



# City of New York

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## OFFICE OF THE COMPTROLLER

**Scott M. Stringer**  
**COMPTROLLER**



## MANAGEMENT AUDIT

**Marjorie Landa**

Deputy Comptroller for Audit

Audit Report on the Department of  
Consumer and Worker Protection's  
Enforcement of the New York City  
Earned Sick Time Act

ME18-070A

**June 28, 2019**

<http://comptroller.nyc.gov>



THE CITY OF NEW YORK  
OFFICE OF THE COMPTROLLER  
SCOTT M. STRINGER

June 28, 2019

To the Residents of the City of New York:

My office has audited the Department of Consumer and Worker Protection (DCWP) to determine whether it has adequate controls in place to effectively enforce the New York City Earned Sick Time Act (ESTA). We conduct audits such as this to increase accountability and to ensure that agencies effectively enforce applicable laws.

The audit found that DCWP needs to strengthen its controls to more effectively enforce ESTA. DCWP successfully completed numerous ESTA investigations that led to orders that employers pay restitution to their employees. However, DCWP has no evidence to show that more than a third of the employees in the audit sample received the restitution payments specified in such orders. In addition, DCWP generally did not impose the late fees stipulated in its consent orders when employers failed to pay the agreed-upon restitution or fines by the due dates. Further, DCWP was often untimely in performing some of the key intake and investigative steps for the cases in the audit sample, and did not consistently document the reasons for significant time gaps in the investigative process and, in some instances, the reasons for key decisions on a case.

The audit made 21 recommendations to DCWP, including that it: enhance its tracking abilities by developing a capacity to readily generate lists of restitution amounts ordered, paid, and past-due; consistently take additional steps (such as sending dunning letters to employers) when there is evidence that fines have not been paid or that employees have not received the restitution payments to which they are entitled; consider all available legal remedies in the event employers default or delay in honoring their stipulated payment obligations; enforce the late fee stipulations in its consent orders; develop mechanisms to more effectively track and manage its handling of complaints; and enhance its monitoring of the recording of investigative activities to ensure that significant time gaps and key investigative decisions are adequately identified and explained.

The results of the audit have been discussed with DCWP officials, and their comments have been considered in preparing this report. Their complete written response is attached to this report.

If you have any questions concerning this report, please e-mail my Audit Bureau at [audit@comptroller.nyc.gov](mailto:audit@comptroller.nyc.gov).

Sincerely,

A handwritten signature in blue ink, appearing to read "Scott M. Stringer".

Scott M. Stringer

# TABLE OF CONTENTS

|  |           |
|--|-----------|
| <b>EXECUTIVE SUMMARY .....</b>   | <b>1</b>  |
| Audit Findings and Conclusions .....   | 2         |
| Audit Recommendations.....   | 2         |
| Agency Response.....   | 3         |
| <b>AUDIT REPORT .....</b>  | <b>4</b>  |
| Background .....   | 4         |
| Objective.....   | 5         |
| Scope and Methodology Statement.....   | 5         |
| Discussion of Audit Results with DCWP .....  | 6         |
| <b>FINDINGS AND RECOMMENDATIONS.....</b>   | <b>7</b>  |
| Weaknesses in DCWP’s Monitoring of Payments of Restitution and Fines.....  | 7         |
| Insufficient Tracking and Pursuit of Restitution Payments Resulted in DCWP’s Having No Evidence That 38 Percent of the Employees in Our Audit Sample Received Payments to Which They Were Entitled ..... | 7         |
| Late Fees Stipulated by Consent Orders Are Generally Not Imposed .....   | 9         |
| Mayor’s Management Report’s Performance Indicators on Restitution Were Misleading and the Indicators on Restitution and Fines Were Insufficiently Supported .....  | 10        |
| Recommendations .....  | 11        |
| Weaknesses in DCWP’s Intake, Investigative, and Litigation Processes .....   | 14        |
| Timeliness Concerns.....   | 14        |
| Key Justifications Not Documented.....   | 17        |
| Documentation Concerns.....  | 19        |
| Data Reliability Concerns.....   | 20        |
| Recommendations .....  | 22        |
| DCWP Lacks a Process for Obtaining Complainant Feedback .....  | 24        |
| Recommendation .....   | 24        |
| <b>DETAILED SCOPE AND METHODOLOGY.....</b>   | <b>25</b> |
| <b>ADDENDUM</b>  |           |

# THE CITY OF NEW YORK OFFICE OF THE COMPTROLLER MANAGEMENT AUDIT

## Audit Report on the Department of Consumer and Worker Protection’s Enforcement of the New York City Earned Sick Time Act

ME18-070A

### EXECUTIVE SUMMARY

The New York City (City) Department of Consumer and Worker Protection (DCWP)—formerly known as the Department of Consumer Affairs (DCA)—endeavors to ensure fair and vibrant marketplaces and workplaces.<sup>1</sup> DCWP licenses and regulates nearly 80,000 businesses in 55 different industries, and enforces the Consumer Protection Law and other related business laws. In addition, DCWP implements, administers, and enforces the Earned Sick Time Act (ESTA), also known as the Paid Sick Leave Law, which went into effect on April 1, 2014. As part of its responsibilities, DCWP educates employees and employers about ESTA to help ensure that they know their rights and responsibilities, and, through its Office of Labor Policy and Standards (OLPS), investigates related complaints and enforces the law. The goal of ESTA is to enable all eligible employees to use sick leave to care for themselves or for ailing family members (including spouses, children, grandchildren, grandparents, and siblings) without threatening their economic security.

ESTA is set forth in Title 20, Chapter 8, of the New York City Administrative Code and covers employees who work in the City, have been with their employer for at least 120 calendar days, and have worked more than 80 hours during a calendar year.<sup>2</sup> Employers with five or more employees who work the prescribed number of hours must provide paid sick leave, while employers with one to four employees who work that many hours must provide unpaid sick leave. Under the law, sick leave is accrued at the rate of 1 hour for every 30 hours worked, up to a maximum of 40 hours per calendar year. The act also includes provisions prohibiting employer retaliation for employees’ use of sick leave or for filing a DCWP complaint alleging ESTA violations.

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<sup>1</sup> In January 2019, the Mayor announced that DCA would become the Department of Consumer and Worker Protection, and the agency currently refers to itself as such on its public website, *NYC Consumer Affairs*, <https://www1.nyc.gov/site/dca/about/overview.page>, accessed May 15, 2019. New York City Charter §2201 continues to refer to the agency as DCA as of the date of this report.

<sup>2</sup> Certain categories of workers are not covered under ESTA—government employees, students in federal work-study positions, certain employees subject to collective bargaining agreements, and independent contractors.



Three units within OLPS are involved in handling ESTA complaints: an intake unit; an investigative unit; and a litigation unit. If an employee believes that an ESTA violation has occurred, the employee can file a complaint with OLPS. An employee can submit a complaint to OLPS via walk-in, phone call, email, or regular mail.

If OLPS determines that an employer violated the law, it first attempts to negotiate a mutually acceptable settlement with the employer. If a settlement is reached, DCWP executes a consent order, which is a formal agreement between DCWP and the employer setting forth the findings and remedies, including the amounts of restitution owed to the employee(s) and fines owed to the City, and the dates by which the restitution and fines are to be paid. If the negotiation does not result in a settlement, DCWP's litigation unit files a petition for a trial on the case before an administrative law judge of the Office of Administrative Trials and Hearings (OATH).

As recorded in a dataset DCWP provided to us, the agency received a total of 310 ESTA complaints in Fiscal Year 2017 (July 1, 2016 through June 30, 2017) that it determined were within the agency's jurisdiction and were therefore docketed as valid complaints. According to other DCWP datasets for the same period, 3,367 employees were reportedly awarded a total of \$1,597,950 in restitution, and employers were reportedly charged a total of \$475,828 in fines.

## **Audit Findings and Conclusions**

DCWP needs to strengthen its controls to more effectively enforce ESTA. Although DCWP, to its credit, successfully completed numerous ESTA investigations that led to orders that employers pay restitution to their employees, DCWP has no evidence to show that a significant number (38 percent) of the employees in our audit sample received the restitution payments specified in such orders. The lack of such evidence resulted in part from DCWP's insufficient tracking and pursuit of these payments. In addition, DCWP generally did not impose the late fees stipulated in its consent orders when employers failed to pay the agreed-upon restitution or fines by the due dates. Further, DCWP's Fiscal Year 2017 Mayor's Management Report (MMR) performance indicators on restitution were misleading and—with regard to restitution and fines—insufficiently supported.

Moreover, DCWP was often untimely in performing some of the key intake and investigative steps for the cases in our sample. In addition, DCWP did not consistently document the reasons for significant time gaps in the investigative process and, in some instances, did not document the reasons for key decisions on a case. Further, the case files for all of the complainant-initiated cases in our sample for which DCWP pursued investigations were missing one or more key documents needed to show that the standard intake, investigative, and litigation steps it deems necessary were actually taken. Finally, DCWP lacked a process for obtaining periodic complainant feedback on its handling of paid sick leave complaints.

## **Audit Recommendations**

To address these issues, the audit makes a total of 21 recommendations, including the following:

- DCWP should enhance its tracking abilities by developing a capacity to readily generate lists of restitution amounts ordered, paid, and past-due.
- DCWP should, both in cases with consent orders and those with OATH decisions and orders, consistently take additional steps (such as sending dunning letters to employers

and filing petitions with OATH) when there is evidence that fines have not been paid or that employees have not received the restitution payments to which they are entitled.

- DCWP should consider all available legal remedies, including, but not limited to, referring matters to the City Law Department for legal action in the event employers default or delay in honoring their stipulated payment obligations. DCWP should further consider whether changes can be made to the language and form of its ESTA consent orders to provide for additional legal remedies, such as confessions of judgment, in appropriate cases.
- DCWP should develop mechanisms to more effectively review employers' submissions of proofs of restitution payments to ensure that employers comply with their consent orders and employees receive the full restitution payments to which they are entitled.
- DCWP should enforce the stipulations in its consent orders that impose late fees on those employers who fail to pay the agreed-upon restitution and fines in a timely manner.
- DCWP should collect and maintain sufficient supporting data and documentation to fully support the performance indicator results regarding restitution and fines that it submits for inclusion in the MMR.
- DCWP should develop mechanisms to more effectively track and manage its handling of complaints to ensure that key intake and investigative steps are taken in a timely manner based on established time frames.
- DCWP should enhance its monitoring of the recording of investigative activities to ensure that significant time gaps and key investigative decisions are adequately identified and explained.
- DCWP should specify in its written procedures the documents that need to be maintained in the case files to demonstrate that all key intake, investigative, and litigation steps have been taken.
- DCWP should periodically survey a sample of employees who have made paid sick leave complaints and consider the ways in which the concerns expressed by the complainants could be addressed.

## Agency Response

In its written response, DCWP generally agreed with the audit's findings and with 18 of its 21 recommendations. DCWP partially agreed with one recommendation (#6) by agreeing to consider the use of late fees commensurate with the size of the restitution orders in its larger cases but disagreeing with the part of the recommendation that calls for the agency to consistently include late fee provisions in its consent orders. DCWP disagreed with one recommendation (#7) that it consider developing new performance indicators for the MMR that show the number of employees who actually received restitution and the total amount of restitution they received, and the agency did not address one recommendation (#5) that it enforce the late fees stipulated in its consent orders.

