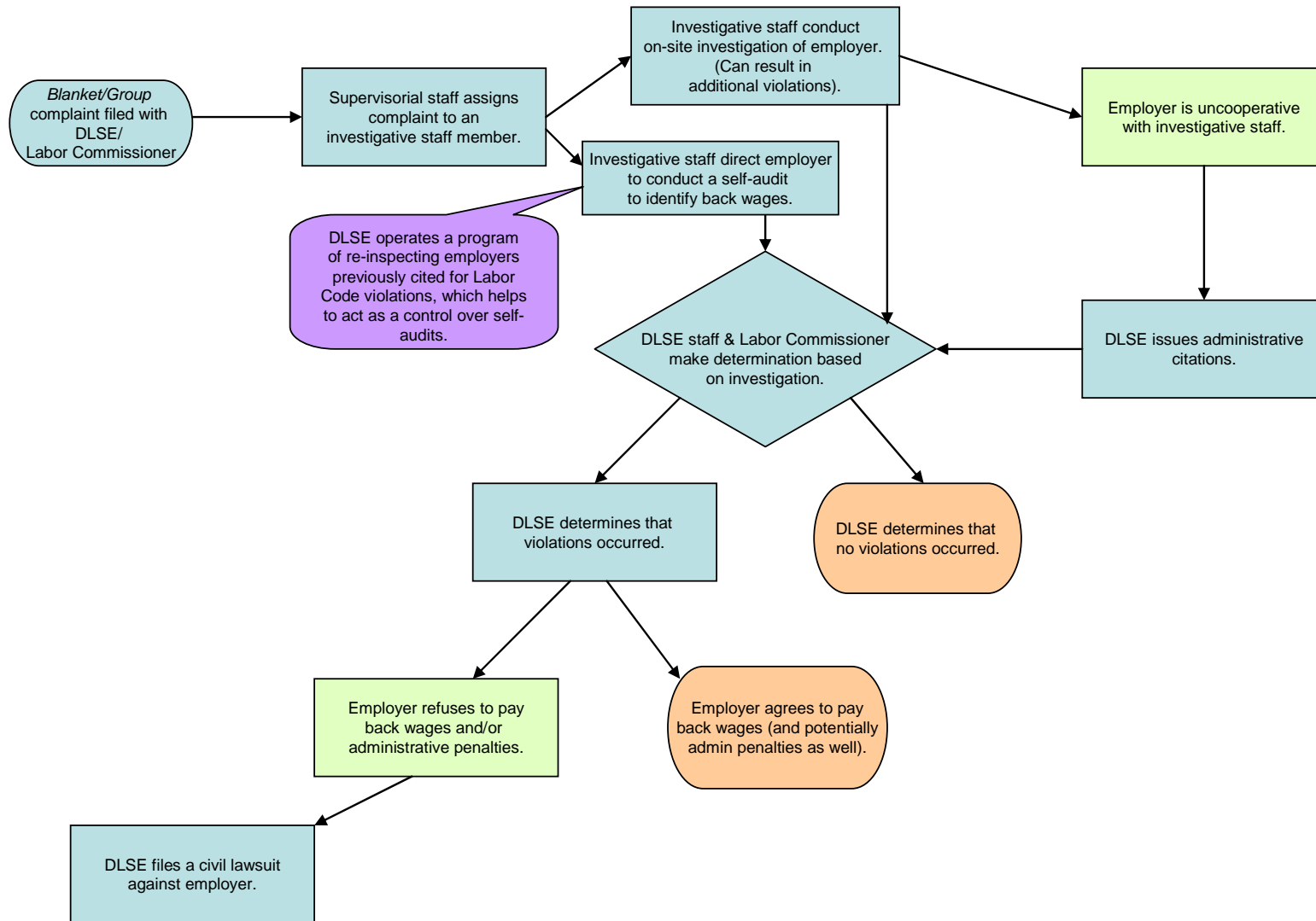
1. A Deputy Labor Commissioner will make a determination based on the claim and notify the parties within 30 days of the filing as to the specific action which will initially be taken regarding the claim. This action will be either (a) referral to an informal settlement conference, (b) referral to a formal hearing, or (c) dismissal of the claim. The vast majority of claims received by Wage Claim Adjudication Unit are initially referred to an informal settlement conference. Generally, the only Wage Claim Adjudication cases that may go to a hearing occur when the employer refuses to meet with the employee.
2. If the decision has been made by the deputy to hold a conference, the parties are notified of the date, time and place of the conference and are directed that they are expected to attend. The purpose of the conference is to determine if the claim has merit¹¹ and can be resolved at the initial conference level. It should be noted that employees do not have the option of filing an anonymous complaint with the Wage Claim Adjudication Unit and typically must sit face to face with their employer at a settlement conference.
3. The Deputy Labor Commissioner will typically refer the case to a formal hearing if the claim is not resolved at the settlement conference or if the defendant fails to appear at the conference. At the formal hearing the complainant must present a prima facie claim of violation. In some instances, such as when the plaintiff fails to appear at the conference, the Deputy Labor Commissioner may dismiss the case after scheduling or holding a settlement conference.
4. If a hearing is scheduled, the parties are sent a notification of the date, time and place of hearing. As opposed to settlement conferences, hearings are formal proceedings where the parties and witnesses testify under oath and are recorded. Additionally, each party has basic rights at the hearing including: (1) to be represented by an attorney or other party of his or her choosing; (2) to present evidence; (3) to testify on his or her behalf; (4) to have his or her own witnesses testify; (5) to cross-examine the opposing party and witnesses; (6) to explain evidence offered in support of his or her position and to rebut evidence offered in opposition; and (7) to have a translator present, if necessary. If the plaintiff fails to appear at the hearing, the claim is dismissed. If the defendant fails to attend the hearing, the hearing officer will decide the matter on the evidence he or she receives from the plaintiff. Either party who fails to appear may request a rescheduling of the matter upon a showing of extraordinary circumstances.

State DLSE- Bureau of Field Enforcement

The Bureau of Field Enforcement is responsible for investigating complaints and initiating enforcement actions to ensure employees are not being required or permitted to work under unlawful conditions. As mentioned previously, the State Bureau of Field Enforcement investigates labor standards complaints that cover two or more workers as well as criminal investigations involving these groups.

¹¹ This determination is made by DLSE staff who oversee the settlement conferences in a neutral role.

Chart 5
California Bureau of Field Investigations Case Processing Overview
(Group Claims)



The Bureau of Field Enforcement relies on self-audits, conducted by employers, to augment the investigations performed in response to specific complaints. If employers refuse to perform self-audits, BOFE auditors obtain payroll records to conduct independent audits. BOFE additionally has a program of re-inspecting employers previously cited for Labor Code violations as a control to help ensure compliance with the State Labor Code. Chart 5 below illustrates the investigative process for cases it handles.

The Bureau of Field Enforcement investigative process has two major differences from the Wage Claim Adjudication process. The first difference is that the Bureau of Field Enforcement does not have a hearing process. If an employer refuses to adhere to the findings of a Bureau investigation, State DLSE may file a civil lawsuit against the employer. In the last three years, 20 civil lawsuits have been filed against employers by the Bureau of Field Enforcement. The second major difference from Wage Claim Adjudication cases is that employees have the option of remaining anonymous.

FINDINGS

1. SF Case Processing Slower Than State and Lacks Mandatory Timelines

Initiation of Investigations

There are no set deadlines in the City's Administrative Code or in SF OLSE procedures for initiating investigations after a complaint is received. Further, SF OLSE does not track how many days have elapsed between when a claim is received and when either (1) an investigation is initiated or (2) when the claim is dismissed for lack of merit. Although SF OLSE does not track the elapsed time for these milestones, SF OLSE management states that most investigations are initiated within a day of receiving an initial claim.

In contrast, State DLSE is required to make an initial determination within 30 days of receiving a complaint and to hold a formal hearing, if necessary, within 120 days of receiving a complaint. Specifically, State DLSE staff must determine within 30 days whether to (1) schedule a settlement conference between the employer and employee; (2) refer the claim to a formal hearing¹²; or (3) dismiss the claim. While State DLSE does not track staff compliance with the requirement to make determinations within this 30 day window, other statistics are tracked and reported such as the number of days from when a claim is filed to when a formal hearing is held. Under this measure, the San Francisco District of the State DLSE did not meet its 120 day requirement for 95 percent of individual claims filed.

Both State DLSE and SF OLSE performance in initiating case processing compares favorably to at least one readily available benchmark. According to *Make the Road New York*¹³, a non-profit organization that assists workers who file unpaid wage claims, the State of New York reportedly does not initiate investigations until 6 to 18 months after claims are received due to extreme case backlogs.

¹² As previously mentioned, formal hearings are generally not scheduled unless the employer and employee can not resolve the claim in an informal settlement conference.

