



Top Management and Performance Challenges Facing the U.S. Department of Labor

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As required by the Reports Consolidation Act of 2000, the Office of Inspector General has identified the most serious management and performance challenges facing the U. S. Department of Labor (DOL). These challenges are included in DOL's "Agency Financial Report" for FY 2020.

The Department plays a vital role in the nation's economy and in the lives of workers and retirees, and therefore, must remain vigilant in its important stewardship of taxpayer funds, particularly in the era of shrinking resources.

In this report, we summarize the challenges, significant DOL progress to date, and what remains to be done to address them. The challenges we identified are:

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CHALLENGE: Identifying and Reducing Unemployment Insurance Improper Payments

BACKGROUND

The Unemployment Insurance (UI) program provides unemployment benefits to eligible workers who are unemployed through no fault of their own and meet other eligibility requirements of state law. In FY 2019, the Department continued to identify the UI program as susceptible to improper payments (IP). Due to the COVID-19 pandemic, beginning in March 2020, jobless rates soared instantly, causing an unprecedented number of workers to file unemployment compensation claims by the millions.

The UI program paid benefits totaling \$86.87 billion during the period of July 1, 2019, to June 30, 2020. Of this amount, improper payments totaled an estimated \$7.96 billion, making the estimated improper payment rate 9.17 percent. It should be noted that total benefits paid and the related estimated improper payment amount are exclusive of the Coronavirus Aid, Relief, and Economic Security (CARES) Act funded benefits. This estimated total is above the \$2 billion threshold established by the Office of Management and Budget (OMB) for designation as a “high-priority” program under the authority of the Improper Payment Elimination and Recovery Improvement Act of 2012.

The CARES Act provided major funding to the state-federal UI program, including covering workers not typically covered by UI, who can self-certify that they are able and available for work but are unemployed due to a COVID-19 related reason. Since the start of the pandemic in the U.S. in early 2020, unemployment compensation claims have risen exponentially. On March 14, 2020, the Department reported 282,000 initial claims. Within 5 months, on August 15, 2020, the Department reported 57.4 million initial claims. This increase in initial claims is the largest increase since the Department began tracking UI data in 1967. As of November 7, 2020, the Department reported more than \$360 billion in UI payments has been expended under the CARES Act. CARES Act benefits have been shown to be particularly susceptible to improper payments. Although the Department has not estimated an improper payment rate for CARES Act funded benefits, the reported improper payment estimate for the regular UI program has been above 10 percent for 14 of the last 17 years. Assuming an improper payment rate of 10 percent or higher for CARES Act benefits, at least \$36 billion of the reported \$360 billion in UI program funds could be paid improperly, with a significant portion attributable to fraud.

CHALLENGE FOR THE DEPARTMENT

The Department continues to face challenges in ensuring UI improper payments are timely and accurately detected, prevented, and reported.

The UI program requires states to make weekly benefit payments while ensuring claimants meet eligibility requirements. A state workforce agency (SWA) may determine a payment is improper after a claimant receives benefits: (a) based on new information that was unavailable when the SWA approved the benefit payment; or, (b) as a result of the requirement that claimants be provided with due process prior to stopping payment of benefits.

Improper payments often occur as a result of three leading causes:

- *Claimants Do Not Meet Work Search Requirements* - Claimants who fail to demonstrate they meet state requirements for work search.
- *Benefit Year Earnings* - Claimants who continue to claim benefits after they return to work.
- *Employers Do Not Timely Report Employees' Separation* - Employers or their third-party administrators who fail to provide timely and adequate information about why individuals separated from their employment.

These causes and lack of information exacerbate the Department's challenges in helping states address improper payments.

States must have processes in place to ensure sufficient staffing and system resources are ready to manage sudden increases in the number of UI claims and payments to meet the continued requirements of the CARES Act, and similar future legislation. The expanded coverage offered under the temporary Pandemic Unemployment Assistance (PUA) program has posed significant challenges to states as they implement processes to determine initial and continued program eligibility for participants. The reliance solely on claimant self-certifications without evidence of eligibility and wages renders the PUA program vulnerable to improper payments and fraud. Furthermore, the Department needs to determine how to incorporate the impact of UI improper payments related to temporary programs, such as those created by the CARES Act, into the traditionally estimated IP rate calculations.

DEPARTMENT'S PROGRESS

The Department has made efforts to focus on program integrity when implementing the CARES Act programs by putting agreements in place with states to comply with all applicable requirements to receive CARES Act funds, issuing operating guidance, and providing technical assistance to states individually and through webinars. The Department has included requirements for states to focus on program integrity in guidance issued related to the CARES Act. In addition, the Department has reinforced the need for states to actively partner with the Office of Inspector General (OIG) to address fraud in the UI program.

Department officials stated the UI Integrity Center¹, which operates in partnership with the National Association of State Workforce Agencies, has continued to develop the Integrity Data Hub (IDH) to serve as a secure portal for states to cross-match public and private sources of data, including new tools that will help prevent improper payments. The Department is working with the Integrity Center to further enhance state participation in and use of the IDH through additional guidance and regular communication with states.

The Department issued letters to six states encouraging them to actively promote employer compliance with new hire reporting and to impose and enforce sanctions for employers who fail to comply. The Department used these letters to improve the effectiveness of states' use of the National Directory of New Hires (NDNH) and to identify claimants who have returned to work but continue to claim benefits. The Integrity Center provided additional technical assistance to these states to address the states' specific challenges on cross-matching and benefit year earnings issues. Furthermore, the Department issued guidance to states on enhanced recommended operating

¹The Integrity Center, established by the Department and operated by the National Association of State Workforce Agencies, is designed to assist states in their efforts to more effectively prevent, detect, and recover improper and fraudulent payments, and improve program integrity by developing and promoting innovative program strategies.

procedures for the use of NDNH and State Directory of New Hires cross-matching activity and conducted webinars to provide technical assistance and share state best practices.

The Department has also taken corrective actions to address the OIG's recommendations aimed at reducing UI improper payments related to two of the three top causes: (1) Employers Do Not Timely Report Employees' Separation and (2) Benefit Year Earnings. In addition, legislative proposals aimed at improving UI program integrity were included in the FY 2018, FY 2019, FY 2020, and FY 2021 President's Budget Requests.

WHAT REMAINS TO BE DONE

The Department needs to continue its ongoing work with states to identify and implement strategies designed to reduce the UI improper payment rate, including sharing best practices identified among states. According to Department officials, they will work with the Integrity Center to expand the functionality of the IDH to include datasets as well as other resources to assist states in detecting overpayments and to continue promoting states using the IDH.