# AUDIT REPORT

## Background

DCWP—formerly known as DCA—endeavors to ensure fair and vibrant marketplaces and workplaces. DCWP licenses and regulates nearly 80,000 businesses in 55 different industries, and enforces the Consumer Protection Law and other related business laws. In addition, DCWP implements, administers, and enforces ESTA, also known as the Paid Sick Leave Law, which went into effect on April 1, 2014. As part of its responsibilities, DCWP educates employees and employers about ESTA to help ensure that they know their rights and responsibilities, and, through OLPS, investigates related complaints and enforces the law. The goal of ESTA is to enable all eligible employees to use sick leave to care for themselves or for ailing family members (including spouses, children, grandchildren, grandparents, and siblings) without threatening their economic security.

ESTA is set forth in Title 20, Chapter 8, of the New York City Administrative Code and covers employees who work in the City, have been with their employer for at least 120 calendar days, and have worked more than 80 hours during a calendar year. Employers with five or more employees who work the prescribed number of hours must provide paid sick leave, while employers with one to four employees who work that many hours must provide unpaid sick leave. Under the law, sick leave is accrued at the rate of 1 hour for every 30 hours worked, up to a maximum of 40 hours per calendar year. The act also includes provisions prohibiting employer retaliation for employees' use of sick leave or for filing a DCWP complaint alleging ESTA violations.

Three units within OLPS are involved in handling ESTA complaints: an intake unit; an investigative unit; and a litigation unit. If an employee believes that an ESTA violation has occurred, the employee can file a complaint with OLPS. An employee can submit a complaint to OLPS via walk-in, phone call, email, or regular mail.

When the intake unit records an ESTA complaint, an intake number is automatically generated by DCWP's tracking system. An investigative unit supervisor is then responsible for determining whether the complaint is "valid" (the term DCWP uses to refer to cases within its jurisdiction) and, if so, for docketing the complaint, which results in the tracking system's automatically assigning a docket number. ESTA requires OLPS to investigate each such docketed complaint "in a timely manner."<sup>3</sup> In contrast, complaints that are not within DCWP's jurisdiction are not docketed and are often referred to another government agency or organization.

After an ESTA complaint has been docketed, OLPS' intake or investigative staff are required to conduct research on the employer identified in the complaint, which may include reviewing various databases. The assigned investigator is responsible for, among other things, contacting the complainant to discuss the circumstances of the complaint, confirming contact information, and providing a brief summary of how the investigation will proceed. The investigator then sends a documentation request, which DCWP refers to as a Notice of Investigation (NOI), to the employer. The requested documentation is among the key items of evidence an OLPS investigator obtains

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<sup>3</sup> ESTA does not provide any specific time frames for the handling of paid sick leave complaints.

to review an employee's complaint and to determine whether an employer is in compliance with the law.

To support the outcome of a case, an OLPS investigator is required to prepare an investigation report. This report should include sufficient details about the case, including a description of the complaint, the evidence gathered, witness information, steps taken in the investigative process, the results of the investigation, and any conclusions concerning violations of the law and monetary charges to be imposed on the employer. The investigation report must be approved by a higher-level official.

If OLPS determines that an employer violated the law, it first attempts to negotiate a mutually acceptable settlement with the employer. If a settlement is reached, DCWP executes a consent order, which is a formal agreement between DCWP and the employer setting forth the findings and remedies, including the amounts of restitution owed to the employee(s) and fines owed to the City, and the dates by which the restitution and fines are to be paid. If the negotiation does not result in a settlement, DCWP's litigation unit files a petition for a trial on the case before an administrative law judge of OATH.

Prior to April 2, 2018, ESTA complaints were recorded in DCWP's Case Management Database (CMD), a computerized database that was exclusively dedicated to the handling of ESTA complaints and related matters. However, as of April 2, 2018, DCWP replaced CMD with the Master Electronic Tracking System (METS). That system handles complaints relating to a variety of labor laws in addition to ESTA, including laws pertaining to fair work weeks, temporary leave, commuter benefits, and prevailing wages.

As recorded in a dataset DCWP provided to us, the agency received a total of 310 ESTA complaints in Fiscal Year 2017 (July 1, 2016 through June 30, 2017) that it determined were within the agency's jurisdiction and were therefore docketed as valid complaints. According to other DCWP datasets for the same period, 3,367 employees were reportedly awarded a total of \$1,597,950 in restitution, and employers were reportedly charged a total of \$475,828 in fines.

## **Objective**

To determine whether DCWP has adequate controls in place to effectively enforce ESTA.

## **Scope and Methodology Statement**

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the City Charter.

The primary scope of this audit was ESTA cases opened during Fiscal Year 2017. We reviewed the enforcement status of these cases through May 24, 2018, and the collection of restitution, fines, and late fees on these cases through October 31, 2018. Please refer to the Detailed Scope and Methodology at the end of this report for the specific procedures followed and tests conducted during this audit.



### *Scope Limitation*

The exception clause in §93(c) of the New York City Charter states that the Comptroller shall be entitled to obtain access to agency records required by law to be kept confidential, “other than records which are protected by the privileges for attorney-client communications, attorney work products, or material prepared for litigation.” DCWP exercised its authority under the City Charter to withhold such documents (such as investigation reports) from the auditors. As a result, we were unable to fully determine whether DCWP consistently followed its investigative and litigation procedures with regard to its enforcement of ESTA.

### *Sensitive Information Omitted*

Because certain aspects of DCWP’s ESTA enforcement efforts could be compromised by their public disclosure, DCWP and our office agreed that these aspects and our associated recommendation would not be included in this report, but would rather be addressed through private communications between our two organizations.

## **Discussion of Audit Results with DCWP**

The matters covered in this report were discussed with DCWP officials during and at the conclusion of this audit. A preliminary draft report was sent to DCWP officials on May 16, 2019, and was discussed at an exit conference held on May 30, 2019. On June 11, 2019, we submitted a draft report to DCWP officials with a request for comments. We received a written response from DCWP officials on June 25, 2019.

In its written response, DCWP generally agreed with the audit’s findings and with 18 of the audit’s 21 recommendations. DCWP partially agreed with one recommendation (#6) in that it agreed to consider the targeted use of late fees commensurate with the size of the restitution orders in its larger cases, but disagreed with the part of the recommendation that calls for the agency to consistently include late fee provisions in its consent orders. DCWP disagreed with one recommendation (#7) that it consider developing new performance indicators for the MMR that show the number of employees who actually received restitution and the total amount of restitution they received, and the agency did not address one recommendation (#5) that it enforce the late fees stipulated in its consent orders.

DCWP stated that OLPS had already begun to “reflect on and make significant improvements to its process of investigating [ESTA] complaints” and that the agency “appreciates the opportunity the report presents to consider additional feedback aimed at strengthening DCWP’s enforcement of [ESTA].”

The full text of DCWP’s response is included as an addendum to this report.

## FINDINGS AND RECOMMENDATIONS

DCWP needs to strengthen its controls to more effectively enforce ESTA. Although DCWP, to its credit, successfully completed numerous ESTA investigations that led to orders that employers pay restitution to their employees, DCWP has no evidence to show that a significant number (38 percent) of the employees in our audit sample received the restitution payments specified in such orders. The lack of such evidence resulted in part from DCWP's insufficient tracking and pursuit of these payments. In addition, DCWP generally did not impose the late fees stipulated in its consent orders when employers failed to pay the agreed-upon restitution or fines by the due dates. Further, DCWP's Fiscal Year 2017 MMR performance indicators on restitution were misleading, and the indicators on restitution and fines were insufficiently supported. During this audit, DCWP changed the data description for the Fiscal Year 2018 MMR to more accurately reflect what it was reporting.

Moreover, DCWP was often untimely in performing some of the key intake and investigative steps for the cases in our sample. In addition, DCWP did not consistently document the reasons for significant time gaps in the investigative process and, in some instances, did not document the reasons for key decisions on a case. Further, the case files for all of the complainant-initiated cases in our sample for which DCWP pursued investigations were missing one or more key documents needed to show that the standard intake, investigative, and litigation steps it deems necessary were actually taken. DCWP also did not maintain sufficient evidence to support the initiation and the outcomes of the employer-compliance reviews it started on its own. Additionally, DCWP complaint data recorded in CMD, as well as complaint data from various datasets the agency provided to us, were not consistently reliable. Finally, DCWP lacked a process for obtaining periodic complainant feedback on its handling of paid sick leave complaints.

### **Weaknesses in DCWP's Monitoring of Payments of Restitution and Fines**

#### **Insufficient Tracking and Pursuit of Restitution Payments Resulted in DCWP's Having No Evidence That 38 Percent of the Employees in Our Audit Sample Received Payments to Which They Were Entitled**

Due in part to DCWP's insufficient tracking and pursuit of restitution payments, DCWP has no evidence that 38 percent of the employees awarded restitution in our sample of 31 cases received the restitution payments to which they were entitled.

As stated previously, a consent order is the result of a negotiation between DCWP and an employer when DCWP believes a violation of law has occurred. The order sets forth the amount of restitution owed and the date(s) by which it is to be paid. The consent order, which is entered into between the employer and DCWP, also contains a stipulation that an employer is to provide proof of the required restitution payments to DCWP by a specified date. If a consent order cannot be agreed upon, DCWP can seek restitution for the employees through an OATH decision.

Although DCWP is able to track the payment of restitution for individual cases through the Agency Licensing Business Automation (ALBA) system, ALBA cannot generate a list of all restitution

charges and payments. Without the capacity to generate such a report, the agency is greatly hindered in its ability to track the payment of restitution across the full population of ESTA cases.

In addition, DCWP's files contained limited evidence that DCWP took substantive steps to pursue the restitution payments stipulated in its ESTA consent orders by, for example, contacting delinquent employers through dunning letters or otherwise, or by petitioning OATH, as permitted by the consent orders, to impose fines on the employers for breaching the orders by failing to pay restitution. For our audit tests, we selected a sample of 31 cases from the population of 310 that DCWP docketed in Fiscal Year 2017. From the 31 cases, we identified 15 consent orders that stipulated that 15 employers were to pay a total of \$566,518 in restitution to 2,312 employees,<sup>4</sup> 1 separate OATH decision ordering an employer to pay restitution of \$21,750 to 1 employee and a fine of \$2,600 to DCWP, and 5 consent orders that only imposed fines on the employers.

However, according to DCWP's ALBA system, as of October 31, 2018, 5 employers had failed to pay a total of \$166,331 (29 percent) of the sampled total of \$566,518 in consent-ordered restitution to 831 employees. Of the remaining \$400,187 in consent-ordered restitution charges that the employers reportedly paid, DCWP's documentation, such as payroll records showing electronic deposits and copies of checks uploaded into ALBA, revealed that \$14,891 of that reportedly paid amount, involving 40 employees, was unsupported by any evidence of the reported payments. As a result, our review of DCWP's records found that 7 employers had failed to pay a total of \$181,222 (\$166,331 + \$14,891) to a total of 871 employees, relating to a total of 7 consent orders in our sample. The amount of \$181,222 in unpaid restitution represents 32 percent of the \$566,518 in consent-ordered restitution. Notwithstanding those delinquencies, however, we found no evidence that DCWP took any action to pursue the overdue payments.