¹³ Make the Road New York is a New York City based non-profit organization that, among other activities, provides assistance to workers and attorneys who file unpaid wage, minimum wage, and overtime claims pursuant to the New York State Labor Law.

Investigation Performance

After receiving a claim, SF OLSE Compliance Officers first conduct an initial review to determine if the claim has merit. While the SF OLSE does not track the number of cases dismissed as a result of the initial review, the vast majority of these reviews result in the initiation of an investigation of the employer's payroll records. Contrary to individual complaints received by the State DLSE, SF OLSE investigations proactively seek additional employees, going as far back as three years, who may also have been underpaid by the employer being investigated.¹⁴ SF OLSE management states that hybrid investigations, in which the Office moves to gain back wages for the original claimant before completing the investigation of additional potentially harmed employees working for the claimant's employer, is possible, but not standard operating procedure for the OLSE. Another difference between the agencies is that while the SF OLSE conducts full investigations and audits of employer payrolls, the State DLSE administers the State's minimum wage law by (1) requesting employers to conduct self-audits¹⁵; (2) facilitating settlements between the employer and employee; and (3) administering formal hearings in which claimants must provide sufficient evidence on their own accord to convince a hearing officer of their claim.¹⁶

Investigation Confidentiality

The anonymity of claimants is treated differently between SF OLSE and State DLSE. According to SF OLSE management, SF OLSE staff strives to keep the identity of claimants anonymous throughout the investigative process to minimize potential intimidation or retribution from the employer. Further, the Administrative Code directs the SF OLSE to encourage reporting of violations by keeping the name and other identifying information of the employee reporting the violation confidential. Claimants who file individually with State DLSE must reveal their identity, by appearing at a settlement conference with the employer, in order to proceed with their case. The identity of claimants who file a group claim with State DLSE is not revealed during the investigation; however claimants must provide their identity when claiming wages.

Length and Conclusion of Investigations

There is no requirement in the City's Administrative Code that SF OLSE conduct and conclude its Minimum Wage Ordinance investigations within a prescribed amount of time. Further, SF OLSE has no guidelines prescribing a timeline for investigations. While State DLSE does not conduct full investigations for most complaints, the State Labor Code requires within 30 days an initial review and determination of whether (1) the case will be dismissed, (2) a settlement conference will be scheduled, or (3) a formal hearing will be scheduled. There are no prescribed timelines in the State's Administrative Code or in Division policies and procedures for the few investigations that are conducted by State DLSE, primarily by the Bureau of Field Enforcement.

While SF OLSE does not aggregate or analyze the length, outcome, or cause of delays for Minimum Wage Ordinance investigations, data taken from the Office's caseload database show that investigations can range from one day or less to over four years in length. SF OLSE data of cases received in calendar year 2009 show that cases that were resolved with a favorable

¹⁴ State DLSE management states that Wage Claim Adjudication Unit staff will refer cases to the Bureau of Field Enforcement when they feel the labor standard violations affect other employees. It is unclear how proactive State DLSE staff is in determining whether additional employees are affected.

¹⁵ When employers fail to adhere to the request to perform a self-audit, State DLSE staff conducts independent audits.

¹⁶ State DLSE management states that both parties are advised at the conference as to what the procedure entails and what they should present to support their positions.

outcome for the claimant were completed in an average of 67 days, with a median length of 23 days. The data also show that cases that were received in calendar year 2009 that resulted in an outcome that was not favorable to the claimant were completed in an average of 131 days with a median length of 58 days. It should be noted that SF OLSE does not have strong controls in place to ensure that caseload data is entered consistently by various staff. Therefore, strong conclusions should not be drawn based on the caseload database.

Hearing Process Overview

In calendar year 2009, the San Francisco office of the State DLSE¹⁷ held 1,363 settlement conferences¹⁸, 448 formal hearings and had over 40 enforcement citations appealed to a hearing. At the City level, only one Minimum Wage Ordinance hearing was held in calendar year 2009.

Time Required before Hearing is Held

More time is required at the City level than at the State level before a hearing is held, as shown in Table 2 below. Although there have only been five minimum wage hearings¹⁹ held in San Francisco since the Minimum Wage Ordinance was enacted, it took an average of 788 days between initial claim filing and the hearing date. The median amount of time taken between initial claim filing and the hearing date was 524 days. State DLSE is required by the State Administrative Code to bring a case that is determined to have merit to a formal hearing within 120 days of claim filing. In calendar year 2009 State DLSE took an average of 260 days from initial claim filing to the hearing date.

Table 2
Comparison of Time Required From Receipt of Claim to Formal Hearing Date

Agency	Code Requirement	Average Time Between Receipt of Claim to Formal Hearing
SF OLSE	N/A	788 days
State DLSE	120 days	260 days

Source: City and State Administrative Codes; Data from State DLSE and SF OLSE

While the State DLSE is not meeting its obligation under the State Administrative Code to hold a formal hearing within 120 days of claim filing for most cases, on average it takes about one third of the time as SF OLSE to bring a case to a formal hearing. An important difference to note is that SF OLSE conducts full investigations of Minimum Wage Ordinance violations for all employees of the employer under investigation, including a review of employer payroll records and timesheets, site visits, employee interviews, and surveillance as needed for all claims received that, after an initial review, are deemed to have merit. As previously mentioned, State DLSE relies heavily on informal settlement conferences, claimants making their case in formal hearings on their own accord, and employer self-audits. SF OLSE management has stated that the length of investigations depends heavily on the willingness of the employer to cooperate with SF OLSE staff by providing payroll records and whether the employer has maintained complete and accurate records.

¹⁷ The San Francisco District office of the State DLSE handles labor standards cases from the City and County of San Francisco as well as from San Mateo County between the San Francisco border and State Route 92.

¹⁸ As previously mentioned, State DLSE requires most individual claimants to first attend a settlement conference with the employer (defendant) in order to determine if the claim can be resolved without a hearing.

¹⁹ SF OLSE has received nearly 500 minimum wage complaints since the Minimum Wage Ordinance was enacted in 2003. Therefore, the cases that have gone to a formal hearing represent approximately 1 percent of the total claims received and processed by SF OLSE.

Under the current hearing and investigative process, if an employer ignores a SF OLSE Letter of Determination informing him or her that an investigation found violations occurred, SF OLSE *must* proceed through the formal hearing process in order to enforce the findings. This differs from the SF OLSE administrative citation process whereby employers must actively appeal a citation in order to avoid being assessed a citation penalty.

Hearing Confidentiality

As previously mentioned the State DLSE hearing process does not allow for anonymity at any point in the investigation or hearing process. SF OLSE staff work to protect the anonymity of claimants as long as feasibly possible. The identity of a claimant is typically not revealed unless a formal hearing is held.

Outcome of Hearings

In calendar year 2009, the San Francisco office of the State DLSE held 395 informal settlement conferences that resulted in a resolution between the employer and employee and 402 formal minimum wage hearings. Of the 402 formal minimum wage hearings held in calendar year 2009, 350, or 87 percent, resulted in a favorable outcome for the plaintiff (employee), while 52, or 13 percent, resulted in a favorable outcome for the defendant (employer).

Of the five SF OLSE minimum wage cases that have gone to a formal hearing since the Minimum Wage Ordinance was enacted in 2003, all five have resulted in favorable outcomes for the plaintiff (employee). SF OLSE management states that only one employee out of seven potentially underpaid employees who worked for an investigated employer was denied wages that he initially claimed. OLSE management state that all other employees in that case received the wages that they claimed were owed to them.

2. SF Collections Higher than State, but Record Keeping and Reporting Could Improve

Citations and Penalties

San Francisco Administrative Code Section 12R.16 provides for three types of administrative citations and associated penalties that the Director of SF OLSE may issue in order to enforce the Minimum Wage Ordinance. According to SF OLSE management, the administrative citations are primarily used as an incentive for employers to cooperate with SF OLSE investigations and, therefore, expedite case processing. SF OLSE management stated that SF OLSE will often reduce or waive such administrative citations if the employer agrees to cooperate with the investigation. These administrative citations are outlined in Table 3 below:

Table 3
San Francisco Minimum Wage Administrative Penalties and Citations

Violation	Penalty Amount
Failure to maintain payroll records or to retain payroll records for four years	\$500.00
Failure to allow the SF OLSE to inspect payroll records	\$500.00
Retaliation for exercising rights under the Minimum Wage Ordinance	\$500.00

Source: SF Administrative Code, Section 12R.16

The penalty amounts listed in Table 3 above can be increased cumulatively by 50 percent for each subsequent violation of the same provision by the same employer or person within a three year period up to a maximum penalty amount in a calendar year for each type of violation of \$5,000. In addition to the penalty amounts, the City's Administrative Code allows SF OLSE to assess enforcement costs to cover the reasonable costs incurred in enforcing the administrative penalty, including reasonable attorney's fees, and do not count toward the \$5,000 annual maximum.