The Department must work with states to enforce UI claimants' requirements to meet the conditions of UI eligibility, including: (1) being available for work; (2) actively seeking work; and, (3) accepting suitable work when offered. As part of this effort, ETA indicated it is developing work search guidance that addresses states' "formal warnings" policies that exclude and therefore underestimate IP rates. The Department needs to continue pursuing legislative action included in previous budget proposals to improve UI program integrity. ETA should also establish a central repository for states' UI claims data and the OIG should have direct access to this data.

As the pandemic and its impact on the U.S. population evolves, the Department will need to issue further guidance consistent with any new laws or changes to current programs. In addition, the Department will need to monitor and provide oversight in all states for CARES Act UI-related programs.

CHALLENGE: Protecting the Safety and Health of Workers

BACKGROUND

The Department's Occupational Safety and Health Administration (OSHA) is responsible for the safety and health of 136 million workers employed at more than 9 million establishments, while the Department's Mine Safety and Health Administration (MSHA) is responsible for the safety and health of approximately 320,000 miners who work at nearly 13,000 mines.

CHALLENGE FOR THE DEPARTMENT

OSHA and MSHA face challenges in determining how to best use their resources to help protect the safety and health of workers, particularly in high-risk industries such as healthcare, meat packing, agriculture, construction, fishing, forestry, manufacturing, and mining. This challenge has been exacerbated by the current COVID-19 pandemic and the limitations imposed on traditional inspection or investigation activity. Further, employers who underreport injuries limit OSHA and MSHA from focusing their inspection and compliance efforts on the most hazardous workplaces.

Since the start of the pandemic, OSHA has been challenged to fulfill essential mission functions, including protecting its workers during this unprecedented health crisis. Every day, concerns of worker safety and

pandemic-related death are raised by news outlets from across the U.S. In response to the pandemic, OSHA has used alternative or modified protocols to ensure worker safety, such as conducting inspections remotely and verifying the abatement of hazards through remote follow-up with employers. This is in addition to performing programmed and unprogrammed inspections.

However, challenges persist. Labor organizations representing healthcare, meat processing, transportation and other essential personnel have expressed concern that OSHA is not providing the level of protection that workers need at various work sites during the pandemic. Furthermore, it was not until September 2020 that OSHA started issuing COVID-19 citations to meat packing employers.

Besides COVID-19 related challenges, when inspections result in citations, the agency continues to face difficulties in verifying hazard abatement at both general industry and construction sites.

In addition, OSHA has been challenged to protect workers who report potential workplace safety violations and complete subsequent whistleblower investigations within the statutory requirements of 30, 60, or 90 days. Escalating this challenge, the pandemic significantly increased the whistleblower complaints OSHA received while the full-time employment in OSHA's Whistleblower Protection Program has decreased. MSHA is specifically challenged to continue performing all its activities during the COVID-19 pandemic. While continuing to perform mandatory inspections, MSHA has limited or suspended certain non-mandatory inspection and enforcement activities and will have to determine both how to resume these activities safely and manage any potential backlog resulting from suspended activities.

In addition, MSHA is challenged by a 25-year high in the number of black lung cases, as reported by the American Journal of Public Health, and needs to develop strategies for addressing this issue. MSHA is currently soliciting public comments, data, and information for a study to assess the impact of the August 2014 Coal Dust Rule on the health of miners, which reduced allowable exposure levels for harmful coal dust. However, because of the latency period between exposure to coal dust and development of black lung disease, it will likely take a decade or more to complete the study. MSHA is also challenged to reduce the number of powered-haulage accidents, which accounted for almost 50 percent of all mining fatalities in 2017 and 2018.

Finally, MSHA and OSHA both regulate the maximum amount of exposure workers can have to respirable silica dust, but the standards for permissible exposure level differ between the two agencies. In the U.S., about 2.3 million workers are exposed to respirable silica dust at the worksite, a situation that can lead to silicosis, a deadly and incurable disease, as well as many other chronic conditions. MSHA is challenged to develop better protections for miners against airborne contaminants, such as respirable silica dust. OSHA's challenge is targeting the highest risk workplaces specifically for silica dust given the agency's limited resources.

DEPARTMENT'S PROGRESS

To facilitate its COVID-19 enforcement efforts, OSHA developed an interim enforcement response plan on April 13, 2020 (revised May 19, 2020)², and conducted a webinar to help compliance officers with handling complaints, referrals, and severe injury reports. OSHA also developed an internal triage document to assist field staff with

²The Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19) is available online at: <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-cov-id-19>

prioritizing certain types of inspections (e.g., fatalities and catastrophes) to better utilize its resources. To ensure the safety of its own staff members, OSHA developed a guide as part of its internal safety and health management system to be used to inform staff about the evolving pandemic and efforts to minimize their exposure to COVID-19.

According to OSHA, the agency encourages employers to comply with illness and injury reporting requirements through a variety of enforcement, outreach, and compliance assistance efforts. OSHA published a revised National Emphasis Program on respirable silica on February 4, 2020, along with a revised directive on Inspection Procedures for the Respirable Crystalline Silica Standards, published on June 25, 2020, to assist in protecting workers and managing risk.

Subsequent to the release of its respirable silica directive, OSHA conducted a webinar for compliance officers across the country to better understand how to conduct silica inspections and enforce the various provisions of the new standards. The OIG is currently performing an audit to determine the extent OSHA has protected workers from exposure to respirable crystalline silica.

MSHA reduced unnecessary contact during the COVID-19 pandemic by temporarily suspending or reducing a number of enforcement activities. As of May 2020, MSHA had suspended five of its enforcement activities, including its accident reduction program. Further, MSHA had reduced the capacity of how it conducted 13 activities, such as mine emergency operations. MSHA was still conducting 15 activities at full capacity, to include its fatal accident investigations and regular safety and health inspections. Further, MSHA posted an information sheet on its website as guidance to its workforce and to the mining industry during this pandemic, which addressed matters such as maintaining social distancing, disinfecting equipment, and washing hands.

MSHA reported it has increased sampling of mines for respirable silica dust and diesel particulate emissions and has ordered additional sampling devices for its inspectors and testing equipment for its lab. Further, in August 2019, MSHA published a request for information (RFI) soliciting information and data on technologically feasible best practices to protect coal and metal and nonmetal miners' health from exposure to silica, including a reduced standard, utilizing protective respiratory technologies, and technical and educational assistance. MSHA held a public meeting on this topic in October 2019.