Regarding the above-mentioned OATH decision, DCWP officials confirmed on March 1, 2019, that the employer had still not paid the fine but stated that they could not comment on whether restitution was paid because the OATH decision "does not order the employer to provide [DCWP] with proof of restitution."

In total, there was no evidence that 872 (38 percent) of the 2,313 employees for whom restitution was ordered in our sample of 31 cases received the restitution to which they were entitled.<sup>5</sup>

It is essential that DCWP enhance its efforts by revising its written procedures to require its staff to take reasonable steps to induce employers to comply with their payment obligations, which might include consistently sending dunning notices to employers that do not pay stipulated restitution charges and/or filing petitions with OATH for orders to these employers to pay the restitution specified in the consent orders. DCWP could also consider taking other steps, such as, in some instances, referring breach-of consent-order cases to the City Law Department for legal action when employers fail to pay agreed-upon restitution to employees.

As a result of weaknesses in DCWP's tracking and pursuit of restitution payments, many employees have not received the restitution to which they are entitled. The significance of awarded restitution amounts is diminished to the extent that DCWP does not ensure that the employers actually make the required restitution payments.

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<sup>4</sup> For purposes of our analysis, we excluded the restitution awarded to five employees who were later determined by DCWP to not qualify for restitution or who waived their right to restitution.

<sup>5</sup> The 872 employees for whom there was no evidence that they received the required restitution payments include the 871 employees awarded restitution through consent orders and the 1 employee who was awarded restitution through an OATH decision. The 2,313 employees include the 2,312 employees awarded restitution through consent orders and the 1 employee who was awarded restitution through an OATH decision.

## Late Fees Stipulated by Consent Orders Are Generally Not Imposed

DCWP generally did not impose the late fees stipulated in its consent orders to be charged to employers that did not pay restitution or fines by specified due dates.

A consent order executed by DCWP generally includes late fee stipulations for failure of the employer to make restitution or fine payments by a specified date. The late fee stipulations generally state that the employer “shall incur a late fee of \$100.00 if [the employer] does not pay the ... employee relief [or civil penalty] by the date specified ... and an additional \$100.00 for each week past the date specified ... in which [the employer] does not pay the ... employee relief [or civil penalty].” The due dates can vary depending on the terms agreed upon during the negotiation process. DCWP generally stipulates the same late fee in each consent order regardless of the size of the restitution or fine.

Of the 20 consent orders in our sample, 16 stipulated late fees for the untimely payment of restitution and/or fines. However, in 5 of the 16 consent orders, DCWP did not charge the 5 employers a total of \$20,700 in late fees that it could have imposed due to the employers’ nonpayment, partial payment or late payment of consent-ordered restitution or fines.<sup>6</sup> The breakdown of the late fees associated with restitution and fines is as follows:

- DCWP could have imposed \$19,000 in late fees on 4 employers for their untimely restitution payments relating to 4 consent orders in the sample that required them to pay restitution totaling \$256,243 to 1,527 employees. In some instances, the employers paid nothing or made only partial payments by the due dates established in the consent orders. In other instances, the employer paid the full restitution amount, but the payment was late. Based upon information in the ALBA system relating to these 4 consent orders, as of October 31, 2018, the restitution payments were late or remained unpaid by periods that ranged from about 4 to 17 months and were, on average, about 11 months late. For example, 1 consent order required an employer to pay restitution totaling \$92,394 to 690 employees, but by October 31, 2018, almost 8 months after the due date, only 1 employee had been paid \$864. Despite that employer’s delinquency, however, DCWP did not impose any portion of the \$3,400 in late fees that were then due.
- DCWP could have imposed \$1,700 in late fees due to untimely fine payments relating to 3 consent orders in the sample for which fine payments of \$14,998 were due.<sup>7</sup> Based upon information in the ALBA system as of October 31, 2018 for these 3 consent orders, the stipulated fines were paid in full but were paid late by periods that ranged from 5 days to over 12 weeks and were paid, on average, 35 days late.

Moreover, 6 of the 20 sampled consent orders lacked stipulated late fees for required restitution or fine payments—restitution payments to employees or fine payments to DCWP were late for 4 of the 6 consent orders. In addition, DCWP generally stipulates the same \$100 late fee regardless of the size of the restitution or fine. For example, one of the consent orders in our sample stipulated a \$435 restitution charge, while another one in our sample stipulated a \$128,048 restitution charge. However, they both stipulated the same \$100 late fee. We believe that a

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<sup>6</sup> For 7 of the remaining 11 consent orders, the employers paid on time, and, therefore, no late fees were required. We did not cite the four consent orders for which the required payments were made less than five days late.

<sup>7</sup> Two of these three consent orders are within the group of four consent orders discussed immediately above for which DCWP also failed to impose the late fees stipulated in the consent orders for untimely payment of restitution.



consent order stipulating a late fee with no monetary relationship to the required restitution or fine amount is of limited value in encouraging timely payments.

As a result of DCWP's failure to adequately track and enforce employers' compliance with the late fee stipulations of its consent orders, the agency's ability to ensure that the employers comply with their payment obligations under the consent orders and that the employees and the City receive the restitution and fine payments they are owed in a timely manner is diminished. The purpose of the stipulated late fees is to encourage employers' timely compliance with the consent orders they enter into. DCWP's lack of enforcement of those stipulated terms nullifies their value in encouraging timely payment and allows the employers to infer that they can pay the agreed amounts if and when they wish without monetary consequences. Revising DCWP's procedures to consistently include and enforce provisions for late fees, commensurate with the amounts of the agreed-upon restitution or fines, could help the agency encourage employer compliance.

### **Mayor's Management Report's Performance Indicators on Restitution Were Misleading and the Indicators on Restitution and Fines Were Insufficiently Supported**

DCWP's Fiscal Year 2017 MMR performance indicators on restitution were misleading and the indicators on restitution and fines were insufficiently supported.

*Comptroller's Directive #1*, §5.6, Performance Measures and Indicators, states that "[c]ontrols should ... be aimed at validating the propriety and integrity of both organizational and individual performance measures and indicators." §5.11, Appropriate Documentation of Transactions and Internal Controls, states that "[a]ll transactions and significant events need to be clearly documented and the documentation readily available for use or examination."

The MMR is mandated by Chapter 1, §12, of the City Charter. The report serves as a government "report card," measuring various aspects of City agencies' performance and indicating whether an agency is delivering services in an effective and timely manner. One of DCWP's performance indicators in the Fiscal Year 2017 MMR is the number of "employees receiving restitution." That term implies that the reported number of employees (3,552) all received restitution. A second indicator, the "total amount of employee restitution," further implies that the reported amount (\$1,584,137) was actually paid to those employees.

DCWP officials informed us, however, that the number of "employees receiving restitution" and the "total amount of employee restitution" reported in the MMR actually refer to the number of employees "to be paid" restitution and the total amount "to be paid" to those employees, as provided by the consent orders.

In addition, DCWP does not maintain sufficient supporting documentation for the data on restitution and fines it submits to the Mayor's Office of Operations for inclusion in the MMR. Our comparison of the Fiscal Year 2017 MMR performance indicator results for restitution and fines to two datasets provided by DCWP (and to documentation subsequently provided by DCWP in response to our finding that the datasets did not fully support the MMR performance indicator results) showed the following:

- While DCWP reported in the Fiscal Year 2017 MMR that employees had been awarded restitution totaling \$1,584,137 in that year, DCWP's supporting dataset and documentation on restitution showed that \$1,649,032 had been awarded—a difference of \$64,895.

- While DCWP reported in the Fiscal Year 2017 MMR that a total of \$502,168 in fines had been imposed on employers in that year, DCWP’s supporting dataset and documentation on fines showed that only \$491,978 in fines had been imposed—a difference of \$10,190.

Regarding the misleading language in DCWP’s indicators, agency officials informed us that the restitution indicators were amended for the Fiscal Year 2018 MMR to “employees awarded restitution” and “total amount of employee restitution awarded.” While those changes are helpful for the purpose of accurately describing what DCWP is in fact measuring, supplementing those indicators with new ones that show the number of employees who actually received restitution and the total amount of restitution they received would provide a more comprehensive and meaningful accounting of DCWP’s success in securing restitution for employees. DCWP officials stated that the agency will consider supplementing its restitution indicators in the MMR.

Unless and until DCWP submits sufficiently meaningful restitution data for the MMR, the public cannot adequately discern the extent to which the agency’s efforts have actually led to employees receiving restitution payments. Furthermore, as a result of DCWP’s not having sufficient controls over the process of collecting and maintaining the documentation necessary to fully support the data regarding restitution and fines it submits for the MMR, the agency cannot provide full assurance that the associated performance data reported in the MMR is accurate .

## Recommendations

1. DCWP should enhance its tracking abilities by developing a capacity to readily generate lists of restitution amounts ordered, paid, and past-due.

**DCWP Response:** DCWP agreed with this recommendation, stating that “DCWP is working to reconcile and combine discrete data sources that store information about different parts of the process to determine which reports on restitution can be readily obtained. For example, during the implementation and early enforcement of new laws, DCWP was unable to track these in the METS system and thus used other technology. DCWP is working to consolidate these different sources so that we can more effectively link disparate data sources to improve our reporting and data management.”

2. DCWP should, both in cases with consent orders and those with OATH decisions and orders, consistently take additional steps (such as sending dunning letters to employers and filing petitions with OATH) when there is evidence that fines have not been paid or that employees have not received the restitution payments to which they are entitled.
3. DCWP should consider all available legal remedies, including, but not limited to, referring matters to the City Law Department for legal action in the event employers default or delay in honoring their stipulated payment obligations. DCWP should further consider whether changes can be made to the language and form of its ESTA consent orders to provide for additional legal remedies, such as confessions of judgment, in appropriate cases.

**DCWP Response to Recommendations #2 and #3:** DWCP agreed with these recommendations, stating that “DCWP agrees that affirmative steps are necessary where an employer either fails to submit adequate proof of restitution payments or fails to make a restitution payment, and DCWP appreciates the

audit's concrete suggestions and ideas. Consumer cases with uncollected fines and fees are already referred to the Law Department and DCWP is assessing the range of other options and tools available, including how to most efficiently verify that payments have been satisfied, the targeted use of confessions of judgment to secure payments and late fees to promote compliance, letters and other communications to employers, third party claims administration, OATH filings, and more.

DCWP's collections team's practice has been to make calls to employers and OLPS also communicates with employers on a case-by-case basis (both for settlements and OATH decisions), but it has been working to refine and codify the process and roles for doing so while also making sure DCWP is requesting the best information for purposes of verifying payments. ... DCWP already has been devoting additional resources to the review of proof of payments."

4. DCWP should develop mechanisms to more effectively review employers' submissions of proofs of restitution payments to ensure that employers comply with their consent orders and employees receive the full restitution payments to which they are entitled.