Citations and formal hearing orders issued by State DLSE may result in the filing of a judgment for non-compliance, which provides more leverage in the collections process. The largest number of citations issued in calendar year 2009 by State DLSE was for not carrying workers' compensation insurance (51 percent), failure to issue an itemized wage statement (22 percent), and penalties for non-registration (10 percent). Only 113 citations, or 2.7 percent of the total number of citations issued by State DLSE, were for violations of the State's minimum wage. Citations assessed by State DLSE occur as the result of complaints received as well as from sweeps conducted by the Division's Economic and Employment Enforcement Coalition Unit (EEEC). Unlike the SF OLSE, the State DLSE conducts periodic statewide sweeps²⁰ of high-risk industries such as car washes and garment factories. Up to 60 businesses could be visited statewide by State DLSE Bureau of Field Enforcement staff in a single coordinated sweep. According to Ms. Ethera Clemons, a State DLSE Assistant Chief, the State DLSE conducts approximately two sweeps per industry per year. The industries targeted by State DLSE for such sweeps include (1) agriculture, (2) car washes, (3) construction, (4) garment manufacturing, (5) restaurants, and (6) retail. State DLSE sweeps cover all State labor standard requirements, including the minimum wage.

Between January 1, 2010 and November 15, 2010, SF OLSE assessed \$125,206 in administrative penalties and enforcement costs. In the same time period, the Office collected \$62,277, or about 50 percent of the amount assessed. Comparatively, the State DLSE assessed \$393,350 statewide in citations relating to the minimum wage and collected \$74,035 in penalties, or only about 19 percent of the amount assessed, in calendar year 2009.

SF OLSE management states that the uncollected assessed amounts are being collected over time under payment plans established in settlement agreements with employers and do not represent lost revenues. However, SF OLSE does not maintain a system for aggregating, analyzing or

²⁰ Sweeps are coordinated, unannounced visits by State DLSE staff (sometimes together with Federal Department of Labor staff) to inquire as to the level of compliance and record keeping by businesses in industries that historically have abused their workforce. Staff may issue violations during such sweeps.

reporting payment performance of employers on such payment plans. Rather, SF OLSE maintains separate files for each employer on a payment plan with payment performance tracked and recorded informally on an individual basis. Further, there is no formal reporting of data or analysis of employer payment performance of wages, interest, penalties, or costs for Minimum Wage Ordinance violations so it cannot be determined from available data if employers are making their required payments timely.

Table 4 below displays the number of minimum wage citations, amount of penalties assessed, and amount of penalties collected by State DLSE in calendar year 2009. As a comparison, Table 5 shows the amount of penalties and enforcement costs assessed and collected by SF OLSE in calendar year 2010 through November 15. Table 6 shows the total amount of penalties collected in FY 2009-2010 by SF OLSE, by category. Direct and practical comparisons of SF OLSE and State DLSE data was not possible due to restrictions of type of data collected by each agency. However, SF OLSE appears to be collecting amounts owed faster than the State.

Table 4
Number and Amount of State DLSE Minimum Wage Citations Statewide
Calendar Year 2009

Citation Category	Number of Citations	Penalties Assessed	Penalties Collected	Collections as a Percent of Assessed
Minimum Wage	113	\$393,350	\$74,035	19%
Other ²¹	4,352	29,912,173	9,458,589	32%
TOTAL	4,465	\$30,305,253	\$9,532,624	31%

Source: 2009 Annual Report on the Effectiveness of Bureau of Field Enforcement

Table 5
Amount of SF OLSE Citations
Calendar Year 2010 Through November 15, 2010

Citation Category	Penalties and Costs Assessed	Penalties and Costs Collected As of 11/15/2010	Collections Paid as of 11/15/2010 as Percent of Assessed²²
Minimum Wage Ordinance	\$125,206	\$62,277	50%

Source: SF OLSE Wage Tracking Spreadsheet

²¹ Other citation categories include workers' compensation, child labor, itemized wage statement, overtime, garment, unlicensed construction contractor, non-registration of car washes and garment manufacturers, and public works prevailing wage.

²² SF OLSE management states that the remaining amount of wages, penalties and costs assessed, but not collected, are amounts already pledged under payment plans pursuant to settlement agreements with employers. However, SF OLSE has no formal record keeping or reporting process for determining payment performance.

Table 6
Amount of SF OLSE Penalties and Costs Collected
FY 2009-2010

Citation Category	Penalties and Costs Collected
Prevailing Wage	\$248,688
Health Care Accountability	19,973
Minimum Wage Ordinance	39,762
TOTAL	\$308,423

Source: FAMIS

State and City codes both require employers to post the respective minimum wage notices in a conspicuous place at workplace/job sites where any employee works. However, unlike the State code, the City's Administrative Code does not include an administrative penalty or citation for non-compliance. Administrative citations are used by both the State and City as a tool to encourage employer cooperation with investigations and expedite case processing.

Amounts Assessed and Collected

In January of 2010 the SF OLSE began formally tracking the amount of wages, penalties, and costs assessed as well as wages, penalties, and costs paid by employers for management informational purposes. Prior to that, only penalty and cost payments were being formally tracked. According to these records, as shown in Table 7, SF OLSE assessed \$1,267,041 and collected \$609,959 in back wages and interest under the Minimum Wage Ordinance between January 1 and November 15, 2010. During the same period the SF OLSE assessed \$125,206 and collected \$62,277 in Minimum Wage Ordinance penalties and costs.

Table 7
Minimum Wage Ordinance Wage, Penalty, and Costs Assessed and Paid
SF OLSE
Calendar Year 2010 through November 15

Collection Type	Assessed Amount	Paid Amount As of 11/15/2010	Paid Amount as a Percent of Assessed Amount²³
Back Wages and Interest	\$1,267,041	\$609,959	48%
Penalties and Costs	125,206	62,277	50%
TOTAL	\$1,392,247	\$672,236	48%

Source: SF OLSE Wage Tracking Spreadsheet

The State DLSE tracks statistics on wages found due and wages collected, but does not break most of them down based on which law they were assessed under (minimum wage, overtime, prevailing wage, etc.).²⁴ In calendar year 2009 the San Francisco office of the State DLSE oversaw the payment of \$31,795 in minimum wages to claimants.

²³ See above.

²⁴ State DLSE management states that these statistics are available for group claims, but not for individual claims processed by the Wage Claim Adjudication Unit.

Methods for Collection

According to SF OLSE management, the Office relies primarily on the use of assessed costs²⁵ and enforcement penalties to encourage employers to pay assessed wages under the Minimum Wage Ordinance. SF OLSE management stated that since the City is not permitted under State law to negotiate away any assessed wages or associated interest, SF OLSE will, in some instances, offer to reduce or waive penalties and/or costs to encourage payment from the employer.

In addition to the use of penalties and costs, SF OLSE has worked with other City agencies to encourage payment. The City's Administrative Code Section 12R.7(b) permits SF OLSE, when prompt compliance is not forthcoming from employers, to request that City agencies or departments revoke or suspend any registration certificates, permits, or licenses held or requested by the employer or person until such time as the violation is remedied. SF OLSE management states that SF OLSE has worked with the Department of Public Health (DPH) on two cases to withhold permits based on Minimum Wage Ordinance violations. Additionally, SF OLSE management states that SF OLSE has a Memorandum of Understanding with the Treasurer and Tax Collector to assist with revoking or withholding business licenses from employers who do not comply with the Minimum Wage Ordinance, but that no cases have yet been referred to the Treasurer and Tax Collector.

State DLSE relies on a Collections Unit, implemented in November 2006, to assist with processing wages and penalties found due and collected. In calendar year 2009 the State DLSE Collections Unit staff processed 3,257 judgments with total penalty collections by the Unit of \$3,064,181. The State DLSE relies on its ability to issue citations for group claims that can become court judgments to encourage cooperation from employers.

3. SF OLSE Lacks Management Performance Analysis and Reporting

SF OLSE Reports

SF OLSE does not provide annual reports to the Board of Supervisors on the implementation of the Minimum Wage Ordinance despite a requirement to do so in the City's Administrative Code. According to Section 12R.26 of the City's Administrative Code, approved in July 2006, OLSE is required to provide annual reports to the Board of Supervisors on the implementation of the Minimum Wage Ordinance. The section does not detail what should be reported to the Board of Supervisors other than "the implementation of the Minimum Wage Ordinance." SF OLSE management states that providing such reports and related analysis is a challenge due to staffing resource constraints.