MSHA also launched a Powered-Haulage Safety Initiative in 2018, which included a website, mine-site visits (particularly for mines with large trucks), training videos, and other safety materials, such as pamphlets and stickers. MSHA announced in the agency's spring 2019 regulatory agenda that it would publish a proposed rule that would require mine operators to develop a safety program for mobile equipment (which includes powered-haulage equipment) at surface mines and surface areas of underground mines. MSHA officials stated they expect to publish the proposed rule in calendar year 2020.

WHAT REMAINS TO BE DONE

OSHA needs to complete its initiatives to improve employer reporting of severe injuries and illnesses and enhance staff training on abatement verification, especially of smaller and transient construction employers. Moreover, because of the pandemic, there has been an increase of complaints but a reduction in inspections, with most

inspections not conducted on-site. OSHA needs to ensure it is providing the level of protection that workers need at various job sites.

MSHA needs to do more to address the potential backlog of suspended and reduced enforcement activities resulting from the pandemic and develop a plan to manage the backlog once full operations resume. Further, MSHA needs to monitor COVID-19 outbreaks at mines and use that information to determine whether to issue an emergency temporary standard related to the pandemic.

MSHA also needs to identify methods for improving mine operators' reporting of accidents, injuries, and illnesses. To ensure mine operators comply with the Coal Dust Rule, MSHA needs to evaluate the effectiveness and implementation of the rule as new information becomes available. MSHA must also identify ways to better protect miners from highly toxic respirable silica dust, potentially by increasing testing and enforcement for other airborne contaminants.

Finally, MSHA needs to continue its existing efforts to decrease powered-haulage accidents by targeting mines for enforcement, enhancing training, and increasing and sharing its knowledge of available technology.

CHALLENGE: Helping Adults and Youth Succeed in the Labor Market

BACKGROUND

In FY 2020, DOL's Employment and Training Administration (ETA) received \$3.8 billion under the Workforce Innovation and Opportunity Act (WIOA) to operate a system of education, skill-based training, and employment services primarily for low-income and dislocated adults as well as at-risk and out-of-school youth.

CHALLENGE FOR THE DEPARTMENT

The Department is challenged to ensure its job training programs provide participants the education, skill-based training, and employment services they need to succeed in the labor market, particularly in light of the health and economic crisis created by the COVID-19 pandemic. This includes (1) helping job seekers, businesses, and career counselors better understand the availability and value of skill-based training and credentials; (2) helping employers recognize the benefit of hiring and training apprentices for their middle- and high-skilled job vacancies; and (3) ensuring all state outcome data are reliable, valid, and accurate. In our most recent audit, we found that although ETA had data to determine if participants were employed after exit, it lacked more specific data to measure the impact credentials had on participants' outcomes, such as job title and if a credential was necessary for the job.

The Department is further challenged in developing an effective strategy for helping disadvantaged job seekers, such as ex-offenders, individuals with disabilities, and those recovering from addiction, become and remain employed. For example, recent studies have reported that opioid abusers commonly drop out of the labor market and are less productive and dependable — making it difficult for them to obtain and retain employment and for employers to find workers in opioid-affected areas. Additionally, as a result of the COVID-19 pandemic, the Department needs to ensure all participants who need job search or training services are able to access them either in person or remotely.

DEPARTMENT'S PROGRESS

With regard to credentials, ETA officials informed us that over the last year they have continued to provide resources through CareerOneStop.org to help job seekers, businesses, and career counselors better understand which credentials are available; the quality and labor market value of those credentials; and, the licenses, education, and training required for specific credentials and occupations. ETA also stated it has continued to emphasize the importance of credential attainment in its grant competitions. ETA has hosted a number of technical assistance events and shared tools online related to the credential attainment measure.

As for state outcome data, in December 2018, ETA issued a Training and Employment Guidance Letter (TEGL) 07-18³, in collaboration with the Department of Education, to provide joint guidance to states and grant recipients on the performance accountability system set forth in section 116 of WIOA, which requires states to develop procedures for ensuring the WIOA data they submit are reliable, valid, and accurate. In June 2020, ETA issued TEGL 23-19: *Guidance for Validating Required Performance Data Submitted by Grant Recipients of U.S. Department of Labor (DOL)*, providing guidelines for validating performance data submitted by grant recipients of workforce development programs administered by the Department. Since the beginning of WIOA, ETA has emphasized the importance of quality data by building into its Workforce Integrated Performance System (WIPS) a multi-pronged approach to validating the data, with upfront edit checks and validation through grant monitoring on the back end. According to ETA officials, these upfront edit check rules are extensive and facilitate state grant recipients submitting consistent and accurate data. Recently, ETA initiated a Quarterly Report Analysis (QRA) to ensure that states are reporting consistently on a set of key data elements.

The Department has also been assessing grant recipient performance under its American Apprenticeship Initiative program through a set of measures that capture performance by participant employment status, industry sector and occupation for which training was received, completion of education/job training activities, credential attainment, job placement, and wage progression from entry until exit from the program. These measures should improve the Department's ability to analyze the relationship between services provided through grants and the outcomes achieved. The Department stated it has provided, and will continue to provide, technical assistance on sector strategies and performance reporting based on its analysis of the performance measures. ETA continues to make progress on implementing the recently approved apprenticeship changes to the DOL-only Participant Individual Record Layout, to have apprenticeship grant recipients report through WIPS, and to support ETA's broader efforts to support performance reporting standardization across workforce programs.

Concerning opioids, in FY 2020, ETA announced on March 18, 2020, the availability of up to \$20 million in funds for opioid recovery demonstration grants to align and deliver career training, and support services that will best serve workers impacted by the crisis in their local areas. The total estimated funding for this demonstration program and other opioid response grants is \$100 million.

WHAT REMAINS TO BE DONE

The Department needs to continue developing programs that support investments in training and education leading to improved job skills and employment. In addition, it must continue to support grant recipients in reporting accurate performance information that allows it to make evidence-based and data-driven decisions about job training programs. To enhance this reporting, the Department needs to continue its data validation efforts as well as to provide enhanced technical support to states on accessing and reporting performance information in the

³ TEGL 07-18 is available online at: https://wdr.doleta.gov/directives/corr_doc.cfm?docn=4255

WIOA performance management system and on data analytics, governance, and transparency. Moreover, the Department needs to continue its monitoring efforts to ensure state data used to calculate performance measures are complete and accurate.

Finally, the Department needs to monitor the performance of discretionary grants it has awarded for delivering services to employers and workers. ETA provides discretionary grant programs access to WIPS for performance reporting and provides policy/reporting support through technical assistance and standardized reporting procedures. This includes technical assistance on reporting for the opioid recovery grants.