**DCWP Response:** DCWP agreed with this recommendation, but stated that "[t]he audit is misleading where it concludes that employees did not receive owed restitution. That said, DCWP has been actively working to improve coordination between OLPS and the Finance Division on both recordkeeping and collection efforts and has increased the time and resources devoted to the review of proof submissions. The tracking of restitution payments currently is monitored in an agency-wide database distinct from the METS case management system. DCWP has been working to ensure that its protocols for monitoring restitution payments are clear for staff across divisions and efficiently address the needs and issues that can arise."

**Auditor Comment:** We commend DCWP for recognizing the need to improve coordination between OLPS and the Finance Division on both recordkeeping and collection efforts and for devoting increased attention to the review of proof submissions. However, DCWP offers no support for its statement that "[t]he audit is misleading where it concludes that employees did not receive owed restitution." As we clearly stated in the draft report to which the agency is responding, and we reaffirm here, *DCWP has provided no evidence* to show that a significant number (38 percent) of the employees in our audit sample received the required restitution payments—totaling \$202,972—to which they were entitled.

5. DCWP should enforce the stipulations in its consent orders that impose late fees on those employers who fail to pay the agreed-upon restitution and fines in a timely manner.

**DCWP Response:** DCWP did not address this recommendation.

**Auditor Comment:** We are concerned that DCWP, by not responding to this recommendation, has not committed itself to enforcing the late fee provisions that it includes in its consent orders. As detailed in this report, DCWP did not charge 5 employers in our sample a total of \$20,700 in late fees that it could have imposed due to the employers' nonpayment, partial payment, or late payment of

consent-ordered restitution or fines. Non-enforcement of late fee provisions nullifies their value as an incentive to induce employers to pay in a timely manner the fines and restitution they acknowledge owing the City and their employees, respectively. Therefore, we continue to encourage DCWP to implement this recommendation.

6. DCWP should consider revising its procedures to ensure that late fees are consistently included in consent orders and that the late fees are commensurate with the size of the restitution or fine amounts.

**DCWP Response:** DCWP partially agreed with this recommendation, stating that “[t]he purpose of the small late fee provisions of consent orders has been to provide an incentive for timely payment, but DCWP does not believe that an across-the-board practice of imposing small late fees will be an effective compliance tool. DCWP agrees, however, that, in certain cases, like DCWP’s workplace-wide cases in which large numbers of employees receive restitution, it could consider targeted use of larger late fee provisions — more akin to liquidated damages. DCWP will review its late fee practices to better tailor them for cases where they may be most impactful.”

**Auditor Comment:** While DCWP indicated that it does not believe that an across-the-board practice of imposing late fees is an effective compliance tool, we continue to believe that the imposition of late fees should be a standard provision of each consent order to encourage timely compliance by the employers. Nevertheless, we commend DCWP for recognizing the need to review its late fee practices and for its willingness to consider the targeted use of larger late fee provisions.

7. DCWP should consider supplementing the restitution performance indicators in the MMR with new performance indicators that show the number of employees who actually received restitution and the total amount of restitution they received.

**DCWP Response:** DCWP disagreed with this recommendation, stating that “DCWP takes the effectiveness of restitution awards very seriously but does not agree that a new MMR indicator is needed to reflect the audit’s recordkeeping concerns regarding restitution. DCWP believes that enhanced recordkeeping, review, and follow-up to delinquent employers are better tools to ensure the integrity of proof submitted by employers and that restitution ultimately reaches the workers to whom it is owed. DCWP will continue to put resources into improving its ability to vet and verify payments made to workers while also increasing the use of other proactive collection-related tools - confessions of judgment, liquidated damages provisions, shorter payment timelines, third party administrators - and ensuring it has proper recourse when employers fail to meet their payment obligations to workers. Similarly, DCWP does not believe that a new MMR performance indicator is needed or would be effective. Before the audit was initiated, DCWP had already taken steps to clarify the language used in the MMR indicator. And while DCWP does not agree that the MMR information provided has been ‘misleading’ to date, DCWP nevertheless will consider revising the description of the existing performance indicator to ensure clarity of meaning for the public.”



**Auditor Comment:** DCWP’s response reflects a fundamental misunderstanding of this issue. Our recommendation is that DCWP consider supplementing its restitution performance indicators to include a more comprehensive and meaningful accounting of DCWP’s success in *securing* restitution—as opposed to merely ordering it—for the employees whose rights it seeks to protect. In its response, DCWP provides no counterargument or specific reason that its performance should *not* be measured that way. Furthermore, as we explain in the body of this report, the agency’s Fiscal Year 2017 MMR performance indicators—“employees *receiving* restitution” and “total amount of employee restitution”—were misleading because the agency was actually only reporting the number of employees “to be paid” and the total amount they were “to be paid,” rather than the number “receiving” such payments and the amounts they received. In its response, DCWP refers to other steps it is taking to improve its pursuit of required restitution payments. These steps are entirely consistent with our other recommendations in this regard and can be done in conjunction with the use of the supplemental performance indicators we recommend. Therefore, we urge DCWP to reconsider its response and implement this recommendation.

8. DCWP should ensure that sufficient quality assurance reviews of its supporting data on restitution and fines are conducted prior to the submission of its performance indicator results to the Mayor’s Office of Operations for inclusion in the MMR.
9. DCWP should collect and maintain sufficient supporting data and documentation to fully support the performance indicator results regarding restitution and fines that it submits for inclusion in the MMR.

**DCWP Response to Recommendations #8, #9, #19, and #20:** DCWP agreed with these recommendations, stating that “[t]he ... recommendations all relate to ensuring reliable data. DCWP has recently restructured its OLPS research team to better support its reporting efforts. OLPS will also begin pulling monthly reports on key metrics which will assist in ongoing quality control and OLPS will establish protocols for quality-control measures. In addition, although we could not void certain record numbers that were created in error, the METS system has been updated so that OLPS can now reuse those record numbers for subsequent matters.”

## Weaknesses in DCWP’s Intake, Investigative, and Litigation Processes

### Timeliness Concerns

DCWP was untimely in performing one or more key steps within the intake and investigative processes for most of the cases in our sample.

*Comptroller’s Directive #1*, §5.9, Accurate and Timely Recording, states that “[t]ransactions should be promptly recorded to maintain their relevance and value to management in controlling operations and decision making. This applies to the entire process or life cycle of a transaction or event from the initiation and authorization through its final classification in the agency’s records.”

According to the *OLPS Paid Sick Leave Intake Procedures*, a complaint received by the intake staff should be recorded in CMD by the close of business on the date it is received.<sup>8</sup> According to the *OLPS Paid Sick Leave Investigation Manual*, the assigned investigator of a case determined to be under OLPS jurisdiction is required to contact the complainant, via a phone call within one week (seven calendar days) of receiving the case assignment, to discuss the circumstances of the complaint and to provide a brief summary of how the investigation will proceed.

DCWP officials informed us via email that there are also certain informal time frames governing the intake and investigative processes:

- Valid complaints (those within OLPS jurisdiction) are to be docketed “generally within three business days” of their receipt.
- Investigations of complaints should be completed within 6 months (180 calendar days) of their docketing date.

Of the 31 cases in our sample, 29 were associated with complaints submitted by or on behalf of employees.<sup>9</sup> The records for 28 (97 percent) of the 29 cases showed that DCWP was untimely in performing one or more key steps within the intake and investigative processes. The following are the key timeliness concerns we identified:

#### *Intake Process*

For 9 (31 percent) of the 29 cases that were based on complaints, DCWP did not record the complaints in CMD by the close of business on the date received as required. These 9 complaints were recorded late by periods ranging from 2 to 137 days and were recorded, on average, 22 days late.<sup>10</sup>

In one case, the complaint was received via email on September 16, 2016, but was not recorded in CMD until 137 calendar days later, on January 31, 2017, at which time DCWP docketed the case; however, on the same day the case was docketed, DCWP also determined that the case was not within its jurisdiction and referred the matter to another City agency (130 days after the required 7-day referral time frame).

For 20 (69 percent) of the 29 complaint-based cases, DCWP did not docket the complaints in CMD within its informal standard of 3 business days following the receipt of the complaint. These 20 complaints were docketed beyond this benchmark by periods ranging from 1 to 87 business days and were docketed, on average, 9 business days beyond the 3-day goal.

On a related matter, 4 of the 29 complaint-based cases involved walk-in complaints for which none of the complaint documentation was date-stamped upon receipt. DCWP’s formal intake procedures only require that mailed-in complaints be date stamped upon receipt. In the absence of a date-stamping requirement for walk-in ESTA complaints, DCWP does not have assurance

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<sup>8</sup> According to OLPS procedures, recorded complaints determined to not be under OLPS jurisdiction should be referred to the appropriate government agency or organization within seven calendar days of its receipt.

<sup>9</sup> Two of the 31 cases were not associated with complaints. Rather, these cases were associated with compliance reviews initiated by DCWP. These reviews are conducted when DCWP receives information that an employer has not corrected the original violation(s) identified in a consent order or has breached one or more of the terms of a consent order.

<sup>10</sup> To account for a complaint received after the close of business, we considered a complaint to be recorded in CMD late if it was recorded two or more days after the date of receipt. Four additional cases were recorded in CMD only one day late.

that the recorded intake dates, by which it measures its timeliness in processing the complaints, are fully reliable.

### *Investigative Process*

For 22 of the 29 cases, we were able to assess whether OLPS' investigators called complainants within 7 days of being assigned to a case, as required.<sup>11</sup> For 9 (41 percent) of these 22 cases, DCWP contacted the complainants late by periods ranging from 5 to 40 days. On average, these complainants were contacted 12 days late.<sup>12</sup>

Of the 29 complaints in our sample, OLPS determined that 25 were within its jurisdiction and completed its investigations by the date that we obtained the case files.<sup>13</sup> For 11 (44 percent) of those 25 closed cases, DCWP did not complete the investigations within its 180-day target.<sup>14</sup> The investigations were completed, on average, more than 104 days beyond the target, ranging from 9 days to 295 days (almost 10 months). Two of these 11 untimely cases were closed due to DCWP's inability to reach the complainants.

Two complaints in our sample were still open and already beyond the 180-day informal standard as of the date we obtained the case files (May 24, 2018). These complaints were beyond the target by almost 6 months (178 days) in one case and by over 10 months (312 days) in the other.

DCWP officials stated that they attempt to meet the 180-day informal time frame; however, due to the "scope and/or complexity of a case, a resolution may not be reached" in that time frame. We do not dispute that the investigations of some cases may take longer than those of others due to their complexity. However, investigations should be properly tracked in an effort to ensure that complainants' issues are resolved as promptly as possible.

DCWP's controls over its complaint intake and investigative processes have been insufficient to ensure that the complaints it received reached an appropriate resolution in a timely manner. For example, DCWP has not formalized in its written procedures all of the key time frames governing these processes.

As a result of these weaknesses, complainants' concerns might not be addressed as promptly as possible, and the risk that evidence and witnesses (including the complainants themselves) might become unavailable is increased. In addition, DCWP cannot ensure that employers are promptly notified to take corrective action within the workplaces at which ESTA violations have occurred, increasing the risk of the continuance of unlawful employee workplace practices.