SF OLSE reports three statistics to the Controller's Office related to implantation and enforcement of San Francisco labor laws for inclusion in the *Annual Year-End Performance Measure Report*. The statistics reported on an annual basis include (1) the number of Minimum Wage Ordinance claims filed; (2) the number of Minimum Wage Ordinance claims resolved; and (3) the number of education/outreach presentations made regarding the San Francisco labor laws. These statistics are collected annually by the Controller's Office and reported with various other performance measures from all City departments. The performance measure annual report is

²⁵ The City Administrative Code allows SF OLSE to assess penalties from the employer, within certain limits, in order to compensate the City for the cost of investigating and remedying violations of the Minimum Wage Ordinance.

provided to the Mayor, Board of Supervisors, departments, and the general public. While this is useful information, in the Budget and Legislative Analyst's opinion, it does not fulfill the Administrative Code requirement for an Office annual report to the Board of Supervisors.

SF OLSE Data Collection and Analysis

SF OLSE maintains two repositories for data on Minimum Wage Ordinance cases. These include (1) a caseload database that contains activity sheets on each case and (2) a spreadsheet that tracks wages, interest, and penalties assessed and collected. The caseload database serves as a basic working repository to manage case processing for minimum wage enforcement. SF OLSE does not use the caseload database or the wage and penalty spreadsheet to formally track case timelines or outcomes for management informational purposes²⁶. Further, SF OLSE does not have formal procedures for entering data into the caseload database or the wage and penalty tracking spreadsheet. A review of the caseload database found inconsistencies in data entered. Specifically, staff does not consistently (1) categorize cases by claim status (pending, closed without a full investigation, resolved after the completion of a full investigation); or (2) enter a date when the claim was closed or resolved. The database also lacks a field to collect the date when SF OLSE staff makes their initial determination, when a Compliance Officer formally initiates an investigation (when an initial audit letter is mailed to the employer), when a Compliance Officer expands an investigation to include additional employees, or when an investigation is concluded (when a Letter of Determination is issued). The lack of this information and inconsistencies in the data make it difficult, if not impossible, to properly analyze or draw clear conclusions of caseload management.

State DLSE Reports

Unlike SF OLSE, the State Labor Commissioner does provide annual reports to the State Legislature, as required by the State Labor Code concerning the effectiveness of the Bureau of Field Enforcement (BOFE). The reports include: (1) the enforcement plan adopted by the Labor Commissioner and the rationale for the priorities, (2) the number of establishments investigated by BOFE and the number and types of violations found, (3) the amount of wages found to be unlawfully withheld from workers and the amount of unpaid wages recovered for workers, and (4) the amount of penalties and unpaid wages transferred to the General Fund as a result of the efforts of BOFE. To date, the State Labor Commissioner has met these reporting requirements.

State DLSE Data Collection and Analysis

Each of the 18 District Offices of State DLSE must report certain statistics on enforcement to State DLSE headquarters on a monthly basis. These statistical reports include data on:

- Informal settlement conferences including number of conferences scheduled and held, the number of conferences that resulted in a settlement, and the number not settled and either referred to a formal hearing or dismissed.
- Citation hearings including the number of citations appealed and number of findings issued from such hearings.
- Formal minimum wage hearings including number of hearings scheduled, number of hearings held, data on the outcome of the hearings, and data on the timing of hearings.
- Wage collections including wages and hearing awards found due and collected and a breakdown of wages collected based on the minimum wage, overtime, and penalties.

²⁶ SF OLSE management states, however, that some supervisors review this data for assessing individual staff members for annual performance reviews.

These statistics are reported by employee and summed by district.

CONCLUSION

Drawing strong conclusions from comparisons of the efficiency and effectiveness of SF OLSE and State DLSE enforcement of the City and State minimum wages is limited by the structural and process differences between the two agencies. However, our analysis has found that when a case is scheduled for a formal hearing, the SF OLSE takes about three times as long as the San Francisco District of the State DLSE to bring the case to a hearing (788 days on average vs. 260 days on average in calendar year 2009). A primary cause of this difference is that the SF OLSE conducts full investigations of employer payroll records and actively seeks out additional employees who may have been violated and, for cases that go to a hearing, the Office must meet evidence standards similar to those of going to trial, according to SF OLSE management. The State DLSE, on the other hand, relies heavily on more expeditious settlement conferences for many claims with plaintiffs and defending employers providing their own case evidence.

Our analysis has also found that the SF OLSE has a slightly more effective record of formal hearing outcomes in favor of claimants. All five out of the SF OLSE cases that have gone to a hearing have resulted in a favorable outcome for the claimant(s).²⁷ Approximately 87 percent of formal State minimum wage hearings in the San Francisco District of the State DLSE resulted in a favorable outcome for the claimant.

Our analysis has identified steps that the City can take to promote transparency, higher collection amounts, and better management of minimum wage caseloads. These are outlined in the recommendations section and include additional use of administrative citations, clarification of the minimum wage violation investigative and hearing process in the Administrative Code, and more effective use of the SF OLSE caseload database. A policy option recommendation is also included that would expedite case processing to allow claimants to obtain any back wages owed more quickly by requesting that SF OLSE investigate their case only, rather than investigating payroll records for all other employees from the previous three years to determine if other violations have occurred, as is current SF OLSE policy.

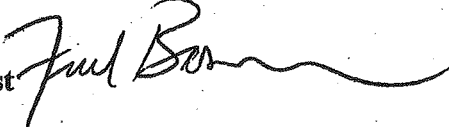
cc: Clerk of the Board

²⁷ As previously mentioned, one claimant (of seven) from one of the five SF OLSE cases that went to a hearing was denied claimed wages.

**CITY AND COUNTY OF SAN FRANCISCO
BOARD OF SUPERVISORS**

BUDGET AND LEGISLATIVE ANALYST

1390 Market Street, Suite 1150, San Francisco, CA 94102
(415) 552-9292 FAX (415) 252-0461

To: Supervisor Campos
From: Budget and Legislative Analyst 
Date: April 19, 2011
Re: Response to Additional Questions Regarding Legislative Analyst Report on Enforcement of the Minimum Wage Ordinance

SUMMARY OF REQUESTED ACTION

Your office requested that the Budget and Legislative Analyst provide an analysis of minimum wage enforcement in San Francisco, comparing processes between the City's Office of Labor Standards Enforcement (OLSE) with the State's Division of Labor Standards Enforcement (DLSE). On January 13, 2011 the Budget and Legislative Analyst provided your office with a report in response to this request. In response to our report your office provided a list of 23 follow-up questions.

On February 7, 2011 we issued a memo with an initial response to the questions based on previously collected information. We denoted questions that we could not provide full answers to.

Your office completed a subsequent Budget and Legislative Analyst legislative request form listing the questions that your office would like us to answer that required obtaining additional data from OLSE and DLSE. This memo includes responses to the 23 questions included in the second request.

ADDITIONAL QUESTIONS FOR BUDGET ANALYST AND LEGISLATIVE ANALYST

1. Why does OLSE conduct so few hearings?

Most employers under investigation cooperate with the OLSE and settle. OLSE management prefers to come to a settlement agreement with the employer to avoid the burdensome process of preparing for and participating in a formal hearing. The use of administrative citations and penalties assists with this. A relatively smaller percentage of claims (10 claims, or 13 percent of Calendar Year 2009 claims as of October 2010) are referred to California DLSE for jurisdictional reasons. About the same proportion of cases, 10 cases, or 13 percent, are closed due to the claimant formally or informally dropping the claim. Finally, some cases are prepared for hearing, but then settle before the hearing is held or before the Hearing Officer releases his/her findings.

The fact that there are few hearings does not seem to be a problem for claimants because they generally receive the back wages they are owed during settlements, assuming the information provided and the audits conducted by OLSE are correct. While there is a possibility that an employer may be unable to pay back wages, whether a settlement agreement is reached or a Hearing Officer decision is issued, settling with the employer may allow claimants to avoid long and stressful investigation and hearing processes.

To determine if the small number of hearings represents a problem for claimants or not, such as if OLSE is somehow discouraging claimants from pursuing hearings and agreeing to settlement amounts less than the full amount to which they are entitled, the Budget and Legislative Analyst conducted a detailed review of a sample of 17 cases.

According to OLSE management, OLSE policy is to not settle for an amount less than the amount owed to the claimant as back wages, as stated in the Determination Letter submitted to the employer. However, four of the 17 sample cases, or 23.5 percent, had settlement amounts that were less than the amount stated in the original Determination Letters. In one of the four cases, one of the original claimants decided to withdraw their claim, according to the activity sheet in the case file. OLSE could no longer support their claim for back wages, but was able to recover wages for the remaining claimants. The reasons for lower settlement amounts for the other three cases were not documented in activity sheets. According to OLSE, other reasons for having a lower settlement amount than the amount stated in the Determination Letter include waiving the simple ten percent interest included in the Determination Letters, crediting charges allowed for meals provided (as allowed under State law), adjusting the hours used in the audit to allow for meal breaks, or adjusting the employment dates in the audit when additional information is provided.