CHALLENGE: Providing a Safe and Healthy Learning Environment at Job Corps Centers

BACKGROUND

The Job Corps program annually provides education, training, and support services to nearly 50,000 disadvantaged, at-risk youth, ages 16-24, at more than 120 Job Corps centers, both residential and nonresidential. OIG audits over the past several years found a wide range of security and safety issues at Job Corps centers, from failure to report and investigate serious misconduct to shortages of security staff. Job Corps now faces new challenges in meeting its mission due to health risks that COVID-19 poses to students and staff. These could potentially become long-term challenges as Job Corps adjusts its operations to reflect new health requirements.

CHALLENGE FOR THE DEPARTMENT

The Job Corps program faces the challenge of continuously providing safe learning environments for its students and staff. Funding plays a significant role in this challenge, particularly as it relates to the procurement, installation, ongoing maintenance, and upgrade of physical security equipment. This equipment allows for the enforcement of safety and security policies via monitoring.

As a result of the pandemic, access to virtual training presents a particular challenge for many Job Corps students. Implementing distance learning programs for Job Corps students may not be feasible for those who do not have access to laptops, tablets, or robust Internet connection that would otherwise allow for successful engagement via an online platform. Moreover, much of the training provided by Job Corps is hands-on and cannot be readily adapted to a distance learning model.

During the pandemic, Job Corps also must ensure the health and safety of students and staff permitted to be on-site at its centers. Job Corps temporarily suspended operations on its campuses on March 16, 2020, and transported nearly 30,000 students to their homes or found them housing. Fifty-five centers remained open to house and feed 445 students who had no other housing options. Between March 16, 2020, and May 31, 2020, four of these students tested positive for COVID-19. 35 staff members, who were actively working at the centers, tested positive as well.

DEPARTMENT'S PROGRESS

According to agency officials, Job Corps is in the final stages of reviewing and approving updated and new center safety and security standard operating procedures for its center oversight activities. The Department plans

to review all centers to ensure new security guidelines are in place. By the close of FY 2020, Job Corps had invested approximately \$89 million in equipping centers with more than 11,500 cameras, more than 5,000 physical access control systems, walk-through and hand-held metal detectors, centralized security radio networks, and emergency notification systems, as well as expanding the intercom system with more than 2,750 speakers. Additionally, Job Corps invested approximately \$1.1 million in essential security equipment, such as radios and magnetometer wands to support security enhancements. In 2020, through the integration of Interagency Security Committee methodology, Job Corps has expanded this effort to establish a consistent and effective means to identify and mitigate risk for each center.

According to agency officials, Job Corps continues to take steps to ensure students have the necessary devices to engage in distance learning. Job Corps has already procured 20,000 Google Chromebooks and wireless hotspots and these devices are now being distributed to students for distance learning. Job Corps is also currently evaluating its options for procuring a learning management system for the program that will standardize the data collection and reporting and much of the delivery of educational training to students during and beyond COVID-19. Changes to the program's existing Center Information System have been made to better track weekly student participation hours until a learning management system is in place.

Agency officials also stated that Job Corps continues to take steps to protect the health and safety of students and staff on-site at its centers during the COVID-19 pandemic. To prepare for resuming on-campus operations, Job Corps released guidance in September 2020 requiring centers to submit for approval center-specific plans for resuming on-campus operations. Job Corps' requirements for these plans consider guidelines from the Centers for Disease Control and Prevention and OSHA, recommendations from state and local health officials, and Job Corps' medical consultants. These center plans for resuming on-campus operations include preadmission health screens and COVID-19 testing for students and staff, new guidelines for social distancing and protective face coverings, and additional physical safety precautions in the classrooms, dorms, recreational facilities, cafeteria, and other campus spaces.

WHAT REMAINS TO BE DONE

Job Corps must continue the progress made with executing and enhancing its safety and security plan. Job Corps must also continue training employees and contractors on new policies and procedures, and ensuring that existing policies and procedures are periodically reviewed and monitored for compliance. Job Corps must ensure center operators and regional office personnel fully enforce Job Corps safety and security policies to improve campus security and control violence. Job Corps is currently developing a centralized security site on the Job Corps intranet where policies, procedures, training opportunities, job aids, security guides, compliance checklists, and additional tools will be accessible. Job Corps must timely identify and remediate noncompliance, as well as expand data collection and analysis, and disseminate information to stakeholders. This is necessary to inform agency decision-making and to assess the impact of proposed, planned, and implemented security reforms. Job Corps needs to ensure students have access to the equipment and technology necessary for distance learning. The program must also protect the health and safety of students and staff who are on-site at its centers during the pandemic.

CHALLENGE: Integrity of DOL Rulemaking Processes

BACKGROUND

DOL issues rules and guidance to promote the welfare of workers, job seekers, and retirees by helping them improve their skills, find work, recover after job loss, injury, or illness, and by safeguarding their working conditions, health and retirement benefits, and wages. Rules are government agency statements that either: (1) implement, explain, or prescribe law or policy; or, (2) describe an agency's organization, procedure, or business practice requirements. Guidance documents assist stakeholders, including agency staff, workers, job seekers, retirees, and employers, with interpreting and taking appropriate actions related to the rules. DOL's Office of the Assistant Secretary for Policy (OASP) is responsible for overseeing DOL's regulatory activities and is working towards: (1) resolving policy discrepancies and clarifying methodologies prior to drafting rules; (2) communicating its decisions to drafters in an efficient and timely manner; and, (3) ensuring internal standard operating procedures (SOPs) are followed to the extent practicable.

CHALLENGE FOR THE DEPARTMENT

DOL faces challenges in ensuring the integrity of its rulemaking process. The OIG has received Congressional requests to review a wide range of DOL's rulemaking activities based on concerns with proposed and finalized rules the agency has issued. The concerns include issues such as the transparency of information provided to the public and the delay of safety standard effective dates. DOL must issue rules that are transparent to the American taxpayer and comply with the requirements of the Administrative Procedure Act (APA) and other applicable federal laws and regulations.

Our work continues to address this area of concern. In particular, we are finalizing our review of the Wage and Hour Division's (WHD's) rulemaking process as it applied to its 2017 Notice of Proposed Rulemaking to rescind portions of WHD's tip regulations issued pursuant to the Fair Labor Standards Act.

DOL also faces challenges in ensuring that it enters into rulemaking when appropriate rather than issuing guidance. We reviewed OSHA's process for issuing rulemaking guidance documents. Our review found OSHA had issued guidance between 2014 and 2016 that could be construed as changing rules in violation of the APA and other federal laws. While OSHA developed procedures to provide reasonable assurance that guidance accurately reflected its rules and policies, it lacked a procedure to document that it had determined the appropriateness of issuing a document as guidance rather than as a rule. As a result, OSHA risked issuing guidance that might create new rules or change existing rules that would be in violation of laws requiring public notice and comment during the agency's rulemaking process.