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<sup>11</sup> Of the remaining seven cases, five had insufficient information in the case files for us to make such a determination; one was a case that was docketed and then referred to another City agency on the same day; and one was a new case that was initiated based on an existing case in our sample. This new case involved the same complaint, complainant, and investigator but related to a second employer.

<sup>12</sup> We did not cite those cases for which complainants were contacted less than five days late.

<sup>13</sup> Of the four remaining cases, one was docketed by DCWP but was subsequently determined to not be within its jurisdiction and was referred to another City agency; one began as a complaint-based investigation, but subsequently continued on as an indirectly related investigation conducted on DCWP's own initiative (without the initial complaint-based investigation having been closed); and two were still open and in the investigative stage as of the date we obtained the case files.

<sup>14</sup> The investigation completion dates used in our calculations were the dates that consent orders were executed (13 cases); the dates that cases were closed in CMD (8 cases); and the dates that the cases were assigned for litigation (4 cases), as indicated by the dates of the petitions filed with OATH requesting hearings on the cases. One of the 13 cases for which consent orders were executed resulted in 4 consent orders. For that case, we used the execution date of the first consent order for our timeliness test.

## Key Justifications Not Documented

DCWP did not consistently document the reasons for significant time gaps in the investigative process and, in some instances, did not document the reasons for key decisions on a case.

*Comptroller's Directive #1*, §5.9, Accurate and Timely Recording, states that “[t]ransactions should be promptly recorded to maintain their relevance and value to management in controlling operations and decision making. This applies to the entire process or life cycle of a transaction or event from the initiation and authorization through its final classification in the agency’s records.” §5.11, Appropriate Documentation of Transactions and Internal Controls, provides additional guidance by stating that “[a]ll transactions and significant events need to be clearly documented and the documentation readily available for use or examination. Internal controls should be documented in management administrative policies or operating manuals.”

According to the *OLPS Paid Sick Leave Investigation Manual*, an investigators’ case-related activities should be recorded within the “Activities” tab of CMD (a summary of all events recorded should appear in another CMD tab known as the “Activity Summary”). An entry should include sufficient detail so that another OLPS staff member reviewing the case history could understand what had occurred. Such information includes (1) the date of an event; (2) the parties involved; and (3) a description of the event (e.g., mailing a request for documents to an employer or submitting an investigation report).

For the 28 complaint-based cases in our sample that were not referred to another agency (1 was referred), DCWP did not include justifications in the Activity Summary for 7 (25 percent) regarding the significant time gaps that occurred during the investigative process, ranging from 1 to 9 months.

In one such case, the Activity Summary indicated that an initial phone call between an investigator and an employer had occurred on March 13, 2017. However, the next activity recorded for this case occurred three months later, on June 12, 2017, with no written justification in the Activity Summary to account for the three-month gap. In another case, the Activity Summary indicated that OATH had rendered a decision on February 7, 2017, imposing a civil penalty on an employer for its failure to respond to various DCWP document requests.<sup>15</sup> However, no further activity was recorded for this case until six months later, on August 21, 2017, when DCWP had a discussion with the employer about providing the outstanding documentation. The Activity Summary contained no written justification to account for the six-month gap. Table I below summarizes the seven cases for which DCWP did not provide written justifications in the Activity Summary for the significant time gaps in the investigative process.

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<sup>15</sup> OATH rendered the decision as a result of a petition filed by DCWP concerning the refusal of the respondent to produce requested records and information.



**Table I**

Summary of the Seven Cases for Which There Were Significant Gaps in the Investigative Process

| Case | Date of Activity | Description of Activity   | Date of Next Activity or, if No Further Activity, Date Auditors Obtained Records from DCWP | Description of Activity  | Time Gap Between Activities (Rounded to the Nearest Month) |
|------|------------------|---|--|--|--|
| 1    | 04/20/2017       | Call – employer counteroffer  | 05/25/2017   | Call – employee privacy concern  | One month  |
|      | 05/25/2017       | Call – employee privacy concern   | 08/04/2017   | Consent order executed   | Two months   |
| 2    | 08/16/2017       | Mail – final request to employer for documentation  | 10/13/2017   | Case reassigned to another investigator (first time)   | Two months   |
|      | 10/13/2017       | Case reassigned to another investigator (first time)  | 12/14/2017   | Case reassigned to another investigator (second time); email – inquiry with complainant about pursuing case in court | Two months   |
| 3    | 03/24/2017       | Email – employer submission of documents  | 05/24/2017   | Case reassigned to another investigator  | Two months   |
| 4    | 03/13/2017       | Call – initial discussion with employer   | 06/12/2017   | Complainant submitted evidence   | Three months   |
| 5    | 08/31/2017       | Call – discussion with employer about submission of policies  | 02/08/2018   | Call – inquiry with employer about payroll records submitted   | Five months  |
|      | 02/08/2018       | Call – inquiry with employer about payroll records submitted  | 05/24/2018   | No further activity indicated  | Three months   |
| 6    | 02/7/2017        | OATH decision – imposition of civil penalty on employer for failure to respond to document requests | 08/21/2017   | Call – discussion with employer about providing outstanding documents for which an OATH-ordered penalty was imposed  | Six months   |
| 7    | 08/18/2017       | Call – employer inquiry regarding DCWP letter   | 05/24/2018   | No further activity indicated  | Nine months  |

In addition to the above-mentioned unexplained time lapses between investigative activities, the Activity Summaries for four complaint-based cases contained no written justifications about key decisions made during the investigations. For one case, the reason for expanding the investigation of a complaint regarding one company (Company A) to include two additional companies (Company B and Company C) was not fully documented. While DCWP docketed a new case for Company B, it was not evident from the Activity Summary what investigative actions and decisions DCWP took and made concerning Company C. DCWP subsequently informed us that because Company C was owned and operated by Company B, DCWP decided not to continue a separate investigation of Company C. For another case, the complainant informed the investigator that the complaint had been resolved, yet DCWP opened an investigation of this employer several months later on its own initiative with no explanation in the Activity Summary (and without closing the complainant-initiated case and creating a separate file with a new docket number for the DCWP-initiated investigation).

For the two compliance-review cases in our sample, we found that DCWP did not maintain sufficient evidence for either case to support the initiation or the outcomes of the compliance reviews.

DCWP does not adequately monitor the recording of investigative activities in the Activity Summary to ensure that explanations for all significant time gaps and the basis for all key investigative decisions are documented. For compliance reviews, DCWP lacks written procedures concerning the key events that should be recorded in the Activity Summary and the key documents that should be maintained in the case files to support the initiation and outcomes of such reviews.

Without documentation of the reasons for delays in a case or, in some instances, the justifications for key decisions made on a case, employees subsequently assigned to such cases, or managers or supervisors responsible for overseeing the handling of them, would be hindered in readily determining the history and status of the cases.

## Documentation Concerns

The case files for the 28 complainant-initiated cases in our sample for which DCWP pursued investigations were missing one or more key documents needed to show that the intake, investigative, and litigation processes were conducted properly.

*Comptroller's Directive #1*, §5.11, Appropriate Documentation of Transactions and Internal Controls, provides additional guidance by stating that “[a]ll transactions and significant events need to be clearly documented and the documentation readily available for use or examination. Internal controls should be documented in management administrative policies or operating manuals.”

The *OLPS Paid Sick Leave Investigation Manual* provides the following guidance regarding the maintenance of documentation:

- Intake or investigative staff are required to conduct research on every employer identified in an ESTA complaint. Furthermore, according to the *OLPS Investigation Employer Research Guide*, research activities pertaining to a case are to be recorded in the CMD Activity Summary and the research results are to be saved in the electronic case file.
- Investigators are required to prepare an investigation report for all docketed complaints. The preparation of such a report is to be noted in the Activity Summary, and the report itself should be saved within the electronic case file.
- If an employer does not respond to a documentation request (an NOI) within 30 calendar days, the investigator is required to send a second (and final) NOI to the employer.

According to an OLPS official, investigators are required to upload all relevant case documentation, including key emails, to an electronic case file. Key emails include all DCWP communications with employers and OATH. Maintaining such documentation allows for any individual reviewing a case file to readily determine the history, supervision, and status of the case.

The following are the key documentation concerns we identified with the 28 cases:

- For 7 (25 percent) of the 28 cases, neither the Activity Summary nor the electronic case files contained evidence that employer research had been performed as required.

- For 6 (24 percent) of the 25 cases in which the investigations had been completed by the date we obtained the case files, an investigation report had not been prepared as required.<sup>16</sup>
- DCWP did not consistently maintain emails in its electronic case files to document key intake, investigative, and litigation activities. The files for all 28 cases lacked evidence of one or more key emails (e.g., emails to employers summarizing the results of the investigations and identifying the violations and associated monetary charges).
- Although DCWP officials informed us via email that checklists should be used to track the receipt of the documentation that it requests in its NOIs to employers, it did not consistently use them. For 22 (88 percent) of the 25 cases, there was no evidence in the case files that checklists had been used to track the receipt of these documents.<sup>17</sup> A consistent use of checklists would help DCWP track the extent to which employers are providing the documents requested in the NOIs.

Of the 25 cases in which it requested documentation from the employers, DCWP received the requested documentation in 21 cases. In 16 of those 21 cases, the employers provided the documentation late—beyond the 30 days stipulated in the NOIs—by an average of 73 days, ranging from 6 to 225 days (more than 7 months).<sup>18</sup> For the remaining four cases, DCWP never received any of the requested documentation.

DCWP does not ensure that it provides effective supervisory oversight of the compilation and maintenance of key documentation in the electronic case files to demonstrate that established intake, investigative, and litigation procedures are followed. In addition, DCWP does not specify in its written procedures the documents that should be maintained in the case files to show that all key intake, investigative, and litigation steps have been taken. Additionally, a senior OLPS official acknowledged that DCWP’s staff did not consistently use checklists because DCWP had not formally directed them to do so.

As a result, of the above-mentioned shortcomings, DCWP cannot ensure that an employee subsequently assigned to a case, or a manager or supervisor responsible for overseeing the handling of a case, would be able to readily determine the activities in a case, whether key steps had been performed by staff, and the status of the case. In addition, DCWP cannot ensure that case resolutions are adequately supported.

## **Data Reliability Concerns**

DCWP data within CMD, as well as data within various datasets the agency provided to us, were not consistently reliable. In addition, DCWP’s Fiscal Year 2017 MMR data on the number of paid sick leave complaints received and closed was inaccurate.

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<sup>16</sup> As noted above in the Scope and Methodology Statement, DCWP withheld investigation reports based on §93.c of the New York City Charter. To determine whether there was evidence of such reports in each of the 25 case files, we reviewed screenshots displaying the names of all associated folders and documents. In addition, we reviewed privilege logs prepared by DCWP, which listed all of the documents withheld by the agency pursuant to §93.c.

<sup>17</sup> DCWP also withheld Document Request Checklists based on §93.c of the New York City Charter. To determine whether there was evidence of such checklists in each of the case files, we reviewed screenshots displaying the names of all associated folders and documents, and the privilege logs, which listed all of the documents withheld by DCWP pursuant to §93.c.

<sup>18</sup> We did not cite those cases for which the requested documentation was received less than five days late.