OLSE management notes that employers in the five cases that did go to a hearing retaliated and/or would not cooperate with OLSE throughout the investigation. Despite receiving a Hearing Officer decision requiring the employer to pay back wages and the cost of investigation, OLSE has been unable to recover all back wages for three of the cases that went to hearing. OLSE filed a lien on the property of one employer, but has been unable to collect back wages because the employer owed back taxes for the State, which took priority for collections. The employer has no other property, and as a result, OLSE has had to close the case. OLSE is currently trying to identify other assets of two other employers. If assets exist, OLSE could try to pursue payment of back wages by imposing a lien on those assets.

2. Aside from multiple claimants, why do the hearings take so long?

In our January 13, 2011 memo, we stated that an average of 788 days passed between the initial claim filing and the hearing date for the five cases that OLSE took to hearings. From our review of activity sheets for the five cases that went to hearing, it was difficult to identify the delays caused by City Attorney and/or OLSE staff without follow up with OLSE staff. Large gaps in time could be identified between activities, but the reasons for those gaps were not clear. Only one case included an activity sheet entry that noted the case was slightly delayed due to the assigned OLSE Compliance Officer preparing another case for a hearing.

OLSE does not have a formal management system for tracking case cycle time and reasons for delays. OLSE staff should consider logging at least one activity per month for all active cases that explains why the case is, or is not, progressing, such as “claimant or employer has not returned phone calls,” or “hearing prep for other case,” etc. Consistent availability of such information could help management assess and improve staff performance.

The detailed review of the activity sheets for the five cases that went to hearing confirms that the primary reason for delay in scheduling a hearing is the failure of certain employers to cooperate with OLSE investigations. Additionally, if the employer does not have records and/or the payment scheme is complicated, then OLSE has to rely on claimants’ testimonies and conduct additional research, which may delay the investigation process. Additionally, the Hearing Officer Directives for each case require OLSE staff to prepare pre-hearing documents for review by the Hearing Officer. For one case, the pre-hearing document contained 25 exhibits as proof that the employer owed back wages to claimants and was over 100 pages long.

Further, there are certain pre-hearing steps that are taken that require written responses. These steps, in chronological order, include: (1) OLSE’s preparation of a formal written request to the Controller’s Office for a hearing; (2) Controller’s Office preparation of a notice appointing a Hearing Officer; (3) the Controller’s Office preparation of a hearing and pre-hearing filing schedule; (4) OLSE’s preparation of a pre-hearing written statement outlining their case; and (5) the employer’s preparation of a pre-hearing written statement refuting points made in the OLSE pre-hearing statement. For four of the five cases that have gone through a full hearing, these steps have taken an average of 69 days out of an average of 788 total days from the filing of the claim.

Finally, as pointed out in our January 13, 2011 report to your office, formal deadlines have not been imposed on the SF OLSE investigation and hearing process, as are in place for State DLSE minimum wage hearings. Such deadlines could be imposed with penalties if they are not met and used to leverage employers to cooperate and respond to OLSE requests.

3. At what stage of the process does the delay occur?

To understand what stage of the hearing process delays occur, we reviewed documentation for the five cases that went through the complete hearing process. As shown in Table 1 below, on average, approximately 86 percent of the time a case is active, from when the first claimant approaches OLSE to the first hearing date, is attributed to OLSE investigating the case. In particular, delays during the investigative process result when employers do not have or will not provide documentation to investigators. This is not to say that the investigation is actively being worked on every day during these elapsed time periods but the causes for inactivity during the investigation process, including any OLSE staff-caused delays, are not always recorded in the case files. However, some additional time is also required at the conclusion of the investigation to prepare pre-hearing written statements and exhibits, such as employer records and OLSE’s audits. On average, approximately 14 percent of OLSE’s time on a case scheduled for a hearing can be attributed to preparation of briefing materials.

Table 1
Number of Days and Percent of OLSE Time Spent on Stages of Preparation
for Five Cases that went to Hearings, as of October 2010

Employer	<u>Investigations:</u> Number of Case Days	<u>Investigations:</u> Percent of Total Case Days	<u>Hearing Preparation:</u> Number of Days	<u>Hearing Preparation:</u> Percent of Total Case Days
A	1,645	96%	70	4%
B	315	81%	76	19%
C	495	86%	80	14%
D	272	80%	67	20%
E	369	88%	51	12%
Average	619¹	86%	69	14%

Source: OLSE case file review

A significant portion of time was spent on the investigation process by OLSE, as part of the case for Employer A. According to OLSE staff, the case was complicated and it took time to understand how the Minimum Wage Ordinance could be applied in the particular claimant's situation. OLSE also reports that there were various staffing issues while the case was pending, including the temporary leave of that assigned OLSE Compliance Officer.

4. Compare what the City Attorney prepares (pre- hearing) – statement, etc. to what DLSE prepares pre-hearing and pre-trial.

When a case goes to a hearing, both OLSE and the City Attorney draft the pre-hearing statement, while the exhibits are solely organized by OLSE. The pre-hearing statement and exhibits include information supporting OLSE's findings in its Determination Letters. If additional information is obtained by OLSE after a pre-hearing statement is submitted, OLSE may draft an amended hearing statement, which may be reviewed and edited by the City Attorney. After the hearing, the City Attorney drafts a post-hearing statement, summarizing OLSE's arguments.

In contrast, State DLSE does not need to prepare a statement prior to hearings or trials. As stated in our January 13, 2011 report to your office, the claimant must present a prima facie claim of the violation at a formal hearing. In preparation for the hearing, DLSE will review the claimant's information and will follow up with the claimant if clarification or additional information is needed.

¹ The number of days in the investigation in Table 1 is calculated from the date a claim is filed until the first hearing date is scheduled. Four of the five cases had multiple hearing dates due to either the employer not appearing on the hearing date, requiring OLSE to reschedule a hearing, or OLSE or the City Attorney requested a revised hearing date to negotiate a settlement or for other reasons. The delays caused by multiple hearing dates accounts for the difference between the 619 average days for an investigation shown in Table 1 and the 788 day average (referenced in our answer to Question 2) for a hearing, from the date a claim is filed until the last hearing date.

If an employer appeals a Hearing Officer's decision, then State attorneys may review the case and conduct some preparation to defend the State's order, decision or award in Superior Court. The preparation may include preparing testimonies and subpoenas for records.

5. What are the costs of bringing a case to hearing? How have those costs increased over the years the law has been in effect?

Costs for bringing a case to a hearing are incurred by OLSE, the City Attorney, and the Controller's Office. The three offices reported that they keep track of staff time spent on each case. The costs incurred by OLSE include salaries and fringe benefits based on staff time spent on the case. However, the cost estimates provided by OLSE for four of the cases do not include overhead costs. Approximately six months ago, OLSE began including overhead charges for the costs of investigation in all cases, whether they are resolved in settlements or through a hearing process. The costs provided by the Controller's Office include general administrative time for scheduling the hearing and sending notifications, as well as staff time for the Hearing Officer to conduct the hearing and issue findings. The City Attorney's costs include salaries, benefits and overhead.

Under Chapter 12R of the City's Administrative Code, the City can require the violating employer to compensate the City for its costs to conduct the investigation and remedy the violation. After the Hearing Officer has issued a finding stating the total back wages owed to each claimant and maximum penalties, the City may demand repayment of investigation costs upon the employer² through a Final Determination Letter to the employer with the actual costs of investigation to be paid.

Summaries of the actual costs incurred and charged for each of the five cases that went to hearing are included in Table 2 below. As seen in Table 2, since 2003, the City has charged a total of \$215,848 to employers for the costs of investigation, or an average of \$43,170 per case for the five cases that went through a complete hearing process. However, the City's actual costs incurred for all five cases were \$330,737, or an average of \$66,147 per case. Therefore, assuming employers are able to fully pay the total costs charged in the Final Determination Letter,³ the City is automatically unable to recoup \$114,889, or 34.7 percent, of the actual costs incurred by the OLSE, City Attorney, and Controller's Office

² The maximum penalty is calculated as \$50 for each day or portion thereof and for each claimant or person as to whom the violation occurred or continued.

³ As discussed in the responses to Questions 21 and 22, not all employers are able to pay all of the back wages owed to the claimants, as well as penalties and citations owed to the City.

Table 2
Actual Costs Incurred by OLSE, City Attorney, and Controller's Office
Versus Costs Charged to Employers for Five Hearing Cases

Employer	Actual OLSE Costs	Actual City Attorney Costs	Actual Controller's Office Costs	Total City Costs	City Costs Charged to Employer	Total City Costs NOT Charged to Employer
A	\$13,557	\$13,592	\$3,243	\$30,392	\$22,550	(\$7,842)
B	8,800	56,305	7,698	72,802	28,400	(44,402)
C	18,489	18,157	9,404	46,050	18,900	(27,150)
D	24,513	44,378	12,684	81,575	68,891	(12,684)
E	15,755	70,508	13,655	99,918	77,107	(22,811)
Total	\$81,114	\$202,940	\$46,684	\$330,737	\$215,848	(\$114,889)
Average	\$16,223	\$40,588	\$9,337	\$66,147	\$43,170	(\$22,978)

Source: OLSE case file review, City Attorney, and Controller's Office

Included in the Hearing Officer's decision for each case are instructions for determining the total City costs to be charged to the employer, including the maximum penalties to be assessed based on \$50 per day of the continued violation, per claimant; the end date up to which costs could be recovered, such as staff time up until the hearing date or delivery of the Final Determination Letter; and the total number of claimants to be considered for cost recovery.