DEPARTMENT'S PROGRESS

DOL is aware of the challenges associated with its rulemaking process and has initiated a comprehensive review and analysis of it, including evaluating enforcement and compliance assistance materials to ensure they are current, accessible, and easy to understand.

In response to Executive Order 13891, DOL published its Final Promoting Regulatory Openness through Good Guidance (PRO Good Guidance) Rule, which established DOL's policy and requirements for guidance, including for issuing, modifying, withdrawing, and using guidance; making guidance available to the public; a notice-and-comment process for significant guidance; and, taking and responding to petitions about guidance. The standards set out in this rule help the entire Department use guidance lawfully and appropriately, and it gives Americans fair notice of and improved access to guidance.

As part of this effort, OASP also coordinated the creation of a searchable database of all DOL guidance documents currently in effect. This process included the review of thousands of documents and the rescission of thousands of outdated or inappropriate guidance documents. New documents are added to the database as agencies publish new guidance. It is available at <https://www.dol.gov/guidance>.

OSHA also stated it was developing a training webinar for its staff to describe the steps necessary for issuing guidance documents. OSHA originally expected the revised policy and webinar to be completed by the end of FY 2020, but due to delays resulting from COVID-19, it now plans to complete the webinar in FY 2021.

WHAT REMAINS TO BE DONE

The Department stated that it will seek to use notice of and comment for rulemaking as its exclusive means of altering the regulated public's rights and obligations. DOL needs to establish and maintain a monitoring function to ensure internal SOPs are followed to the extent practicable.

Further, OSHA stated that it intends to revise its guidance issuance policy while DOL's Office of the Solicitor will consider any possible legal risks and ensure adherence to requirements of the APA and the Occupational Safety and Health Act. DOL will need to guarantee that along with OSHA issuing its revised policy, the agency will also implement training webinars for staff and managers. Finally, the Department will need to verify that all DOL agencies with the ability to issue rulemaking-related guidance have training in place to prevent the issuance of guidance that changes legitimately promulgated rules.

CHALLENGE: Maintaining the Integrity of Foreign Labor Certification Programs

BACKGROUND

The Immigration and Nationality Act and related laws assign certain responsibilities to the Secretary of Labor for employment-based immigration and guest worker programs. These responsibilities include determining whether able, willing, and qualified U.S. workers are available for the job and whether there would be any adverse impact on similarly employed U.S. workers if a labor certification allowing the admission of a foreign worker were granted. To carry out these responsibilities, the Secretary has delegated to ETA's Office of Foreign Labor Certification the processing of prevailing wage determinations and applications from employers seeking to hire: (1) immigrant workers for permanent jobs; (2) nonimmigrant workers for temporary specialty jobs; and, (3) nonimmigrant workers for temporary or seasonal agricultural and non-agricultural jobs.

WHD conducts civil investigations to enforce Foreign Labor Certification (FLC) labor protections, which involve wages, working conditions, and making sure similarly employed U.S. workers are not adversely affected in terms of hours, shifts, vacation periods, or benefits.

CHALLENGE FOR THE DEPARTMENT

FLC programs rely solely on employer attestation in determining whether to certify their applications. Thus, it is difficult for the Department to ensure U.S. workers were not available for the job and that a foreign worker filling the job would not adversely affect wages and working conditions of U.S. workers similarly employed. As a result, the Department is challenged with balancing a thorough review of FLC applications to protect U.S. workers all the while timely processing applications to meet employer workforce demands. For example, in the H-2B program, which is used to hire foreign workers for temporary, non-agricultural jobs, rising application levels and seasonal spikes in employer workforce demands have resulted in periodic application processing delays.

Moreover, in response to the Northern Mariana Islands U.S. Workforce Act of 2018, the Department implemented a new DOL certification requirement and related administering procedures for the CW-1 program effective April 4, 2019, which permits employers to hire nonimmigrant workers temporarily in the Commonwealth of the Northern Mariana Islands. Without Congressional funding for dedicated staff for this program, the Department had to temporarily reassign staff to the program to process the CW-1 applications. This adversely impacted work on other FLC programs.

Over the last decade, the OIG, along with other federal partners, conducted more than 70 criminal investigations related to fraud in the H-2B program. These investigations have shown FLC programs to be susceptible to fraud and abuse by dishonest immigration attorneys, employers, labor brokers, and organized criminal enterprises. OIG investigations have also uncovered instances of unscrupulous employers misusing FLC programs to engage in human trafficking, with victims often exploited for economic gain.

As of the end of September 2020, the unemployment rate was more than double the rate prior to the pandemic. Given this substantial increase in unemployment, there will be greater scrutiny placed upon the hiring of foreign labor. On August 3, 2020, the President signed an Executive Order titled "Aligning Federal Contracting and Hiring Practices with the Interests of American Workers," which requires DOL and the Department of Homeland Security to take action to protect U.S. workers from any adverse effects on wages and working conditions caused by the employment of H-1B visa holders at job sites.

The H-1B program allows U.S. employers to employ foreign workers temporarily in specialty occupations. With the high number of job seekers during the pandemic and the Executive Order in effect, the Department is challenged to: (1) verify whether any U.S. workers are available for a job vacancy where H-1B candidates might be considered; and, (2) ensure that a foreign worker filling the job will not adversely affect the wages and working conditions of U.S. workers similarly employed. The fact that these are attestation-based programs further challenges the Department's ability to protect U.S. workers. Moreover, due to social distancing and businesses being permanently or temporarily closed in response to COVID-19, the Department has been limited in its ability to perform any on-site investigations. It has made efforts to increase on-site investigations in priority cases, such as those involving the health and safety of H-2A agricultural workers, as different localities in the U.S. have been re-opening. However, these investigations represent a small fraction of the total number of on-site investigations pending that the Department cannot carry out due to COVID-19.

The Department's limited statutory authority to act on potentially fraudulent H-1B foreign labor applications has been a long-standing challenge, and at times, leads to unscrupulous employers misusing FLC programs for labor and human trafficking. OIG investigations have shown that the H-1B program is susceptible to significant

fraud and abuse, often by dishonest immigration attorneys, employers, labor brokers, and organized criminal enterprises. One of the reasons for the fraud and abuse of the H-1B program is that the Department is statutorily required to certify H-1B applications within seven days unless it determines the applications to be “incomplete or obviously inaccurate.” The OIG continues to investigate various fraud schemes within the H-1B program, including labor leasing⁴, benching of foreign workers⁵, and wage kickbacks⁶.