*Comptroller's Directive #1, §5.4, Control Over Computer Information Processing*, states that “management approved controls are used to ensure that software performs the functions that it is intended to, and that processed data is accurate and reliable.”

A DCWP dataset of 378 Fiscal Year 2017 complaints listed 22 complaints for which the docketing status was not indicated. DCWP stated that a CMD error initially prevented the user from entering the docketing status for these 22 complaints.

These 22 entries were not voided. For 14 of the 22 erroneous entries, DCWP created new records that included the docketing status. Thus, these records appeared twice in CMD (with and without a docketing status). For the remaining eight erroneous entries, no new records were created to maintain information on the results. The existence of these erroneous records in CMD illustrates the need for a feature in DCWP's new METS system whereby intake records can be voided. This would prevent entries of an erroneous nature from improperly skewing DCWP's data (reported internally and to the public) regarding the number of complaints that it receives. The dataset of 378 complaints also improperly included 13 additional entries of existing complaints.<sup>19</sup> DCWP stated that these additional entries were also likely due to a CMD error.

The dataset of 378 complaints was part of a larger dataset of 2,478 Fiscal Year 2017 inquiries, which included these 378 complaints and an additional 2,100 requests for information on ESTA. When we sorted the dataset of 2,478 inquiries by intake number, we identified 52 (2 percent) missing intake numbers within the 5-digit series generally used in the dataset.<sup>20</sup> In addition, two inquiries were associated with an entirely different five-digit series. Gaps in intake numbers could involve the inappropriate deletion of complaints. DCWP was unable to provide satisfactory explanations for these 52 missing intake numbers or for the 2 complaints with intake numbers from an entirely different 5-digit series.

According to a dataset provided by DCWP, the agency reportedly received a total of 310 complaints in Fiscal Year 2017 that it determined were within its jurisdiction and were therefore docketed as valid complaints. However, DCWP reported in the MMR that it received 315 valid complaints during that year—a difference of 5. DCWP told us that the 315 complaints reported in the MMR included 16 invalid complaints—which would mean the number of valid complaints was 299. The inclusion of invalid complaints in a compilation of reportedly valid complaints in the MMR, if true, would in itself be inappropriate and still does not explain the difference between the list of complaints DCWP provided to us and the data it submitted for the MMR.

In addition, based on another dataset DCWP provided to us, the agency closed a total of 251 complaints in Fiscal Year 2017. However, DCWP reported in the MMR that it closed 246 paid sick leave complaints in that year—a difference of 5. DCWP officials attributed this discrepancy to data entry errors.

Although the specific data inaccuracies discussed above are of modest proportions when considered individually, the concern about the reliability of the data is increased when they are

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<sup>19</sup> The dataset of 378 complaints includes those identified in the dataset of 310 docketed complaints, those in the dataset of 16 invalid (undocketed) complaints, the 22 complaints for which the docketing status was not indicated, and the 13 additional entries of existing complaints, plus 9 withdrawn complaints, 3 complaints that were not docketed until Fiscal Year 2018, 2 “complaints” that were proactive investigations initiated by DCWP (and were unrelated to previous cases), 2 additional undocketed complaints that DCWP identified after it provided the dataset of 16 invalid complaints, and 1 docketed complaint that was not listed on the dataset of docketed complaints.

<sup>20</sup> An intake number actually consists of 13 digits. The first eight digits correspond to the month, day, and year that an intake event was recorded. The remaining five digits should have been automatically generated by CMD in sequential order.



considered collectively. Reliable data is necessary to accurately inform the public about the agency's activities and to assist the agency in making sound operational and financial decisions.

## Recommendations

10. DCWP should revise its written procedures to ensure that they include all of the key time frames governing the intake and investigative processes, including time frames to docket a complaint and to complete an investigation.

**DCWP Response to Recommendations #10, #14, and #16:** DCWP agreed with these recommendations, stating that “DCWP’s intake and investigation manuals and protocols are living documents that are always subject to review and improvement and have been regularly revised including for purposes of enforcing new laws ... and integrating guidance and procedures for the METS system (several METS-related and other timelines are already included in the manual). DCWP will consider the audit’s recommendations alongside other potential improvements and agrees with the principle that time frames, recordkeeping, and processes be clearly communicated and set forth. DCWP is also reviewing other written protocols and manuals to assess the adequacy of its guidance for staff on both METS and other recordkeeping practices.”

11. DCWP should develop mechanisms to more effectively track and manage its handling of complaints to ensure that key intake and investigative steps are taken in a timely manner based on established time frames.

12. DCWP should date stamp its receipt of walk-in complaint documentation.

**DCWP Response to Recommendations #11 and #12:** DCWP agreed with these recommendations, stating that “DCWP continually makes improvements to its case-handling processes and will consider these recommendations. DCWP has already integrated METS-specific and recordkeeping guidance in its written manuals for intake and investigative staff and will further do so in any other written manuals or protocols developed for case-handling purposes. DCWP provides regular training for intake, investigative, and litigation staff on substantive issues relating to DCWP laws and on office protocols relating to case-handling processes. DCWP will further ensure that supervisors regularly conduct quality control checks to ensure proper recordkeeping and case-handling by staff. DCWP is also working on a data consolidation and reporting function that will link METS to DCWP’s Cognos reporting system to have the on-demand ability to run reports on case-handling timelines across many different stages of the enforcement process, including complaint docketing, investigation, and litigation timelines. DCWP will work across divisions to build and implement this capability as soon as possible so that it will have increased ability to monitor the timeliness of key case processes. Specifically, with respect to the receipt of walk-in documents, DCWP will assess its current practices and ensure that a consistent and adequate system is in place to receive and maintain such information.”

13. DCWP should enhance its monitoring of the recording of investigative activities to ensure that significant time gaps and key investigative decisions are adequately identified and explained.

**DCWP Response to Recommendations #13, #15, #17, and #18:** DCWP agreed with these recommendations, stating that “DCWP agrees that accurate and consistent maintenance of case files are integral to its work. There is a relatively new supervisory structure on the investigations team which will support efforts to perform quality control. Additionally, DCWP is creating new reporting functions that will eventually allow [its] supervisors [with] additional insight into the case loads of their direct reports. DCWP will also ensure that quality assurance reviews continue to be integrated into the roles of supervisors.”

14. DCWP should specify in its written procedures the documents that need to be maintained in the case files to demonstrate that all key intake, investigative, and litigation steps have been taken.

**DCWP Response:** DCWP agreed with this recommendation (see response to recommendation #10).

15. DCWP should enhance its supervisory oversight to ensure that all key documentation is maintained in its electronic case files.

**DCWP Response:** DCWP agreed with this recommendation (see response to recommendation #13).

16. DCWP should revise its written procedures to ensure that they include guidelines regarding the compliance review process. These guidelines should include the need for staff to record all key events in the Activity Summary, the time frames for the completion of key steps, the key documents to be maintained, and any necessary approvals.

**DCWP Response:** DCWP agreed with this recommendation (see response to recommendation #10)

17. DCWP should enhance its monitoring efforts over the recording of key activities in the Activity Summary and the maintenance of key documentation during compliance reviews to ensure that all key steps performed are adequately supported and that the initiation and the outcomes of the reviews are clearly justified.

**DCWP Response:** DCWP agreed with this recommendation (see response to recommendation #13).

18. DCWP should more closely monitor the accuracy and completeness of information contained in its systems.

**DCWP Response:** DCWP agreed with this recommendation (see response to recommendation #13).

19. DCWP should ensure that sufficient data quality reviews are conducted on an ongoing basis throughout the fiscal year to ensure the availability of reliable data.

**DCWP Response:** DCWP agreed with this recommendation (see response to recommendation #8).

20. DCWP should consider the inclusion of a feature in METS whereby intake records of an erroneous nature can be voided, provided there is appropriate approval.

**DCWP Response:** DCWP agreed with this recommendation (see response to recommendation #8).

## DCWP Lacks a Process for Obtaining Complainant Feedback

The *Comptroller's Directive #1* Financial Integrity Statement Checklist is designed for management to assess the adequacy of its internal controls. As noted in that checklist, having a process for obtaining periodic customer feedback is considered to be an important tool for maintaining an agency's effectiveness and efficiency.

OLPS officials stated that the office strives to provide an environment in which potential complainants—employees who believe they have been unlawfully denied sick leave benefits or have faced retaliation—feel comfortable in submitting complaints and in supplying sufficient detail to enable investigations to proceed. However, DCWP lacks a process for obtaining periodic feedback from the individuals who submit such complaints concerning its handling of them. A senior OLPS official stated that DCWP has never conducted a survey of complainants to gauge their satisfaction with the handling of their paid sick leave complaints.

Moreover, an OLPS intake official stated that when complainants express dissatisfaction (via an email or phone call) regarding the resolution of their cases, they are generally directed by the intake unit to the investigator or attorney who handled the case. Nevertheless, the intake official informed us that OLPS does not record information on such communications.

For an agency such as DCWP that provides services to the public, gathering feedback from complainants can help identify their expectations and satisfaction levels, as well as shortcomings in the scope and quality of the services it provides.

### Recommendation

21. DCWP should periodically survey a sample of employees who have made paid sick leave complaints and consider the ways in which the concerns expressed by the complainants could be addressed.

**DCWP Response:** DCWP agreed with this recommendation, stating that “DCWP will consider adopting a regular protocol for surveying complainants as the information it currently has is largely anecdotal. DCWP does on occasion receive feedback from complainants, complainant representatives, and employers who contact the office on their own accord to express both positive and negative impressions of the enforcement process. DCWP provides timely and tailored responses to those who offer feedback.”

## DETAILED SCOPE AND METHODOLOGY

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the City Charter.

The primary scope of this audit was ESTA cases opened during Fiscal Year 2017. We reviewed the enforcement status of these cases up through May 24, 2018, and the collection of restitution, fines, and late fees on these cases up through October 31, 2018.

As noted above, the exception clause in §93(c) of the New York City Charter states that the Comptroller shall be entitled to obtain access to agency records required by law to be kept confidential, “other than records which are protected by the privileges for attorney-client communications, attorney work products, or material prepared for litigation.” DCWP exercised its authority under the City Charter to withhold such documents (such as investigation reports) from the auditors. As a result, we were unable to fully determine whether DCWP consistently followed its investigative and litigation procedures with regard to its enforcement of ESTA.

As also noted above, because certain aspects of DCWP’s ESTA enforcement efforts could be compromised by their public disclosure, DCWP and our office agreed that these aspects and our associated recommendation would not be included in this report, but would rather be addressed through private communications between our two organizations.