The Hearing Officer exercises discretion regarding these factors based on the information presented at the hearings. As a result, sometimes OLSE is not able to recover all of the City's costs from employers. For example, if the Hearing Officer decides that one of the claimants in a multi-claimant case does not have merit for recovering back wages or City costs incurred during the investigation, OLSE will have to deduct the costs associated with staff time spent conducting audits and preparing for the hearing for that claimant. Such a situation occurred in the case against Employer E.

Additionally, if the Hearing Officer decides that OLSE can only charge for costs incurred up until the hearing date, then OLSE and the City Attorney may not charge the employer for work on the post-hearing statement, or any case preparation if the employer files an appeal with the Superior Court. Both Employers B and C filed appeals, but the work conducted by OLSE and the City Attorney could not be recovered from the employers.

According to OLSE management, three of the five cases had OLSE and City Attorney costs that exceeded the maximum charges to the employer allowed, as directed in the Hearing Officer's decision. Therefore, the Controller's Office costs were not included in the charges to the employer. For the two other cases, OLSE could have included the Controller's Office staff time as part of the City's costs to be charged to the employer, but did not.

It is difficult to determine how costs have increased over the years due to the diverse nature of each case. In general, the major factors that affect cost amounts are the number of

claimants involved in the case and the degree to which employers cooperate with OLSE. For example, there were 45 claimants against Employer D, but the employer generally provided information to OLSE. In contrast, Employer E had only 6 claimants in the case, but some of the claimants were in another country, and the employer was not as cooperative with OLSE as Employer D.

6. How do OLSE and DLSE deal with the employee's burden of proof regarding hours worked? (e.g. level of specificity regarding hours worked, different standards depending upon whether the employer kept records, etc.)

For Minimum Wage Ordinance violations investigated by OLSE, the burden of proof is with the employer. When there are no records, OLSE must rely on claimants' representations of hours worked and wages paid, which can be unreliable. However, the burden of proof remains with the employer to refute claimants' representations for cases investigated by the City.

In contrast, at DLSE, the burden of proof primarily rests with the claimant. However, in DLSE cases, the burden of proof shifts to the employer when the employer has no records to refute the claimants' assertions and/or when the employer asserts that the claimant is an independent contractor.

7. Compare the processes for DLSE and OLSE to appeal a case to Superior Court.

The major difference between the DLSE and OLSE processes for appealing a case to the Superior Court is that OLSE serves as an advocate for the claimants in hearings and thus has a role in filing appeals. However, according to DLSE management, DLSE would not appeal cases adjudicated by the Hearing Officers on their staff, to the Superior Court.

OLSE had referred only one case to Superior Court, without a formal hearing process through the City, because there was a concurrent case for the employer through DLSE. However, the case was eventually settled before the conclusion of the trial. Otherwise, no other case has been formally referred or appealed by OLSE to the Superior Court because the Hearing Officer has issued favorable decisions for all five OLSE cases that went to hearing.

According to DLSE, only the employer or claimant would appeal a Wage Claim Adjudication Unit case to the Superior Court. DLSE would not appeal a Wage Claim Adjudication case for which their office issued a decision.

If a citation issued by the Bureau of Field Enforcement is appealed and goes through a formal hearing process, the findings issued by the DLSE Hearing Officer could be appealed by the employer, claimant, or Bureau of Field Enforcement Compliance Officer. However, according to DLSE management, DLSE would not likely file a writ appealing a decision by one of its own staff members.

8. Compare the citation powers of DLSE and OLSE investigators.

The citation powers of OLSE and DLSE differ in that OLSE primarily uses citations to encourage cooperation from employers with investigations while DLSE citations are punitive for employers that violate State labor regulations. Additionally OLSE has more flexibility in waiving payment of citations.

As stated in our January 13, 2011 report to your office, OLSE investigators may issue citations for three specific violations: (1) failure to maintain payroll records, (2) failure to allow the OLSE to inspect payroll records, and (3) retaliation for exercising rights under the Minimum Wage Ordinance. OLSE management reported that the administrative citations are primarily used as an incentive for employers to cooperate with OLSE investigation and expedite case processing.

A Notice of Violation is first issued by OLSE to an employer by a Compliance Officer. If the employer continues to be non-cooperative, then the OLSE Director issues an Administrative Citation. According to OLSE management, collection of the administrative penalties associated with the citation may be waived when the case is settled, a practice that follows OLSE's intent to use citations as leverage for the employer to cooperate with OLSE staff.

In contrast, the DLSE Bureau of Field Enforcement staff prepares and issues citations to employers for violating State regulations on minimum wage, overtime, workers' compensation, and other labor regulations, while in the field. No approval process or supervision is required for the Bureau of Field Enforcement staff to issue these citations. Once a citation is issued, the staff person tells the employer the timeframe they have to file an appeal. If the employer files an appeal, a DLSE Supervisor is then provided a copy of the citation and request for a hearing.

9. How many times has DLSE brought a case to Superior Court vs. OLSE and/or City Attorney?

As previously stated only one case has been referred by OLSE to the Superior Court. However, two employers from OLSE cases have appealed the Hearing Officer's decision to the Superior Court. One case was settled while the other case was dismissed because the employer eventually did not proceed with the appeal.

There were no DLSE cases appealed by employers to the Superior Court in 2009.

10. Is Chart 3 from the January 13, 2011 report for administrative penalties in addition to citation process, or just the latter? Where does the City Attorney participate in the process?

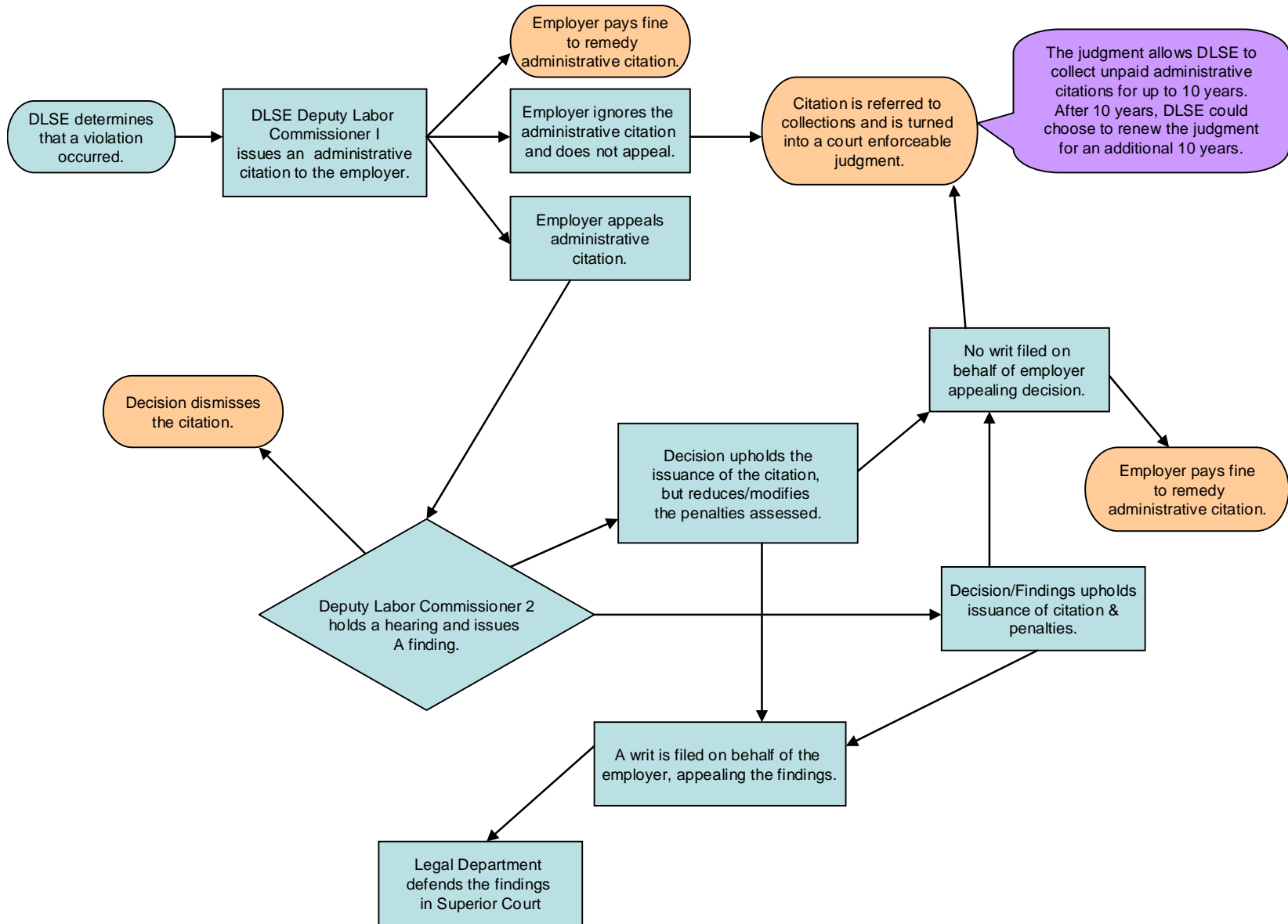
Chart 3 from the January 13, 2011 report, attached, mostly depicts the appeal process for administrative citations. The first two steps summarize the provision of citations. To date, no employer has appealed an administrative citation so OLSE and the City Attorney have never proceeded past the second step in the chart.