DEPARTMENT’S PROGRESS

As part of the Department's technology modernization initiative, the Foreign Labor Application Gateway (FLAG) System and SeasonalJobs.dol.gov website were developed to replace the legacy iCERT System, improve customer service, and modernize the administration of FLC programs. Employers are able to electronically file applications and upload documents in the FLAG system. The FLAG system is a case management system for the Department and can issue determination letters electronically for a seamless transition of employers' applications from DOL to the Department of Homeland Security. The FLAG system also enhanced data sharing between the State Workforce Agencies and the Department.

SeasonalJobs.dol.gov is a mobile-friendly online portal that is designed to help U.S. workers identify and apply for open seasonal and temporary jobs under the H-2A and H-2B visa programs. In addition to providing more robust and personalized search capabilities that tailor results to the geographic location of U.S. workers, this website makes it easier to integrate employment postings with third-party job search websites to make these job opportunities more accessible to job seekers.

ETA made significant changes to the application form used in the H-2B program in response to the OIG's recommendation to address the form's ambiguity, which has impeded the OIG's Office of Investigations' past efforts to prosecute offenders committing fraud against this program. These changes include: a) requiring petitioners and preparers to affirm they have read and understood the attestations they declared in the application; b) clarifying the petitioners and preparer's responsibility to accurately complete the application form; and, c) acknowledging the consequences of providing misrepresentation on attestations and declarations made on the application.

According to Department officials, every year since FY 2016, the Department has requested authorization, through its annual budget formulation process, to establish and retain fees to cover the operating costs for FLC programs. This proposal aligns the Department with the funding structures used by the Department of Homeland Security and the Department of State to finance their application-processing activities related to these programs. Employing a similar model for foreign labor certifications would eliminate the need for Congressional appropriations and create a funding structure responsive to market conditions.

⁴Labor leasing: The provision of labor to a third party usually providing limited or no benefits to workers, and for a limited time. Most commonly used to describe agricultural and construction contract labor arrangements.

⁵Benching of foreign workers: When employers, during a period of low productivity or otherwise slow business, refuse to pay foreign workers their wages, a.k.a. “benching” them.

⁶Wage kickbacks: When third-party placement firms obtain H-1B workers and pay them lower wages than what U.S. employers would have paid.

WHAT REMAINS TO BE DONE

The Department needs to continue its efforts to ensure H-2B applications are processed in time for employers to hire foreign workers by their dates of need while simultaneously ensuring the review process protects the interests of U.S. workers.

DOL indicated it was starting a process to self-initiate H-1B investigations, which includes entering into a memorandum of understanding with the Department of Homeland Security (DHS) that allows DHS to provide DOL with data on potentially suspect activities. However, DOL should still seek statutory and regulatory authority to strengthen its ability to debar those who abuse the H-1B program. DOL also needs to seek statutory authority to verify the accuracy of information provided on H-1B labor condition applications. DOL officials need to refer all potentially criminal violations to the OIG in a timely manner and enhance the reporting and application of suspensions and debarments government-wide.

CHALLENGE: Protecting Retirement, Health, and Other Benefit Plans for Workers, Retirees, and Their Families

BACKGROUND

The Employee Benefits Security Administration (EBSA) is responsible for protecting the integrity of pensions, health, and other employee benefits for about 154 million people. This responsibility includes enforcement authority over approximately 722,000 private retirement plans, 2.5 million health plans, and millions of welfare benefit plans, which altogether hold approximately \$10.7 trillion in assets. It also includes interpretive and regulatory responsibilities for Individual Retirement Accounts, which hold about \$9.56 trillion in assets.

EBSA also provides oversight of the federal government's Thrift Savings Plan (TSP), the largest defined contribution plan in the U.S., with nearly 6 million participants and \$621 billion in assets as of June 2020.

CHALLENGE FOR THE DEPARTMENT

EBSA is challenged to allocate its limited resources in a way that will maximize the positive impact of its efforts. This is especially significant given the fast pace of market and regulatory changes affecting ERISA-covered plans, including Congress' recent creation of a new class of plan sponsor (pooled plan providers) in the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act). EBSA needs to maximize its resources to conduct the number of investigations, audits, reviews, and compliance assistance activities needed to best protect workers' pensions, health, and other benefits.

One specific challenge EBSA faces is finding an effective way to protect the public from fraud and mismanagement in connection with Multiple Employer Welfare Arrangements (MEWAs). Although fraudulent or mismanaged MEWAs are few, illegal activities associated with them are resistant to early detection. Consequently, by the time the violations become apparent, tens of thousands of plan participants may have been deprived of promised health benefits.

EBSA is further challenged because it has no statutory authority to force certain plans to conduct full scope audits, which would provide significantly stronger assurances to participants than limited-scope audits. Past OIG work revealed that as much as \$3.3 trillion in pension assets, including an estimated \$800 billion in hard-to-value alternative investments, received limited-scope audits. Independent public accountants performing these limited-

scope audits generally were not required to audit investment information already certified by certain banks or insurance carriers, which meant the independent public accountants expressed “no opinion” on the valuation of these assets. These limited-scope audits weaken assurances to stakeholders and put retirement plan assets at risk because they provide little to no confirmation regarding the existence or value of plan assets.

Finally, EBSA is challenged to obtain compliance with its TSP audit recommendations given its limited legal authority to enforce its oversight of more than \$500 billion in TSP assets and compel the Federal Retirement Thrift Investment Board (the Board), which administers the TSP, to act on these recommendations. In our 2018 audit on this subject, we found 73 percent of the recommendations EBSA auditors had made to the Board between 2010 and 2017 were still open.

DEPARTMENT’S PROGRESS

In June 2018, EBSA issued regulatory guidance regarding Association Health Plans (AHPs) and MEWAs, as well as other related reforms in the health care market.

With respect to limited scope audits, the American Institute of Certified Public Accountants (AICPA) has recently taken action. In July 2019, the AICPA issued Statement on Auditing Standards (SAS) 136, Forming an Opinion and Reporting on Financial Statements of Employee Benefit Plans Subject to ERISA. Effective for years ending after December 15, 2021, for “limited-scope” audits, SAS 136 will require auditors to issue an audit opinion on information not covered by the qualified financial institution’s certification. Accordingly, auditors will no longer “disclaim” opinions subject to limited-scope audits. Nonetheless, auditors will continue to not opine on the value of plan assets.

EBSA also stated it has (1) requested an increase of 49 FTEs and \$8 million in additional funding for enforcement and administration of its responsibilities with respect to MEWAs and AHPs; and, (2) taken a number of steps to improve its TSP audit risk assessment and encourage the Board to implement audit recommendations.