To obtain an understanding of DCWP’s regulations and procedures relating to ESTA enforcement and to the functions of OLPS, we reviewed the following:

- Title 20, Chapter 8, of the New York City Administrative Code, and Title 6, Chapter 7, of the Rules of the City of New York, which set forth employee eligibility requirements pertaining to the accrual and use of sick leave, employers’ legal obligations regarding such leave, and DCWP’s role in enforcing ESTA and imposing fines and restitution charges for employer violations of the law;
- OLPS’ *Paid Sick Leave Intake Procedures*, which summarizes the intake process for ESTA complaints and identifies the information to be recorded in CMD and maintained in electronic case files;
- OLPS’ *Paid Sick Leave Investigation Employer Research Guide*, which summarizes the process for conducting employer research. It identifies the various databases to be reviewed and the documentation requirements for the searches;
- OLPS’ *Paid Sick Leave Investigation Manual*, which summarizes the investigative process for docketed ESTA complaints, including: assigning a case to an investigator, contacting the complainant and employer, conducting the investigation, preparing the investigation report, computing fines and restitution, executing a consent order, and recording information in CMD; and

- OLPS' *OATH Filing Narrative*, which summarizes the litigation process with regard to filing petitions with OATH.

In addition, we reviewed informational and instructional materials available to the general public regarding DCWP's enforcement of ESTA, including the Fiscal Year 2017 Mayor's Management Report and the associated Indicator Definitions. We also reviewed various documents obtained from the DCWP website, including the documents entitled: *Paid Sick Leave: Frequently Asked Questions*; *Rules for Sick Leave Policies*; *Paid Sick Leave: What Employees Need to Know*; *Paid Sick Leave: What Employers Need to Know*; a *Sick Leave Timekeeping Tool* tracking spreadsheet for employers; and an *NYC's Paid Sick Leave Law PowerPoint* training presentation. Additionally, we reviewed the *Intake Form – Sick Leave Complaint* available on the DCWP website for employees to use when filing a complaint via email, regular mail, or walk-in.

To familiarize ourselves with the key documentation sent to employees and employers during the investigative process, we reviewed examples of the following documents: Complaint Acknowledgement letter, which confirms receipt of an employee complaint and indicates the associated docket number; an NOI, which lists the documents requested from an employer; and an Affirmation Granting Authority to Act form, which is to be completed and signed by an employer that is represented by an attorney.

We also used as criteria *Comptroller's Directive #1: Principles of Internal Control*, with which DCWP is required to comply. In addition, we reviewed the responses to the Calendar Year 2017 Directive #1 Checklist that DCWP submitted to the Comptroller in accordance with *Directive #1, §6, Agency Financial Integrity Statement*. These and other cited materials (guides, procedures, manuals, etc.) noted herein were used as audit criteria, where applicable.

To familiarize ourselves with CMD and its various features and functions related to the handling of ESTA complaints, we observed a demonstration of the system by several OLPS officials and reviewed the related *Paid Sick Leave System Overview* manual. This system was in place during part of our audit. However, as of April 2, 2018, DCWP replaced CMD with METS. To familiarize ourselves with the features of the new system and to determine whether any concerns we identified with CMD had been addressed by METS, we observed a demonstration of METS by several OLPS officials and reviewed the related *User Guide for OLPS Master Electronic Tracking System*. We also observed a demonstration of DCWP's vendor-provided management reporting software known as Cognos.

To gain a general understanding of the responsibilities of OLPS officials and the controls in place in relation to the enforcement of ESTA complaints, we interviewed a (now former) Deputy Commissioner for Labor Policy and Standards, a (now former) Associate Commissioner for Labor Policy and Standards, the Deputy Director of Administration and Operations (of the intake unit), a (now former) Supervising Investigator (of the investigations unit), the Director of Investigations, and the Legal Director and Director of Advocacy and Enforcement (of the litigation units). In addition, we interviewed an intake coordinator, an investigator, and an attorney in OLPS. To better understand the intake process, we also observed two intake unit employees handle complaints submitted via phone calls and record the information in CMD.

To obtain an understanding of the involvement of DCWP's Finance and Collections Divisions regarding ESTA fines and restitution charges, we interviewed the Director of Payments and Receivables and the Deputy Director of Collections. We also reviewed the *Collections Policy and Procedural Manual* and the *Finance Division Accounts Receivable Manual*.



In addition, we reviewed the following 4 Fiscal Year 2017 ESTA datasets provided by DCWP to determine whether the data was accurate and complete: (1) requests-for-information dataset; (2) complaints dataset (complaints prior to docketing); (3) invalid complaints dataset; and (4) valid complaints dataset. The requests-for-information dataset contained 2,100 inquiries; the complaints dataset contained 378 complaints; the invalid complaints dataset contained 16 undocketed complaints; and the valid complaints dataset contained 310 docketed complaints. As part of our review, we determined whether:

- All ESTA complaints and requests for information received via email were recorded on the complaints and requests-for-information datasets. To do so, we randomly selected 12 days (1 day for each month) and obtained emails received for these days and compared these emails to the datasets. There were 5 complaint emails and 48 request-for-information emails;
- All valid and invalid ESTA complaints received via mail or walk-in were recorded on the valid and invalid complaints datasets. To do so, we reviewed the intake unit's files of all valid complaints (89) and invalid complaints (8) received via walk-in or mail during Fiscal Year 2017 and compared these documents to the datasets;;
- The complaints and requests-for-information datasets included all entries recorded in CMD. To do so, we randomly selected another set of 12 days (1 day for each month) and obtained the screenshots for all CMD entries related to complaints and requests for information received on those days and compared these screenshots to the datasets. There were 98 CMD entries—11 related to complaints and 87 related to requests for information; and
- The two intake datasets (i.e., the requests-for-information and the complaints-prior-to-docketing datasets) and the valid complaints dataset contained any gaps in the intake and docket numbers. We also determined whether the complaints-prior-to-docketing dataset had additional entries of existing complaints. In addition, we determined whether all complaints reflected a docketing status (i.e., whether they were valid or invalid).

As a result of these reviews, we determined that DCWP data was sufficiently reliable for audit testing purposes. We used the valid complaints dataset of 310 complaints to randomly select an initial sample of 20 complaints for detailed testing. Prior to the selection, we checked the dataset for questionable entries, including duplicates, blank fields, and clearly anomalous information. We then selected our sample based on the following 3 strata: (1) 5 of the 10 complaints resulting in the highest combined fines and restitution charges; (2) 5 of the 63 additional complaints for which there were fines and/or restitution charges; and (3) 10 of the 237 complaints for which there were no associated fines or restitution charges. Due to the fact that we had not randomly selected any cases that had been filed with OATH by June 30, 2017, or any cases that had been closed because of unreachable complainants, we randomly selected 5 of the 9 complaints for which cases had been filed with OATH as of June 30, 2017, and 5 of the 13 complaints for which DCWP closed the cases because of unreachable complainants. For 1 of our 30 sampled cases, the investigation began with 1 employer, but later expanded to include an additional employer. DCWP docketed a new case relating to this additional employer. Thus, our sample size increased from 30 to 31 cases.

For each of the 31 cases, we determined whether:

- Employers adhered to the consent orders regarding fines and restitution payments;

- DCWP tracked fine payments to the City and restitution payments to employees to ensure that they received the amounts to which they were entitled;
- DCWP imposed and collected stipulated late fees on employers who failed to make timely restitution or fine payments;
- Certain key steps within the intake, investigative, and litigation processes had been performed in a timely manner (e.g., recording and docketing a complaint, contacting a complainant, completing an investigation, and filing required documentation with OATH);
- DCWP took the appropriate steps to contact unreachable complainants before closing the cases;
- There was evidence of appropriate justifications, supervisory reviews, and supervisory approvals (e.g., in CMD's Activity Summary tab or in emails); and
- Electronic case files contained key documents needed to show that the intake, investigative, and litigation processes were conducted properly (e.g., evidence of employer research, emails documenting key activities, checklists tracking the receipt of NOI documentation, and investigation reports).

Finally, we reviewed the Fiscal Year 2017 Mayor's Management Report results for the following performance indicators: (1) total number of employees awarded restitution; (2) total amount of restitution charges imposed; (3) total amount of fines imposed; (4) total number of complaints received; and (5) total number of complaints closed. To determine whether the results DCWP submitted for the MMR were adequately supported, we compared them to the valid complaints dataset and to three other datasets that DCWP provided to us.

Although the results of our sampling tests were not projectable to their respective populations, these results, together with the results of our other audit procedures and tests, provide a reasonable basis for us to evaluate and to support our findings and conclusions about the adequacy of DCWP's controls to effectively enforce ESTA.



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June 25, 2019

Ms. Marjorie Landa  
Deputy Comptroller, Audit Bureau  
Municipal Building  
1 Centre Street, Room 1100 North  
New York, New York 10007

**RE: Audit Report on the New York City Department of Consumer and Worker Protection (ME18-070A)**

Dear Deputy Comptroller Landa,

The Department of Consumer and Worker Protection (“DCWP”) appreciates the opportunity to respond to the Comptroller’s audit findings contained in its June 11, 2019 draft report (“audit report”) regarding its audit of DCWP’s Earned Sick Time Act (“ESTA”) investigations that were opened during Fiscal Year 2017 (“audit”). DCWP’s responses to the Comptroller’s findings, methodology, and recommendations are detailed below.

**Background**

DCWP houses New York City’s Office of Labor Policy and Standards (“OLPS”). OLPS was established in 2016 and is charged with enforcing New York City’s workplace laws, developing innovative policies to raise job standards, and providing a central resource to help working New Yorkers assert their rights under local, state, and federal laws. In the course of its enforcement and education efforts, OLPS deeply engages with stakeholders, and receives and incorporates feedback from the diverse array of workers and employers in New York City. OLPS has expertise in the issues that workers face, including low-wage and immigrant workers, through its enforcement of the City’s laws concerning access to paid safe and sick leave, regular and predictable work hours, and freedom from retaliation for asserting their workplace rights.

The Comptroller’s audit examined a sample of cases that were opened during FY 2017—July 1, 2016 through June 30, 2017—just as OLPS was being established. At the time, an integrated case management database scaled to the volume of OLPS’ work did not exist. And, in addition to investigating ESTA complaints, OLPS was more than doubling in size from a smaller staff investigating ESTA complaints to an interdisciplinary office of over 40 staff.



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The breadth of DCWP's work expanded to include enforcement of new municipal labor laws, including but not limited to ESTA, alternative enforcement of new worker protections, original research, and policy development and legislative advocacy on labor standards that impact working New Yorkers. During FY 2017, OLPS' enforcement jurisdiction expanded beyond ESTA to include implementation of the Freelance isn't Free Act, which requires written contracts for freelance workers and sets up a process within OLPS to assist freelancers in getting paid for their work, and the Fair Workweek Law, which requires predictable schedules and provides a pathway to full-time work for retail and fast food workers. Once passed, OLPS promulgated rules, created all the public-facing materials for these new laws, and updated its enforcement processes. Additionally, in February of 2017, the Paid Care Division was established within OLPS. The Paid Care Division is a one-of-a-kind division within government focused on raising standards for nannies, housecleaners, home care aides, and other paid care workers.

Amidst OLPS' rapid expansion and integration into the broader agency, in FY 2017, OLPS received 310 complaints alleging violations of ESTA, closed 251 ESTA investigations, and obtained resolutions requiring \$2 million in combined fines and restitution for workers from investigations closed during that time. As of this month, OLPS has received 1,844 complaints alleging violations of ESTA, closed 1,711 ESTA investigations, and obtained more than \$10 million in combined fines and restitution for workers from investigations closed. 32,159 workers have been entitled to restitution because of OLPS' enforcement of ESTA. OLPS has been successful in achieving this widespread impact with relatively few complaints because it leverages its proactive investigation authority to expand an investigation beyond an individual complainant to an entire workplace. Where applicable, OLPS uses this approach to maximize recoveries for affected workers and to create the best incentives for compliance going forward.