According to the City Attorney, if an employer appeals an administrative citation, the City Attorney should be informed by OLSE of the matters of the case prior to attending any hearing.

11. Create a similar Chart 3 from the January 13, 2011 report for the DLSE process.

The Chart below illustrates the appeals process for DLSE citations issued.

Chart 1
DLSE Penalties and Citations Processing Overview



12. Please break down the \$125,206 of penalties and enforcement costs that have been collected, by category. (e.g. by underlying code violation, by enforcement activity, etc.) Where did the money go after collection? (e.g. to City Attorney budget, General Fund, etc.)

As stated in our January 13, 2011 memo, OLSE had *assessed* \$125,206 in penalties and costs in *calendar year 2010 through November 15, 2010*. The \$125,206 is not the amount collected in the same time period. According to the Controller's Office, \$39,762 in penalties and costs was *collected in FY 2009-10*. OLSE management reports that they do not currently break down the \$125,206 of penalties and enforcement costs assessed by enforcement activity, in their caseload database. OLSE should disaggregate by case what costs are assessed as penalties (i.e. the costs of investigation charged to the employer) versus citations. Further, the citations should be broken down by violation type (i.e. the citation is for failure to maintain payroll, failure to allow OLSE to inspect records, or for retaliation for exercising rights under the Minimum Wage Ordinance).

Funds collected from penalties and enforcement costs are deposited into the General Fund.

13. How many press releases has OLSE issued about cases vs. DLSE?

OLSE has issued four press releases regarding prevailing wage cases and two press releases related to the Minimum Wage Ordinance since 2003. Issues OLSE considers when drafting a press release include whether the public exposure of the case would lead to voluntary compliance and if the case has a strong message for other employers and employees. Because several of the cases are settled in agreements with payment plans, OLSE considers negative public exposure through press releases a possible deterrent for cooperation from employers and is, therefore, judicious in its issuance of press releases.

DLSE issues press releases on major industry sweeps, which could result in several citations for various labor law violations, including Minimum Wage Law violations. From calendar year 2005 through 2010, DLSE issued 42 press releases that included at least one citation to an employer for not paying employees the minimum wage.

14. How many repeat offenders has OLSE investigated?

The Budget and Legislative Analyst also recognizes that there are various definitions for repeat offenders, but based the analysis of repeat offenders on the employers with separate cases opened, per the caseload database, as of October, 2010. Based on a review of OLSE caseload data and follow up with OLSE management, we found that OLSE has investigated 21 repeat offender employers out of a total of 434 offenders. However, the actual number of repeat cases may be higher as some of these offenders may have three or more separate cases. These repeat offenders may be the same businesses with the same owners; the same business owner, but with businesses that have changed names; or, the same business but a different owner who may be related to the previous business owner.

15. Please provide a breakdown of why cases have been closed and the number of cases in each category.

According to data provided by OLSE, as of October 14, 2010, 46 cases out of 463 cases were identified as closed. However, as we've observed while analyzing the database, and OLSE has confirmed, there are several cases labeled as resolved, that were technically closed. Therefore, the number of cases closed may be greater and the reasons they were closed are not included in our analysis.

Of the 46 closed cases in the OLSE database, 15 of the cases, or 33 percent were closed because the complaint was found to have no merit. An additional 10 cases, or 22 percent, of the closed cases in the OLSE database were closed because OLSE lost contact with the claimant. Another 7 cases, or 15 percent, of the closed cases were closed because the case was referred to or settled at DLSE. Table 3 below provides a breakdown of why cases have been closed.

**Table 3
Breakdown of OLSE Closed Cases and the Reasons
For Closing the Case, as of October, 2010**

Reasons for Closing Case	Number of Cases	Percent
Complaint Found to Have no Merit	15	33%
Lost Contact with Claimant	10	22%
Referred to or Settled at DLSE	7	15%
Business Changed Owner / Unable to Identify or Locate Owner	6	13%
Claimant Officially Withdrew Case	6	13%
Employer Remedied Violation	2	4%
Total	46	100%

Source: OLSE Caseload Database

16. How many cases involve non-cooperation by the employer? (e.g. employers that ignore the Notice of Determination or fail to provide records)

Determining how many cases involve non-cooperation by the employer is difficult to estimate because OLSE does not track "non-cooperation" in the database. However, we estimate that there are at least 17 cases that involve non-cooperation of employers based on the five individual cases that have gone to hearing, four cases in which the employer was issued a citation after ignoring a Notice of Violation (as recorded in the database), and eight cases for which penalties have been collected for each day that the violation continued. All 17 of these cases were for separate, individual businesses and their owners.

We believe that 17 cases is an underestimate because OLSE does not formally track the number of Notice of Violations it issues by case. To determine this number, OLSE would

have to review each individual case file. Going forward, OLSE should input when a Notice of Violation has been issued into the database to identify instances where employers are non-cooperative and to help improve performance measurement.

Further, using citations issued and penalties recovered to estimate the number of cases where the employer was non-cooperative may result in an underestimate because OLSE waives citations and penalties at settlements, but this is not reported regularly.

17. Provide a breakdown of the size of cases. How many cases are on behalf of individual employees, how many over 10 employees, etc?

As stated in our January 13, 2011 report, one or multiple claimants may approach OLSE regarding a Minimum Wage Ordinance violation by one employer, but the case may impact additional workers as OLSE conducts its investigation. Therefore, Tables 4 and 5 below provide a breakdown of the size of cases based on the number of original workers filing the claim, or claimants, as well as the number of workers impacted.

Together, the two tables below illustrate that OLSE’s investigation for one claimant could expand and lead to additional delays in processing cases, but could also result in a greater number of workers receiving wages owed to them. For example, one case began with one claimant, but wages were recovered for 145 workers. As shown in Table 4 below, 380 cases, or 82 percent of the 463 cases that were pending, making payments, referred elsewhere, closed, or resolved as of October, 2010, had only one claimant. However, as shown in Table 5, only 129 cases, or 28 percent of the 463 cases in the database, impacted only one worker. Further, 135 workers, or 29 percent of the 463 cases, impacted between two to 15 workers.

**Table 4
 Breakdown of Size of Cases by
 The Number of Original Workers Filing a Case (Claimants)
 November 2003 to October 2010**

	Number of Original Claimants						
	0 or unknown ⁴	1	2	3	4	5 or more	Total
Number of Cases	3	380	47	16	8	9	463
Percent	1%	82%	10%	3%	2%	2%	100%

Source: OLSE caseload database

However, not all cases result in workers being impacted. Table 5 below illustrates that 162 cases, or 35 percent of the 463 cases in the database, impacted zero workers, as of October, 2010, because the case was closed, referred to DLSE, was resolved but technically closed, or

⁴ “0 or Unknown” cases refer to cases in which “0” or no data was included for the number of workers filing a claim. Two of these cases were closed, while the third case resulted in wage recoveries for seven workers, even though “0” workers filing the claim is listed in the caseload database.

is still pending. Of the 162 cases with zero workers impacted as of October 2010, 46 cases, or 28 percent are still pending.

Table 5
Breakdown of Size of Cases by the Number of Workers Impacted
As of October 2010

	Number of Workers Impacted						
	0 or unknown	1	2-5	6-15	16-25	25 or more	Total
Number of Cases	162	129	71	64	18	19	463
Percent	35%	28%	15%	14%	4%	4%	100%

Source: OLSE caseload database

18. How many cases involve workers who have not been paid at all? What is the average amount workers are being paid below the minimum wage?

According to OLSE management, a breakdown of how many cases involve workers who have not been paid at all and the average amount workers are being paid below minimum wage cannot be provided. First, data on the amount of back wages owed per worker is not recorded in the caseload database. Instead, only the number of claimants, workers impacted (receive back wages), and wages recovered are included in the database.