WHAT REMAINS TO BE DONE

EBSA needs to develop new outreach, education, and enforcement strategies for AHPs and the expanded Multi-Employer Plans (MEP) to accommodate the new diverse plans now available in the market and the new pooled provider plans anticipated to be established under the SECURE Act. Given the new regulations enabling AHPs and the expansion of MEPs likely to result from the SECURE Act, EBSA will have to determine how best to allocate its limited resources to oversee the expansion both in terms of number of plans as well as the increased number of plan types it has to regulate.

In addition, given the dollar amounts involved, EBSA should pursue legislative repeal of the limited-scope audit exemption to ensure better security for retirement plans. Notwithstanding the recently issued SAS 136, limited-scope audits, (now known as ERISA Section 103(a)(3)(C) audits) offer participants significantly reduced assurances of plan asset values as compared to full-scope audits. The proliferation of plan assets subject only to ERISA Section 103(a)(3)(C) audits greatly increases the risk of loss to participants.

Finally, EBSA needs to consistently apply its newly developed audit risk assessment for the TSP to improve the usefulness of its TSP audits, as well as seeking amendments to the Federal Employee Retirement Security Act to solidify its authority to ensure TSP audit recommendations are implemented.

CHALLENGE: Managing Medical Benefits in OWCP Programs, Including Opioids

BACKGROUND

The Department's Office of Workers' Compensation Programs (OWCP) provides compensation and medical benefits to workers for employment-related injuries and occupational diseases. During FY 2019, OWCP paid more than \$900 million worth of medical benefits under the Federal Employees' Compensation Act (FECA), more than \$840 million under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), and \$40 million under the Black Lung Benefits Act.

CHALLENGE FOR THE DEPARTMENT

OWCP is challenged to effectively manage medical benefits in its workers' compensation programs due to the high risk of fraud, waste, and abuse associated with (1) rising home health care costs in the EEOICPA program, and (2) the use and cost of pharmaceuticals — including opioids — in the FECA program.

In the EEOICPA program, annual home health care costs have risen from \$100 million in FY 2010 to more than \$610 million in FY 2019, comprising 73 percent of all medical benefits paid by the program in FY 2019. With an aging claimant population, providers can take advantage of the increased demand for home health care services and exploit weaknesses in OWCP's existing controls by employing tactics that are legal but unethical, such as inappropriately bundling or unbundling services. Additionally, the increased use of telehealth as a result of the COVID-19 pandemic could impact OWCP's existing controls over home health care service requests.

Previous OIG work in the FECA program has identified internal control weaknesses related to OWCP's management of pharmaceuticals. For example, OWCP allowed increases in billings for compounded drugs to go undetected and failed to identify the overuse of opioids. Given the high risk of fraud related to prescription payments, OWCP needs to analyze and monitor FECA costs to promptly detect and address such problems.

For opioids in particular, it is critical that OWCP develops controls to help ensure prescription drugs reimbursed by the program are safe, effective, medically necessary, and obtained at a fair price. OWCP needs to be able to identify claimants at risk of opioid addiction and determine the associated costs of treatment. In response to the COVID-19 pandemic, OWCP has had to divert resources from focusing on claimants with opioid prescriptions to processing an influx of COVID-19 claims from federal workers, which has the potential to negatively impact FECA's opioid user population.

DEPARTMENT'S PROGRESS

OWCP continues to analyze and audit home health care billing practices in the EEOICPA program for the purpose of modifying billing rules and policies when it uncovers abusive practices. It has also moved the adjudication of home health care into a national office unit that focuses exclusively on medical benefits adjudication and it has provided internal training to that unit. OWCP officials also implemented a program integrity unit and increased the number of fraud referrals to the OIG for investigation. In addition, consistent with OWCP's concern, the OIG is currently conducting an audit of home health care costs in the EEOICPA program, focusing on controls in place to prevent improper payments for home health care benefits.

In the FECA program, OWCP has reviewed questionable providers acting in a fraudulent or abusive manner, implemented procedures to identify prescribers of prescription drugs, imposed quantity limits on initial fills

and refills for compounded drugs and opioids, performed an initial analysis of generic drug prescriptions, and implemented drug exclusion lists for drugs and drug ingredients.

Regarding opioids, OWCP is analyzing prescription data, reaching out to physicians when claimants have long-term and high dose prescriptions, and taking a tailored approach with these claimants and physicians. In June 2017, OWCP developed an authorization requirement for opioid prescriptions that resulted in a decrease in the cost of non-compounded opioids from \$58 million to \$36 million between FY 2016 and FY 2019. Effective September 23, 2019, OWCP began limiting all initial opioid fills to seven days. Three subsequent seven-day fills can be obtained, but prior authorization is required to obtain opioids beyond 28 days.

OWCP has taken additional actions to better manage pharmaceuticals in the FECA program, which include (1) implementing new policies related to the review and approval of pharmacy claims; (2) providing information to claimants and doctors regarding the risks of opioid use and the availability of alternate treatment options; (3) focusing data analytics on the population of opioid users, with the purpose of predicting their future behavior; (4) improving the detection of fraudulent medical providers and risky opioid prescribers; and, (5) applying non-procurement suspension and debarment procedures to stop payments to medical providers criminally convicted of or indicted for defrauding the FECA program.

WHAT REMAINS TO BE DONE

OWCP should continue its efforts to analyze home health care billings for abusive practices and to identify and refer allegations involving potential fraud or abuse to the OIG for further investigation.

OWCP also needs to follow through on its planned actions in the FECA program, including contracting for a Pharmacy Benefit Manager, a third-party administrator of prescription drug programs that will address the options identified below. After completing these planned actions, OWCP needs to measure their impact on use and cost of prescription drugs as well as consider additional options for monitoring and managing medical costs, including the following:

- Conducting drug utilization reviews to prevent potentially harmful drug interactions;
- Implementing drug exclusion and formulary lists for all drugs and drug ingredients;
- Ensuring continued use of the best methods for calculating fair and reasonable pharmaceutical pricing;
- Requiring the use of preferred pharmacy providers; and,
- Performing cost-limit checks to identify high drug prices requiring additional review and authorization.

OWCP should continue its efforts to identify what insurance providers and other federal, state, and local agencies are doing to manage medical costs and determine which best or promising practices may be suitable for its operations. OWCP also needs to expand its use of data analytics to monitor payments for pharmaceuticals, particularly opioids, and identify trends, risks, and appropriate treatment plans. Finally, OWCP needs to carefully monitor the ongoing COVID-19 pandemic and its impacts on OWCP's four major compensation programs, paying particular attention to FECA's opioid user population, as well as the demand for and cost of home health care services in the EEOICPA program.