As a natural part of its growth cycle from startup to established municipal labor office, OLPS has already begun to reflect on and make significant improvements to its process of investigating Earned Safe and Sick Time Act ("ESSTA") complaints. The Comptroller's audit report coincides with the work OLPS is already undertaking and DCWP appreciates the opportunity the report presents to consider additional feedback aimed at strengthening DCWP's enforcement of ESSTA.

**Responses to Recommendations**

The Comptroller made several recommendations to address perceived weaknesses in the investigations and recordkeeping processes. Because many of these recommendations relate to each other, DCWP has categorized them as follows: a) implement quality control measures, b) update written protocol manuals, and c) change processes.

**a) Recommendations relating to implementing quality control measures**

The following recommendations relate to the implementation of quality-control measures to ensure that key points in the investigations and compliance review process are documented and that data is



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reliable and supports the MMR performance indicator results. DCWP will implement these recommendations to the extent it has not already done so since the audit period.

**13. DCWP should enhance its monitoring of the recording of the investigative activities to ensure that significant time gaps and key investigative decisions are adequately identified and explained.**

**15. DCWP should enhance its supervisory oversight to ensure that all key documentation is maintained in its electronic case files.**

**17. DCWP should enhance its monitoring efforts over the recording of key activities in the Activity Summary and the maintenance of key documentation during compliance reviews to ensure that all key steps performed are adequately supported and that the initiation and the outcomes of the reviews are clearly justified.**

**18. DCWP should more closely monitor the accuracy and completeness of information contained in the system.**

The above recommendations all relate to ensuring that line staff and supervisors are properly and consistently documenting their activities. DCWP agrees that accurate and consistent maintenance of case files are integral to its work. There is a relatively new supervisory structure on the investigations team which will support efforts to perform quality control. Additionally, DCWP is creating new reporting functions that will eventually allow supervisors additional insight into the case loads of their direct reports. DCWP will also ensure that quality assurance reviews continue to be integrated into the roles of supervisors.

**1. DCWP should enhance its tracking abilities by developing a capacity to readily generate lists of restitution amounts ordered, paid, and overdue.**

DCWP is working to reconcile and combine discrete data sources that store information about different parts of the process to determine which reports on restitution can be readily obtained. For example, during the implementation and early enforcement of new laws, DCWP was unable to track these in the METS system and thus used other technology. DCWP is working to consolidate these different sources so that we can more effectively link disparate data sources to improve our reporting and data management.

**8. DCWP should ensure that sufficient quality assurance reviews of its supporting data on restitution and fines are conducted prior to the submission of its performance indicator results to the Mayor's Office of Operations for inclusion in the MMR.**





**9. DCWP should collect and maintain sufficient supporting data and documentation to fully support the performance indicator results regarding restitution and fines that it submits for inclusion in the MMR.**

**19. DCWP should ensure that sufficient quality reviews are conducted on an ongoing basis throughout the fiscal year to ensure the availability of reliable data.**

**20. DCWP should consider the inclusion of a feature in METS whereby intake records of an erroneous nature can be voided, provided there is appropriate approval.**

The above recommendations all relate to ensuring reliable data. DCWP has recently restructured its OLPS research team to better support its reporting efforts. OLPS will also begin pulling monthly reports on key metrics which will assist in ongoing quality control and OLPS will establish protocols for quality-control measures. In addition, although we could not void certain record numbers that were created in error, the METS system has been updated so that OLPS can now reuse those record numbers for subsequent matters.

**21. DCWP should periodically survey a sample of employees who have made paid sick leave complaints and consider ways in which the concerns expressed by the complainants could be addressed.**

DCWP will consider adopting a regular protocol for surveying complainants as the information it currently has is largely anecdotal. DCWP does on occasion receive feedback from complainants, complainant representatives, and employers who contact the office on their own accord to express both positive and negative impressions of the enforcement process. DCWP provides timely and tailored responses to those who offer feedback.

#### **b) Recommendations relating to DCWP Written Protocols and Manuals**

DCWP actively seeks to assess and revise its written manuals and procedures and has also put a high priority on ongoing staff training and quality control, especially given the transition to the METS case management system. DCWP appreciates the audit's feedback and suggestions in this area and will continue to update its written guidance while also providing training and support for staff.

**10. DCWP should revise its written procedures to ensure that they include all of the key time frames governing the intake and investigative processes, including time frames to docket a complaint and to complete an investigation.**

**14. DCWP should specify in its written procedures the documents that need to be maintained in the case files to demonstrate that all key intake, investigative, and litigation steps have been taken.**



Consumer  
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**16. DCWP should revise its written procedures to ensure that they include guidelines regarding the compliance review process. These guidelines should include the need for staff to record all key events in the Activity Summary, the time frames for the completion of key steps, the key documents to be maintained, and necessary approvals.**

DCWP's intake and investigation manuals and protocols are living documents that are always subject to review and improvement and have been regularly revised including for purposes of enforcing new laws (the Fair Workweek Laws, the paid safe leave amendments to ESSTA) and integrating guidance and procedures for the METS system (several METS-related and other timelines are already included in the manual). DCWP will consider the audit's recommendations alongside other potential improvements and agrees with the principle that time frames, recordkeeping, and processes be clearly communicated and set forth. DCWP is also reviewing other written protocols and manuals to assess the adequacy of its guidance for staff on both METS and other recordkeeping practices.

#### **c) Recommendations relating to DCWP Processes**

The audit makes several recommendations relating to DCWP enforcement processes, particularly the tracking of payments, the terms of consent orders, and case-handling procedures. DCWP already has been actively working to improve these and other processes and appreciates the audit's recommendations, though finds fault with several of the audit's conclusions.

**4. DCWP should develop mechanisms to more effectively review employers' submissions of proof of restitution payments to ensure that employers comply with their consent orders and employees receive the full restitution payments to which they are entitled.**

The audit is misleading where it concludes that employees did not receive owed restitution. That said, DCWP has been actively working to improve coordination between OLPS and the Finance Division on both recordkeeping and collection efforts and has increased the time and resources devoted to the review of proof submissions. The tracking of restitution payments currently is monitored in an agency-wide database distinct from the METS case management system. DCWP has been working to ensure that its protocols for monitoring restitution payments are clear for staff across divisions and efficiently address the needs and issues that can arise.

**7. DCWP should consider supplementing the restitution performance indicators in the MMR with new performance indicators that show the number of employees who actually received restitution and the total amount of restitution they received.**

DCWP takes the effectiveness of restitution awards very seriously but does not agree that a new MMR indicator is needed to reflect the audit's recordkeeping concerns regarding restitution. DCWP believes that enhanced recordkeeping, review, and follow-up to delinquent employers are better tools to ensure the integrity of proof submitted by employers and that restitution ultimately reaches the workers to whom it is owed. DCWP will continue to put resources into improving its ability to vet and



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verify payments made to workers while also increasing the use of other proactive collection-related tools – confessions of judgment, liquidated damages provisions, shorter payment timelines, third party administrators – and ensuring it has proper recourse when employers fail to meet their payment obligations to workers. Similarly, DCWP does not believe that a new MMR performance indicator is needed or would be effective. Before the audit was initiated, DCWP had already taken steps to clarify the language used in the MMR indicator. And while DCWP does not agree that the MMR information provided has been “misleading” to date, DCWP nevertheless will consider revising the description of the existing performance indicator to ensure clarity of meaning for the public.

**11. DCWP should develop mechanisms to more effectively track and manage its handling of complaints to ensure that key intake and investigative steps are taken in a timely manner based on established time frames.**

**12. DCWP should date stamp its receipt of walk-in complaint documentation.**

DCWP continually makes improvements to its case-handling processes and will consider these recommendations. DCWP has already integrated METS-specific and recordkeeping guidance in its written manuals for intake and investigative staff and will further do so in any other written manuals or protocols developed for case-handling purposes. DCWP provides regular training for intake, investigative, and litigation staff on substantive issues relating to DCWP laws and on office protocols relating to case-handling processes. DCWP will further ensure that supervisors regularly conduct quality control checks to ensure proper recordkeeping and case-handling by staff. DCWP is also working on a data consolidation and reporting function that will link METS to DCWP’s Cognos reporting system to have the on-demand ability to run reports on case-handling timelines across many different stages of the enforcement process, including complaint docketing, investigation, and litigation timelines. DCWP will work across divisions to build and implement this capability as soon as possible so that it will have increased ability to monitor the timeliness of key case processes. Specifically, with respect to the receipt of walk-in documents, DCWP will assess its current practices and ensure that a consistent and adequate system is in place to receive and maintain such information.

**2. DCWP should, in both cases with consent orders and those with OATH decisions and orders, consistently take additional steps (such as sending dunning letters to employers and filing petitions at OATH) when there is evidence that fines have not been paid or that employees have not received the restitution payments to which they are entitled.**

**3. DCWP should consider all available legal remedies, including but not limited to, referring matters to the City Law Department for legal action in the event employers default or delay in honoring their stipulated payment obligations. DCWP should further consider whether changes can be made to the language of and form of its ESTA consent orders to provide for additional legal remedies, such as confessions of judgment, in appropriate cases.**



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DCWP agrees that affirmative steps are necessary where an employer either fails to submit adequate proof of restitution payments or fails to make a restitution payment, and DCWP appreciates the audit's concrete suggestions and ideas. Consumer cases with uncollected fines and fees are already referred to the Law Department and DCWP is assessing the range of other options and tools available, including how to most efficiently verify that payments have been satisfied, the targeted use of confessions of judgment to secure payments and late fees to promote compliance, letters and other communications to employers, third party claims administration, OATH filings, and more.

DCWP's collections team's practice has been to make calls to employers and OLPS also communicates with employers on a case-by-case basis (both for settlements and OATH decisions), but it has been working to refine and codify the process and roles for doing so while also making sure DCWP is requesting the best information for purposes of verifying payments. And as noted above, DCWP already has been devoting additional resources to the review of proof of payments.

**5. DCWP should enforce the stipulations in its consent orders that impose late fees on those employers who fail to pay the agreed-upon restitution and fines in a timely manner.**

**6. DCWP should consider revising its procedures to ensure that late fees are consistently included in consent orders and that late fees are commensurate with the size of the restitution or fine amounts.**

The purpose of the small late fee provisions of consent orders has been to provide an incentive for timely payment, but DCWP does not believe that an across-the-board practice of imposing small late fees will be an effective compliance tool. DCWP agrees, however, that, in certain cases, like DCWP's workplace-wide cases in which large numbers of employees receive restitution, it could consider targeted use of larger late fee provisions – more akin to liquidated damages. DCWP will review its late fee practices to better tailor them for cases where they may be most impactful.

Thank you for your consideration of our responses.

Sincerely,

A blue ink handwritten signature, appearing to read "Lorelei Salas", written in a cursive style.

Lorelei Salas  
Commissioner

cc: George Davis, Mayor's Office of Operations