Even if OLSE were to review each case file and analyze the amount owed per worker, which may range from one worker to up to 170 workers in one case, OLSE would have a difficult time averaging the amount paid below the minimum wage and identifying the number of cases where workers were not paid at all because of the mixed nature of back wages owed for several workers. For example, a worker may be paid below the minimum wage for a few months, but then not paid at all for the last two weeks of their work history with the employer in question. Another complicated pay scheme may include workers being paid the minimum wage for the first 40 hours worked within a month, then below minimum wage for every hour worked after 40 hours, and so forth.

At a minimum, OLSE should track how much each claimant per case initially thinks they are owed, how much OLSE determines they are owed after an audit, and how many times the audit is revised, through settlement onto the caseload database in addition to the already recorded total wages recovered and the total number of workers impacted per case. With information disaggregated by claimant and at different stages of the case, OLSE management would be able to assess the performance of staff in recovering the full wages owed per claimant.

19. What industries comprise the top offenders – at OLSE & DLSE?

OLSE currently tracks cases by industries. According to data provided by OLSE, as of March 3, 2011, 159 of the 323 resolved Minimum Wage Ordinance cases in the database, or

about 49 percent, were restaurants, cafés, coffee shops, or bars. The second largest industry comprising Minimum Wage Ordinance offenders are service providers, with 61 cases, or 19 percent of the resolved minimum wage claims in the database. The service industry includes day labor, janitorial, security, temporary agency, and miscellaneous services. The sales industry, including retail and wholesale, had 55 cases, or 17 percent of the resolved Minimum Wage Ordinance cases, as of March 3, 2011. Table 6 below illustrates the breakdown of OLSE resolved Minimum Wage Ordinance cases by industry, from the industry with the greatest number to least number of offenders.

Table 6
Breakdown of Resolved SF OLSE Minimum Wage Ordinance Cases by Industry
As of March 2011

Industry	Number of Cases	Percent
Restaurants, Cafés, Coffee Shops, and Bars	159	49%
Services	61	19%
Sales (Retail and Wholesale)	55	17%
Hotels / Apartments	21	6%
Health Medical Care	10	3%
Manufacturing	6	2%
Laundry, Cleaning and Dyeing	5	2%
Personal Transportation	4	1%
Media	2	1%
Total	323	100%

Source: OLSE

The DLSE is only able to provide information regarding citations issued by the Bureau of Field Enforcement, which conducts sweeps of employers by industry and issues citations for labor law violations. Data breaking down the cases brought to DLSE by individual claimants through the Wage Claim Adjudication Unit, by industry, is unavailable.

According to the DLSE Bureau of Field Enforcement 2009 report, the Division issued 113 citations related to the Minimum Wage Law, or approximately three percent of the total 4,202 citations issued by DLSE for labor law violations. As shown in Table 7 below, the industry with the most citations issued is the restaurant industry with 31 citations, or 35 percent of the 113 citations issued in 2009.

Table 7
Breakdown of State DLSE Minimum Wage Citations Issued
Calendar Year 2009

Industry	Number of Cases	Percent
Other ⁵	39	35%
Restaurant	31	27%
Car Wash	20	18%
Garment	7	6%
Construction	7	6%
Retail	6	5%
Agriculture	3	3%
Total	113	100%

Source: DLSE

20. Compare the staffing at SF office of DLSE & OLSE working on minimum wage issues.

As noted in our January 13, 2011 report, the OLSE and San Francisco State DLSE office operate under different procedures. An initial analysis of staffing and workload, determined by the number of cases assigned per OLSE staff member, as well as the number of settlement conferences and hearings held at DLSE, may indicate that DLSE may be more productive (e.g. process more cases per staff member). However, the different procedures might partially explain why the State staff processes so many more cases per Full-time Equivalent position (FTE).

According to State DLSE management, staff does relatively little preparation prior to an informal settlement conference. DLSE staff members conduct an initial intake of information from the claimant, review the information, and schedule the informal settlement conference. The tasks performed by State DLSE staff require substantially less time per case than conducting a full investigation of employer records for multiple claimants, the standard OLSE procedure for all claims. Similarly, if a case is referred to a formal hearing, DLSE staff reviews the claimant's information and arranges for a hearing, which also requires substantially less time per case than OLSE's standard of preparing pre-hearing statements.

Based on OLSE's caseload database, as of October 2010, OLSE had six filled full-time equivalent positions (FTEs) that worked part of their time on Minimum Wage Ordinance cases in calendar year 2009. These same staff members also worked on Paid Sick Leave Ordinance cases. These six staff members processed approximately 117⁶ Minimum Wage Ordinance cases in calendar year 2009, or an average of 20 cases per staff member.

⁵ The "other" category includes race tracks, auto body, janitorial, pallet manufacturing and distributing, and various other industries not falling into any of the other categories specified.

⁶ The 117 cases processed in 2009 include cases that were opened in 2009; cases that were opened prior to 2009, but were closed or resolved in 2009; and cases that were opened prior to 2009, but were still pending as of October, 2010.

San Francisco DLSE⁷ has six filled FTEs and one floating Hearing Officer from other field offices that work on minimum wage cases. Three of the filled FTEs are Deputy Commissioner I's who process settlement conferences. In calendar year 2009 these three staff members processed 1,363 cases that went to settlement conferences. This is an average of 454 cases per staff member. Of the 1,363 cases, 976 cases were referred to formal hearings due to an inability to resolve the case at an informal settlement hearing, or an average of 325 cases per staff member. Two of the filled FTEs are Deputy Commissioner II's. The Deputy Commissioner II's and a Hearing Officer processed 448 formal hearings, or an average of 149 formal hearings per staff member. One of the Deputy Commissioner II's issued 47 findings in calendar year 2009 for citation hearings.

Though the State DLSE appears to process more cases in a faster timeframe, their procedures that require claimants to bear the burden of proof and that attempt to settle cases in informal conferences comes with some tradeoffs. Specifically, these procedures could result in fewer wages being paid to the claimants, fewer workers coming forward to claim wages, fewer workers being discovered through a thorough investigation, and no follow through by DLSE to ensure the employer corrected their behavior.

21. When an employer ignores a citation and does not appeal the issuance of a citation, how does OLSE go about collecting the money from the employer? Is the citation entered as a final judgment against the employer with the Superior Court?

The citation is not entered as a final judgment. Outstanding citations and back wages owed to claimants are collected together and OLSE has employed several methods to try to collect the money. The OLSE has worked with DPH on three cases and has set up a Memorandum of Understanding with the Treasurer and Tax Collector for collection of outstanding wages, citations and penalties.

To date, there has been one case where the employer filed for bankruptcy while under a payment plan. OLSE intends to take this case to court and is currently determining the process to do so within OLSE, but will refer to the City Attorney when needed.

OLSE is also preparing to file for a judgment for one employer. If granted the judgment, OLSE could refer the case to the Treasurer/Tax Collector to place a lien against the property.

⁷ San Francisco District office of the State DLSE handles labor standards cases from the City and County of San Francisco as well as from San Mateo County between the San Francisco border and State Route 92.

22. Is there a breakdown of why assessed amounts of back wages, penalties, and costs have not been collected? (i.e. payment on-going per settlement agreement, employer filed bankruptcy, in collections, employer disappeared, etc.)

Of the 24 employers on a payment plan per their settlement agreement, six of the employers were not current as of March 14, 2011. OLSE noted that one of the late employers often pays their installments late after receiving a follow up call from OLSE staff. Three of the employers were out of business at the time of the additional case review. OLSE is currently trying to locate one of the out of business employers, is negotiating with the prime contractor of the second late employer to pay unpaid assessment amounts, and is conducting an asset search for the third out of business employer and will work with the Treasurer/Tax Collector regarding collections. A fifth employer has filed for bankruptcy and OLSE will attend a meeting with other creditors at bankruptcy court. The sixth late employer cannot pay because of a State tax lien; OLSE has referred this matter to a DPH permit revocation hearing.

23. If we created an OLSE Commission to conduct hearings that OLSE cannot informally solve, would it save the city money?

As stated in our February 7, 2011 memo to your office, we believe a commission could potentially help by setting and enforcing timelines and reducing or eliminating the need to work with the Controller's Office to arrange for Hearing Officers. We also think a commission would improve transparency and oversight of OLSE by requiring and carefully reviewing annual reports prepared by OLSE management.

Another option is to place the burden on the employer to appeal OLSE's determinations and researching the potential of enabling these Determination Letters to become legal judgments. Also, having the City Attorney review and possibly modify the standards of evidence required before/at hearings could help reduce staff time and costs spent on such cases. Also, a commission could serve in a quasi-judicial role, serving as an appeals body for OLSE staff decisions without requiring filing a claim with Superior Court, as is presently the only appeals process open to claimants or employers.

**Chart 3
 San Francisco Administrative Penalties and Citations Processing Overview**