CHALLENGE: Securing and Managing Information Systems

BACKGROUND

The Department's major information systems contain sensitive information central to its mission and programs. These systems maintain critical and sensitive data related to financial activities, enforcement actions, job training services, pensions, welfare benefits, and worker safety and health. In FY 2020, the Department's Chief Information Officer (CIO) had oversight of IT investments estimated at \$666 million. The funds were used in implementing the Department's services and functions to safeguard the American workforce.

CHALLENGE FOR THE DEPARTMENT

The Department faces challenges safeguarding its data and information systems. Although DOL has made progress in this area, we have long-standing concerns about the Department's IT governance, modernization efforts, and ability to identify, protect, and recover information systems and data.

The OIG continues to identify information security deficiencies in the areas of configuration management, third-party oversight, risk management, and continuous monitoring. While the Department has made improvements in these areas, these deficiencies continue to exist and represent ongoing risks to the confidentiality, integrity, and availability of the Department's information.

In addition, COVID-19 created a new challenge with the sudden rise of DOL employees' teleworking to maintain business operations and DOL providing IT services to its staff while maintaining IT security and accessibility. Once DOL employees can return on-site for work after required telework due to COVID-19, the Department will be further challenged in determining which functions and operations are suitable for continued telework, and whether its information systems can provide sufficient capability and security. The Department also continues to face management challenges in transitioning additional systems to secure cloud services, maintaining its current systems, and modernizing or replacing legacy systems.

DEPARTMENT'S PROGRESS

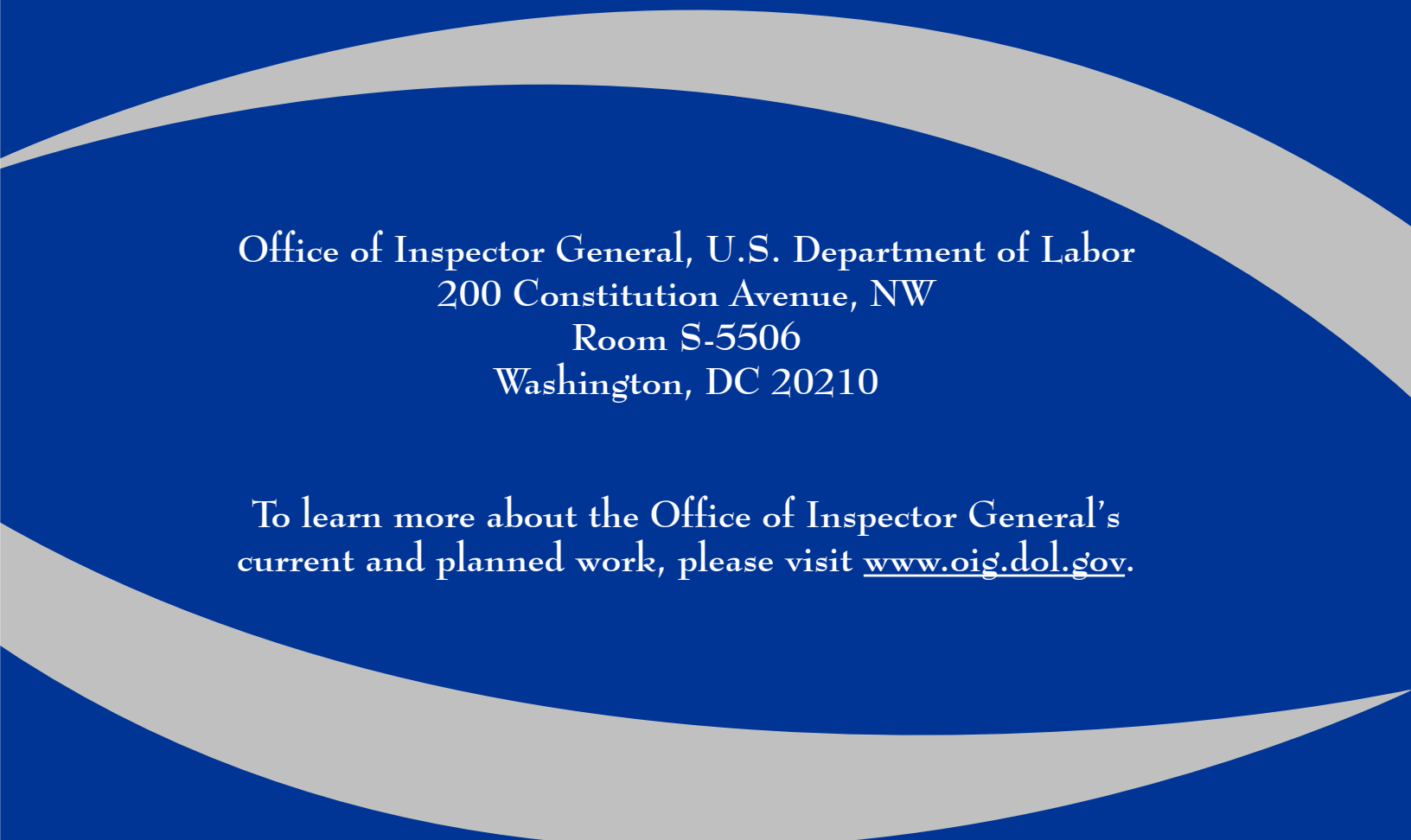
DOL has implemented new programs and systems designed to strengthen security operations. According to DOL, it continues to make progress in reorganizing its information technology to better manage projects for modernizing, securing, and consolidating information technology, and this includes realigning information processes and personnel under the CIO. While DOL is in the process of restructuring its IT resources and capabilities to a more centralized shared services environment, the OIG is currently conducting an audit of DOL's IT governance to provide insight and best practices.

WHAT REMAINS TO BE DONE

While DOL has begun to consolidate information technology within the Office of the Chief Information Officer, the CIO needs to use this opportunity to:

- Address recurring information security deficiencies;
- Strengthen its oversight responsibilities to ensure DOL agencies adhere to the Department's information security policies, procedures, and controls; and,
- Enhance its security program by ensuring security tools are effectively implemented to improve its Federal Information Security Modernization Act of 2014 (FISMA) maturity posture.

Consistent with the intent of the Clinger-Cohen Act, DOL is consolidating information technology under the CIO. However, we continue to recommend the Department realign the position of the CIO to provide this role greater independence and authority for implementing and maintaining an effective information security program. Under the Department's current organizational structure, the CIO reports to the Assistant Secretary of Administration and Management, not the agency head in compliance with the Clinger-Cohen Act.



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